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SOL (MSHA) V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 30, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 82-174

MID-CONTINENT RESOURCES, INC.

DECISION

The issue presented in this civil penalty case is whether substantial evidence supports the conclusion of the Commission's administrative law judge that Mid-Continent Resources, Inc., violated 30 C.F.R. $ 75.511, a mandatory safety standard requiring that certain electrical work be performed by qualified persons. For the reasons that follow, we conclude that substantial evidence supports the judge's decision and we affirm.

The case arose following a methane and coal dust explosion at the Dutch Creek No. 1 Mine on April 15, 1981. The mine is owned and operated by Mid-Continent and is located in Pitkin County, Colorado. Fifteen miners were killed in the accident and three received non-fatal injuries.

The Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the explosion. In its accident investigation report (Pet. Exh. 1), MSHA concluded that the methane was ignited by an electric arc originating inside an electrical switch box on a continuous mining machine. The machine was fitted with two lighting systems: one provided by the manufacturer and an additional system installed by the company, known as "add-on lights." When the mining machine was examined after the accident, it was discovered that the switch box for the add-on lights had an opening between the box and the box cover (the switch box "cover plate") which exceeded permissible limits. (The opening was in excess of .015 inch. The maximum clearance permitted under the applicable mandatory standard is .004 inch.) The oversized opening was the result of an insulated wire having been wedged in the flange joint between the switch box and the cover plate.

MSHA concluded that prior to the explosion there had been a sudden release of methane. MSHA determined that following this release,

mining was discontinued on the section and the section crew began making ventilation changes in the face area to dilute and carry away the methane. When the concentration of methane in the atmosphere around the continuous miner reached 2.0 volume per centum, power to the miner was automatically

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shut off, except to the add-on lights. 1/ As a result, these lights may have "blinded" miners working in the face area so that someone then turned the add-on light switch on the top of the cover plate to the "off" position. (The light switch was found in the off position following the explosion.) MSHA concluded that this caused the switch mechanism inside the box to arc and that the arc ignited methane which had entered into the box. MSHA concluded that the flame then "escaped" the box through the non-permissible opening and touched off the explosion.

Because MSHA believed that the non-permissible opening between the switch box and the cover plate was part of the causative chain leading to the explosion, MSHA attempted to determine who had installed the cover plate. MSHA concluded that the cover plate was installed on April 6, 1981, nine days before the explosion and that this work was not performed by a qualified person or performed under the direction of such a person as required by 30 C.F.R. $ 75.511. MSHA therefore issued a citation to Mid-Continent which alleged a violation of section 75.511. The pertinent provision of this standard states:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.

A civil penalty proceeding ensued. Following an evidentiary hearing, the judge entered a decision in which he affirmed the violation and assessed a penalty of $10,000. 5 FMSHRC 261, 273-78 (February 1983)(ALJ). 2/

The judge found that the cover plate was installed by Marge Theil, a miner who was not a qualified person within the meaning of section 75.511. At the hearing, the Secretary of Labor introduced evidence showing that

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1/ The continuous miner was equipped with a methane monitor. 30 C.F.R. $ 75.313, a mandatory safety standard requires that the methane monitor be set to deenergize the machine automatically when there is more than 2.0 volume per centum of methane in the mine atmosphere. However, in this instance, the methane monitor was not wired into the primary circuit of the continuous miner's lighting

transformer. As a result, when the sensor of the methane monitor detected concentrations of methane exceeding 2.0 volume per centum it deenergized the continuous miner, but not the add-on lights which remained lit. MSHA therefore cited Mid-Continent for a violation of section 75.313, and the judge concluded the company violated the section by failing to properly wire the methane monitor. 5 FMSHRC at 269-71. Mid-Continent did not seek review of this portion of the decision.

2/ In addition to asserting that the cover plate was not installed by a qualified person, the citation also alleged that the light switch was not wired by a qualified person. Because MSHA offered no evidence to prove that alleged violation, the judge vacated that portion of the citation. 5 FMSHRC at 277-78. Neither party challenges the judge's action in this regard.

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the plate was installed on April 6, 1981, during the maintenance shift (the "C", or third shift). 5 FMSHRC at 273. Cecil Lester, an MSHA inspector, testified that John Cerise, who was the foreman of the maintenance shift both prior to and after the explosion, told him that the cover plate "was probably installed by Marge Theil who was not a qualified person." 3/ The judge found this evidence to be uncontroverted. 5 FMSHRC at 277. The judge also noted that another MSHA inspector, Clarence Daniels, stated that Cerise had told him he did not know who had done the work but he thought it was Marge Theil. 4/

3/ Cecil Lester is a coal mine inspector stationed at MSHA headquarters in Arlington, Virginia. His specialty is the investigation of mine fires and mine explosions which are suspected of having an electrical cause. The following exchange at the hearing took place between Lester and the Secretary's counsel:

Q. Mr. Lester, did you participate in determining whether a qualified person had installed the light switch cover on the auxiliary light control?

