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ENERGY FUELS V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 1, 1979

ENERGY FUELS CORPORATION

v. Docket No. DENV 78-410

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA).

DECISION

The question here is whether an operator served with a citation for a violation that has been abated may immediately contest the allegation of violation in that citation. We answer this question in the affirmative.

At 2 p.m., on April 5, 1978, Energy Fuels Corporation received from a representative of the Secretary of Labor's Mine Safety and Health Administration (MSHA), a citation issued under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (1978) ["the 1977 Act"]. The citation alleged that Energy Fuels had violated the requirements for work on high-voltage lines in the mine safety standard at 30 CFR $77.704-1. It also contained findings of the MSHA inspector, made under section 104(d)(1) of the 1977 Act, 1/ that while the violative condition did not cause an imminent danger, it could have "significantly and substantially contribute[d] to the cause and effect of a ...mine safety or health hazard," and that it was caused by an "unwarrantable failure" of Energy Fuels to comply with the standard. The citation required that Energy Fuels abate the violation by the noon of the following day. On the next day, the inspector found that the alleged violation had been abated.

Energy Fuels then filed with the Commission an application for review of the citation under 29 CFR $$2700.18 and 2700.19,

Interim Procedural Rules 18 and 19. The operator denied that a violation had occurred, denied that the alleged violation was "significant and substantial and was caused by an "unwarrantable failure" to comply with the cited standard, and requested that the citation be vacated. The Secretary denied in his answer the substantive allegations of the application for review. The Secretary also moved to dismiss the application on the ground that the 1977 Act did not permit Energy Fuels to contest, or the Commission to review, any part of this citation, including the

1/ See note 1 infra, for the text of section 104(d) of the 1977 Act. Unless otherwise stated, all section references are to the 1977 Act.

allegation of violation and the inspector's "significant and substantial" and "unwarrantable failure" findings. He argued that review of these matters was not yet available because the underlying violation had been abated, the Secretary had not yet notified the operator of the penalty proposed to be assessed for the violation, and a related withdrawal order had not been issued. Energy Fuels claimed that section 105(d) grants it the right to immediately contest all parts of a citation. Administrative Law Judge Malcolm P. Littlefield granted the motion to dismiss. The Commission granted Energy Fuels' petition for discretionary review, and heard oral argument from Energy Fuels, the Secretary, and other parties in similar cases. 2/ We have examined the opinions of the administrative law judges and the briefs and oral arguments of the parties to this and the similar cases. We reverse and remand to Judge Littlefield for further proceedings.

Section 105(d) reads in part as follows:.

> If, within 30 days of receipt thereof, an operator of a ... mine notifies the Secretary that he intends to contest the issuance ... of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation ... issued under section 104, ... the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order ... affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. [Emphasis added.]

Each party claims that the words, structure, or punctuation of this section supports its position. We find the section ambiguous.

Reliance upon the plain words of the statute is made problematic by the fact that section 105(a) appears to be inconsistent with the operators' literal reading of section 105(d). Section 105(a) reads in part as follows:

> If ... the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of [the] inspection or investigation, notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited and that the

> operator has 30 days in which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. ... If, within 30 days

2/ The similar. cases are: Peter White Coal Mining Corp., Nos. HOPE 78-374, etc.; U.S. Steel Corp., No. PITT 78-335; Monterey Coal Co., No. VINC 78-416; Peabody Coal Co., No. VINC 78-386; Iselin Preparation Co., Nos. PITT 78-343, 344; Rochester & Pittsburgh Coal Co., No. PITT 78-323; Helvetia Coal Co.. No. PITT 78-322. A consolidated oral argument was heard in these cases on January 12, 1979.

> from the receipt of the notification ..., the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, ... the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.... [Emphasis added.]

The language of this provision, considered alone, may mean that the contest period for a citation begins to run only after notification of the proposed penalty is received by the operator, and that a contest of a citation before the penalty was proposed was not intended by Congress. On the other hand, section 105(a), when read with section 105(d), may be read to permit an operator to await the issuance of the notification of proposed assessment of penalty before deciding whether to contest the entire citation, rather than require the operator to so wait.

Section 105(d) is also inconsistent in its use of commas to set off phrases identifying the documents that may be contested and the issues that may be raised. The operators attach no significance to the lack of a comma between the words "citation" and "a notification of proposed assessment of penalty", while the Secretary finds the omission highly significant. In the Secretary's view, Congress deliberately used commas to indicate separate "areas of review"; the lack of a comma between "citation" and "a notification of [proposed penalty]" indicates to the Secretary that Commission review of a citation and a proposed penalty was to take place in one proceeding, rather than two. He thus argues that the word "or" between "citation" and "a notification of [proposed penalty]" should be read as conjunctive rather than as disjunctive--as "and" rather than as "or". While it may be possible to construe "or" to mean "and" to give effect to legislative intent, (DeSylva v. Ballentine, 351 U.S. 570 (1956)); Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 862 (D.C. Cir. 1978)), the statutory language alone does not convince us that Congress intended the conjunctive. 3/

These ambiguities convince us that the words of the 1977 Act can not serve alone as an accurate gauge of congressional intent. We have therefore considered the legislative history of the 1977 Act, and what construction and application of the 1977 Act would best implement it.

