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MSHA V. EASTERN ASSOC. COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
September 2, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
v. Docket No. HOPE 75-699
IBMA 76-98

EASTERN ASSOCIATED COAL COMPANY

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)["the 1969 Act"], and involves the interpretation of section 103(f) of that act. 1/ Section 103(f) provided:

> In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative in consultation with the appropriate state representative, when feasible, of any plan to recover any person in the mine or to return the affected areas of the mine to normal.

On January 8, 1975, an inspector of the Interior Department's Mining Enforcement and Safety Administration ("MESA"") issued to Eastern Associated Coal Company ('Eastern") an order under section 103(f). The order required the withdrawal of miners from a section of Eastern's Keystone No. 1 Mine.

The MESA inspector had been in another area of the mine when he was informed by the general mine foreman that a miner had been pushed against a rib by a shuttle car. The administrative law judge

described the circumstances as follows:

> The accident had occurred as coal was being loaded from a shuttle car into mine cars. Shuttle cars loaded with coal go to the track entry by means of a slight ramp. The coal is discharged from the shuttle car into the mine cars by a boom. The mine cars are

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1/ Commissioner Backley did not participate in the consideration or decision of this case.

> located on a track just below the shuttle car ramp. There were eight cars in this particular mine car trip. The mine cars were initially placed in the loading area by a locomotive. After arriving in the area, an electric hoist, using a hook attached to a rope, was connected to the rear car of the mine car trip in order to position the mine cars in the loading area. The locomotive leaves once the cars are hooked to the hoist. The loading area track has a slight grade, approximately 2 percent, hence the electric hoist, rope, and the hook prevent the mine car trip from rolling down the grade under the influence of gravity. As each mine car is loaded with coal from the shuttle car boom, an empty mine car is positioned to be loaded by the electric hoist. In this case, empty oil drums were also placed on the loaded mine cars. The oil drums were placed there in order to haul them out of the mine (Tr. 45-48, 50-56).
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> In this case, the victim was unloading his shuttle car, which was properly located in the entry ramp to the loading area. The hook which was attached to the mine car trip from the hoist became dislodged. The mine car trip then began to move down the slight grade. As it did so, the shuttle car boom came in contact with an empty oil drum on one of the mine cars which had already been loaded with coal. As the shuttle boom came in contact with the oil drum, it pushed the shuttle car crossways into the rib, trapping the victim [the shuttle car operator] between the rib and the shuttle car (Tr. 50, 51, 56).
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> Upon arriving [at the accident scene, the inspector] observed that the victim was conscious and being treated for shock and a possible broken back. The inspector felt that the victim had been seriously injured although he did not have positive knowledge of the extent of these injuries at that time. There was no one in the mine then capable of accurately ascertaining the victim's injuries (Tr. 41, 43, 48-50, 63).

The judge relied upon the inspector's testimony that the accident was precipitated by the hoist hook coming loose, that he was uncertain as to why the hook had come loose, and that he considered himself unqualified to conduct the investigation. The judge found the inspector was prompted to issue the section 103(f) order to preserve the evidence pending an investigation of why the hook came loose. The next day the inspector issued an order modifying the initial section 103(f) order. The modification order stated:

> This modification will permit the operator to operate 4 mains

section provided that:

(I) Persons involved in loading operations will be instructed to inspect the hoist hook to ascertain that the hook is properly positioned prior to uncoupling the locomotive from the trip.

(II) To provide the hoist rope with a device to preclude twisting, which may dislodge the hook.

(III) To provide and install a device to maintain control of mine cars in the event of a runaway.

(IV) Until such time that item No. 3 can be provided the operator will provide a suitable locomotive manned by a competent motorman, which will be coupled to the mine cars at all times during loading operations.

The order was terminated when a device was installed in the loading track to stop runaway mine cars.

