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MSHA V. KENNY RICHARDSON
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 19, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. BARB 78-600-P

v.

KENNY RICHARDSON

DECISION

This case presents several issues arising out of an alleged violation of section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) ("the Coal Act" or "the Act"). 1/ In his decision, the administrative law judge concluded that Kenny Richardson, Peabody Coal Company's (Peabody) day shift master mechanic, had "knowingly authorized, ordered, or carried out a violation of 30 CFR 77.404(a)". He found Richardson individually liable pursuant to section 109(c) and assessed a $500 penalty against him. 2/ For the reasons below, we affirm the judge.

On August 4, 1977, a federal mine inspector issued to Peabody a notice alleging that it had violated 30 CFR 77.404(a) because:

> [m]obile equipment in unsafe condition was not removed from service immediately, in that, a crack in the lower chord of the boom of the Bucyrus-Erie 1260 dragline was known to exist and not removed from service. 3/

1/ The alleged violation occurred when the Coal Act was in effect. The Secretary of Labor filed a petition for assessment of civil penalty on July 28, 1978, after the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) ("the Mine Act"). Thus, while the alleged violation arose under the Coal Act, the case has been processed under the Mine Act review procedures. Section 109(c) of the Coal Act and section 110(c) of the Mine Act are

identical except for the redesignation of other affected sections. Therefore, although our analysis would be the same under either Act, this decision discusses the violation in terms of the statute in effect at the time the alleged violation occurred, the Coal Act.

2/ The judge concluded that Richardson had not "knowingly" violated another cited standard, 30 CFR 77.405(a). No issue concerning the judge's disposition of this alleged violation is before us on review.

3/ A dragline is "A [crane-like] type of excavating equipment which casts a rope hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket and dumps the material on a spoil bank, in a hopper, or on a pile." Dictionary of Mining, Mineral and Related Terms, at 346 (Department of Interior, 1968)

The inspector issued the notice following his investigation of a fatal accident that had occurred while the boom was being repaired, after the dragline had been removed from service.

On July 28, 1978, the Secretary of Labor filed a petition for assessment of civil penalty against Richardson..4/ Richardson contested the action and a hearing was held. From the administrative law judge's decision finding him in violation of section 109(c) of the Coal Act, Richardson filed a petition for discretionary review. We granted the petition for review and heard oral argument.

The issues before us are: 5/

(1) Is the Interior Board of Mine Operations Appeals' decision in Everett L. Pritt, 8 IBMA 216 (1977), correct insofar as it held that the corporate operator need not be a party to a section 109(c) proceeding against the corporate agent;

(2) Did the judge err in finding that the dragline was unsafe while it was in service;

(3) Did the judge erroneously construe the "knowingly" element of section 109(c) of the Coal Act;

(4) Did the judge err in concluding that Richardson knowingly permitted an unsafe dragline to remain in service in violation of 30 CFR 77.404(a);

(5) Is section 109(c) of the Coal Act unconstitutional because it imposes liability only on agents of corporate operators?

Was the Board correct in Pritt?

In its decision in Everett L. Pritt, the Interior Board of Mine Operations Appeals concluded that the corporate operator need not be a party to a section 109(c) proceeding against an agent, even though a necessary predicate for an agent's liability under section 109(c) is a finding that the operator violated the Act. Richardson urges that the Commission not follow the Board's Pritt decision, asserting that section 109(c) requires that a corporate operator must bc found to have violated a mandatory standard, in a proceeding to which the operator is a party, before liability can be imposed on the corporate agent. Richardson submits that because the Secretary did not name Peabody as a party-respondent to the present proceeding, and because Peabody's failure to contest the violation alleged against it should

not constitute an admission of liability, he cannot be held liable.

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4/ Peabody was cited separately for a violation of the same mandatory standard, but was not named as a party-respondent to the instant proceeding. Peabody did not contest the charges against it and paid the penalties assessed.

5/ Our statement of the issues restates, but encompasses. the issues raised in the petition for discretionary review.

Section 109(c) of the Coal Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered. or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

We find the language of section 109(c) and its legislative history to be ambiguous and not dispositive of the question presented. Consequently, we have considered the arguments for and against the Pritt decision, and are persuaded by the strong practical arguments underlying the Board's decision. Here the corporate operator, Peabody, paid the penalty sought against it prior to formal assessment or a hearing. In doing so, the corporate operator exercised its rights under the statute and the applicable regulations not to contest the Secretary's allegation of a violation and proposed penalty, and by operation of statute it became a final order of the Commission not reviewable by any court or agency. 30 U.S.C. 815(a); 30 CFR Part 100. As a result of the operator's failure to contest the alleged violation, the Secretary could not have secured an adjudication on the merits that the operator violated the standard. Thus, unless the Secretary can prove the corporate operator's violation of the standard as an element of proof in its case against the agent, it would be impossible to reach the agent under section 109(c) in those cases where, as here, the operator paid the proposed penalty and thereby avoided a hearing on the merits.

Conversely, we are unpersuaded by the arguments in opposition to Pritt. First, the rationale of Pritt does not jeopardize either the agent's or the operator's due process rights. As did the Board, we believe that due process does not require a determination of the operator's violation in a proceeding separate from that in which the agent is found liable. The operator is not at risk for a penalty in the proceeding against the agent. Whether or not the operator is found liable in a separate proceeding. the Secretary must still fully prove his case in a section 109(c) proceeding against the agent. The operator's violation is merely an element o.. proof in the Secretary's case against the agent. Thus, the agent's due process rights are amply protected by this procedure; he has notice and an opportunity to

be heard in the proceedings against him, including the opportunity to contest the threshold allegation that the operator violated the standard.