3/ The legislative history also does not so convince us. Infra at 4-8. We are therefore reluctant to depart from the general

rule that "or" is to be construed as disjunctive. Azure v. Morton, 514 F.2d 897 (9th Cir. 1975); Peacock v. Lubbock Compress Co., 252 F.2d 892 (5th Cir.), cert. denied, 356 U.S. 973 (1958). Furthermore, we cannot agree with the Secretary that the omission of a comma is of great significance in this controversy. See note 4, infra.

The 1977 Act is derived from S. 717, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 433 (1978) (as reported to Senate) ["1977 Legis. Hist.]. Section 106(d) of that bill is much the same as section 105(d) of the 1977 Act, but with a crucial exception: Where the Senate bill spoke of an operator's right to contest, "within 15 working days of receipt thereof, ...[a withdrawal] order ..., or a notification issued under subsection (a) or (b) of this section", the 1977 Act speaks of an operator's right to contest, "within 30 days of receipt thereof, ... [a withdrawal] order ...., or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section" (emphasis added). 4/ A conference committee changed the language of the Senate bill but did not explain the reason for the change. S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess., at 18, 50 (1977); 1977 Legis. Hist. at 1279, 1296, 1328. 5/

4/ The full text of section 106(d) of the Senate bill is as follows:

> If, within fifteen working days of receipt thereof, an operator of a mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 105, or a notification issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 105, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 105, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 105, the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief; such order shall become final thirty days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take

whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 105.

1977 Legis. Hist. at 546-547. Because the insertion of the words "or citation" into section 105(d) occurred late in the congressional consideration of the statute, we cannot attach great significance to the absence of a comma after "citation". Cf. Northern P. Ry. v. United States, 227 U.S. 355, 360 (1913)(placement of commas a fallible indication of legislative intent).

5/ The description of the change in the original slip version of the Joint Explanatory Statement of the conference committee is not exactly the same as that given in the bound legislative history. The pertinent

(Footnote continued)

Although one might infer from this event that the conferees intended to make citations immediately contestable, the Secretary urges that we not draw the inference. He reasons as follows: The 1977 Act is a cognate of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976) (amended 1977) ["the 1969 Act"]. The 1977 Act's enforcement provisions are generally "patterned on" the 1969 Act, notwithstanding that the 1977 Act counterparts of the relevant provisions of the 1969 Act are cast in substantially modified language. United Mine Workers of America v. Andrus (Carbon Fuel Co.), 581 F.2d 888, 889 n. 3 (D.C. Cir.), cert. denied, 99 S. Ct. 313 (1978), quoting from S. Rep. No. 95-181, 95th Cong., 1st Sess., at 12 (1977) ["Senate Report"]; 1977 Legis. Hist. at 589, 600. Under the 1969 Act, as applied by the Interior Department's

fn 5/ continued
passage in the slip version of the conference report states:

PROCEDURE FOR ENFORCEMENT

The Senate bill required that within a reasonable time after completion of the inspection, the Secretary notify the operator, by certified mail, of the proposal [sic] civil penalty to be assessed for any violation noted in the inspection. Such notice, a copy of which must be sent to the representatives of miners at the mine, would notify the operator that he had fifteen working days from receipt to contest the citation or proposed civil penalty assessment. If within 15 working days, the operator or any miner or the representative of miners did not contest the civil penalty assessment or citation, such would be the final order of the Commission, and would not be reviewable in any court.

The House amendment adopted the provisions of the current Coal Act (section 105(a)(1) which provide that upon issuance of an order or notice, the operator or representative of miners (but not specific miners) shall have a period of 30 days to seek review of the order or notice by the Secretary. With respect to proposed civil penalties, the House amendment, adopting Section 109(a)(3) of the Coal Act, provided that civil penalties shall not be finally assessed by --- the Secretary until the person charged has been afforded the opportunity for a hearing. The House amendment contained no time limitation on petitions for review of proposed civil penalties.

The conference substitute conforms to the Senate bill, with an amendment changing the period within which appeals may be taken from orders and penalty proposals from 'fifteen working days' to 'thirty days.' The conferees intend that this shall mean 30 calendar days.

Slip version at 50. The last paragraph of this excerpt does not reflect the insertion of the words "or citation" into section 105(d). The version of the conference report that appears in the bound legislative history, however, is somewhat different. The last paragraph was changed by the insertion of typewritten material (indicated below by italic type) reflecting the conferees' alteration of the Senate bill. This paragraph appears in the bound legislative history as follows:

> The conference substitute conforms to the Senate bill, with an amendment changing the period within which appeals may be taken from order, citations, and penalty proposals from "fifteen working days' to thirty days.' The conferees intend that this shall mean 30 calendar days. [Underscoring indicates added language.]

