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MSHA V. REPUBLIC STEEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 11, 1979
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

v.

REPUBLIC STEEL CORPORATION

Docket Nos. IBMA 76-28
MORG 76-21
IBMA 77-39
MORG 76X95-P

DECISION

These cases present a common issue under the Federal Coal Mine Health and Safety Act of 1969. 1/ The material facts in both cases are not disputed. Republic Steel concedes that the violations of the 1969 Act giving rise to these enforcement proceedings occurred at a mine that it owned. The parties agree that the violations occurred during the course of work performed by independent contractors engaged by Republic. The Secretary concedes that no employees of Republic were endangered by the violative conditions. For the purposes of deciding these cases, it is also assumed that Republic could not have prevented the violations. 2/ Thus, the question of law at issue is clearly framed: Can Republic, as owner of the involved mine, be held responsible for violations of the 1969 Act created by its independent contractors even though none of Republic's employees were exposed to the violative conditions and Republic could not have prevented the violations. For the reasons that follow, we answer this question in the affirmative.

The question of a mine owner's responsibility for violations of the 1969 Act created by independent contractors has been the subject of much litigation. An understanding of the issues involved can best be reached by tracing the development of the law in this area.

The 1969 Act provided that "[e]ach coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, shall be subject to the provisions of this Act". 30 U.S.C. $ 803 (emphasis added). The Act defined the term "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal mine". 30 U.S.C. $ 802(d). The Act further provided for the issuance of notices, orders, and civil penalty assessments to operators who violated the Act's requirements.

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1/ 30 U.S.C. $801 et seq. (1976) (amended 1977) ("the 1969 Act" or "the Act"). These cases present no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (1978).
2/ The violations were abated after service to Republic of the notices and the order at issue.

Early in the Act's enforcement, the Interior Department's Board of Mine Operations Appeals held that, although an independent contractor and the coal company to whom the contractor provides services may both be "operators" under the Act, 3/ only the operator responsible for the violation and the safety and health of the endangered employees could be served with notices and orders and assessed penalties. Affinity Mining Co., 2 IBMA 57 (1973). The Board further stated, however, that an operator such as Affinity 4/ could be assessed a civil penalty where it "materially abetted" the independent contractor's violations or "actually committed" such violations.

In subsequent cases, the test stated in Affinity for determining a coal mine owner's responsibility for violations of the Act created by its contractors was modified by the Board. In Peggs Run Coal Co., Inc., 5 IBMA 175 (1975), the Board expanded the bases for holding a coal mine owner responsible to situations where the owner's employees were endangered by the violation and the owner could have prevented the violation "with a minimum of diligence." 5 IBMA at 183. The rationale of Peggs Run was followed by the Board in West Freedom Mining Corp., 5 IBMA 329 (1975), and Armco Steel Corp., 6 IBMA 64 (1976), in which notices issued to mine owners for violations arising from the work activities of their contractors were affirmed.

The Board's application of its "endangerment/preventability" test for determining a coal mine owner's responsibility for violations created by independent contractors was brought to an end, however, through a chain of events set in motion by the Board's decision in Affinity Mining Co., supra.

3/ In Laurel Shaft Construction Co., Inc., 1 IBMA 217 (1972), the Board held that an independent contractor can be an "operator" within the meaning of the 1969 Act. This conclusion was also reached by the Fourth Circuit in Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240 (1977), and the D.C. Circuit in Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (1978). The Commission has followed the holdings of the Board and the courts on this issue. Cowin and Co., Inc., Docket No. BARB 74-259, April 11, 1979. No argument is made in the present cases that the involved independent contractors were not "operators" within the meaning of the Act or that the violations did not occur

in a "coal mine".

4/ The mine involved in Affinity was located on land leased by Affinity Mining Company from the Pocahontas Land Corporation. 2 IBMA at 63.