Second, a proceeding against only the agent docs not necessarily permit the operator to escape without cost. Here the operator paid penalties prior to litigation. Such a procedure conserves the operator's and the government's resources by eliminating the need for a potentially protracted and costly administrative proceeding against the operator.

Third, we find the rationale of the dissent in Pritt unpersuasive. While Congress stated that the agent should not bear the brunt of corporate violations, it stated also that an agent should "stand on his own and be personally responsible for any penalties or punishment meted out to him." 6/ There is no indication in the legislative history that Congress intended to foreclose a penalty proceeding against an agent because the operator was not also a party, or that it intended to require that a separate proceeding be held to determine if the operator violated the standard. Also, we note that the dissent misconstrued the law in stating that in the absence of section 109(c), the "corporate shield" would protect a corporate agent from personal liability. We note that the corporate shield, as that term is normally used, does not protect agents; it protects shareholders. I.E. Fletcher, Cyclopedia of the Law of Private Corporations, 41.3 at 192-193 (rev. perm. ed. 1974). Therefore, in the absence of section 109(c), agents would be protected not by the corporate shield, but rather by the statute's general enforceability against operators.

For these reasons, we conclude that the Board's decision in Pritt correctly interpreted and applied section 109(c).

Did the judge err in finding that the machine was unsafe while in service?

The cited standard, 30 CFR 77.404(a). provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The administrative law judge found that the 1260 dragline "was unsafe to operate and pursuant to 30 CFR 77.404(a) should have been removed from service immediately". Richardson challenges the judge's finding. We conclude that the judge's finding is supported by substantial evidence of record and must be affirmed.

Richardson asserts that the judge's finding of unsafeness was not supported by substantial evidence and that the evidence "compels the opposite conclusion". He argues that the finding of unsafeness is inconsistent with other findings made by the judge: that later repairs weakened the lower chord and caused it to break; that the crack was not considered unusual; and that the chord had been repaired numerous times. Richardson contends further that the judge's finding, based in part on a letter from the dragline's manufacturer after the

accident, is unsound

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6/ Rep. John H. Dent (D. Pa.), House Debate on H.R. 13950. 91st Cong., 1st Sess. (1969); reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Coal Mine Health and Safety Act of 1969, Part I at 1191 (1975). ("Legis. Hist.").

because the manufacturer's field repair instructions do not mention any unsafeness. He also argues that the accident was caused by a design defect, not by an unsafe machine. 7/

The Secretary submits that Richardson "has ... ignored the basic legal principles pertaining to substantial evidence," because "[i]t is axiomatic ... that a judge's finding cannot be overturned merely because ... the judge could have made a contrary finding." The Secretary asserts that the judge could have, and did, reasonably conclude that the lower chord was cracked in all but 9 inches of its 38-inch circumference at the time of Richardson's inspection: that the crack was in a location which had been repaired on numerous previous occasions; and that the crack would continue to enlarge, thus permitting a reasonable inference that the dragline was unsafe.

An observation may help to clarify our discussion and resolution of the question of the dragline's unsafeness. A fatal accident occurred after the machine had been taken out of service and was under repair, after the violation at issue allegedly had occurred. Although this fatality is irrelevant to whether Richardson had knowingly failed to remove the unsafe machine from service at an earlier time, it has colored the discussion of the violation at issue by the parties and the judge. 8/

7/ We reject, .without extended discussion, two further challenges made by Richardson to the sufficiency of the evidence. Richardson argues that the judge's findings were not supported by substantial evidence because the Secretary purportedly based his entire case on uncorroborated hearsay evidence. First, evidence is admissible in an administrative proceeding so long as it is not immaterial or irrelevant. Administrative Procedure Act, 5 U.S.C. 556(d)(Supp. III 1979). Richardson v. Perales, 402 U.S. 389 (1971). The hearsay evidence relied on by the judge in this case was both material and relevant: it related to the safeness of the dragline and to Richardson's knowledge. Second, the judge relied only in part on hearsay evidence. Virtually all of the hearsay regarding unsafeness and knowledge was corroborated by direct evidence. See discussion, infra, at 6.

Richardson asserts also that the proper standard of proof to be applied by the administrative law judge is "direct and clearly convincing." The usual standard of proof required in an administrative proceeding is a preponderance or the evidence, and we hold that this is the appropriate standard of proof in proceedings before Commission administrative law judges. See 2 Am. Jur. 2d. Admin. Law 932, at 199. In any event, the Mine Act imposes a substantial evidence test for Commission review of findings of

material fact. 30 U.S.C. 823(d)(2).

8/ An alleged violation arising out of the fatality was also tried before the judge: that Richardson had knowingly failed to ensure that the boom had been properly blocked or supported during repairs, as required by 30 CFR 77.405(a). The judge found for Richardson on this point because there was insufficient evidence of the "knowingly" element. The Secretary did not petition for review on this matter. and it is not before us.

The presence of a crack in the boom of the dragline is undisputed. There was also general agreement as to how long the crack had existed and that it had worsened over time. Numerous witnesses including Richardson testified that the crack, indicated by a drop in a pressure gauge, had developed sometime before Richardson's August 2 examination of the dragline. Richardson testified that he was told about the crack on August 1, the day before his examination, and that the crack "had extended a small amount from what they could see." Tr. at 233-234; Tr. II at 31. 130-131, 172, 187. He testified in addition that, on August 2, prior to his examination, he was told that the crack was getting worse. Tr. II at 64. When he examined the crack, he "could detect just a little movement...." Id. at 137. Other witnesses corroborated the fact that the crack was getting larger; "it was moving a little." Id. at 172, 199.