1977 Legis. Hist. at 1328.

Board of Mine Operations Appeals and the federal courts before the passage of the 1977 Act, the allegation of a violation in a notice--the rough equivalent of a citation under the 1977 Act--was not reviewable, if the violation had been abated, until a penalty was sought or a related withdrawal order issued. 6/ Freeman Coal Mining Corp., 1 IBMA 1, 12-15, 1971-73 OSHD %15,367 (1970); Reliable Coal Corp., 1 IBMA 51, 1971-73 OSHD %15,368 (1971); 7/ Lucas Coal Co. v. Interior Board of Mine Operations Appeals, 52 F.2d 581 (3d Cir. 1975); Reliable Coal Corp. v. Morton, 478 F.2d 257, 258 n. 1 (4th Cir. 1973). The Senate bill also did not provide for an immediate contest of the allegation of violation in a citation. See Senate Report at 13, 68, 69; 1977 Legis. Hist. at 601, 656, 657. The conference report states that "[t]he conference substitute conforms to the Senate bill ...." If the conferees had intended to permit operators to immediately contest, the Secretary argues, the conference report would have noted the change, particularly because the existing practice under the 1969 Act would have been altered. Therefore, the addition of the words "or citation" did not, in the Secretary's view, effect a substantive change of the existing procedure under the 1969 Act. Although the Secretary does not offer to us an explanation of the conferees' action, he argued to Judge Littlefield that the insertion of the words "or citation" was merely an attempt to clean up" the language of section 105(d) so as to make the section reflect the "areas of review" open at some stage to an operator.

We do not, for three reasons, think the issue is so easily disposed of. First, we are not at all certain that the intent behind the Senate bill was to disallow immediate contestability. Although the language of the Senate bill may suggest the Secretary's reading, inconsistencies in the Senate Report cast doubt on it. The Senate Report's description of the contest procedures in the Senate bill states that "[u]nder the bill, review is sought by notifying the Secretary of an intention to contest

6/ Under the 1969 Act, special findings in the notice, made under section 104(c)(1) of the 1969 Act, that the violation was "significant and substantial" and was caused by an "unwarrantable failure" to comply with a standard, were not reviewable until a withdrawal order issued. Ziegler Coal Co., 3 IBMA 448, 454-455, 1974-75 OSHD 19,131 (1974), aff'd on reconsideration, 4 IBMA 139, 148-151, 1974-75 OSHD 19,638 (1975), rev'd on another point sub nom. United Mine Workers v. Kleppe, 532 F.2d 1403 (D.C. Cir.), cert. denied, 429 U.S. 858 (1976). Because the Board found that section 105(a) of the 1969 Act limited its review of a notice to the reasonableness of time for

abatement, and concluded that special findings were not related to that issue, it held that they were not reviewable until a withdrawal order issued under section 104(c) of the 1969 Act. The 1977 Act's counterpart of section 104(c) of the 1969 Act is section 104(d), reproduced in note 11, infra.

7/ In Reliable the Board also suggested that it would vacate a notice that was "patently invalid", even if the violation were abated. 1 IBMA at 65.

an order, notice, 8/ or proposed penalty within 15 days after the operator's receipt of the Secretary's order, "notice or proposed penalty." Senate Report at 48; 1977 Legis. Hist. at 636 (emphasis added). Two of the passages of the Senate Report cited by the Secretary (Senate Report at 68, 69; 1977 Legis. Hist. at 656, 657) merely repeat or closely paraphrase the text of the Senate bill, and are therefore unenlightening. The final passage cited by the Secretary reads in part as follows:

> ... An operator or affected party or employee representative may appeal to the Commission the issuance of a closure order or of any proposed penalty. Miners or their representative, or Operators may contest to the Commission a citation issued to an operator that fixes an abatement period they believe is unreasonable. In all such cases, the Commission is to afford an opportunity for a hearing. Administrative Law Judges of the Commission shall hear matters before the Commission and issue decisions affirming, modifying or vacating the Secretary's order, proposed penalty or extending the abatement period set in the citation....

Senate Report at 13; Legis. Hist. at 601. This passage suggests that under the Senate bill the Commission could not vacate a citation, and that the Commission therefore lacked express authority to consider at some point the allegation of violation in a citation. The Senate bill, however, expressly empowered the Commission to vacate a citation (sections 105(h) and 106(d); 1977 Legis. Hist. at 540-541, 546), and thus clearly indicated that the Commission could review the allegation of violation at some time. Thus, the passage is not only inconsistent with the other statements in the Senate Report, but it does not accurately characterize the Senate bill. We accordingly assign it little weight.

