FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 12, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-130
Petitioner	:	A.C. No. 46-08586-03506
v.	:	
	:	
INDEPENDENCE COAL COMPANY,	:	
INC.,	:	
Respondent	:	Twilight-Winifrede Mine

DECISION DENYING MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Melick

Eleven days before hearings scheduled in the captioned case and pursuant to Commission Rule 67, 29 C.F.R. ' 2200.67, the Secretary filed the instant motion for partial summary decision. In her motion the Secretary argues, in essence, that since imminent danger Order No. 4400658 became a final order of the Commission (because it had not been challenged pursuant to Section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, the "Act") it was equivalent to a final judgment on a litigated issue, i.e., that the condition cited in the order constituted an "imminent danger." She further argues that since the condition was an "imminent danger" the same condition charged in Citation No. 4400659, (at issue in this civil penalty proceeding), therefore, also presented a hazard which would reasonably likely result in a serious injury. The Secretary is presumably relying upon either the doctrine of *res judicata* or collateral estoppel in seeking to prohibit the operator from now challenging whether an "imminent danger" (or a hazard which would reasonably likely result in a serious injury) actually existed.

The same issue was examined in a concurring opinion by Commissioners Doyle and Holen, in *Secretary of Labor v. Wyoming Fuel Company, n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, at 1632-1633 (August 1994) (Commissioners Doyle and Holen, concurring), I find the legal analysis therein to be persuasive. It is set forth, in relevant part, below:

> Section 107(e)(1) of the Mine Act provides operators with the opportunity to challenge section 107(a) imminent danger orders within 30 days after issuance. 30 U.S.C. ' 817. The finality of such orders is not referenced in the Mine Act, except in section 111, as a basis for compensation to miners who are idled as a consequence. 30 U.S.C. ' 821. The judge=s opinion appears to be based on a theory that the imminent danger order, as a final order of the Commission, is equivalent to a final judgment on a litigated issue. Under this theory, Basin is prohibited, presumably under the doctrine of either *res judicata* or collateral

estoppel, from challenging whether an imminent danger actually existed on June 25. We disagree that this is the effect of a final imminent danger order.

The judge offers no legal theory or other basis for his conclusion that the allegations set forth in a final imminent danger order can be used in another proceeding to irrebuttably establish those allegations. The Mine Act and Commission precedent address the finality of an imminent danger order only in the context of compensation proceedings arising under Section 111. The doctrines of *res judicata* and collateral estoppel would not preclude challenge to such a final order because those doctrines require the claim or issue to have been previously litigated. Moreover, those doctrines have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979), citing *Blonder-Tongue Lab., Inc., v. University of Ill. Found*, 402 U.S. 313, 328-329 (1971).

Here, neither purpose would be served. Presently, an operator has, in most instances, no reason to contest an imminent danger order unless compensation is in issue. Penalties are not assessed in connection with an imminent danger order. Nor are alleged violations giving rise to an imminent danger order part of the imminent danger order itself, but rather are set forth in other citations and orders issued in connection with the dangerous condition, as was the case here. Under the judge=s logic, operators desiring to avoid a *per se* finding of reasonable likelihood of injury, the third element of the Commission=s S&S test, would need to litigate each and every imminent danger order, irrespective of whether compensation were in issue. Where no imminent danger was found, the reasonable likelihood allegation, which could be based on a less dangerous and less immediate threat to safety, would still be in issue and subject to litigation.

To the extent our colleague=s opinion suggests that *Ranger Fuel Corp.*, 12 FMSHRC 363 (March 1990), would support the judge=s conclusion, we believe it is in error. Slip op. at 9. *Ranger* is not relevant here. That case involved section 111 compensation to miners arising from an imminent danger withdrawal order. Under section 111, limited compensation is payable to miners irrespective of the validity of the withdrawal order but the further compensation sought in *Ranger* was contingent upon the relevant order becoming "final." 30 U.S.C. ' 821; 12 FMSHRC at 373. The operator attempted to contest the validity of a final imminent danger order in the compensation proceeding although, under section 111, the challenged compensation was contingent only upon the order being final, not on the actual existence of an imminent danger. *See* U.S.C ' 821. The Commission denied Ranger=s challenge. 12 FMSHRC at 373. Here, the issue is not whether the order is final but whether a final unlitigated imminent danger order can be used in a penalty proceeding to irrebuttably establish that an imminent

danger actually existed.