The testimony relative to the extent of the crack is somewhat ambiguous, and it is unclear whether Richardson realized the magnitude of the crack. Richardson testified that during his examination of the dragline from the catwalk, he could see a 10-inch long crack. Tr. II at 65, 66. The Secretary's witnesses reiterated that fact, and testified that the crack actually extended for about 29 inches of the chord's 38-inch circumference. Tr. at 94, 158-161, 217, 261.

There was also testimony by the federal mine inspector and a mechanical engineer familiar with the construction of the dragline that a 29 inch crack, or even the 10-inch segment visible from the catwalk, was serious enough to warrant removal of the machine from service. Tr. at 168 169 266 267. Their testimony was substantiated by one of Richardson s witnesses. Peabody's director of heavy equipment. He testified in the hypothetical that if he had seen a 9-inch crack from the catwalk, and in investigating further had determined it was actually a -7-30 inch crack, he would have shut the machine down immediately. Tr. II at 263.

Richardson made a number of admissions, which go to the unsafeness of the dragline, as well as to his knowledge of the condition. He testified that he was concerned about the periodic recurrence of cracks in the boom. Prior to August 2, he had contacted the manufacturer for advice on repairs because he "wanted to achieve the possibility and reduce the chances of this area that had been cracked. It had been too numerous; it needed something to be stopped." Tr. II at 37 39, 64. Despite his testimony that he did not consider the machine to be unsafe, Richardson apparently decided that immediate repairs were necessary, because he stated "that we needed to make some repairs pretty quick." Tr. 11 at 66-67, 201. In response to

a question about whether he believed that the machine should be shut down for repairs Richardson answered. "As soon as I got the available equipment over. Id. at 67. Therefore. his conclusion that the machine was safe is at odds with his testimony relative to the immediacy of the risk.

Other evidence also tends to show that the dragline was unsafe while it was in service. The Secretary introduced into evidence a letter from the dragline's manufacturer, Bucyrus-Erie, in which it commented on the Secretary's post-accident report. The letter stated: "The machine is equipped with a crack detection and warning system. The crack should have been repaired immediately when it was detected." Pet. Exh. 38. 9/ Richardson also introduced evidence of prior cracks and repairs to support his argument that this crack was no different than many that preceded it and impliedly did not :sake the machine unsafe. We reject that argument. As the judge correctly stated:

> It is not enough ... that Mr. Richardson had allowed the machine to operate with a cracked chord in the past. This means only that the miners were lucky it did not break in the past, not that it was safe or that it should have been considered as safe.

We believe that the above evidence constitutes substantial evidence to support the judge's finding that the machine was unsafe while in service. We note, however, that the basis of the judge's finding of unsafeness is at least partially defective. The judge noted testimony by Richardson and his witnesses to the effect that the dragline was safe. However, he accepted as more convincing the testimony of the Secretary's witnesses "because the ultimate breaking of the chord demonstrates that the machine was unsafe". (Emphasis added.) Richardson correctly argues that this basis for the judge's finding is unsound. The breaking of the chord on the day after the alleged violation occurred did not necessarily demonstrate anything about the safeness of the machine at the time of the alleged violation because, as found by the judge, the collapse was caused, at least in part, by a repairman's actions, and we do not rely on this rationale in reaching our decision.

One further evidentiary issue merits comment. The judge found that the dragline would have been safe and the violation at issue would not have occurred if the dragline had been equipped with a modified suspension system. This finding is largely irrelevant to the violation at issue because the question here is whether the machine, however equipped, was unsafe while in service. The fact of unsafeness, rather than the reason for the unsafeness, is relevant. If the machine was unsafe. 30 CFR 77.404(a) required that it be removed from service immediately. 10/

9/ Richardson argues that the judge's finding of unsafeness is "glaringly inconsistent" with the manufacturer's instructions for

repair. This argument is without merit because the instructions relate only to support of the boom during repairs, not to the point at issue here, i.e., the unsafeness of the machine before it was taken out of service. Richardson refers also to the letter from Bucyrus Eric as "clearly inconsistent" with its field instructions, because it failed to mention what Richardson contends was a design defeat and the proximate cause of the accident. Again, the cause of the fatal accident is not at issue.

10/ Although there was some controversy over the length of time Richardson allowed the machine to remain in service, this factor relates to the amount of the penalty, not to the fact of violation.

For the above reasons, we affirm the judge's finding that the dragline was unsafe at the time of the alleged violation.

Did the judge erroneously construe the "knowingly" element of section 109(c) of the Coal Act?

In his decision, the administrative law judge construed the term "knowingly" as used in section 109(c) of the Coal Act to mean "knowing or having reason to know." Richardson asserts that the judge should have applied a "willfulness" test, rather than what he terms a "negligence" test. Alternatively, he urges that the statute requires a showing of actual knowledge. We reject both arguments and affirm the judge.

The statutory provision and its legislative history provide little guidance on the construction to be given to the term "knowingly". Section 109(c), as enacted. adopted the language of section 308(c) of the Senate bill insofar as it dealt with an agent's knowing violation. Neither the Conference Report nor the prior Senate Report discussed the knowledge requirement. 11/ The House bill imposed a "knowingly" element for criminal penalties against agents, but not for civil penalties.