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Following the decision in Affinity, the Association of Bituminous Contractors ("ABC") instituted a declaratory judgment proceeding seeking to establish that, contrary to the decision in Affinity, an independent contractor engaged by a coal mining company to perform construction work at a coal mine was not an "operator" within the meaning of the 1969 Act. ABC v. Morton, Secretary of Interior, No. 1058-74 (D.D.C., May 23, 1975). In its order granting the relief sought, the district court stated:

> . . . [A] coal mine construction company is not an operator" as defined in Section 3(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $802(d), where it is engaged in coal mine construction work on behalf of the owner, lessee or other person who operates, controls or supervises a coal mine;
>
> Nothing in the foregoing declaration shall affect or prejudice the right of the Secretary of the Interior to contend in a subsequent proceeding that, if a coal mine construction company fails to observe the interim mandatory health and safety standards of the [1969 Act] and the regulations of the Secretary of the Interior promulgated thereunder, the Secretary may institute proceedings to seek compliance therewith and assess appropriate penalties against the owner, lessee or other person who operates, controls or supervises said coal mine.

On August 21, 1975, in response to the district court's order, then Acting Secretary of Interior Frizzell issued Secretarial Order No. 2977. This order directed the Interior Department's enforcement personnel to cite only coal mine operators for violations of the Act created by contractors performing work on behalf of the operators. The Board of Mine Operations Appeals held that Order 2977 was a department-wide policy directive, binding upon the Board and the administrative law judges as well as the enforcement personnel, and, therefore, that it was compelled to hold a coal mine owner responsible for its contractors' violations regardless of the particular circumstances surrounding the violations. E.g., Rushton Mining Co., 5 IBMA 367 (1975).

Based on this rationale, the Board affirmed the withdrawal order at issue in Docket No. MORG 76-21 ("Republic I"), 5 IBMA 306 (1975), and an administrative law judge assessed civil penalties for the

violations in Docket No. MORG 76X95-P ("Republic II"). These decisions were then appealed to the Court of Appeals for the District of Columbia Circuit and to the Board, respectively. 5/

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5/ The appeal before the Board in Republic II was stayed by the Board pending the decision of the D.C. Circuit in Republic I. That appeal is now before the Commission pursuant to section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. $ 961 (1978).

While the appeals in Republic I and Republic II were pending, the Court of Appeals for the Fourth Circuit issued its decision in Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d. 240 (1977). The Bituminous Coal Operators' Association (BCOA) had filed suit in district court following the issuance of Secretarial Order 2977. The BCOA sought a declaratory judgment that coal mine operators are not responsible for violations created by independent contractors and an injunction restraining the Secretary from enforcing the policy announced in Order 2977. The district court held that construction contractors are not "operators" under the Act, but are "statutory agents" of the coal mining companies. The court further concluded, however, that the coal mining companies, as "operators", could be held responsible for violations created by their "agent" contractors. Accordingly, the court dismissed the complaints for declaratory and injunctive relief. BCOA v. Hathaway, 400 F.Supp. 371 (W.D. Va. 1975).

On appeal the Fourth Circuit affirmed the ultimate judgment of the district court although it did not embrace all of that court's conclusions of law. The court of appeals held, contrary to the district court, that construction contractors can be "operators" under the 1969 Act and, therefore, that the Secretary properly could enforce the provisions of the Act against such contractors. The court further held that a coal mine owner or lessee also could be held responsible for a construction contractor's violations. BCOA v. Secretary, supra, 547 F.2d at 246-47. This latter conclusion was premised on two bases. First, the court noted that the Act defined the term "operator" to include an owner or lessee and that the Act imposed responsibility for violations on the operator of a mine without exemption or exclusion. Therefore, the court concluded that the Act "impose[s] liability on the owner or lessee of a mine regardless of who violated the Act or created the danger requiring withdrawal." BCOA v. Secretary, 547 F.2d at 246. Second, the court agreed with the district court's conclusions that a construction contractor "may be considered the statutory agent of an owner or lessee of a coal mine", and that under the Act an owner or lessee may be held responsible for the violations of its agents. 547 F.2d at 247.

