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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 29, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. VINC 79-119

v.

OLD BEN COAL COMPANY

DECISION

The issue in this case is whether Old Ben Coal Company (Old Ben) is responsible for a violation of the Federal Mine Safety and Health Act of 1977 1/ committed by its contractor, ANSCO, Inc. (ANSCO). In his decision, Chief Administrative Law Judge Broderick found that Old Ben violated a provision of the Act and assessed a $750 penalty for the violation. For the reasons that follow, we affirm.

The material facts are not in dispute. ANSCO contracted with Old Ben to construct a building at Old Ben's No. 2 strip mine near Petersburg, Indiana. On April 12, 1978, a Mine Safety and Health Administration (MSHA) inspector conducted an inspection of Old Ben's mine. The MSHA inspector was accompanied by Old Ben's safety inspector and a representative of the United Mine Workers of America. During the inspection, the MSHA inspector observed an ANSCO employee working on an I-beam 15 to 20 feet above the ground. The employee was not wearing a safety belt. Believing that there was a danger of the employee falling, the MSHA inspector informed Old Ben's safety inspector that he was issuing a citation for violation of 30 CFR $77.1710(g). 2/ Old Ben's inspector requested the ANSCO employee to come down and the employee complied. The citation was issued to Old Ben.

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1/ 30 U.S.C. $801 et seq (1978)(hereafter "the 1977 Act" or the

Act").

2/ This standard, in pertinent part, provides:

$77-1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(g) Safety belts and lines where there is a danger of falling ....

Old Ben does not argue that a violation of the standard did not occur. Rather, Old Ben argues that as a matter of law under the 1977 Act it is neither absolutely liable nor jointly and severally liable for a violation of the Act committed by its contractor. Old Ben urges the Commission to hold that ANSCO, as an independent contractor, was the operator solely responsible for the violation at issue. The Secretary of Labor argues that under the 1977 Act an owner-operator is absolutely and vicariously liable for violations attributable to its independent contractors. The Secretary further argues that his decision to proceed against an owner-operator for a contractor's violation is exempt from judicial review. In the alternative the Secretary argues that, if his decision to proceed solely against Old Ben is reviewable by the Commission, it should be upheld because it resulted from a rationally based interim policy.

The 1977 Act defines "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. $802(d). The enforcement provisions of the Act all speak in terms of operator: the Act provides for the issuance of citations and orders to the operator for violations of "mandatory standards and imminent dangers (30 U.S.C. $$814, 817); requires the assessment of civil penalties against the operator of a mine in which a violation occurs (30 U.S.C. $820(a)); and provides for the compensation by the operator of miners idled by withdrawal orders. 30 U.S.C. $821. Analogous provisions under the Federal Coal Mine Health and Safety Act of 1969 have been construed to permit the imposition of liability on owner operators, for violations occurring in their mines "regardless of who violated the Act or created the danger requiring withdrawal". Bituminous Coal Operators' Assoc., Inc. v. Secretary of Interior ("BCOA v. Secretary") 547 F.2d 240, 246 (4th Cir. 1977); Republic Steel Corp., 1 FMSHRC 5, 9 (1979), pet. for rev. filed, No. 79-1491, D.C. Cir., May 11, 1979; Kaiser Steel Corp., 1 FMSHRC 343 (1979); Consolidation Coal Co., 1 FMSHRC 347 (1979). See Republic Steel Corp. v. IBMOA, 581 F. 2d 868, 870 n. 5 (D.C. Cir. 1978). For the reasons stated in those decisions, the same conclusion is warranted under the 1977 Act.

The amendment of the 1969 Act's definition of "operator" to include "any independent contractor performing services or construction at such mine" does not require a different result. On its face, the additional language in the 1977 Act's definition of "operator" does not affect the question of an owner's responsibility for contractor violations. Rather, the amendment simply appears to settle an uncertainty that arose under the 1969

Act, i.e., whether certain contractors are "operators" within the meaning of the Act. See, e,g., Association of Bituminous Contractors, Inc. (ABC) v. Morton, No. 1058-74 (D.D.C., May 23, 1975), rev'd sub nom. ABC v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); BCOA v. Secretary, supra; Cowin and Co., Inc., 1 FMSHRC 20 (1979).