Although Congress did not specify the meaning of "knowingly" that it intended to convey in section 109(c) of the Coal Act, we are persuaded that Congress did not intend that "knowingly" should be synonymous with "willfully." Section 109(b), which imposed criminal liability for violations, stated that any operator who "willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104...." is subject to fine or imprisonment.(Emphasis added) We believe that because the words "willfully" and "knowingly" were used in the disjunctive in section 109(b), and used singly in other sections of the Coal Act, e.g., sections 109(c), (d) and (e), Congress must have intended the words to have different meanings. Sees U.S. v. Illinois Central Ry. Co., 303 U.S. 239, 242, 243 (1938), quoting St. Louis and S.F.R. Co. v. U.S., 169 F. 69, 71 (8th Cir. 1909); see also, U.S. v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974). Therefore, we reject Richardson's argument that "willfulness" must be shown in order to establish a violation of section 109(c).

11/ H. Conf. Rep. No. 91-761, 16, 71-72; S. 2917, 108; S. Rep. No. 91-411, 91st Cong., 1st Sess., 93 (1969); Legis. Hist. at 219, 889, 1515-1516.

The Mine Act's legislative history on section 110(c)'s continued

use of the term "knowingly" sheds no further light on the issue. See H. Rep. No. 95-31, 20; S. Rep. No. 95 181, 40 41; and the Conference Report, S. Rep. No. 95-461, 57, 95th Cong., 1st Sess. (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. (1978) at 376, 628 629, 1335.

The question remains, however, as to whether Congress intended the interpretation reached by the judge in this case, that "knowingly" means "knew or should have known." As the judge observed:

> The word 'knowingly,' as used in civil and criminal statutes, is not a term of precise definition. The courts have given various shades of meaning to the word, depending u.=on the context in which it was considered.

In our view, the judge correctly analogized the meaning of "knowingly" as set forth in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (D.S.C. 1950), to section 109(c) of the Coal Act. Although Sweet Briar involved the liquidated damages provision o.s the Walsh Healey Public Contracts Act, 41 U.S.C. 35 et seq. (1976), and not the imposition of a civil penalty as is involved here, that Act, like the Coal Act, has certain humanitarian objectives; under it Congress used the government's purchasing power to raise labor standards. 92 F. Supp. at 779. Consequently, we believe the court's reasoning is equally applicable to the statutory requirement at issue here. In Sweet Briar the court stated:

> '[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of.the fact in question or to infer its existence.

92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 12/

Did the judge err in concluding that Richardson knowingly permitted an unsafe machine to remain in service?

The judge found that Richardson "knew or should have known that the 1260 dragline was unsafe," and did not remove it from service immediately. Therefore, "Richardson, as agent of ... [Peabody] corporation, knowingly authorized, ordered or carried out ... [a] violation [of 30 CFR 77.404(a)]." The judge stated that "[i]t was the kind of situation which would raise a person's suspicion,

particularly a mechanic with considerable experience, that something bad was happening which could well endanger personnel." He concluded that Richardson "had such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer [their] existence," as well as "considerable direct knowledge about a potentially dangerous situation."

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12/ We note that the judge's discussion of Richardson's "negligence" arose only in terms of evaluating the penalty assessment criteria of section 109(a)(1) of the Coal Act, now section 110(a)(1) of Mine Act.

Richardson submits that even if the judge's finding were properly based on a "should have known" test, it erroneously imputed to him knowledge of the machine's unsafeness, in view of his testimony that he was unaware of the modified intermediate boom suspension system and his lack of control over the purchase and installation of the system. Richardson contend=.further that his knowledge must be determined as of the time before the accident, and that no evidence demonstrates that he had any reason to consider the dragline unsafe.

We agree with Richardson that his knowledge must be determined as of the time of the violation at issue on review, i.e., before the machine finally was removed from service and before the fatal accident occurred. We conclude, however, that the record overwhelmingly supports the judge's finding that Richardson knew or should have known the machine was unsafe while it was in service. Although Richardson emphasizes his ignorance of the modified intermediate boom suspension system, the judge did not base his finding as to Richardson's knowledge on the presence or absence of that system, nor do we. The judge observed that, even without knowledge of the suspension system and the protection it would have provided, Richardson had reason to believe the machine was unsafe. The judge relied for the most part on the same evidence recited in our previous discussion establishing the unsafeness of the dragline. We find that this evidence also establishes that Richardson, in view of his position as day shift master mechanic with general supervisory authority over the dragline, knew or had reason to know that the dragline was unsafe and should have removed it from service. 13/

Accordingly, we affirm the administrative law judge's conclusion that Richardson knowingly violated the mandatory safety standard at 30 CFR 77.404(a).

13/ Richardson also asserts that he cannot be held responsible for Peabody's failure to comply with the manufacturer's recommended equipment modifications because he had no control over the purchase or modification of equipment. This argument misses the mark. The violation at issue involves only the question of whether Richardson knowingly permitted an unsafe machine to remain in service. There was undisputed testimony, including admissions by Richardson, that anyone, including Richardson, could remove from service a machine considered to be unsafe. This is the duty imposed by the standard. Richardson's authority to order the modified suspension system or other equipment is irrelevant.

Is section 109(c) of the Coal Act unconstitutional because it imposes liability only on corporate agents.

The administrative law judge rejected as a ground for dismissal Richardson's claim that section 109(c) is unconstitutional because it denies him equal protection of law. The judge ruled that resolution of challenges to the constitutionality of a provision of the Act is reserved to the courts.