On February 22, 1978, the D.C. Circuit issued its decisions in ABC v. Andrus, 581 F.2d 853 (1978), and Republic Steel Corp. v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (1978). ABC v. Andrus was the appeal of the district court's order in ABC v. Morton, supra, declaring the 1969 Act unenforceable against contractors. On appeal, the D.C. Circuit reversed the district court's order and held that independent contractors that otherwise fell within the Act's coverage were "operators" against whom the Act could be enforced. 581 F.2d at 862-63.

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In Republic Steel, the D.C. Circuit reversed the Board's decision in Republic I. The court observed that the sole basis for the Board's decision was its belief that it was bound by Secretarial Order 2977 to hold coal mine owners such as Republic responsible for violations of the Act created by their contractors. Since the district court's order that resulted in the issuance of Secretarial Order 2977 had been reversed in ABC v. Andrus, the court concluded that the Board's decision in Republic I "no longer had a foundation" and that a remand was necessary. 581 F.2d at 820. 6/

Against this background we turn to a discussion of our holding. We agree with the Fourth Circuit's conclusion in BCOA v. Secretary that as a matter of law under the 1969 Act an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors. Our conclusion is derived from the text of the statute itself. The Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." 7/ The Act provides for the issuance of orders and notices to the operator for imminent dangers and violations of mandatory standards; 8/ the assessment of civil penalties against the operator of a mine in which a violation occurs; 9/ and the compensation by the operator of miners idled by a withdrawal order. 10/ As the Fourth Circuit correctly observed, "[t]hese sections, when read with the definition of operator, impose liability on the owner . . . of a mine regardless of who violated the Act or created the danger requiring withdrawal." 547 F.2d at 246. 11/

Furthermore, we can find nothing in the Act or its legislative history that requires that an owner's responsibility for contractor violations be qualified by any consideration of the owner's ability to prevent the violations. Rather, Congress determined that the question of an operator's fault was not to enter into the determination of

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6/ The D.C. Circuit's decision remanded Republic I to the Board. The case is now before the Commission for disposition. See n. 5, supra.

7/ 30 U.S.C. $ 802(d).

8/ 30 U.S.C. $ 814.

9/ 30 U.S.C. $ 819.
10/ 30 U.S.C. $ 820.
11/ In Republic Steel Corp., supra, the D.C. Circuit also endorsed this conclusion. 581 F.2d at 870 n. 5.
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whether a violation of the Act had occurred. l2/ Valley Camp Coal Co, 1 IBMA 196 (1972); Webster County Coal Corp., 7 IBMA 264 (1977). Thus, it is consistent with the Act's language and the intent of Congress to hold an owner responsible for its contractors' violations without regard to the owner's ability to prevent the violations. Insofar as the decisions of the Board held to the contrary, we decline to follow them.

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12/ The House managers explained the conference report's provisions requiring the assessment of a penalty on the operator of a coal mine in which a violation of the Act occurs as follows:
Section 109.
* * * * * * *
2. The Senate bill provided that, in determining the amount of the civil penalty only, the Secretary should consider, among other things, whether the operator was at fault. The House amendment did not contain this provision. Since the conference agreement provides liability for violation of the standards against the operator without regard to fault, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test, in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine.
H. Conf. Rep. No. 91-761, 91st Cong., 1st Sess., at 71 (1969) (emphasis added), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I, at 1515 (1975).
The 1969 Act's imposition of liability without regard to an operator's fault should be compared with the Occupational Safety and Health Act of 1970, 29 U.S.C. $651 et seq. In the OSHAct Congress declared that its purpose and policy was "to assure so far as possible" safe and healthful working conditions to America's workforce. 29 U.S.C. $651(b) (emphasis added). Some courts have interpreted the emphasized phrase as an indication of Congressional intent not to hold employers responsible for violations of the OSHAct that they could not have prevented. See, e.g., Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D. C. Cir. 1973).

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We also can find no support for the assertion that the Act permits an owner to avoid responsibility for a contractor's violations simply because the only miners endangered by the violative conditions at its mine are employees of the contractor. The Act seeks to protect the safety and health of all individuals working in a coal mine. 30 U.S.C. $$ 801(a) and 802(g). In order to achieve this goal, the Act places a duty on each operator to comply with its provisions. 30 U.S.C. $ 803. The purpose of the Act is not served by interpreting these provisions to allow an operator to limit the benefit of the protection it affords to its own employees. Employer-employee is not the test. The duty of an operator, whether owner or contractor, extends to all miners. Again, to the extent the decisions of the Board held to the contrary, we decline to follow them.