Within this legal framework, therefore, final unlitigated imminent danger Order No. 4400659 cannot be used in a subsequent penalty proceeding, for a citation charging the same condition, to irrebuttably establish that the condition presented a hazard which would reasonably likely result in a serious injury or that a "significant and substantial" violation actually existed. Accordingly, this aspect of the Secretary=s motion for partial summary decision must be denied as a matter of law. Commission Rule 67, 29 C.F.R. ' 2700.67.

The Secretary also argues in her motion for partial summary decision that admissions in the deposition testimony of mine superintendent Christopher Sloan that the cited condition was in fact an "imminent danger" also constitutes an admission of the "existence of a hazard and that it is reasonably likely that this hazard could contribute to a serious injury." Presumably the Secretary is relying upon the deposition testimony of Sloan cited at page 9, indicated by the following colloquy:

Q: And would you say that it looked like what it does in these photographs?

A: [By Christopher Sloan] Yes.

Q: Would you consider this a dangerous situation?

A: Yes, I would.

The Secretary also cites Sloan=s deposition at page 16, in which the following colloquy occurs:

Q: Do you agree that there was imminent danger there?

A: [By Christopher Sloan] Yes.

Q: You do?

A: As long as trucks were trying to haul by it, yes.

Q: Would you also agree that that is a significant and substantial violation?

A: What?

Q: The fact that there wasn=t a berm on this road.

A: If trucks were hauling by it, yes, in fact, there wasn=t a - - the road was shut down.

Finally, the Secretary quotes Sloan=s deposition at page 24:

Q: When you say it would be stupid, it would be stupid for a truck driver to

drive over it; is that what your are saying?

A: [By Christopher Sloan] Yes, if I saw that, I wouldn=t go up.

In its response, Independence Coal Company Inc., states as follows:

> Review of Sloan=s testimony demonstrates that a considerable number of factual and legal issues remain in dispute, and thus renders any type of summary decision inappropriate. First, as Sloan=s deposition testimony indicates, a significant hazard was presented only if haul trucks were using the road. Deposition at 16. Sloan himself stated he only used the road occasionally (*id*. at 6), had no personal knowledge that the trucks were using the road (*id*. at 7), and indicates that the road might have been shut down (*id*. at 16). Consequently, the operator is not prepared to concede that trucks were using the road at the relevant times, and the Secretary must meet her burden of proof on this point.
>
> Second, Sloan=s deposition testimony highlights a point the Secretary apparently disregards: the company=s right to contest its responsibility for the road, and to argue that the inspector abused his discretion in citing independence. *Id.* at 16.
>
> Finally, and most importantly, Sloan=s testimony reveals a fundamental flaw in the Secretary=s argument for summary decision: the defect that so concerned the inspector is not the condition that was cited and that the Secretary argues forms the basis for the inspector=s "significant and substantial" determination. Throughout Sloan=s deposition, the Secretary sought out information regarding a slip in the road and efforts to repair the slip. However, the citation at issue alleges a violation of 30 C.F.R. ' 77.1605(k), which requires the "(b)erms or guards shall be provided on the outer bank of elevated roadways."
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> The Secretary pointed out at footnote 3 of her Motion for Partial Summary Decision that, in order to establish that a violation is significant and substantial, the Secretary has the burden of proving "(2) a discrete safety hazard - - that is, a measure of danger to safety - - **contributed to by the violation** . . . . " Secretary=s Motion at 4, n.3. Emphasis added. Sloan=s deposition makes clear that the hazard that concerned the inspector was posed, not so much by the lack of a berm or guard, but, allegedly, by the lack of a few feet of the roadway itself. Consequently, a significant factual question is presented as to whether the discrete safety hazard that concerned the inspector was contributed to by the condition that he cited.

Under Commission Rule 67, 29 C.F.R. ' 2700.67, a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law. As Respondent

notes, the proffered deposition testimony of Christopher Sloan is not, to say the least, without ambiguity on the issues presented. Accordingly, the factual conclusions the Secretary seeks in this case cannot be made and may not, in any event, be germane to the issues raised by Respondent. Genuine issues of material fact remain and, accordingly, this portion of the Secretary= motion for summary decision must also be denied.

ORDER

The Secretary=s motion for partial summary decision is **DENIED**. Hearings will proceed as scheduled on January 21, 1998, in Charleston, West Virginia.

Gary Melick
Administrative Law Judge

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