Before us Richardson reiterates his argument that section 109(c) of the Coal Act violates his constitutional right to equal protection because it subjects him to a penalty solely because his employer does business in a corporate form. He asserts that such a distinction is illogical and bears no rational relation to the objective of mine safety or to any difference between a corporate or other form of business. The Secretary argues that the judge correctly. held that the Commission lacks the authority to decide the constitutional question raised. Assuming that the Commission has such power, the Secretary argues that section 109(c) does not deny equal protection to corporate agents because the classification in that section has a rational basis.

The threshold question we must decide is whether we have the power to determine the constitutionality of a provision of the Act. We acknowledge the traditional view that administrative agencies lack the power to decide whether legislation is constitutional because such authority is reserved to the courts. 14/ K. Davis, 3 Administrative Law Treatise 20.04, at 74 (1967 ed.). However, we find that view and its underlying rationale deficient with respect to the situation here presented. See Southern Pacific Transp. Co. v. Public Utilities Commission, 18 Cal.2d 308, 556 P.2d 289 (1976); see also, "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes," 90 Harv. L. Rev. 1682 (1977); and "Administrative Adjudication of Constitutional Questions; Confusion in Florida Law and A Dying Misconception in Federal Law," 33 U. Miami L. Rev. 527 (1979).

We note first that the Mine Act specifies that this Commission, rather than the United States district courts, has primary adjudicative jurisdiction over disputes arising under the Act. 30 U.S.C. 823(d). Congress authorized the Commission to decide independently questions of fact, law and policy. Id. see also, Secretary of Labor v. Helen Mining Co., 1 FMSHRC 1796, 1800-1802 (1979), pet. for review filed, Nos. 79-2518, 79-2537 (D.C. Cir., December 19 and 21, 1979). A necessary concomitant of

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14/ Many of the cases generally cited for the proposition that an administrative agency may not decide constitutional questions stop short of an absolute bar to agency determination, or do so in conditional language. '.Adjudication of ... constitutionality ... has generally been thought beyond the jurisdiction of administrative agencies." Oestereich v. Selective Service Local Bd. No. 11, 393 U.S. 233, 242 (1968)(J. Haran, concurring) (emphasis added). See Johnson v. Robinson, 415 U.S. 361, 368 (1974).

that authority is that this Commission, whose members are sworn to uphold the Constitution, must make its determinations in accordance with the Constitution. Every branch of the government is obligated to uphold the Constitution, and "a law repugnant to the Constitution is void." Marbury v. Madison, 5 U.S. 368, 391 (I Cranch 137)(1803). We believe that we cannot properly fulfill our duty to interpret the law and to apply it constitutionally, without at the same time deciding whether the law or a portion of it conforms to the Constitution.

We have examined with great care, and have found inapplicable to us, the arguments advanced for denying administrative agencies the power to resolve constitutional questions. The conventional view is that only Article III courts, insulated from the influences of both the executive and legislative branches, possess the independence necessary to render an impartial decision on a constitutional question. 15/ We note, however, that this reasoning is generally applied to administrative agencies significantly different from this Commission, in that they often have combined regulatory and adjudicatory responsibilities. Because we do not have these combined functions, but are vested with solely adjudicative responsibilities, we are not susceptible to any inherent bias believed to exist in agencies that simultaneously regulate, prosecute and adjudicate.16/

We are insulated also from pressures that some fear might be exerted on adjudicatory components that are one part of a larger executive department. The Mine Act established the Commission as an independent administrative adjudicatory agency. Commission members are appointed by the President with the advice and consent of the Senate. Members are selected from persons "who by reason of training, education, or experience are qualified to carry out the functions" of the office. Members are appointed for fixed terms of six years and can be removed from office only for "inefficiency, neglect of duty, or malfeasance in office". 30 U.S.C. 823. We believe that this independence assures the necessary impartiality for deciding constitutional questions.

15/ E.g., J. Monaghan, "First Amendment Due Process," 83 Harvard Law Review 518, 523 (1970).

16/ The Board of Tax Appeals (BTA) was established in 1924 as an independent adjudicatory agency in the executive branch, and retained that characteristic after being renamed the Tax Court in 1942. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 725 (1929). 90 Harv. L. Rev. 1682, 1687, n. 29. Section 951 of the 1969 Tax Reform Act, 26 U.S.C. 101(a) et seq., converted the Tax Court to an Article I legislative court, but its prior designation as an

independent adjudicatory agency in the executive branch did not change. Although the BTA initially divided sharply over its authority to decide constitutional questions (Cappellini v. Commissioner, 14 B.T.A. 1269, 1.-93 (1929)), it later found that it had such power and was since exercised it "with the apparent acquiescence of reviewing courts." 90 Harv. L. Rev., supra at 1687, n. 29.

The Occupational Safety and Health Review Commission, an independent adjudicatory agency with functions analogous to this Commission's, has stated that it has "no power to declare any portion of its enabling legislation unconstitutional." Buckeye Industries, Inc., 3 BNA OSHC 1837, 1975 1976 CCH OSHD 20,239 (No. 8454, 1975). However, because the OSHRC did not discuss the underlying rationale for its conclusion, we find little that is instructive in its decision.