A. Yes.

Q. And what did you learn as a result of that investigation?

A. Of course, no one was there that we knew of when the light switch cover was installed, therefore, we had to rely upon statements made by company officials. We questioned each foreman, trying to find out who installed it, and we determined by the process of elimination, and also by Mr. Meraz' statement that it was installed on the third shift. [Meraz was the master mechanic in charge of equipment maintenance at the mine. All maintenance foremen reported to him.] We talked to the maintenance

foreman on the third shift, Mr. John Cerise, and he told us that it probably was installed by a Mrs. Marge Theil, who was not a qualified person. ... We talked to Marge Theil and she stated that she didn't remember whether she put the light switch cover on or not.
Tr. 389-90.
4/ Clarence Daniels is also an MSHA coal mine inspector specializing in electrical inspections. His task during MSHA's investigation of the explosion at the Dutch Creek No. 1 Mine was to examine the entire electrical system of the mine. He testified as follows:
Q. What did these two gentlemen [Cerise and Meraz] tell you?
A. They told me they thought this lid was put on this particular machine on April the 6th, 1981. John Cerise stated that he examined this lid on April 6th and found out if the light switch worked. He said he did not examine the box as far as permissibility. When asked who put the lid on, Mr. Cerise stated that he didn't know who put the box on. That he thought Marge Theil on his shift had put the light [sic] on. After interviewing Marge Theil, she couldn't remember whether she had put the lid on or not.
Tr. 57-58.
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The judge characterized this statement by Cerise to Daniels as similar to the one Cerise made to Lester, "but not quite as strong." 5 FMSHRC at 277.
Mid-Continent offered testimony by its personnel that it was the custom and practice at the Dutch Creek No. 1 Mine always to have qualified persons do those tasks requiring qualified persons. The judge agreed that Mid-Continent's evidence supported a finding that there was an adequate number of qualified persons at the mine and that it was the operator's custom and practice to have only certified personnel perform those tasks which required special qualifications. However, in the judge's opinion, this evidence did not overcome the admission of the foreman, Cerise, to the inspectors concerning Marge Theil. The judge observed that neither Cerise nor Theil said anything to the inspectors concerning this custom and practice. 5 FMSHRC at 277. The judge noted that the only statement attributed to Theil on the subject was that she "couldn't remember whether she put the lid on or not." Id. 5/
The judge concluded that the evidence supported a finding that the cover plate was not installed by a qualified person as required by the cited standard, and found the operator to have violated 30 C.F.R. $ 75.511. We granted Mid-Continent's petition for discretionary review and subsequently heard oral argument in the case.

The essence of Mid-Continent's challenge on review is that the judge's finding of a violation is not supported by substantial evidence. Mid-Continent argues that the judge, in relying upon Lester's and Daniels' recitations of what they were told by Foreman Cerise, based his finding of a violation upon uncorroborated hearsay speculations rather than upon statements of fact. Mid-Continent also contends that even if the violation could be established by the statements of Cerise, as recounted by the inspectors, it successfully defended by establishing that the Secretary failed to prove that all the qualified persons who could have installed the cover plate did not do so.

We begin by noting that the judge properly admitted and relied upon the testimony of Inspectors Lester and Daniels concerning what they were told by Foreman Cerise. Hearsay evidence is admissible in our proceedings so long as it is material and relevant. Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n.7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied,____U.S._____77 L. Ed. 2d 299 (1983). In this instance, the hearing testimony was offered to prove that the cover plate was not installed by a qualified person. Because the installation was at issue in the case, the testimony was material. The hearsay testimony was relevant also in that, if true, it tended to prove this proposition.

Moreover, properly admitted hearsay testimony, and reasonable inferences drawn from it, may constitute substantial evidence upholding a judge's decision

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5/ Theil was not called as a witness by either party and did not appear at the hearing. No attempt was made to subpoena her. During the course of MSHA's investigation of the explosion she was interviewed over the telephone by MSHA investigators. Statements attributed to Theil by the investigators were made during this interview. When the hearing took place Theil was no longer employed by Mid-Continent.