Second, even if we were to agree with the Secretary that the Senate bill did not provide for immediate contestability, the statement in the conference report that the conference bill conforms to the Senate bill does not furnish clear support for the Secretary's position; with respect to the issue of immediate contestability, the language of the conference bill does not conform to that of the Senate bill. Third, the Secretary's reasoning on review fails to take account of the conferees' action, and his argument before Judge Littlefield is flawed. The conferees had no need to alter the Senate bill to reflect the various "areas of review". The Senate bill

already indicated that the Commission could review the allegation of violation in a citation at some point, for it expressly authorized the Commission to vacate citations.

8/ As we have noted, a notice under the 1969 Act is the rough equivalent of a citation under the 1977 Act.

We are thus left to assume, despite the lack of explanation for the change, that the conferees acted to effect some purpose. The purpose that the addition of the words "or citation" most likely signifies is to make the allegation of violation in a citation immediately contestable. The Secretary's different reading would make the conferees' alteration ineffective, and we are therefore reluctant to adopt it. 9/

The uncertainties in the legislative history including the lack of explanation for the conferees' alteration, nevertheless makes reliance on it an uncertain matter. We have therefore considered what construction would best implement the 1977 Act.

We begin our discussion with the interest of the miner, which Congress has stated in section 2(a) to be the mining industry's most precious resource and its first priority and concern. The safety and health of the miner would not be adversely affected by immediate review because the alleged violations have been abated. 10/ Furthermore, the Commission cannot, unless a final order favorable to Energy Fuels is issued, relieve Energy Fuels of its responsibilities to continue to maintain the cited condition in compliance. The 1977 Act does not permit the Commission to stay abatement requirements of a citation during litigation. See sections 104(b) and (h), 105(b)(1)(A) and (b)(2).

The interests of the Secretary that would be adversely affected by immediate contestability are not entirely clear. Despite repeated inquiries during oral argument, the Secretary was unable to state how his interests would be harmed if operators were able to immediately contest. In his briefs on review, the Secretary claims only that "sound adjudicative practice mandates that piecemeal adjudications be avoided, and that all issues in a case be tried simultaneously." He states:

9/ We point out, for the sake of clarity, another flaw in the Secretary's argument. Although the 1969 Act served in many respects as a model for the provisions of the 1977 Act, the designers of the administrative review mechanisms of the Senate bill seem to have borrowed heavily from the Occupational Safety and Health Act of 1970, 29 U.S.C. $651 et seq. (1978) ["OSHA"] in drafting what are now sections 105(a), (b), and (d) of the 1977 Act. Although no part of an OSHA citation is contestable by an employer until a penalty is proposed (section 10(a) of OSHA, 29 U.S.C. 659(a); Rothstein, Occupational Safety and Health Law $$261, 263 (1978)), the Secretary has attached no importance to this and neither do we. Under OSHA the

timing of contests of citations is of no practical significance while under the 1977 Act it may have great importance. Unlike the 1977 Act, the abatement requirements of citations under OSHA are stayed during litigation. Compare section 10(b) of OSHA, 29 U.S.C. $659(b), with sections 104(b) and (h), 105(b)(1)(A) and (b)(2) (penultimate sentence). Also, OSHA citations and notifications of proposed penalties were almost always mailed in the same envelope, and are now combined in the same document. Rothstein, $250; Form OSHA-2 (May 1976), reprinted in l CCH Employ. S. & H. Guide 4400.6. Citations under the 1977 Act are usually delivered separately from penalty proposals.

10/ The issues in this proceeding do not involve the assessment of a civil penalty, the validity of a withdrawal order, or other matters, such as a claim for compensation. We intimate no view of the magnitude of a miner's interest in the timing of review of such matters in cases where the alleged violations have been abated.

> If two hearings must be provided instead of one, operators will be more likely to request a separate hearing on the citation alone. This may delay the penalty hearings, resulting in a much longer time lapse between the time of the citation and eventual payment of the penalty. It could lead to serious problems in the management of hearing caseloads. Until the penalty is finally resolved, the operator's money is earning interest, so it is financially advantageous to delay payment as long as possible. When it passed the 1977 Mine Act, Congress was concerned about the problem of lengthy delays between citation and penalty, since a penalty becomes progressively less effective as a deterrent the longer the payment is delayed. [Citing Senate Report at 46; 1977 Legis. Hist. at 634].