In addition to our institutional independence, the judicial nature of Commission proceedings adequately preserves due process. Our procedures are largely governed by the Administrative Procedure Act, 5 U.S.C. 551 et seq.; notice and an opportunity to be heard are provided; parties may retain counsel; and hearings culminate in reasoned opinions rendered by experienced administrative law judges. These decisions may then be reviewed by Presidentially-appointed Commissioners who possess the requisite competence for exercising their adjudicatory powers. 30 U.S.C. 823. Due process is protected further because aggrieved parties may appeal an adverse Commission decision to a United States court of appeals. 30 U.S.C. 816. Therefore, because of our "essentially judicial procedures and experience," we avoid the potential for bias that would undermine our ability to decide constitutional issues. Aircraft and Diesel Corp. v. Hirsch, 331 U.S. 752, 769 (1947);.Dobson v. Commissioner, 320 U.S. 489 (1943). We believe that the judicial nature of our proceedings assures parties of reasoned consideration of their arguments and provides us with the institutional competence to decide constitutional issues, further distinguishing us from other agencies denied this authority by the courts. See Oestereich, 393 U.S. at 242 (J. Harlan, concurring); cf. Glines v. Wad , 586 F.2d 675, 676 (9th Cir. 1978).

Other reasons support our conclusion as well. It is generally agreed that, because of its expertise, an administrative agency may entertain constitutional issues at least to develop a factual record and clarify the issues for ultimate disposition by a reviewing court. An administrative agency may also hear constitutional issues where it is possible that the administrative proceeding will leave no remnant of the constitutional question. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Public Utilities Commission of California v. U.S., 355 U.S. 534, 539 (1958); Far East Conference v. U.S . 342 U.S. 570, 574 (1952). It has also been stated that an agency may resolve constitutional questions "not by reviewing the constitutionality of its statute but by interpreting the statute and by applying constitutional principles to specific facts." Babcock and Wilcox v. Secretary of Labor and Occupational Safety and Health Review Commission, 610 F.2d 1128, 1139 (3rd Cir. 1979). We reject as undesirable and artificial, however, the conventional view that an agency may only compile a factual record relevant to a constitutional issue or apply constitutional principles to particular facts, but may not pass judgment on the ultimate question of the constitutionality of the organic act or portions of it. As a solely adjudicatory agency the Commission regularly considers myriad legal questions, many with substantial constitutional components. We decide due process claims and consider constitutional objections to rules, standards, or other

administrative actions. It is our belief that the judicial role of the Commission, admittedly adequate for entertaining various constitutional objections to agency actions, also appropriately permits the Commission to entertain constitutional objections to the underlying statute, especially where, as here, review in a United States court of appeals is available.

Finally, there arc also several important policy considerations supporting our authority to decide constitutional questions. In establishing the Commission, Congress intended that the Commission have primary jurisdiction over disputes arising under the Mine Act. The ability to pass upon constitutional challenges is a vital step in the resolution of

many of those disputes, and is fully consistent with Congress' expressed preference for administrative adjudication under the Act. Such administrative review, we believe, will foster efficient and expeditious resolution of constitutional issues, as it does with non constitutional questions, reducing costs of litigation to the parties as well as reducing delays in the ultimate disposition of the cases in which such questions arise. We believe also that courts will benefit from the Commission's action in compiling a complete factual record and in analyzing the constitutional question presented within the context of that record and the statute that the Commission interprets on a daily basis.

In sum, we are persuaded that there is no valid reason for our refusing to address the constitutional challenge raised against the enforcement of the statute in this case. Therefore, we now turn to an examination of Richardson's equal protection claim.

The first inquiry made in examining a claimed denial of equal protection is whether a suspect class or a fundamental right is involved. If the regulation burdens a suspect classification or a fundamental right, a strict scrutiny test is applied. If a suspect classification or a fundamental right is not involved, a rational relationship test applies. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

Both tests require analysis of the purpose of the legislation and the means the legislature has chosen to accomplish that purpose. Where the rational relationship test is applied, the law is presumed to be valid. The challenging party has the burden of proving that there is no rational reason for the means the legislature has used to reach its purpose or end. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), and Williamson v. Lee Optical, 348 U.S. 483 (1955). The fact that some legislation must, by its nature, classify people or activities is recognized by the Supreme Court. See Massachusetts Board of Retirement v. Murgia, supra. The question is whether the means are rationally related to the ends.

Under the strict scrutiny test, once it is established that a suspect class or a fundamental right is adversely affected by a classification, the burden shifts to the government to show a "compelling state interest" to justify the legislation. The government must also prove that, not only is there a rational relationship between the purpose of the law and the means by which it is accomplished, but that the means are necessary to the accomplishment of those ends. A court must look to see whether there

actually is a loss restrictive alternative to the legislature's choice. See McLaughlin v. Florida, 379 U.S. 184 (1964); In Re Griffiths, 413 U.S. 717 (1973); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

Persons classified according to the business form "of their employer, e.g., corporate agents versus non-corporate agents, do not fall within any of the suspect classifications. Nor does imposing liability for

payment of civil penalties infringe on fundamental rights. 17/ As the Supreme Court observed in Murgia: ',[W]e have expressly stated that a standard less than strict scrutiny 'has consistently been applied to ... legislation restricting the availability of employment opportunities.'" 427 U.S. at 313. Thus, Richardson must carry the burden of proving that the classification in section 109(c) is not rationally related to the purpose of the Act.