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if the hearsay testimony is surrounded by adequate indicia of probativeness and trustworthiness. Richardson v. Perales, 402 U.S. 389, 407-408 (1971); Johnson v. United States, 628 F.2d 187, 190-91 (D.C. Cir. 1980); U.S. v. FMC, 655 F.2d 247, 253-54 (D.C. Cir. 1980). 6/ Hearsay testimony "may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence." Hayes v. Dept. of the Navy, 727 F.2d 1535, 1538 (Fed. Cir. 1984) (footnote omitted). We reject a per se rule that evidence may not be considered to be substantial for purposes of our review merely because it bears a hearsay label. Rather, we look to its underlying probative value to

determine if the evidence may support a judge's finding of fact. Although no single test can be established to evaluate the role of hearsay in determining whether substantial evidence supports a judge's finding, we measure the probative value of such evidence by weighing it against various factors, which, when added together, may tip the scale for or against a determination that substantial evidence is present. For example, we look to whether the out-of-court declarant, whose statement is reported at the hearing by another, had an interest in the outcome of the case and thus a reason to dissemble. Richardson v. Perales, 402 U.S. at 402-03. We also examine whether the out-of-court statement rests on personal knowledge gained from firsthand experience. 402 U.S. at 403. If there is more than one reported statement, we inquire whether the statements are consistent. 402 U.S. at 404. We also find significant whether the party against whom the statement was used exercised the right of subpoena so as to cross-examine the out-of-court declarant.

6/ Counsel for the Secretary of Labor contends that Cerise's statements are "admissions by a party opponent" under Rule 801(d)(2) of the Federal Rules of Evidence. As such, counsel asserts that the statements are presumed to be reliable and trustworthy and are entitled to considerable weight as statements which are not hearsay. This argument may possibly confuse the presumed reliability of a party opponent's admissions with the reliability of an unavailable declarant's statements against interest. See Fed. R. Evid. 804(b)(3); 4 J. Weinstein & M. Berger, Weinstein's Evidence 801-134 to -139 (1981). Even were we to regard Cerise's statements as "admissions by a party opponent" we still would be required to examine their underlying probative value. However, we decline the opportunity to become enmeshed in the hearsay intricacies and terminology of the Federal Rules of Evidence. While the Federal Rules of Evidence may have value by analogy, they are not required to be applied to our hearings-- either by their own terms, by the Mine Act, or by our procedural rules. By contract, the National Labor Relations Board is required under its organic act, the National Labor Relations Act, 29 U.S.C. $ 151 et seq., to conduct its administrative hearings "so far as practicable" in accordance with the Federal Rules of Evidence. 29 U.S.C. $ 160(b). See NLRB v. Process and Pollution Control Co., 588 F.2d 786, 791 (lOth Cir. 1978). We believe it better to view hearsay statements as possibly relevant and material evidence whose probative value must be evaluated on the basis of each particular case. See generally 3 K. Davis, Administrative Law Treatise ch. 16 (2d ed. 1980).

2 U.S. at 404. We likewise determine whether the making of the

statement was denied or whether its contents were declared untrue. And we examine the content of any contradictory or corroborating evidence. School Board of Broward County, Florida v. H.E.W., 525 F.2d 900, 907 (5th Cir. 1976). Our aim is to determine if, given all of these factors, there is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Application of these criteria to the record in this case convinces us that the judge's finding of a violation is supported by substantial evidence.

John Cerise was the out-of-court declarant whose statements were testified to by the MSHA inspectors. Cerise, foreman of Theil's shift, would have had good reason not to state that the electrical work was done on his shift by an unqualified person. As the foreman of the maintenance shift, it was his job to assign the maintenance tasks which needed to be done, including the installation of the switch box cover plate. (Cerise directed repair work on mining equipment. Tr. 276, 378). Also, as foreman, he was responsible for assuring the work was done in compliance with applicable safety standards. Cerise's statements would tend to indicate that he may not have met his responsibilities in this regard. In addition, Cerise's statements rested upon his personal knowledge and first-hand experience. He was on the section on April 6, the day he stated that Theil probably installed the plate. In addition, as noted above, installation of the cover plate was the type of work which would be performed by his crew. As the foreman, he may be presumed to know what his miners were doing.

We note also that the testimonial accounts of the two MSHA inspectors concerning their conversation with Cerise refer to the same series of events and are consistent.