The interest of the operator may not be apparent at first glance. Inasmuch as the alleged violation has been timely abated, and presumably will continue to be abated, the operator is not exposed to withdrawal orders for failure to abate under section 104(b), nor to failure to abate penalties under section 105(b)(1)(A). His interest in immediately contesting the allegation of violation might not be expected to extend further than ascertaining his legal duties early enough to avoid similar litigation. If, however, continued abatement is expensive, the operator may desire an early hearing so that, if he prevails on the question of whether his practice violates the Act, he may cease abatement. The citation may also contain special findings under section 104(d) that may start a series of events culminating in an order that miners be withdrawn from some areas of the mine. 11/ Section

11/ Section 104(d) reads as follows:

> (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent

inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another citation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn

104(d)(1) permits an inspector to include "significant and substantial" and "unwarrantable failure" findings in a citation; such findings were included in the citation received by Energy Fuels. If, within the 90-day period following the issuance of the citation, an inspector finds what he believes to be another violation of a standard, and finds that the second violation was also caused by an unwarrantable failure to comply, an order is issued requiring withdrawal of miners until the inspector finds that the violation has been abated. If such a withdrawal order is issued, another withdrawal order must promptly be issued by an inspector who finds at a subsequent inspection violative conditions similar to those that precipitated the first withdrawal order. Section 104(d)(2). Indeed, Energy Fuels informs us in its brief that the special findings in the citation before us have precipitated a chain of withdrawal orders.

Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's or the administrative law judge's own motion. If the operator has an urgent need for a hearing, the Secretary could make it more likely that the two contests would be

fn 11/ continued

> from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a

coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

tried together by quickly proposing a penalty. 12/ If a penalty is contested, and the hearing on the citation is already underway, consolidation would still be possible. Moreover, even if consolidation were not possible, it has not yet been suggested that principles of repose, such as res judicata, or collateral estoppel, could not be employed to prevent multiple hearings on the same issues. We are unwilling to eschew so early in the history of the 1977 Act these possible avenues of accommodation.

Therefore, we hold that the purposes of the Act and the interests of the parties are best served by permitting an operator to contest the citation immediately upon its issuance.

Accordingly, the Judge's decision is reversed. The case is remanded to the Judge for further proceedings consistent with this opinion.

12/ Section 105(a) requires the Secretary to propose a penalty within "a reasonable time after the termination of [the] inspection or investigation...."

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Commissioner Lawson, dissenting:

The only question presented (in this and related cases)1/ is whether the Act2/ provides complete and independent review of an abated citation prior to review of a withdrawal order or penalty proceeding related to the citation. The majority would in effect encourage independent review of an abated3/ citation prior to related penalty proceedings and thereafter allow a second review in the penalty proceedings.

Analysis of the Act reveals that the statutory scheme precludes double review; Before the Administrative Law Judge, the Secretary of Labor moved to dismiss Energy Fuel's Application for Review by arguing that review was not yet available because the violation had been abated, the Secretary had not notified Energy of a civil penalty proposed to be assessed under Section 110(a) of the Act, and a related withdrawal order had not been issued. The Administrative Law Judge granted the Secretary's motion to dismiss, holding that this abated citation could be reviewed only as a part of the related civil penalty proceeding.4/

I agree with the holding below, and find that the language of the Act, the failure of the legislative history to support the interpretation urged by the majority, and the policy considerations enunciated in the statute compel a result contrary to that reached by the majority.

1/ See majority decision at p.2-n2.
2/ Unless otherwise stated, references to the Act and section citations mean Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (1978).
3/This case is to be distinguished from those involving the review of citations for unabated violations.
4/The Administrative Law Judge also noted: "The expense of duplicate full review of citations would be in derogation.of the prime purpose of the Act, namely, protection of the miner" citing section 2 of the Act.

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Section 105(a) of the Act requires that the Secretary notify the operator of the proposed penalty "within a reasonable time." Thereafter,

> [T]he operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of a penalty. If, within 30 days from the receipt of the notification issued by the Secretary the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty and no notice is filed by any miner or representative of miners***the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency****[Emphasis added.]

The other directly operative section of the Act with which we are concerned, section 105(d), provides:

> If, within 30 days of receipt thereof the operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of time fixed in a citation or modification thereof issued under section 104, (or any miner or miners' representative so notifies the Secretary), the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.***The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals or orders issued under section 104. [Emphasis added.]

My difference with the majority is with what they perceive to be the contradictory mandates of sections 105(a) and (d). As the Secretary contended, and I agree, these sections of the Act are not in conflict, and do not provide operators with any right to independent review of an abated citation.

In chronological summary, a case begins with the issuance, under section 104 of the Act, of a citation by the Secretary. The Secretary "within a reasonable time" must then notify the operator (and the miners) of the penalty assessment required by section 110(a) of the Act. The operator under section 105(a) then has 30 days, from receipt of the notification of the proposed penalty, within which to notify the Secretary that it intends to contest the citation or the proposed penalty. If no such notification is given to the Secretary, the citation and proposed penalty become "a final order" of the Commission.

Section 105(a) of the statute thus clearly provides the operator with the right to contest either the "citation or proposed assessment of penalty" within 30 days of the operator's receipt of the notification of the penalty proposed to be assessed.

This section of the Act, standing alone, would consequently seem to permit one--and only one--opportunity for the operator to appeal the "citation or proposed assessment of penalty."