To the extent that the legislative history concerning the amended definition bears on the question of owner responsibility for contractor violations, it supports the imposition of such liability. The Senate

Committee Report on the 1977 Act explained the amended definition as follows:

> ...[T]he definition of mine "operator" is expanded to include "any independent contractor performing services or construction at such mine". It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the [1977 Act]. In enforcing this Act, the Secretary should be able to assess civil penalties against such independent contractor as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of Interior, 547 F. 2d 240 (C.A. 4, 1977).

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14 (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 602 (1978) ["1977 Act Legis. Hist."].

The Conference Committee Report stated the following regarding the amended definition:

> The Senate bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine.

S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess., at 37 (1977); 1977 Act Legis. Hist. at 1315.

We read these passages simply as a more complete explanation of that which was accomplished by the amendment to the definition, i.e., a clarification that certain contractors are operators under the Act. The addition of independent contractors to the definition of operator was done solely to dispose of any remaining doubt that independent contractors can be held liable as mine operators. It was not the intention of the Congress to limit the number of persons who are

responsible for the health and safety of the miner, nor to dilute or weaken the obligation imposed on those persons. Viewed in this light, the citation in the Senate Report to the Fourth Circuit's BCOA decision is explainable as a reference to that portion of the BCOA decision holding that certain contractors were operators under the 1969 Act. In view of the approving reference to the BCOA decision in the Senate Report, however, we cannot conclude that the drafters were unaware of that decision's further holding that owners can be held solely responsible "regardless of who violated the Act or created the danger requiring withdrawal". 547 F. 2d at 246. Given this fact, and the fact that the

1977 Act and the legislative history are otherwise silent on this important question of law, we conclude that Congress endorsed the conclusion that owners can be held solely responsible for contractor violations. Cf National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 702-703 (3rd Cir. 1979).

For these reasons, we find that, as a matter of law under the 1977 Act, Old Ben, as an owner-operator, can be held responsible without fault for the violation of the Act committed by its contractor. 4/ When a mine owner engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation.

We emphasize that our conclusion regarding an owner's liability does not affect a contractor's duty to comply with the Act or its liability for violations that it commits. The amendment of the definition of operator in the 1977 Act makes it clear that contractors can be proceeded against and held responsible for their violations. Indeed, as discussed more fully below, direct enforcement against contractors for their violations is a vital part of the 1977 Act's enforcement scheme.

Our inquiry in the present case does not end with the conclusion that as a matter of law Old Ben can be held responsible for its contractor's violation. The Secretary's argument that Commission review of his decision to proceed against Old Ben is precluded by 5 U.S.C.$701 because it is a matter committed entirely to his discretion by law is without merit. 5/ The structure and intent of the detailed administrative review provisions of the 1977 Act compel the conclusion that the Secretary's decision may be reviewed by the Commission.

First, section 507 of the 1977 Act provides:

> Except as otherwise provided in this Act, the provisions of ... sections 701-706 of title 5

4/ In view of our conclusion, it is unnecessary to reach the

Secretary's argument that a mine owner is vicariously liable for a contractor's violation because the contractor is an "agent" of the owner under section 3(e) of the 1977 Act, 30 U.S.C. $802(e).

5/ 5 U.S.C. $701, in pertinent part, provides:

(a) This chapter applies, accordingly to the provisions thereof, except to the extent that

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

> of the United States Code shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof.

The 1977 Act does not otherwise make 5 U.S.C. $701 applicable to Commission proceedings. Therefore, the authority the Secretary cites as controlling on the question of reviewability is not even applicable.