Nor did Mid-Continent produce witnesses who testified that Cerise's statements were not made or that the content of the statements was reported inaccurately. Both inspectors agreed that Theil stated that she could not remember whether or not she installed the cover plate. Mid-Continent had no records pertaining to the installation of the cover plate. Oral Arg. Tr. 10. Mid-Continent's vice president stated that the company did not know who installed the plate. Tr. 289. Further, Cerise, a salaried employee of Mid-Continent, was not subpoenaed by the operator to rebut what he was reported to have said to the inspectors. 7/

7/ Our dissenting colleagues err in their assertion that Mid-Continent was effectively denied by Commission Rule 59 the right to discover, prior to hearing, the identity of declarants Cerise and Theil (Slip op. at 5). The Secretary's MSHA accident investigation report

(Exhibit 1) was referred to by Mid-Continent in its answer to the citation issued herein. The record notes that Cerise stated that the cover plate was installed on April 16, 1981, and this operator could certainly have interviewed Cerise and determined what he had told MSHA, including his identification of Theil as the miner who installed the cover. Further, it is unclear what effect, if any, Rule 59 would have had on Mid-Continent's ability to obtain the identity of an informant whose identity had already been disclosed in the report. Although Counsel for Mid-Continent stated at oral argument that he first learned at the hearing that Cerise's statements were part of MSHA's case, he did not attempt to call either Cerise or Theil and did not seek an adjournment. Counsel for Mid-Continent explained at oral argument that during the two-day hearing Cerise was employed on the night shift and was "in bed" while the hearing was in session. Oral
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Arg. Tr. 20-21.
Thus Mid-Continent did not defend against the Secretary's evidence that an unqualified person installed the cover plate by showing that a qualified person had installed it. Rather, Mid-Continent offered evidence of a general character that there was no shortage of qualified personnel and that it was the practice at the mine to use only those employees to perform the tasks requiring qualified persons. The judge concluded, however, that because this practice was not mentioned by Cerise (or Theil), Mid-Continent's evidence did not outweigh the testimony of Daniels and Lester as to the specific statements of Cerise. We agree. General evidence that a violation would not normally have occurred does not outweigh the inference drawn from specific testimony that the violation did occur. In evaluating the probative value of Cerise's statements to the inspectors, we recognize that his statements, to some degree, were expressed in terms of probability rather than in terms of absolute certainty. However, the record clearly supports a finding that the cover plate was installed on Cerise's maintenance shift, the "C" shift, on April 6 by a member of Cerise's crew. Inspectors Daniels and Lester stated that they were told so by Cerise and by John Meraz, Mid-Continent's master mechanic whose job it was to supervise the foremen. Tr. 57, 71, 378, 389, 403. 8/ Presumably, therefore, Cerise knew whereof he spoke when he indicated his belief that Theil had probably installed the cover plate. The judge inferred from this testimony that it was more probable than not that Theil had, in fact, installed the plate. 9/ Such inferences are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred. See for example, EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 194 (3rd Cir. 1980).

Moreover, as noted above, the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence. See for example, FMC v. Svenska America Linien, 390 U.S. 238, 248-49 (1968); U.S. v. FMC, 655 F.2d at 253-54. This is particularly true where, as here, it is either impossible or there is only a remote possibility of obtaining direct evidence to establish a violation. We must be mindful of the fact that the Secretary alleged a violation that was associated with a fatal explosion. It is not surprising under the circumstances that no person would admit installing the cover plate and that direct proof was lacking. Given the difficulty of obtaining direct evidence as to who installed the plate, we find the judge's inference that Theil installed it to be reasonable, inherently probable and logically connected to the evidentiary facts at hand. Moreover, as the Supreme Court has emphasized, "The possibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [an agency] from drawing one of them...." NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106 (1942).

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8/ In addition, the "B" shift maintenance foreman informed inspector Daniels that the lid was not installed on the "B" shift. Carl Heater, the only qualified person on the "A" shift told the inspector he had no knowledge of it being installed during the "A" shift. We also note that at oral argument Mid-Continent's counsel conceded that the cover plate was installed on April 6. Tr. Arg. 10. 9/ Theil did not advise the MSHA investigators that she had never installed cover plates, a more likely response if, indeed, she had never performed this task.

In view of the indicia of probity and believability which surround Cerise's statements, the judge's conclusion that the cover plate was not installed by a qualified person is based on adequate record support and substantial evidence. It is, of course, the judge's duty to draw conclusions from the record and where, as here, that evidence is adequate to support the conclusion it is our duty to affirm his decision. 10/

Accordingly, on the bases explained above, the judge's decision is affirmed.