Of equal importance, because a "final order" disposing of both the citation and proposed penalty can only result as a consequence of the issuance of the citation and the proposed assessment of penalty, provision of but a single review appears logically inescapable. Section 105(a) therefore clearly sets out the time within which a citation or proposed penalty may be challenged and the essentially simple procedure to be followed.

The procedure adopted by the majority would, however, contrary to the Judge below and the writer, vitiate section 105(a). But both sections can be read in harmony. Section 105(d) is complementary to 105(a), and specifically enumerates the items which may be challenged.

Section 105(d) provides that, if a timely notice of contest is filed under section 105(a), the Commission "shall afford an opportunity for a hearing." Hence, even if section 105(d) were read to provide an additional (and superfluous) thirty-day period within which to challenge a citation separately, the only effect of the receipt of the notice of contest is to require that the Secretary immediately so advise the Commission, which in turn is required to afford the operator "an opportunity for a hearing."

The internal construction and syntax of section 105(d) further supports the proposition that separate hearings for citations and proposed Penalties are not contemplated. The placement of commas after "section 104," "this section," and "section 104," suggest strongly that only three areas of review were intended under section 105(d):

(1) Review of orders;
(2) Review of citations and proposed penalties; and
(3) Review of the time set for abatement of violations.

If Congress had intended that there be a fourth area of review this would have been easily accomplished by the placement of a comma after the word "citation" in the phrase "or citation or a notification of proposed assessment." Section 105(d) is not so punctuated.

Further, if Congress had intended the independent review envisioned by the majority, it is submitted that it would have again been consistent and added--in addition to the comma--"under section 104" following the word "citation", as it consistently did elsewhere throughout section 105(d) when it referred to a citation or an order reviewable thereunder.

Nor is the word "or" (between "citation" and "a notification of proposed assessment of a penalty") disjunctive in the context of 105(d). For again, if it were disjunctive, the word "citation" would have been followed by "under section 104", as well as a comma, in order to maintain the internally consistent grammatical structure of section 105(d). And, if separate review for a citation had been intended, the pertinent part of section 105(d) would have read "or a citation issued under section 104, or notification of a proposed assessment of a penalty issued under subsection (a) or (b) of this section." It does not so read. The "or" therefore should be read to indicate that either the citation, or the proposed penalty, or both,

may be challenged in a single proceeding.

Indeed the majority's conclusion that the "or" is purely disjunctive, if carried to its logical extreme, would evidently require an operator to elect between a challenge of the citation or the proposed penalty. But it is entirely possible, even probable, that an operator might wish to contest only the amount of the penalty, conceding the violation; or to contest the fact, or gravity, of the violation but not the proposed penalty. It would be an odd--and impermissible--construction of this section indeed that would compel the operator to challenge either the penalty or the citation, but not both.

The absence of a comma in section 105(d) after the words "or citation" is not considered significant by the majority, despite the complete absence of evidence that this omission was unintended. Indeed, to support this interpretation, the majority must necessarily assume Congressional error. But this Commission cannot rewrite legislation, either by adding language or by repunctuating the Act. We are, and properly, bound by the statutory language as punctuated and written,and absent any indication of an intent to separate "or citation" from the remainder of section 105(d), sections 105(a) and (d) can both be meaningful only if one review, one hearing, is had of the citation and the penalty.

The majority's decision to allow immediate review of citations would also completely destroy the need for and effect of that part of section 105(d) which provides for immediate review of "the reasonableness of the length of abatement time fixed in a citation."

As has been often stated:

> "The cardinal principle of statutory construction is to save and not destroy N.L.R.B. vs. Jones & Laughlin Steel Corp., 301, U.S. 1, 30, 81 L.Ed. 893, 907, 57 S.Ct. 615, 108 ALR 1352. It is our duty "to give effect, if possible, to every clause and word of a statute," Monteclair v. Ramsdell, 107 U.S. 147, 152, 27 L.Ed. 431, 433, 2 S.Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires." United States vs. Menasche, 348 U.S. 528, 538-539, 99 L.Ed. 615, 75 S. Ct. 513 (1955).

The majority's intrusive punctuation would make meaningless that part of 105(d) which allows the operator to contest "the reasonableness of the length of abatement time." For if Congress had intended independent review of citations generally under section 105(d), it would be obviously superfluous to enumerate a specific right of review of abatement time. See Judge Merlin's discussion in his opinions in the related cases of Rochester & Pittsburgh, Helvetia, and U.S. Steel.5/

Under the Act, citations--analogs to civil complaints--are issued pursuant to section 104. The citation describes the violation and fixes a reasonable time for abatement thereof. In conformity with the general practice of the Secretary, the citation herein was personally delivered directly to the operator at the time of inspection in order that the operator comply with the statutory directive to "***immediately take appropriate measures to insure compliance with such *** citation ***." Section 109(c).