Second, we reject the Secretary's attempt to equate the Commission with a court of appeals and have the judicial review provisions of the Administrative Procedure Act, including 5 U.S.C. $701, applied to Commission proceedings by analogy. The Commission stands in a fundamentally different position in relation to the Secretary than does a court of appeals. The Commission was established as the "ultimate administrative review body" under the Act due to the recognition that "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program". 1977 Act Legis. Hist. at 601, 635. The Commission is comprised of persons who "by reason of training, education, or experience" are qualified to carry out its specialized functions under the Act. Section 113(a). The Commission is authorized to review, on a discretionary basis, decisions of its administrative law judges on statutorily specified grounds, including whether the decision presents a "substantial question of ... policy", is "contrary to ... Commission policy", or presents a "novel question of policy". Section 113(d)(2)(A) and (B). The Commission's authority to review judge's decisions extends even to cases in which no person has filed a petition for review. Section 113(d)(2)(B). These powers were given to the Commission to enable it to "develop a uniform and comprehensive interpretation of the law", providing "guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law". 6/ These provisions demonstrate that the Commission was intended to play a major role under the 1977 Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis. Thus, the Act provides a clear basis for distinguishing the Commission's role from that of a court reviewing agency action, thereby rendering application of 5 U.S.C. $701 by analogy inappropriate. Cf Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974). The Commission's review authority extends to "determining operator responsibility and liability" for violations of the Act. 1977 Act Legis. Hist. at 89.

For these reasons, we conclude that the Secretary's decision to proceed against an owner-operator for a contractor's violation is reviewable by the Commission.

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6/ Nomination Hearing, Members of Federal Mine Safety and Health Review Commission Before the Senate Committee on Human Resources, 95th Cong., 2d Sess. 1 (1978) (statement of Senator Harrison A. Williams, Jr., Chairman).

Having decided that in a contested case the Secretary's decision to institute enforcement proceedings against an owner for its contractor's violations is reviewable by the Commission, we must determine an appropriate standard of review. The Secretary argues that, if his decision is reviewable, the appropriate standard of review is that set forth in section 10(e) of the Administrative Procedure Act, 5 U.S.C. $706 (2)(A). This provision, in pertinent part, provides that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". As noted above, however, section 507 of the 1977 Act specifically provides that 5 U.S.C. $706 is not applicable to Commission proceedings.

In reviewing this case, some latitude must be given to the Secretary's determination as to how to enforce the Act for contractor violations. The Secretary, by virtue of his enforcement responsibilities, has direct experience with the nature of the working relationships of owners and contractors on the jobsite. The experience makes it possible for the Secretary to be apprised of the diverse economic and technical consideration that should be taken into account in formulating a policy on liability for contractor's violations. Also, the Secretary's enforcement policy must be coordinated among hundreds of inspectors in the field. These considerations require that the Commission not employ a broad standard of review in this case. Thus, in these circumstances we believe that an appropriate inquiry is for the Commission to determine whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purpose and policies of the 1977 Act.

We turn now to examining the record in the case before us. It is clear from the record that the particular facts of this case had no bearing on the Secretary's decision to issue the citation to Old Ben. The Secretary concedes that Old Ben was proceeded against under an agencywide policy to directly enforce the Act against only owner-operators for contractor violations. The record is far from clear as to the basis of this policy. The Secretary admits that the policy, in part, represents a continuation of past practice under the 1969 Act . The policy under the 1969 Act of citing only owner-operators for contractor violations had its roots in the district court's decision in ABC v. Morton, supra, holding that contractors were not "operators" under the 1969 Act. On February 22, 1978, however, the district court's decision was reversed in ABC v. Andrus, supra, and after that date it was clear that the Secretary

could enforce the Act directly against contractors. More importantly, when the 1977 Act became effective on March 9, 1978, any doubt concerning the Secretary's ability to proceed directly against contractors was dispelled. Therefore, if the Secretary's decision to proceed against Old Ben was made pursuant to an enforcement policy based solely on the discredited foundation of ABC v. Morton, there would be no doubt that his decision was improper. Cf. Republic Steel Corp. v. IBMOA, 581 F. 2d 868 (D.C. Cir. 1978).