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10/ The Secretary argues to us, as he argued to the judge, that he deductively proved the violation by establishing that all qualified personnel who could have installed the cover plate denied that they had done so. Mid-Continent disputes this claim. The judge did not rule on the merits of this contention, and in view of our disposition of the case we need not do so either. Nevertheless, we note in passing that Mid-Continent's contention in this regard centers on

two named individuals, John Ball and Bernie Fenton. Although the statement of qualified electrician John Ball to the MSHA inspectors is to some degree uncertain, its thrust is a denial that he installed the cover plate, just aa the thrust of Cerise's statement is an assertion that Theil had installed it. Ball is quoted by the inspectors as saying that he could not remember installing the cover plate, but that if he had installed it he would have checked between the plate and the switch box for impermissible openings. Tr. 58, 389-90.

We also note that Mid-Continent asserts that Bernie Fenton, a preventive maintenance engineer and a qualified person, was not interviewed by MSHA. Oral Arg. Tr. 13, 37. Without passing on the merits of this argument, we note that although Fenton usually worked on the "C" shift, it is not clear that his duties, unlike those of Cerise, would have included installation of the cover plate. His job was variously described as inspecting, oiling and greasing mine machinery and changing worn-out machine parts. Tr. 276, 358.

The dissent notes, at n. 2, that neither Mr. Guthrie nor Mr. Clark were interviewed. However, since both individuals were employed on the "B" shift, and the evidence establishes the lid was installed on the "C" shift, further exculpating evidence is unnecessary.

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Collyer, Chairman and Backley, Commissioner dissenting:

This case was best summed up by the trial attorney for the Secretary of Labor at the beginning of the hearing where he stated:

> The person or identity of the person who installed the light switch cover is not known, either by MSHA or Mid-Continent Resources. The light switch cover was most likely installed by the maintenance shift, which would be a third shift at this mine, but that fact has not been ascertained as a certainty. (Tr. 6).

After careful analysis of the entire record we find no reason to dispute the Secretary's counsel. Accordingly, we find that the Secretary failed to meet his burden of proving that the subject violation occurred and we would reverse the ALJ and vacate the subject citation.

We wish to stress at the outset that this case does not present the question of whether the cover plate was impermissible but only the question of who installed it.

The Secretary stated that he did not know who installed the subject cover plate, but that through a deductive process he could prove that Marge Theil, an unqualified miner, was the only miner who could have installed the cover plate. His deduction, however, rests on uncorroborated hearsay testimony which, as shown herein, is itself weak and inconclusive. In order to establish any valid inference made through a deductive process, it is integral to that process that

no other choice or possibility reasonably exist. NLRB v. Melrose Processing Co., 351 F.2d 693 (8th Cir. 1965). Indeed, even the Secretary appears to have appreciated this point when he argued in opposition to Mid-Continent's motion to dismiss:

> The testimony will show that in discussions with all the qualified personnel at the mine who may have had the opportunity to install that light switch box, all indicated they did not install it. Therefore, the only person who could have installed it would have been someone who was not qualified to install it. (Tr.. 8; emph. added).

If the Secretary had actually conducted his investigation as indicated above, and if the Secretary had actually proved that all responses from all qualified personnel indicated that they had not installed the cover plate, we might have been persuaded to affirm the ALJ. However, the record evidence clearly establishes that all qualified miners were not interviewed by MSHA, as so claimed, and of those qualified miners interviewed, all did not clearly deny involvement with the installation of the subject cover plate. Moreover, we find the record evidence, upon which the majority relies, to be weak, equivocal, and not substantial.

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Assuming arguendo that the Secretary's contention is correct and that the installation of the cover plate occurred on April 6, 1981 1/, the record contains no evidence of the identity of all Mid-Continent miners who were working on that day and who were legally qualified to install the subject cover plate. Although the record indicates that Mid-Continent's Master Mechanic Meraz and.Maintenance Foremen Heater, Cordoba and Cerise were interviewed, none of the maintenance foremen was ever called to testify at hearing. Moreover, in closely scrutinizing the testimony of Inspectors Daniels (Tr. 58-60) and Lester (Tr. 389), it is apparent that they did not question all miners who were legally qualified to install the subject cover plate, but rather relied upon the qualified representations made by the aforenamed miners.

The record also clearly establishes that the Secretary, in issuing the subject citation and in prosecuting this matter, did not consider or interview the qualified personnel working on the preventive maintenance crew which operated on the "C" shift, the very shift during which the Secretary asserts the subject cover plate was installed. (Tr. 170). This unbelievable omission was apparently a continuing one because the Secretary professed ignorance of the existence of the special maintenance crew at oral argument. (Oral argument Tr. 25). This omission of evidence as to an entire crew significantly undermines the Secretary's deductive process. Indeed,

the respondent's evidence suggests that the job of replacing the cover plate could have been routinely performed by the preventive maintenance crew or by one of the production crews.