It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.

We need not decide in this case the scope of Commission review, if any, over the Secretary's choice in proceeding against the owner, the independent contractor, or both, 13/ for a contractor's violation. At the time that the involved notices and orders were issued to Republic, the District Court's order in ABC v. Morton, supra, declaring independent contractors not liable under the Act, was still outstanding. Therefore, the Secretary had the choice of either proceeding against the owner or entirely abdicating enforcement of the Act for contractor violations. In view of this fact, no matter what test is applied, the Secretary's choice to proceed against Republic was entirely proper.

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13/ We are not suggesting that the Act requires that an owner must be proceeded against whenever a contractor violates the Act. Nor are we suggesting that the fact that an owner may be proceeded against in anyway lessens the duty of the contractor to comply with the Act's requirements. Even where an enforcement action is undertaken against an owner, the contractor may also be proceeded against in a separate or consolidated proceeding.

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In view of Republic's concession that the violations alleged occurred at a mine that it owned, we conclude that Republic violated the Act. Accordingly, the decision of the administrative law judge

vacating the withdrawal order in Republic I is reversed and the decision of the administrative law judge in Republic II assessing civil penalties is affirmed as to result.

Backley, Commissioner, dissenting:

The majority opinion combines two cases involving Republic Steel Corporation, Docket Nos. IBMA 76-28 and IBMA 77-39, referred to herein as "Republic I" and "Republic II," respectively. This, I believe, is unfortunate as it ignores the fact that Republic I is before us on remand from the United States Court of Appeals for the District of Columbia Circuit with the issue to be decided clearly stated. Republic II was stayed by our predecessor, the Interior Board of Mine Operations Appeals (Board), for review pending the outcome of Republic I.

By combining the two cases, the majority disregards the individual factual situations presented by these cases. Furthermore, the issue is stated in the majority opinion as if the sole issue to be decided is one of statutory construction, which is not accurate. As a result, the majority concludes that Republic, as owner of the mine where the alleged violations occurred, can be held liable for the violations "created by its independent contractors." This general proposition of statutory construction does in fact have support from two recent court decisions. 1/

The majority then concludes, without any discussion of the factual situation surrounding the occurrence of the violation, or finding of fact relevant thereto, that Republic.should be held liable for the violations of its independent contractor. Accordingly, it must follow that Republic, absent a finding of any causal connection between its actions and the violations, is being held liable under a strict liability theory. I cannot agree with this latter conclusion and, therefore, must dissent from today's decision.

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1/ Association of Bituminous Contractors Inc. (ABC) v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); Bituminous Coal Operators Association, Inc. (BCOA) v. Secretary, 547 F.2d 240 (4th Cir. 1977).

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In order to put this matter in proper perspective, we must first look at the facts that gave rise to Republic I and under what circumstances that case is now before us.

As indicated above, Republic I was remanded from the Circuit Court which vacated the decision of the Board. 2/ The Board had, in turn, reversed the decision of the Administrative Law Judge (ALJ) who had held that the owner-operator (Republic) was not the proper party to cite in a withdrawal order for the acts of an independent contractor (Roberts and Schaefer Construction Company) who violates the health or safety provisions of the Federal Coal Mine Health and Safety Act of