To assist in our analysis of the denial of equal protection claimed in this case, we turn to a discussion of six Supreme Court cases applying the rational relationship test. One of the more recent equal protection cases is Massachusetts Board of Retirement v. Murgia, supra. There the Court was faced with an equal protection challenge to a Massachusetts statute requiring that uniformed state police retire at age 50. Despite evidence that many persons over the age of 50 continue to be physically and mentally capable of meeting the rigorous demands of their profession, the Court found that the statute is "rationally related to furthering a legitimate state interest." 427 U.S. at 312. The Court conceded that "the state perhaps has not chosen the best means to accomplish" its purpose of protecting "the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314, 316. In applying the rational relationship test, the Court stated:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. [citation omitted]. Such action by a legislature is presumed to be valid.

427 U.S. at 314.

17/ The Court provided the following list of fundamental rights and suspect classes in Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 312 n.3, 4: The fundamental rights: E.g., Roe v. Wade, 410 U.S. 113 (1973) (right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the First Amendment): Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to procreate). The suspect classes: E.g., Graham v. Richardson". 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry).

There is also a very limited middle ground: gender and age. The Court has shied away from labelling these classifications as being suspect, but in most gender cases and some age cases the Court has imposed a "substantial relationship" test, rather than either of the two standard tests: rational relationship or strict scrutiny. See Califano v. Webster. 430 U.S. 314 (1977)(age); Craig v. Boren, 429 U.S. 190 (1976) (sex); and Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979).

Smith v. Cahoon, 283 U.S. 553 (1931), concerned the imposition of certain licensing requirements upon commercial carriers, excluding private carriers and commercial carriers transporting agricultural and dairy products. The statutes in question carried criminal sanctions. The Court held that, although the state has "broad discretion in classification in the exercise of its power of regulation, ... the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary." 283 U.S. at 566-567. The classifications drawn in the laws in question were found to be so totally arbitrary in their distinctions as to be violative of equal protection.

Colgate v. Harvey, 296 U.S. 404 (1935), concerned a tax scheme that imposed a higher tax on dividends derived from corporations outside the state then on dividends derived from resident corporations. This portion of the tax was found to be constitutional because the Court found a "fair and reasonable" reason for the differentiation. Another portion of the scheme taxed interest from interest bearing securities, but exempted interest received on account of money loaned within the state, while taxing income derived from similar loans made outside the state. This portion of the tax was found to be unconstitutional. The Court found that the tax was not rationally related to the purpose of the Act--raising revenue. It noted that if the legislation had gone further and required that the income from in state loans be invested within the state as well, then it would have had a purpose: increasing the actual wealth within the state. The Court declined to interpret the provision in this manner, however, "for that would be to amend [the provision] and not to construe it." 296 U.S. at 424. Thus, the Court did not reject the entire tax scheme, but rather invalidated only that portion for which it was unable to find a rational explanation.

In Liggett Co. v. Le , .88 U.S. 517 (1933), a Florida tax statute was challenged on equal protection grounds. The purpose of the statute was to require the licensing of all stores. The act established a licensing fee on a per store basis, but the amount of the per store fee increased if the owner operated stores in more than one county. The Court was unable to find a rational reason for increasing the tax where an owner had a store in more than one county. The Court found that the statute was not aimed solely at large corporate chains, which frequently owned stores in more than one county, but that it was aimed at all store owners. The Court stated:

> The legislature of Florida has declared the purpose and object of the statute to be to tax every store owner and

operator, and we should not go behind that declaration and attribute to the lawmakers some other ulterior design. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. [Citations omitted.] Unequal treatment and arbitrary discrimination as between corporations and natural persons. or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid.

> Those provisions of 5 which increase the tax if the owner's stores are located in more than one county are unreasonable and arbitrary, and violate the guaranties of the Fourteenth Amendment. 288 U.S. at 536.

Williamson v. Lee Optical, 348 U.S. 483 (1955), may be the seminal case concerning the Supreme Court's view of the requirements of equal protection and due process. In Williamson the Court upheld an Oklahoma statute that forbade opticians from filling or duplicating eye glass lenses without a prescription from an opthamologist or optometrist. The Court stated "that regulation of economic interest will violate the principle of equal protection if such regulation fails to bear a rational relation to the objective sought." However, the Court went on to find the challenged statute constitutional:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation omitted.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation omitted.] The legislature may select one phase of one field and apply a remedy there, neglecting the others.

348 U.S. at 488-89. The Court speculated on various rationales the legislature might have had in mind when enacting the legislation. From these speculations, the Court concluded that "[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." 348 U.S. at 491.

A final example of the Supreme Court's rational relationship analysis is Idaho Department of Employment v. Smith, 434 U.S. 100 (1977). The statute involved precluded any person who attended school during the day from receiving unemployment benefits. The classification challenged was night students versus day students. The Court stated:

> The holding below misconstrues the requirements of the Equal Protection Clause in the field of social welfare and economics. This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does

not offend the Constitution simply because the classification
'is not made with mathematical nicety or because in practice

> it results in some inequality.'" Dandridge v. Willis, 397 U.S. 471,485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). See also Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Mathews v. De Castro, 429 U.S. 181 (1976); Jefferson v. Hackney., 406 U.S. 535 (1972). The legislative classification at issue here passes this test. It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining fulltime employment than does attending school at night.... The fact that the classification is imperfect and that the availability of some students desiring fulltime employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited supra, render the statute invalid under the United States Constitution.

434 U.S. at 101-102. Thus, despite the imperfection in the classification, the legislation was upheld because the Court found a rational reason to support the classification.