We also find it significant that the "B" shift had been idled for five days preceding the April 15 explosion and that no coal production occurred during that time. During such "down time" mechanical and/or electrical work is customarily performed on the equipment. Inspector Daniels admitted that he did not know production had been suspended. (Tr. 76, 77). Additionally, Master Mechanic Meraz testified that a "foul up" involving qualified miner Ball had made it necessary for "B" shift mechanics Darrell Clark and Eugene Gutherie to perform permissibility checks ordinarily performed on the "C" shift. This testimony indicates that prior to the explosion, production shift personnel did perform work ordinarily performed on the "C" shift. This fact is ignored by the majority for the reason that it further removes support for their conclusion.

Clearly the line between production shift work assignments and maintenance shift work assignments often became blurred and therefore it is unreliable and unreasonable to hinge a conclusion of violation on a contrary presumption. Consequently, because the Secretary has not identified all of the qualified miners who were actually working on April 6, 1981, we can only wonder who else was not interviewed 2/.

1/ Although not established by the Secretary, Mid-Continent appears to have conceded this point. (Oral argument Tr. 10).

2/ Obviously, it was not possible to interview deceased qualified miner Eugene Gutherie. However the record contains no evidence to warrant a categorical removal of Mr. Gutherie from the list of those who may have had involvement in the installation of the subject cover plate. Also, the record contains no evidence inculpating or exculpating qualified miner Darrell Clark.

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MSHA did, however, interview qualified miner John Ball 3/.

His statement is characterized through the hearsay testimony of Inspector Daniels and Lester as follows: "John Ball, he stated he couldn't remember putting the lid on, but if he had, he was sure that he would have checked for permissibility" (Daniels, Tr. 58); and "He stated that if he had installed it, he would have checked it with a feeler gauge." (Lester, Tr. 390).

The majority noted the foregoing and concluded that the statement of Ball was "uncertain" but "its thrust is a denial that he installed the cover plate." Although we find the declarations attributed to John Ball to be weak, equivocal, and insubstantial, not unlike the declarations attributed to John Cerise and Marge Theil, it is of greater interest to note the sharp inconsistency with which the

majority evaluated the subject hearsay evidence. Inspector Daniels also testified that Marge Theil said "she couldn't remember whether she put the lid on or not." "Couldn't remember" results in the exculpation of John Ball, but through unexplained logic, is used to incriminate Marge Theil.

Beyond the foregoing hearsay testimony characterizing Marge Theil's statement, the Secretary's case rests upon the hearsay testimony of the two MSHA inspectors purporting to relate the declarations of John Cerise, Mid-Continent's maintenance foreman of the "C" shift. Initially it should be noted that the record fails to clearly indicate the manner in which MSHA Inspectors Daniels and Lester conducted their interview(s) of declarants Cerise and Theil. Specifically, it is unclear whether the inspectors conducted all interviews jointly or separately. This is not insignificant.

The number of times and circumstances under which witnesses are interviewed is material in evaluating the reliability and trustworthiness of the declarations. This factor is even more critical when the entire issue of liability may be hinged upon such "evidence."

As noted in the majority decision, Inspector Daniels testified that John Cerise said, "He didn't know who put the box on. That he thought Marge Theil on his shift had put the light on." (Tr. 57). Inspector Lester testified, "He told us that it probably was installed by a Mrs. Marge Theil." (Tr. 389).

If the foregoing testimony resulted from one interview then there is no explanation why the stronger inference of "probability" should have been adopted by the administrative law judge and the majority.

Beyond the fact that the attributed statement(s) itself is weak and inconclusive, more damaging is the fact that it stands alone without any corroboration. Although the record contains MSHA reference to a "notetaker" no written corroboration is found in the record. Indeed, even the most rudimentary attempt to corroborate the hearsay is not to be found in the record, i.e., there is no evidence showing that Marge Theil actually worked on April 6, 1981. Accordingly,

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3/ The record is unclear as to whether Mr. Ball was interviewed by both MSHA inspectors jointly or separately.

the majority's reliance upon Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n.7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert denied,___U.S.__, 77 L. Ed. 2d 299 (1983), is certainly in conflict with one of two express reasons stated therein by the Commission: "Virtually all of the hearsay was corroborated by direct evidence." The majority's reliance upon Hayes v. Department of the Navy,