The Secretary, however, has provided another reason explaining his

decision to proceed against Old Ben for its contractor's violation. The Secretary asserts that, although Old Ben was proceeded against in accordance with a Secretarial policy of directly enforcing the Act only against owners, this policy is an interim one pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors. In the Secretary's view, this interim policy is necessary to avoid the "unpredictability, confusion, and potential unfairness" that would result if each of more than 1,600 inspectors determined the appropriate operator to proceed against on an individual ad hoc basis.

On October 23, 1978, MSHA made public a draft of proposed regulations indicating its intent to enable inspectors to proceed directly against contractors for their violations. On August 14, 1979, the proposed regulations were published. 44 Fed. Reg. 47746-47753 (1979). The proposed regulations provide a firm indication of the Secretary's intent to enforce the Act directly against contractors for violations that they commit.

We note that the interim policy being pursued by the Secretary is not in line with the view expressed in his proposed regulations of how best to enforce the 1977 Act. Also, we have doubts concerning the necessity of the Secretary's blanket "owners only" enforcement policy even on an interim basis. In many circumstances, as in the present case, it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring. Thus, we fail to see the overriding need for adherence to a uniform policy in instances where it is clear that proceeding against a contractor is a more effective method of protecting the safety and health of miners. Nevertheless, we recognize that it takes some time for the development of new policies and procedures by a department newly assigned the enforcement of a major program designed to protect the health and safety of miners. 7/ Therefore, because the Secretary's decision to proceed against Old Ben was grounded on considerations of consistent enforcement, it was made for reasons consistent with the purposes and policies of the 1977 Act and we will not disturb his choice.

We emphasize, however, as the Secretary has recognized in his proposed regulations, that the amendment of the 1977 Act's definition of operator to include independent contractors was intended to accomplish a specific purpose, i.e., to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act. The Secretary has also recognized in his proposed regulations

that enforcement against owners for contractor violations, although a legally permissible method of effecting miner safety and health, often times proves to be an inefficient and unsatisfactory runner of achieving the Act's purposes. See also ABC v. Andrus, supra, 581 F.2d at 863. We note that there is no indication of when the interim policy will be replaced by a new one. If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against contractors, he will be disregarding the intent of Congress. In view of the Secretary's express recognition of the wisdom and effectiveness

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7/ The 1977 Act became effective on March 9, 1978. The citation in this case was issued to Old Ben on April 12, 1978.

of subjecting contractors to direct enforcement, continuation of a policy that forecloses such enforcement will provide evidence that the current policy is grounded solely on improper considerations of administrative convenience, a basis that would not be consistent with the Act's purpose and policies. The ability to proceed against owners for contractor violations was intended to provide an effective tool for protecting the safety and health of miners. To use this tool as a mere administrative expedient would be an abuse.

For these reasons, the decision of the administrative law judge finding that Old Ben violated the Act is affirmed.

Jerome R. Waldie,

Chairman

Frank F. Jestrab,

Commissioner

A. E. Lawson,

Commissioner

Marian Pearlman

Nease, Commissioner

Backley, Commissioner, dissenting:

This case arises under the Federal Mine Safety and Health Act of 1977 (1977 Act), but poses the same question as was presented to the Commission in Republic Steel Corporation (Republic), 1/ a case that was decided under the Federal Coal Mine Health and Safety Act of 1969 (1969 Act). Under the 1969 Act, the term "independent contractor" was not included in the statutory definition of "operator". 2/ However, court decisions, in interpreting that word, held that under the definition of "operator" in the 1969 Act an independent construction contractor could be considered a coal mine operator. 3/ In the enactment of the 1977 Act, Congress, noting with approval such judicial interpretation, 4/ amended the definition of "operator" to include independent contractors performing services or construction at a mine.

1/ Secretary of Labor v. Republic Steel Corporation, Docket Nos.