Richardson here argues that the classification of agents according to the business form of their employers cannot withstand constitutional challenge. Applying the rational relationship test we have examined whether the classification established by Congress in section 109(c) is rationally related to the accomplishment of its intended purpose. As discussed below, we find a rational basis for the classification in section 109(c) and reject Richardson's challenge.

The expressed fundamental purpose of the 1969 Coal Act is to "protect the health and safety of the Nation's coal miners." 30 U.S.C. 801 (1976). Section 109(c) is intended to provide one vehicle for accomplishing this purpose by holding corporate agents who commit knowing violations individually liable. We believe that imposing personal liability on corporate agents furthers the overall goal of the Act by providing an additional deterrent to many of those individuals in a position to achieve compliance. That this was the intent of Congress in enacting section 109(c) is clear. As stated in the legislative history concerning this section:

> The committee expended considerable time in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violations

of the act. At one point, it was agreed to hold the corporate operator responsible for any fine levied against an agent. It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him.

> The committee recognizes, however, the awkward situation of the agent with respect to the act and his supervisor, the corporate operator, and his position somewhere between the two. The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield. The committee does not, however, intend that the agent should bear the brunt of corporate violations. It is presumed that the agent is often acting with some higher authority when he chooses to violate a mandatory health or safety standard or any other provision of the act, or worse, when he knowingly violates or fails or refuses to comply with an imminent danger withdrawal order or any final decision on any other order.

Legis. Hist. at 1041-1042 (Emphasis added.)

Furthermore, as stated by the Supreme Court in Lindsley v. Natural Carbonic Gas Co., supra "when the classification ... is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted can be assumed". 2-0 U.S. at 78. The Secretary has proffered a further explanation in support of the rationality of section 109(c). In his brief the Secretary stated:

> Congress was obviously aware that it is often difficult to penetrate the corporate decision making processes of large corporate mining operations and determine the precise involvement of individual officers, directors, and agents in any given situation. In contrast, when a mine is run by an individual partnership, or association, generally the operation is smaller and the individual, partner, or associate is involved in the day to day operation of the mine and thus is chargeable as a mine operator himself under the Act.
>
> The rational basis for the classification in [section 109(c) of the Coal Act] is the Congressional acknowledgement of the necessity for piercing the corporate shield and placing the blame directly on the individuals responsible for the violations.

Also, as stated by counsel for the Secretary at oral argument:

> One of the problems which concern[ed] the Congress when they considered the Coal Act was that while operators who

conducted their business in the form of a partnership or sole proprietorship were directly and personally liable for violations of the Act, the decision makers in a mine conducting business within a corporate structure

> were insulated from such personal liability.... Congress also knew that a high proportion of the nation's coal mines are operated by corporate operators.
>
> In fact, as we noted in our brief, the top fifteen corporate operators of coal in this country produce forty percent of all the coal mined in the United States.
>
> To remedy this inequity, Congress chose to make corporate operators agents, as well as directors and officers, liable for knowing violations of the Act....

We find that the explanations set forth in the legislative history and by the Secretary provide rational reasons for the classification made in section 109(c). We recognize that much of the reasoning for placing individual liability on agents of corporate operators would likewise be applicable to imposing similar liability on agents of noncorporate operators. Such agents are also in a position to secure compliance with the Act's requirements to assure the safety of miners, but unlike their corporate counterparts they are not subject to the threat of direct enforcement against them. As noted by the Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., supra, however:

> If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'.

As also recognized by the Supreme Court, Congress "may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind". Williamson v. Lee Optical, supra, 348 U.S. at 488-489. Finally, as cogently stated by the Supreme Court in Vance v. Bradley. supra, where a statutory distinction does not burden a suspect group or a fundamental interest,

> ... courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were

irrational.

440 U.S. at 96 97 (footnotes omitted).

Applying these principles we find that Congress' imposition of liability on corporate agents is not totally arbitrary but has a rational basis, and therefore conclude that the classification in section 109(c) does not offend the Constitution.

Accordingly, we affirm the judge's conclusion that Richardson violated section 109(c) of the Coal Act by knowingly permitting mobile equipment in an unsafe condition to remain in service. We also affirm the $500 penalty assessed by the judge against Richardson.

R. V. Backley, Chairman, Concurring In Part And Dissenting In Part.

I must dissent from that part of the decision that upholds the constitutionality of section 109(c) of the Coal Act. I do so because I can perceive no rational basis for singling out the agents of corporate operators for violations of the Act and excusing other agents for the same acts. The purpose of the section is to penalize individuals responsible for the safety of the miners who knowingly fail in that responsibility. I fail to see how mine health and safety is advanced when agents who are guilty of some grievous act are allowed to escape liability solely because they work for a partnership or sole proprietorship.

In this regard, the Secretary's comments quoted on pages 19-20 of the majority arc wide of the mark. The question is not whether the liability falls directly upon the partnership or sole proprietorship but whether it can be placed upon the event of those entities. In the case of a corporation, both the corporation and those individuals enumerated in section 109(c), are subject to the assessment of a civil penalty. This is the case before us. However, under the same circumstances, the agent of a noncorporate operator would escape liability. Accordingly, I find no rational basis for the exclusion if the purpose of the section is to place responsibility where it properly belongs. In my opinion not only is the classification arbitrary but exculpatory. The exoneration of one class of offenders under the Act provides little support for the rational basis test.

Rees Kinney, Esq.
Sam Jarvis, Esq.
Jarvis, Payton & Kinney
O'Bryan Court Building
P.0. Box 569
Greenville, KY 42345

J. Philip Smith, Esq.
MSHA Trials Branch
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203