727 F.2d 1535 (Fed. Cir. 1984), is similarly flawed. Hayes involved the hearsay use of agency records in a hearing before the Merit Systems Protection Board on an appeal of Mr. Hayes' discharge. The record at issue detailed the circumstances of the employee's conviction for assault and battery on a 10-year-old female child. The record was developed by a Navy Captain, who had "prepared a memorandum for the record which reflected in detail his conversation with Mr. Hayes, his attorney, and with the prosecuting attorney..." 727 F.2d at 1536. It is noteworthy that this record was a contemporaneous one, on an issue the employee did not dispute. The employee had been advised, before the hearing, of his right to see and copy any part of the record developed by the Navy and had not done so. In accepting the hearsay, the court also relied on the fact that it was submitted as required by properly promulgated regulations of the MSPB. 727 F.2d at 1538-39. Surely the hearsay evidence at bar, i.e., the testimony of two MSHA inspectors which completely lacks detail or any form of corroboration, is in no way analogous to the Hayes memorandum detailing the circumstances of a criminal conviction, which conviction was admitted by the employee.

Despite the inherent weakness of the Secretary's case, the majority has concluded, relying upon Richardson v. Perales, 402 U.S. 389 (1971), that hearsay evidence may constitute substantial evidence, and that in the instant case the subject hearsay evidence is substantial evidence. Although we do agree that under certain circumstances hearsay evidence may constitute substantial evidence, we find the majority's reliance upon Perales to be erroneous. The quality, quantity and precision of the hearsay evidence reviewed by the Court in Perales was far superior to the instant hearsay evidence.

In Perales, the Supreme Court held that written medical reports prepared by licensed physicians who had independently examined a disability claimant could be received as evidence despite their hearsay character and could constitute substantial evidence supportive of a finding adverse to the claimant when the claimant had not exercised his right to subpoena the reporting physicians and thereby avail himself of the opportunity to cross-examine them. In reaching its decision, the Court carefully outlined several factors pertinent to the written reports which the Court felt would "assure underlying reliability and probative value." 402 U.S. at 402.

The Court noted that the social security administrative agency sponsoring the hearsay evidence operated as an adjudicator and not as an advocate. Certainly MSHA's posture as an enforcement agency in the instant case is not analogous.

The Court noted that the written medical reports were routine, standard and unbiased, and prepared by licensed physicians who were specialists who had personally examined the disability claimant. The

Court further noted that the range of examinations (five) was impressive and represented a "careful endeavor by the state agency and the examiner to ascertain the truth." 402 U.S. at 404.
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In reaching its conclusion that hearsay evidence may constitute substantial evidence, the Supreme Court placed considerable weight on the fact that "courts have recognized reliability and probative worth of written medical reports even in formal trials and while acknowledging their hearsay character have admitted them as an exception to the hearsay rule." 402 U.S. at 407. The Court further indicated that there exists a uniform court recognition of "reliability and probative value" in written medical reports. 402 U.S. at 405.
Our review of the subject hearsay evidence discloses the existence of none of the above-noted safeguards. MSHA's evidence is extremely narrow and inconclusive. It consists totally of unclarified hearsay without any indications of the circumstances under which statements were obtained, without contemporaneous corroborating notes, and without certainty within the declarations themselves. The haphazard investigation which overlooked a number of qualified persons who might have installed the cover plate was by no means a "careful endeavor." The Secretary's failure to call Marge Theil and/or John Cerise is similarly lacking in care. This house of cards is not by any measure "impressive."
The Court in Perales was also influenced by the fact that the claimant failed to seek issuance of the subpoena for the presence of the reporting physicians notwithstanding notification that the medical reports were on file and were available for claimant inspection prior to hearing.
In the instant case Commission Procedural Rule 59, 29 CFR Section 2700.59 effectively denied Mid-Continent the right to discover, prior to hearing, the identity of declarants John Cerise and Marge Theil 4/. Therefore Mid-Continent cannot properly be faulted for failure to seek a subpoena prior to hearing. Nor can this failure be utilized as it is by the majority, to give support to their findings. Moreover, in view of the weak and insubstantial evidence introduced by the Secretary, the party with the burden of proof, we have no difficulty in understanding why Mid-Continent apparently decided not to seek the issuance of subpoenas commanding the presence of declarants Cerise and Theil.
Lost in all the pirouetting is the basic proposition that the government has the burden of proof. Accordingly, its failure to adequately explain why it did not even attempt to subpoena the declarants who were apparently still living

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4/ Although the name John Cerise, along with numerous other Mid-Continent employees, appears in the MSHA investigative report, there was no prior indication that Mr. Cerise knew, or disclosed to MSHA the name of Marge Theil, as the one who "probably" installed the cover plate. Moreover, to recommend, as the majority does, that Mid-Continent should have attempted to "determine what he (Cerise) had told MSHA" (Slip op. at 6; emph. added) reflects a potentially serious insensitivity to the parameters of the protections afforded miners under Section 105 (c), which prohibits interference with miners in the exercise of their statutory rights. We have found no record indication supporting the contention that Mid-Continent knew of John Cerise as the one who would have, or the one who did state that Marge Theil "probably" installed the subject cover plate.