1969. 3/

The Board did not, as the ALJ did, analyze the facts of the case, but held as a matter of departmental policy that the owner or lessee of a coal mine is the sole party to be held absolutely liable for violations of the mandatory standards caused by a coal mine construction contractor regardless of the circumstances. The Board stated that it was compelled to so hold as a result of Secretarial Order 2977, issued as a policy directive by the Acting Secretary of Interior on August 21, 1975, and made retroactively effective to May 24, 1975. The Secretarial Order stated that it was being issued to comply with the declaratory judgment order issued by the U.S. District Court for the District of Columbia on May 23, 1975, in Association of Bituminous Contractors, Inc. v. Morton, (C.A. No. 1058-74, unreported) (hereafter cited as ABC v. Morton). In that case the district court held that coal mine construction contractors were not "operators" within the meaning of 30 U.S.C. $802, and therefore were not liable for failure to abide by the mandatory health and safety standards. On February 22, 1978, that decision was reversed by the Court of Appeals on the basis of an erroneous statutory interpretation of the term "operator" by the district court. 4/ On the same day of its reversal of ABC v. Morton, the Court of Appeals remanded the instant case involving essentially the same issue. 5/

In remanding this case, the Court noted that the Board's decision "was not, in fact, based on an interpretation of law. It was based, pure and simple, on the Association of Bituminous Contractors decision." 581 F.2d at 870. The Court then vacated the decision and remanded, as

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2/ Section 106(a) of the Act, 30 U.S.C. $816(a) (1970), provided that "Any order or decision" issued by the Secretary shall be subject to review in an appropriate court of appeals.

3/ 30 U.S.C. $801 et seq., hereafter "The Act".

4/ Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (1978).

5/ Republic Steel Corporation v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (1978).

noted above, with the following language:

"The Board may then determine what enforcement action it will follow; whether to proceed, as in the past, only against construction contractors, and therefore dismiss the present action against Republic or to proceed against Republic on the basis of the Board's own interpretation of how best to effectuate the purposes of the Act." [Emphasis added.]

Thus, the Court of Appeals has left to us the determination as to which of the options available in determining liability will most effectively assure the health and safety of the miner. The policy considerations enunciated by the majority fail to convince me that by holding Republic strictly liable under the facts of this case, the purposes of the Act would be most efficiently promoted.

The undisputed circumstances of this case are as follows:

Republic's Kitt No. 1 Mine was undergoing construction on August 4, 1975, when a federal inspector issued a notice of violation under section 104(b) 6/ of the Act. The notice cited Republic, as operator of the Kitt mine, the following alleged violation of 30 C.F.R. $71.101: 7/

The Roberts and Schaefer Construction Company, doing construction work on the operator's property has not collected respirable dust samples on their employee [sic], as required.

The construction company was employed by Republic to construct a coal preparation plant at the Kitt Mine and its work activity did not involve any underground operation at the mine site. Abatement of the violation was required to be completed by August 11, 1975. On August 13, 1975, the inspector returned to the mine site and finding that "little or no effort was being made to abate the violation," issued an Order of Withdrawal to Republic pursuant to section 104(b) of the Act. The withdrawal order prohibited Republic from allowing Roberts and Schaefer to perform the work it had contracted to do. Following Republic's abatement of the violation on the same day, the withdrawal order was terminated.

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6/ 30 U.S.C. 814(b) (1970).

7/ The pertinent part of section 71.101 reads:

"(a) Each operator of an underground coal mine and each operator of a surface coal mine shall take, as prescribed in this subpart, accurate samples of the amount of respirable dust in the atmosphere to which each miner employed in a surface installation or a surface worksite is exposed."

A timely application for review of the propriety of the withdrawal order was filed by Republic. 8/ Filed concurrently was a motion for summary decision with a supporting affidavit. In response, the government filed a motion and memorandum in opposition to the motion for summary decision together with a cross motion for summary disposition. The government's motion recited the allegations made by Republic and "agree(d) that there is no genuine issue of fact raised in this proceeding ..." The motion then cited Secretarial Order 2977,

referred to above, as the basis for citing Republic.
Thus, based on the above documents, the record established the following:
(1) Roberts and Schaefer was employed by Republic as an independent contractor to construct a coal preparation plant at its mine;
(2) Roberts and Schaefer had exclusive control and responsibility over its employees engaged in that construction activity;
(3) The alleged violation in question related solely to the failure to take samples of the respirable dust to which the employees of Roberts and Schaefer were exposed;
(4) No employees of Republic were subject to any danger because of the alleged violations; and
(5) The notice and order were issued to Republic instead of the independent contractor so as to comply with the departmental policy expressed in Secretarial Order 2977, which, in turn was based upon the district court's misinterpretation of the statute.
In concluding that Republic is absolutely liable for the violation charged, the majority relies in part upon the observation of the Fourth Circuit in BCOA v. Secretary 9/ that the provisions of the Act "impose liability on the owner ... of a mine regardless of who violated the Act or created the danger requiring withdrawal." However, when this quoted