IBMA 76-28, MORG 76-21, IBMA 77-39, MORG 76X95-P, Comn. No. 79-4-4.
2/ 30 U.S.C. $802 (d).
3/ Bituminous Coal Operators' Association v. Secretary of the Interior, 541 F.2d 240 (4th Cir. 1977), (BCOA); Association of Bituminous Contractors Inc., (ABC) v. Andrus, 581 F.2d 852 (D.C. Cir. 1978).
4/ The Senate Committee Report specifically cites the BCOA decision. S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977).

Accordingly, under both Acts an independent contractor can be held liable as a mine operator. The underlying question thus presented in both Republic and the instant case is under what circumstances should liability of the contractor attach. Today's majority opinion sheds little light on this question. As in Republic, the majority has held the owner-operator liable on a theory of absolute or strict liability without any consideration of the action or inaction of the independent contractor. 5/

However, it is apparent that the majority has retreated from its rigid position, as enunciated in Republic, of approving without meaningful review the Secretary's imposition of absolute liability on the owner-operator and now considers such policy of the Secretary to be "permissive" dependent upon the Secretary's promulgation of regulations discussed later herein. The fact remains, however, that the majority has disregarded the facts presented in this case and, accordingly, has deferred to the Secretary's present ill-founded policy of citing only the owner-operator. Accordingly, I must dissent.

As in Republic, I do not dissent from the court supported proposition that the statutory language permits the imposition of absolute liability on owner-operators for independent contractor violations. However, the Secretary of Labor and this Commission have an obligation to determine under what circumstances imposition of the statutorily permissible concept of absolute liability will best promote the safety and health of miners. Thus the thrust of my dissent, both in Republic and in the instant case, goes to the question of whether the owner-operators, under the facts presented to use, should be held liable for the violations of their contractors. I submit that the answer to the latter question depends on the factual situation presented in each case measured against a standard of preventative control. 6/

5/ In lieu of the term "absolute liability", the majority finds Old Ben can be held responsible "as a matter of law ... without fault ...". The phrase, "a distinction without a difference," I believe is appropriate.

6/ While conceding that "one operator may be in a better position to prevent the violation," the majority then, surprisingly, proceeds to reason that the "issue" need not be decided, attributing such reasoning to Congress. It would appear that the ability to prevent a violation from taking place would do more for the promotion of health and safety, then the blind assertion that Congress allows "the imposition of liability on both operators" regardless of their

relative position insofar as a violation is concerned. The rationale that Congress "endorsed the conclusion that owners can be held solely responsible for contractor violations" does not support the conclusion that they should. This leap in logic ignores safety, for to hold one party liable who is in a lesser position to prevent violations provides little comfort for the miners.

Thus, as I indicated in Republic, I would impose liability on the person most able to prevent the violation and to correct it quickly would it occur. In my opinion that person would be the party who has functional control of, or supervision over, the work activity in that portion of the mine where the violation occurred.

Accordingly, I submit that there must be, at a minimum, some rational relationship between the owner-operator and the wrongdoing alleged in the citation before the owner-operator should be held legally responsible for the violation. Such relationship does not exist under the facts of this case as examined below. Therefore, I conclude that Old Ben should not te held liable for the violation admitted by its independent contractor. Application of the concept of absolute liability of the owner-operator regardless of the facts can produce only unreasonable results as this case clearly demonstrates.

An inspection of the Old Ben No. 2 Strip Mine was made by Department of Labor inspector Joseph Hensley on April 10, 11 and 12, 1978. During the inspection employees of an independent construction contractor, ANSCO, Inc., were working at two different locations on the mine property. ANSCO had been contracted by Old Ben to construct a structure to be used in repairing the dragline shovel buckets used at the No. 2 strip mine. ANSCO employees were also on mine property constructing an addition to the tipple.