Abatement is therefore mandated by the Act within the time set by the citation notwithstanding any appeal--or appeals--which may be brought by the operator. The filing of a notice of contest does not stay the abatement required by the citation. Section 104(h). The majority's decision cannot, of course, modify this statutory imperative. The Act does, however, permit the Secretary or his representative to seek modification of the abatement time specified in a citation. Indeed, as was conceded in oral argument, such modifications have been very frequently granted for the very purpose of permitting review.

The majority appears to be concerned with whether there may be a legally unwarranted or prejudicial delay if there is no immediate review provided of an abated citation, particularly where an inspector has made "significant and substantial" and "u"warrantable failure" findings in a citation, one in which a withdrawal order might result under section 104(d) if a second violation caused by "unwarrantable failure" to comply is found within 90 days. Section 104(d).

This construction ignores the fact that a withdrawal order may issue at any time within the statutorily established ninety day period -on the same day the first citation is issued or on any subsequent day thereafter during the ninety day period. The immediate review allowed by the

5/Rochester & Pittsburgh Coal, Docket No. PITT 78-323 (ALJ decision dated August 23, .1.978); Helvetia Coal Co., Docket No. PITT 78-322

(ALJ decision dated August 23, 1978); U.S. Steel Corp., Docket No. PITT 78-335 (ALJ decision dated July 11, 1978).

majority may or may not be determined finally at the time any second violation causes a withdrawal order to issue. The same situation may exist if a subsequent order is issued under section 104(d)(2). While the Act does not provide for expedited review of citations, it does provide for immediate and expedited review with expedited procedures for temporary relief from any withdrawal order issued under section 104. Sections 105(d) and 105(b)(2) of the Act. The availability of this latter procedure would no doubt provide the operator with its most immediate relief if circumstances. merited immediate review.

The proponents of independent reviewability of citations suggest constitutional implications if immediate review of citations is not conceded. They specifically refer to the possibility that an unreviewed citation could be a predicate for a subsequent withdrawal order under sections 104(b), 104(d) and 104(e) of the Act. Their fears regarding a section 104(b) order are not here relevant since the disputed citation was abated and could not therefore precipitate a section 104(b) order.

As to a section 104(e) order, it is true that any abated citation could be one of many citations (with significant and substantial and unwarrantable findings) that could result in a pattern violation. Nor would any pending or unsuccessful review of a single citation remove such citation from pattern consideration. Indeed to destroy the pattern it would be necessary for the cited operator to seek review of each and every citation with such findings. Nine months, or longer, could be consumed in such challenge.6/ In that period the operator should have had full review of the earlier citations through related penalty or order proceedings.

Further, if review has not been had through related penalty or order proceedings at the time the operator receives a pattern notice under section 104(e), the Commission is empowered to and might well decide that it would be appropriate to afford an opportunity for a hearing.7/ That hearing would eliminate the multitude of separate citation review hearings (prior to penalty proceedings) which would otherwise ensue if the operator elects to resist a section 104(e) pattern order.

6/Pattern of Violations, p.3, (Appendix A to Brief of Peter White Coal Mining Co., Nos. HOPE 78-374, et al).
7/Cates v. Haderlein, 342 U.S. 804 (1951); Wong Yang Snag v. McGrath, 339 U.S. 33, 50-51 (1949).

If a hearing is not provided after the notice and before the pattern order, the order itself would be subject to an immediate and expedited appeal under section 105(d) of the Act, and to an immediate and expedited procedure provided for temporary relief under section 105(b)(2) of the Act. As the Court of Appeals noted in rejecting a similar challenge to the procedure provided under the 1969 Coal Act:

> "Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings." Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1975)

Indeed, the Federal Mine Safety and Health Act of 1977 was enacted for only one reason: protection of the health and safety of the Nation's miners. When either health or safety is threatened, it is clear that Congress balanced the interests concerned and intended to protect its declared "first priority" and "most precious resource--the miner." Section 2 of the Act.

Resort to legislative history is unnecessary when questioned statutory language is unambiguous,8/ as appears to be the case here. As the majority has conceded, "the uncertainties in the legislative history including the lack of explanation for the conferees' alteration make reliance on it an uncertain matter."

Historically, the Interior Board of Mine Operations appeals (BMOA) consistently held that the effect of section 105(a) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), was to subject unabated, not abated, notices of violation to independent review. Freeman Coal Mining Co., 1 IBMA 1 (1970); Reliable Coal Corp., 1 IBMA 50 (1971). This view of the administrative review procedures under the 1969 Act had been cited with approval by two Federal courts at the time of enactment of section 105(d) of the 1977 Act. Lucas Coal Co. v. IBMA, 522 F.2d 581 (3rd Cir. 1975); Kanawha Coal Corp. v. Secretary, 553 F.2d 361 (4th Cir. 1977). Energy conceded on oral argument: "the Coal Act, I believe, fairly clearly limited review of citations to the reasonableness of the abatement time." Oral Arg. Tr. 4-5.