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8/ Attached to the application were two memoranda from the Assistant Administrator, Coal Mine Health and Safety to all District Managers instructing inspectors to issue all notices and orders to owner operators and not to construction companies or independent contractors, and to vacate those notices and orders issued to independent contractors prior to June 3, 1975, and reissue them to the owner-operator involved. Such action was taken to adhere to the District Court decision in ABC v. Morton.
9/ Supra, 547 F.2d at 246.

portion of the sentence is read within the context of the entire paragraph the court seemed to be holding that the referenced provisions of the Act authorized the Secretary to impose strict liability on the owner of the mine.
To realize the true impact of that holding it must be remembered that the court was referring to the Secretary of Interior and the departmental structure utilized for the enforcement of the Act at the

time of the court's decision. The court had earlier noted at page 242 that "[w]ithdrawal orders may be reviewed by the Secretary through the Board of Mine Operations Appeals." 10/

The majority opinion further notes that the District of Columbia Circuit also endorsed this "same conclusion" of the Fourth Circuit in its remand of the instant case and cites footnote 5 of the Republic decision. That footnote, in its entirety, states as follows:

"Hence we do not disagree with the Fourth Circuit's logic in BCOA, that the Act leaves the agency free to assess either coal mine owners or contractors."

The majority apparently reads this footnote as support from the District of Columbia Circuit for the proposition that the statute mandates that the owner-operator be liable for any violations of the Act committed by its contractors on mine property should the enforcement body, not the reviewing authority, so determine. When the remand opinion is read as a whole, however, it is clear that the District of Columbia Circuit did not adopt this theory in Republic. If it had, it would have simply affirmed on the grounds that the Secretary was well within his statutory right to proceed against Republic.

On the contrary, however, the Court of Appeals remanded the present case with the options for the administrative reviewing authority clearly stated. Our determination regarding proper allocation of liability was to be based upon the policy considerations enunciated by the court. For the majority to now refer to the language quoted above from the opinions in ABC v. Andrus and BCOA v. Secretary for authority supporting a policy determination to impose strict liability on owner-operators indicates a significantly different reading of those cases then my own. 11/

Thus, I believe it would be helpful to summarize precisely my view as to what the Circuit Courts have held regarding the issues before us. The District of Columbia Circuit held in ABC v. Andrus that it has not contrary to the statutory language of the Act for the Board of Mine

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10/ The Secretary had delegated his review authority under the Federal Coal Mine Health and Safety Act to the Interior Board of Mine Operations Appeals, 43 C.F.R. $4.500 (1976).

11/ The majority appears to place great emphasis on the fact that the statute does not "qualify" the owner-operators' liability by his inability to prevent a violation. Yet in ABC v. Andrus the D.C. Circuit specifically referred to control and supervision in assessing liability. For further discussion of this principle see pages 13 and 14 infra.

Operations Appeals to hold independent construction companies liable as "operators" for failure to comply with the mandatory safety and health standards of the Act.

The Fourth Circuit held in BCOA v. Secretary that it was not contrary to the statutory language of the Act for the Board of Mine Operations Appeals to impose liability on a coal mine construction company that violates the Act. The Court in BCOA v. Secretary further held that it was not contrary to the statutory language of the Act for the Secretary (i.e., Board of Mine Operations Appeals) to impose liability on the owner for any violation committed by the construction company on mine property, regardless of the circumstances. However, the Court emphasized the narrowness of its holding by stating that the "opinion presents no occasion, however, for determining the proper allocation of liability in view of the myriad factual situations that may arise." Review by the Court pursuant to Section 106(a) of the Act as to the proper allocation of liability based on a specific factual situation was inappropriate because no administrative record had been developed. 12/

The Bituminous Coal Operator's Association (BCOA) and the Association of Bituminous Contractors (ABC) had both filed requests for declaratory relief in the respective district courts. Those courts had been requested to construe the Act as to the permissible limits of the term "operator." The decisions of the circuit courts do not purport to state which party should be held liable in a specific factual situation; rather, they provide guidance as to which party can be held liable as an "operator" consistent with the proper statutory construction. In line with these decisions, I therefore conclude that either the owner or the independent contractor may be held liable as operators under the Act.