On April llth, Inspector Hensley visited the construction site at the tipple and observed four men working in an elevated position with neither safety belts nor scaffolding. Hensley pointed out this safety hazard to Dale Wools, the Old Ben representative accompanying him, who asked the men to "come down." Hensley and Wools then contacted William Wagner, ANSCO's superintendent of construction at the No. 2 mine. Inspector Hensley explained to Mr. Wagner "at that time what the law said about safety belts and what was required for his men to do when working on an elevated platform and he assured me [Hensley] at that time that he would have none of his men working from an elevated position again unless they were wearing safety belts." (TR. 20)

On April 12th Inspector Hensley was again accompanied on the continuation of his inspection by Old Ben's representative, Dale Wools. While driving by the bucket building construction site with Mr. Wools, the inspector observed an employee of ANSCO working 15 to 20 feet in the air standing on an I-beam. The employee, who was welding, was not wearing a safety belt and was not using scaffolding which was available at the site. The inspector instructed the Old Ben representative to have the men come to the ground, which he did. When

the employee descended the inspector considered the violation to be abated. (TR. 32) There were no other Old Ben hourly employees or supervisors in the immediate vicinity of the construction site. ANSCO's construction supervisor, Mr. Wagner, was on the mine property but he was not at the bucket building construction site at the time of the violation. (TR. 34, 35)

The ANSCO employee who was cited for failure to wear the safety belt stated to Inspector Hensley at the time of the violation "that he knew that he was required to wear safety belts but he was instructed" by Mr. Wagner "that he had to get the job done and that there were no belts available for him so he went up" without the safety belt. (TR. 37) The ANSCO employee had further explained that "he had just a quick job. His foreman was in the office making a phone call and he thought he would get the job done right away while the foreman was gone and have it done when he got back." (TR. 50)

Inspector Hensley also testified that he issued the citation to Old Ben under the unwarrantable failure provisions of section 104(d) 7/ because he had previously explained the safety belt requirements to the ANSCO supervisor and because the ANSCO employee admitted that he knew he was violating a safety standard. (TR. 35)

The contract between Old Ben and ANSCO provided that ANSCO was to erect the building for a fixed sum according to certain specifications. The administrative law judge made a finding that under the terms of the contract and in carrying it out, ANSCO was independent of any control by Old Ben. He further found that ANSCO's employees were supervised by its own supervisor and Old Ben did not hire, fire, direct or control them in their duties. (Dec. P. 2, 3) The employee in question was not directly or indirectly under Old Ben's control. (Dec. p. 4)

Thus under these facts, Old Ben has been assessed a civil penalty of $750.00 as a result of the poor safety practices of a construction company's employees over which they had no practical control. Furthermore, Old Ben's No. 2 Strip Mine was subjected to the potential closure sanctions of the unwarrantable provisions of section 104(d) of the Act not because of any action or inaction of Old Ben, but, according to the testimony of the inspector, because of the laxity of supervision by ANSCO and the act of the ANSCO employee in flagrantly committing the violation.

The transcript of the evidentiary hearing in this case indicates that the inspector felt he had been placed in an awkward position by the MSHA policy as enunciated by counsel at the hearing. In response to a question from the Judge as to why the inspector did not cite both the owner-operator and the independent contractor, the Secretary's counsel stated that "there are no regulations out now that state we can cite independent contractors for violations." (TR. 7) Counsel further stated:

> "The present practice of the Secretary is to cite the owner operators of all violations that are committed on the (mine) property." (TR. 8)

The inspector was clearly aware of this policy to cite only owner-operators and not independent contractors. However, his testimony indicates that he sensed he was citing an improper party, but was helpless to remedy the situation because of the restrictions placed upon him.

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7/ 30 U.S.C. 814(d).