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within a reasonable radius of the hearing site is suspect, at least. NLRB v. Process and Pollution Control, 588 F.2d 786 (lOth Cir. 1978). This failure to call the very witnesses upon whom the government relied denied the administrative law judge the opportunity to make a very necessary credibility ruling which would have been especially significant in the instant case.

It appears that the government was intentionally selective in its presentation insofar as particular witnesses were concerned. At oral argument, Counsel for MSHA admitted that Mrs. Theil was not called by MSHA because:

> ...she would have been an extremely uncooperative witness. At best she would not have recalled what happened. At worst we may have ended up having to ask the judge to declare her a hostile witness. We had very little in the way of knowing exactly what she would testify to. (Oral argument at 30, 31).

Therefore, the government spared the ALJ from the rigors of determining where the truth may lie, and instead presented a neat, tidy statement purporting to be Marge Theil's position on this crucial issue. Accordingly, the question arises as to whether the judge was given the complete picture. Since he was not, his credibility findings are suspect.

Finally, it should be noted that the Perales Court was in part motivated to conclude that the written medical reports should be accepted as substantial evidence because of the extremely large volume of disability claim hearings conducted. The Court indicated that amount to be in excess of 20,000 cases per year. Obviously, the administrative burden placed upon MSHA as well as this Commission in no way approaches that volume.

We conclude that many of the well-reasoned factors relied upon by the Perales Court to insure the "reliability and probative value" of

the hearsay evidence are not to be found in the hearsay evidence at bar. We find the hearsay to be weak, equivocal, uncorroborated and therefore suspect. As such it is "neither logical nor reasonable" to rely on such evidence as substantial evidence. See Union Carbide v. NLRB, 714 F.2d 657.

We are troubled by other serious lapses and contradictions in this proceeding. The ALJ found that Mid-Continent had provided "extensive evidence" supporting its defense that an adequate number of qualified maintenance personnel were employed at the mine and that Mid-Continent's evidence did establish that the custom and practice at the Dutch Creek No. 1 mine was to have "only certified personnel perform occupational tasks which require special qualifications." 5 FMSHRC at 277. However, the ALJ rejected the defense of custom and practice. In support of that rejection, the ALJ found that declarants Cerise and Theil both failed to state to MSHA anything about custom and practice at the mine. 5 FMSHRC at 277.

We do not agree with the reasoning of the ALJ and the majority, and would conclude and find that he erred. The proper occasion to draw an inference from failure to state something occurs only under very narrow, limited circumstances.

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To draw negative conclusions from silence in the instant case represents a gross misjudgment by the ALJ. Here we have been provided with no insight into the manner of investigation, no indication of precisely what questions were asked, and no indication of precisely what responses were provided. Here the enforcing agency characterized prior statements without any indication of the breadth and depth of the responses of either declarant. The record consists only of inconclusive recollections of two MSHA inspectors who may have heard one declaration from each of two Mid-Continent employees. The hearsay testimony is likely a selective synopsis of one or more interviews "seasoned" with the passage of time. Accordingly we find that the ALJ erred in basing his rejection of the Mid-Continent custom. and practice defense on the conclusion and finding that specific words were not uttered by declarants Cerise and Theil 5/. Indeed the error is compounded in view of the fact that the ALJ relied on identical evidence in ruling, on a related citation, that Mid-Continent properly maintained its methane monitor maintenance program 6/.

For the foregoing reasons we would reverse the ALJ and vacate the citation.

Richard V. Backley, Commissioner

5/ It should also be stated that the ALJ and majority (see majority decision f.n. 9) appear not to appreciate the fact that it would be legally permissible for Marge Theil to have deviated from the

Mid-Continent custom and practice as long as she worked under the direct supervision of a qualified person." See 30 CFR Section 75.511.

6/ This seems to be supported by the fact that on April 9 and 13, MSHA inspectors issued no citation to Mid-Continent related to the methane monitor during the course of their inspections.

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