In light of the above discussion, I now turn to my own determination of how best to allocate legal responsibility for violations and safety hazards: as between the mine owner and the independent contractor working on mine property. I am convinced that the Act's purpose of assuring the health and safety of miners can best be accomplished by placing the responsibility for their health and safety on the person most able to prevent violations or hazards and to correct them quickly should they occur. In most situations that person would be the party who controls or supervises the work activity in that portion of the mine where the violation or hazard occurred.

In ABC v. Andrus, the appellate court noted, with approval, that decisions of the Board 13/ "stress the importance of placing direct liability on the independent construction company as the party most able to take precautionary measures." 14/ Noting that the Board had "forcefully rejected" the conclusion that mine owners should be absolutely

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12/ The court's discussion of this point is found at 547 F.2d 243.

13/ Affinity Mining Company, 2 IBMA 57, 80 Interior Dec. at 229 (1973); Wilson v. Laurel Shaft Construction Co., 1 IBMA 217, 79 Interior Dec. 701 (1973).

14/ 581 F.2d at 862.

liable, the court went on to state:

"It is not a stretching of the statute to hold that companies who profess to be as independent of coal mine owners as these construction companies purport to be, do control and supervise the construction work they have contracted to perform over the area where they are working. If a coal mine owner contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of insuring compliance with mandatory safety regulations." 581 F.2d at 862-63 (emphasis added in last two sentences).

Although the majority opinion suggests otherwise (page 7), there is no evidence that mine owners, either in this case or any other case, establish contractual relationships with independent construction contractors so as to "exonerate" themselves from the contractors' violations. Rather, in the normal situation an owner of a coal mine contracts with a construction company to perform services that are beyond his area of expertise. In this regard, the Fourth Circuit, in BCOA v. Secretary, was well aware of the role of the independent construction contractor when it stated:

Mining companies frequently employ independent, general contractors for both surface and sub-surface construction work. These construction companies build coal preparation plants, tipples, conveyor equipment, storage silos, bath houses, office building, power lines, roads, drag lines, and shovels. They also construct underground facilities, such as shafts, slopes, and tunnels. Their work may be done before or after the mine is in operation. The construction companies, however, do not process the coal that they remove. (547 F.2d 243)

Although it is true that the independent contractor is invited upon the property of the mine owner to perform work promoting the interests of the owner, as noted by the majority, this fact should not be the sole basis of liability as suggested. The test as to liability should be based on a party's ability to assure safety.
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Under the majority decision, Republic's lack of control over the independent contractor's actions and resulting inability to prevent the latter's indiscretions has no bearing on liability. Failure to consider these elements I find more than somewhat prejudicial to Republic.
Accordingly, the question now arises as to whether the facts in this case can support a finding of liability on the part of Republic under the test I would adopt.
There is no dispute that the contractor was in complete control of its employees who were engaged in the construction activity. There is no evidence to even suggest that Republic had control. Roberts and Schaefer failed to take respirable dust samples of its employees, not Republic's. In fact, no Republic employee was in danger as a result of Roberts and Schaefer's failure to comply with the law. Upon consideration of the evidence of record, the only party that could have prevented the violation and thus effectuated the purposes of the Act was Roberts and Schaefer.
Given the factual situation presented in this case, I can not find Republic in violation of the Act and accordingly would affirm the Administrative Law Judge in Republic I.
In light of the above discussion, and the fact the Judge did not consider the factual situation in Republic II but relied on a misinterpretation of statute, I would remand for hearing on the merits.