Inspector Hensley was asked at the evidentiary hearing why Old Ben was cited instead of ANSCO. He replied as follows:

> "I had no provisions to cite ANSCO at that time. We were aware of the law, the '77 Act that they were trying to promulgate laws for construction people to get them to stand on their own merits but at the time, there were no laws in effect at which there is not yet, as far as I am aware of, maybe there is but as far as I am aware of there is no law governing contractors. They still come under the jurisdiction of the mine while they are on mine property. If you will note on my citation, I did write in the body of the citation that it was ANSCO." (TR. 28)

There is, of course, a "law governing contractors." What does not exist, however, is a rational application of that law only a policy of what can best be described as one based principally on administrative convenience.

As noted by the majority, the Secretary made public in October 1978, a draft of proposed regulations establishing criteria by which independent contractors would be designated operators. On August 14, 1979, 17 months and 5 days after the effective date of the Act the revised proposed rules were published by the Secretary. In both the draft version and the final 8/ proposed version of the rules, the preambles makes it clear that in determining liability as between the owner-operator and the independent contractor, the paramount concern is approved safety and health conditions for miners. I am in full agreement with that underlying premise. The preamble to the proposed rules published in August further states that "MSHA's experience under the 1969 Coal Act and the 1977 Act has been that persons controlling a mine are generally in a position to act more responsibly and effectively with regard to safety and health conditions at the mine." (F.R. p. 47747) I believe that conclusion of the enforcement arm of the Secretary is most important and should be given careful consideration. So as to fulfill the Congressional mandate to most effectively promote the health and safety of the miner, the Secretary then concluded as follows:

> Accordingly, under the proposed rule the primary criterion for identification of independent contractors as operators would be whether the contractor will have effective control over an area of the mine during the performance of its work.

8/ The proposal of August 14, 1979, provides for a 60-day comment period. Accordingly the finality of the proposal is, at this point, tenuous.

In Republic, I set forth criteria I would utilize in determining the responsible party. Those criteria have much in common with what the Secretary proposes. What I fail to understand is why the implementation of principles with which the Secretary agrees would more effectively promote the safety and health of the miners must await this interim period of formal departmental rulemaking with all of its delays, some inherent and some not. No satisfactory answer to this question has been advanced. I do not believe there is one. 9/

Certainly, administrative convenience, in and of itself, is an inadequate reason to sacrifice miners' safety. But the Secretary argues that continuation of the policy of prosecuting owner-operators for independent contractors violations is not only rational but necessary. The Secretary states:

> If each inspector were to exercise the Secretary's prosecutorial discretion without guidelines, as the inspector saw fit, the resulting unpredictability, confusion, and potential unfairness would harm the Secretary's enforcement program and, potentially, disrupt the mining industry. (Brief of Secretary, p. 27, Monterey Coal Company v. Secretary of Labor HOPE 78-469, et al.)

I believe that the Secretary has overstated the practical difficulties which inspectors encounter at the mine site in the vast majority of situations involving violations of independent contractors. The portions of the record cited above in the instant case serves to illustrate this point. The record reveals an inspector who knew through experience which party should have been held responsible, but who was unable to exercise this expertise as a result of the Secretary's interim policy.

The majority opinion correctly, in my view, outlines the Commission's role vis-a-vis that of the Secretary in reviewing the latter's enforcement policy. In this regard, I agree with the majority's statement that "... The Commission was intended to play a major role under the 1977 Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis." [Emphasis supplied] Unfortunately, having said that, my colleagues defer again to the Secretary in this case, notwithstanding the facts of this case, let alone their own well articulated description of their roles as members of the Commission. One can only hope, in reading their decision, that their patience is growing thin insofar as the Secretary's failure to establish a policy that allows

the enforcement of the Act against the

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9/ While this issue is not before us, the question as to why one class of "operator" must be further defined beyond the statutory definition, gives me some problems. The Secretary's regulations will condition liability in the case of independent contractors but not in the case of an owner-operator. I find no such distinction in the Act.

"other operator," the independent contractor. Even more important it remains to be seen what their position will be if the Secretary continues to be dilatory in his promulgation of such a policy. Nothing in their opinion suggests an answer to this question.

For the reasons set forth herein and in Republic, I would reverse the decision of the administrative law judge.