8/ Tennessee Valley Authority v. Hill____U.S.____, 96 S. Ct. 2279, 2296 n.29)1978); Fairport Railroad Co. v. Meredith, 292 U.S. 589, 594-595 (1934).

The absence of any explanation for the insertion of the "or citation" language by the Conference Committee buttresses the view that Congress did not intend any change in the review procedures, and did not legislate full and independent review of citations separate from penalty proceedings.

Indeed, upon analysis, it appears as if the principal ambiguities stem from the legislative history, not the statute. In view of the majority's extensive--and in my view inconclusive--analysis thereof, only minimal additional attention thereto is warranted.

The majority made reference to the Senate Report description of contest procedures. Senate Report at 48, 1977 Legislative History at 636. In contradiction to any provision or intent of the Senate to permit independent review of citations, the section-by-section analysis of this same report (Senate Report at 69; Legislative History at 657) provided that:

> "If an operator notifies the Secretary that he intends to contest the issuance or modification of an order or a notification,9/or the reasonableness of an abatement period---." The Secretary shall immediately so advise the Commission." [Emphasis supplied.]

The "notification" for which contest was provided is clearly the notification of proposed penalty issued under subsections (a) and (b) of the same section. Independent and full review of citations was neither provided nor intended.

The major difference between Senate Bill 717 and the 1977 Act is the insertion of the words "or citation" in section 105(d). This insertion was made without explanation by the Conference Committee.

9/ That part of the Senate Bill analyzed above provided for a contest of "the issuance or modification of an order issued under section 105, or a notification issued under subsections (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation ***" [Emphasis supplied.] Legislative History at p. 547.

However, if the conferees thought that the omission in the Senate Bill's version of section 105(d) of a reference to a notice of contest of a violation meant that citations were not reviewable at all, it would appear that the words "or citation" were inserted only to make it clear that a citation is reviewable at some time. There is certainly nothing else contained in the legislative history which would demonstrate that the Congress intended to make citations fully and immediately reviewable. Indeed the legislative history when considered as a whole, together with the reading of sections 105(a) and (d) suggested above, evidence no intention to so drastically alter the mechanisms provided for by the Senate Bill, which the conferees adopted.

There is thus no statutory compulsion nor none which can be gleaned from the legislative or judicial history of the Act or its predecessor which requires that an operator be provided with a separate opportunity for a hearing on a citation apart from the related penalty proceeding.

Finally, even if no other reasons were apparent, efficient judicial administration would mandate that neither the Judges' nor the Commission's limited resources should be squandered on separate proceedings involving common parties and to a great extent common facts and issues.10/

To what extent operators will benefit from independent review of citations and the consequent increase in litigation may be questionable, but it is clear that the miner will suffer. The forcing of additional reviews will no doubt result in inspectors who are better able to perform in the courtroom, but it will also inevitably diminish their availability for mine inspections. The resultant decrease in the enforcement of the safety and health standards mandated by the Act is not, in my view, in accord with the Congressional intent reflected in the statute.

10/ See Mathews v. Eldridge, supra, 347-349 (1975); Lucas v. IBMA, 522 F.2d, 581, 587 (3rd Cir. 1975).

The majority opinion evades the considerable increase in the number of citations which will be immediately contested for, in truth, the operators will be strongly motivated to clog the system despite the majority's expectations.11/ The majority reveals its unstated apprehension of an increase in the number of reviews of citations by suggesting procedures to defer these reviews after citations have been placed on the Commission's docket, and suggest that citations without special findings be continued. This would, however, affect review of only an insignificant number of citations.12/

I therefore conclude that independent reviewability is not required by the language of the Act and was not intended by its drafters. In addition, since abatement is admittedly not stayed even with independent reviewability, no possible prejudice to the operator can result if review must await the imposition of a penalty. If a withdrawal order were issued, immediate and expedited review, together with expedited procedures for temporary relief, are always available to the operator.

I therefore dissent.

11/ For example, during calendar year 1978, 136,682 citations were issued and 135,346 penalties were assessed. Of these 3,002 went to a penalty hearing. MSHA Assessment Activity Report, December 1978. A doubling, or even an increase in the number of hearings by 50 percent--which I have no doubt would result from permitting independent review of citations -would obviously have a serious if not crippling effect on our ability to comply with the mandate of the Act "to provide more effective means and measures for improving the working condition and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines ...." Section 2(d) of 1977 Act.

12/ MSHA has stated that it interprets "significant and substantial" to mean all violations except those which pose "no risk of injury at all, purely technical violations," and those which pose "a source of injury which has only a remote or speculative chance of happening." See Brief of Peter White Coal Mining Co., HOPE 78-374,.et al, p.10-n6, and Appendix B thereto.