Eastern filed an application for review with the Interior Department's Office of Hearings and Appeals. The administrative law judge held that he had no authority to review the order. Eastern appealed to the Interior Department's Board of Mine Operations Appeals, which held that the judge did have authority to review the order and remanded for a decision on the merits. 5 IBMA 74, 1975-76 CCH OSHD 19,921 (1975). In his decision of June 4, 1976, the judge affirmed the section 103(f) order and the modification. Eastern then appealed again to the Board. While the appeal was pending before the Board, the 1969 Act was substantially amended by the Federal Mine Safety and Health Amendments Act of 1977, and was re-named the Federal Mine Safety and Health Act of 1977, 801 et seq. (Supp. II 1978)["the 1977 Act"]. The 1977 Act transferred adjudication functions to this Commission and transferred investigation, inspection, prosecution and rulemaking functions to the Secretary of Labor.

The United Mine Workers of America (the "Union") argued to the Board that it could not review section 103(f) orders. MESA concurred with the Union's position that the Board could not do so, but for a different reason--that the Board was not authorized by the Secretary of the Interior to review section 103(f) orders and that, in effect, the Interior Secretary had reserved this power, if it existed,to himself. 2/

2/ See Oral Argument Tr 28-29, 35 (July 9, 1975)(before the Board). In deciding this case, we considered the arguments of these same

parties in a similar case, Eastern Associated Coal Corp., Docket No. HOPE 76-289, IBMA 77-20.

We observe at the outset that the issue of whether section 103(f) orders are administratively reviewable is not quite in the same posture as it was before the Board. The Board was merely a delegatee of some of the Secretary of the Interior's adjudicative functions. The transfer provision of the 1977 Amendments Act transferred to the Commission the adjudicative powers of the Secretary of the Interior, not those of his Board 3/ nor his Office of Hearings and Appeals. The adjudicative powers of the Commission of cases under the 1969 Act that were pending on the effective date of the 1977 Act are therefore not derivative of the Board's powers, but are derivative of the Secretary of the Interior's powers. Accordingly, the question is not whether the Board was authorized by the Secretary of the Interior to decide this case, but rather, whether the Secretary of the Interior could have reviewed this order.

We conclude that the Secretary of the Interior could have reviewed this section 103(f) order. As the superior of the MESA inspector the Secretary of the Interior had the power to voluntarily review the actions of his subordinate. We see no reason why he could not have done so in an adjudicative manner. 4/ The 1969 Act contained no express prohibition that would have prevented the Secretary from voluntarily creating an administrative adjudicative system for reviewing section 103(f) orders. The mere absence of a requirement that the Secretary review these orders, even coupled with the express requirement of review of orders issued under section 104, does not sufficiently indicate that Congress formed an intent to forbid such review. There is no indication in the legislative history of the 1969 Act that Congress so intended and review of section 103(f) orders can cause no deprivation of the protection accorded to miners by the Act. Compare Mine Workers v. Andrus (Carbon Fuel Co.), 581 F.2d 888, 892-894 (D.C. Cir.), cert. denied, 439 U.S. 928 (1978). The Board concluded, when it first considered this case, that the Interior Secretary had established an administrative adjudication system for review of section 103(f) orders, and we agree with that conclusion. 5 IBMA 74.

3/ Section 301(a) of the 1977 Amendments Act, 30 U.S.C. 861(a), reads in part as follows:

> (a) [T]he functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969, as amended, and the Federal Metal and Nonmetallic Mine Safety Act are transferred to the Secretary of Labor except those which are expressly transferred to the Commission by this Act. [Emphasis added.]

4/ Cf. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950)(agency holds hearing by "special dispensation"); Cross-Sound Ferry Services, Inc.

v. United Stares. 573 F.2d 725, 732 n. 4 (2d Cir. 1978)(hearings on environmental impact statement discretionary with agency); Attorney General's Manual on the Administrative Procedure Act, at 41 (1947) (hearing held "as a matter of agency policy or practice").

We also conclude that the Commission succeeded to the Interior Secretary's power to adjudicate this case. Although section 301 of the 1977 Amendments Act does not clearly state the particular adjudicative powers that were transferred, we think it obvious that Congress intended all adjudicative matters pending before the Secretary of Interior on the effective date of the 1977 Act be continued before the Commission, except those which the Secretary of Labor had been given the function of a deciding under the 1977 Act, such as petitions for modification. See section 301(c) of the 1977 Act. 5/ This view is most consistent with Congress' preference under the 1977 Act for independent, administrative review by the Commission, not the Secretary of Labor. Accordingly, we conclude that the Commission may decide this case. 6/

We now turn to Eastern's arguments that both the section 103(f) order and its modification were invalid. Eastern argues that the section 103(f) order continued beyond the period of danger to the safety of the miners caused by the accident, and that section 103(f) did not authorize issuance of "post-inspection withdrawal orders to serve the purpose of future accident prevention". MESA (now MSHA) maintains that issuing a section 103(f) order to preserve evidence is authorized by section 103(f) because the resumption of mining operations would have resulted in the loss of evidence that could have established the underlying cause of the accident and thus assure that a similar accident would not recur on the same equipment. Preservation of the evidence in such circumstances thereby helped insure miner safety, MSHA argues.

5/ Section 301(c)(3) of the 1977 Amendments Act, 30 U.S.C. 861(c)(3), reads in part as follows:

> The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department, agency, or component thereof, functions of which are transferred by this section, except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Secretary of Labor or the Federal Mine Safety and Health Review Commission, by a court of competent jurisdiction, or by operation of law.... [Emphasis added.]

6/ The Union maintains that this case is moot because Eastern complied with the order even before it filed its application for review. The Board briefly rejected the argument on the authority of Eastern Associated Coal Corp. v. IBMOA, 491 F.2d 277 (4th Cir. 1974), and Freeman Coal Mining Co. v. IBMOA, 504 F.2d 741, 743 (7th Cir. 1974). See 5 IBMA at 80 n.3. The Union in its renewed mootness argument

vigorously maintains that these cases are distinguishable and furnish no authority for the Board's holding. We find no need to resolve this dispute for we have placed our holding on a different ground. The philosophy of review of both the 1969 and 1977 Acts is that operators are to comply with administrative orders first and litigate their merits later. The Union's argument would contravene this approach. It would condition the operator's opportunity to be heard on his disobedience to an order, and would eviscerate the opportunity to be heard for conscientious mine operators.

The judge concluded that a section 103(f) order cannot be routinely issued for the sole purpose of preserving evidence pending a post-accident investigation. He observed, however, that there may be circumstances in which a section 103(f) order issued to preserve evidence might be appropriate. The judge concluded that where there is "a strong possibility that the accident might be repeated if operations were allowed to resume," a section 103(f) order may be used to ensure that the accident scene remains undisturbed if "the accident investigation has a direct relationship to the accident ... and [if] the investigation is necessary to determine the cause of the accident and means to prevent a recurrence." He concluded that this was the case here because one accident had resulted in injuries to the shuttle car operator, and the inspector's inability to determine why the cable hook became loose caused concern that the accident might recur. Finally, the judge found the inspector "acted reasonably" in imposing in the later modification of the order conditions precedent to terminating the order because "the conditions were directly related to insuring that a similar accident would not occur while mining was in progress". The judge rejected Eastern's argument that the modification of the order was invalid because it imposed duties upon the operator that were not imposed by any mandatory mine health or safety standard. The judge noted that section 103(f) expressly required the operator to obtain the approval of the inspector in order to return the mine to normal after an accident, and stated that "I am not persuaded that the inspector exceeded his authority by modifying the order to insure the safety of miners in the area."

With respect to the original order, we adopt the judge's views. On the facts of this case, the judge correctly found that the order comported with the express, remedial purpose of section 103(f)--to insure the safety of any person in the coal mine.

We also agree with the judge's view that the requirements in the modification of the order were valid. Section 103(f) permits an inspector to issue orders "he deems appropriate to insure the safety of any person in the mine", and requires that "the operator of such mine shall obtain the approval of [the inspector] ... of any plan ... to return the affected areas of the mine to normal." Nothing in section 103(f) restricted the inspector to enforcing only mandatory safety standards or preventing imminent dangers. Compare sections 104(a) (imminent danger), 104(b) and (c)(standards), and 104(i) dust standard). 7/

Accordingly, the judge's decision is affirmed.

Marian Pearlman Nease, Commissioner

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7/ We have no occasion here to determine whether the inspector's action as reviewable on an "arbitrary or capricious", "reasonableness", or de novo basis.

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