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MSHA V. ASARCO
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FMSHRC-WDC
November 10, 1986

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

v. Docket No. WEST 84-48-M

ASARCO, INCORPORATED-NORTHWESTERN
MINING DEPARTMENT

BEFORE Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Doyle, Lastowka and Nelson, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) (the "Mine Act"). The issue is whether a miner's violation of 30 C.F.R. $ 57.3-22 (1983), a metal-nonmetal underground safety standard regulating ground control, was properly attributed to the mine operator, Asarco, Inc. ("Asarco"). 1/ The administrative law judge found that Asarco violated the standard and assessed a civil penalty of $25. 7 FMSHRC 1714 (October 1985)(ALJ). For the reasons that follow, we affirm.

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1/ 30 C.F.R. $ 57.3-22 (1983) provides:

> Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work

is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Following the Secretary of Labor's revision of the metal-nonmetal standards in January 1985, this standard is now found unchanged at 30 C.F.R. $ 57.3022 (1985).

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Asarco's Leadville Unit Mine, an underground metal mine located in Lake County, Colorado, produces lead and zinc concentrates. On September 28, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") began a two-day inspection of the mine. The inspector, who was accompanied by Asarco's safety engineer, observed miners Alan Lysne and George Naranjo working in stope 15-25-300. (Stopes are excavated areas from which ore is mined in a series of steps.) The inspector determined that the ribs and back of the stope were loose and dangerous. The inspector suggested to the safety engineer that the stope be made safe by barring down 2/ the loose rock and by matting 3/ the area, prior to any further work at the face. The safety engineer instructed the miners to bar down the loose rock and to make the area safe. Neither the inspector nor the safety engineer specifically mentioned barring down loose rock at the face of the stope because at that time the face was covered by muck (i.e., stone and dirt) and consequently was not visible.

After Lysne and Naranjo received their instructions they proceeded to institute ground control measures. They barred down some loose rock and installed mats in areas of the stope away from the face.

Continuing his inspection on the following day, the inspector saw Lysne being carried from the mine on a stretcher. Lysne had been drilling in stope 15-25-300 when rock at the face fell, breaking his foot. The inspector, along with the safety director and the shift foreman. went immediately to the accident scene.

Upon arriving at the stope, the inspector found that although the back of the stope had been secured properly, the face area was unsafe because of the amount of loose rock present. In order to secure the area, the shift foreman proceeded to bar down the stope. The barring-down procedure took approximately thirty minutes and yielded over one ton of loose rock.

The inspector concluded that vibrations from Lysne's drill caused the loose rock to fall from the face. The inspector believed that the accident would not have occurred if the loose rock in the stope had been barred down as ordered the previous day. Consequently, the inspector issued a citation to Asarco alleging a violation of 30 C.F.R. $ 57.3-22.

Following an evidentiary hearing the judge concluded that the standard was violated and that Asarco was liable for the violation. The judge held that the face where Lysne was working was plainly

unstable,

2/ "Barring down" is defined as: "removing, with a bar, loose rock from the sides and roof of mine workings ... prying off loose rock after blasting, to prevent danger of fall." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 83 (1968).

3/ A "mat" is a piece of sheet steel that is used to hold loose ground or to keep ground from getting loose.

that Lysne did not "examine and test" the face "frequently" as required by the standard, and that Lysne ignored the standard's command that "loose rock shall be taken down or adequately supported before any other work is done." 7 FMSHRC at 1716. Stating that "an operator is liable without fault for violations committed by its employees," the judge concluded that Lysne's "omissions must be imputed to Asarco under the strict liability doctrine inherent in the [Mine] Act." 7 FMSHRC at 1716, 1717 (footnote omitted).

In assessing a civil penalty for the violation, the judge made findings regarding all of the statutory penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. $ 820(i), but focused his attention primarily upon the criterion of negligence. In his brief to the judge, the Secretary of Labor ("Secretary") stated that "the effectiveness of Asarco's supervision and training is not in issue" and the judge agreed. 7 FMSHRC at 1719. The judge found that barring down loose ground was "an ordinary and almost inevitable phase of the mining cycle" at the mine, and that in this regard Asarco's training and supervision of its miners, particularly of Lysne, were "adequate under all the circumstances." 7 FMSHRC at 1717. The judge noted that Lysne's supervisors had been at the stope on the day prior to the accident and had instructed Lysne specifically to "give his first attention to ground control the next day." 7 FMSHRC at 1718. The judge found Lysne's decision to begin drilling the unstable face "unforeseeable and idiosyncratic." The judge found no evidence of "supervisory dereliction" on Asarco's part and concluded that Asarco was not negligent. 7 FMSHRC at 1718. The judge stated that the other penalty assessment criteria were "overshadowed by the negligence factor" and he assessed a civil penalty of only $25.

On review there is no dispute that Lysne's conduct violated the standard. Asarco contends, however, that under the Mine Act it cannot be held liable for a violation of a mandatory standard when the standard places responsibility for compliance upon the miner. Asarco also contends that it cannot be held liable for a violation because it has taken all practicable measures to prevent the miner from violating the standard. In effect, Asarco is asking the Commission to re-examine the principle that under the Mine Act an operator is liable, without regard to fault, for violations of the Act committed by its employees. See Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982).

We have examined the principle of liability without fault in the light of Asarco's arguments, the language and legislative history of the Mine Act, and relevant Commission and court precedent. For the

reasons set forth below, we reaffirm that under the Mine Act an operator may be held liable for a violation without regard to fault and, accordingly, we conclude that the judge did not err in holding Asarco liable for the violation of 30 C.F.R. $ 57.3-22.

The general principle that an operator is liable for the violations of the Act committed by its employees has been stated frequently. Sewell Coal Co. v. FMSHRC 686 F.2d 1066, 1071 (4th Cir. 1982); Allied

Products Co. v. FMSHRC, 666 F.2d 890, 893 (5th Cir. 1982); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982); American Materials Corp., 4 FMSHRC 415, 419 n. 8 (March 1982); Kerr-McGee Corp., 3 FMSHRC 2496, 2799 (November 1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (January 1981). Cf. Ace Drilling Coal Co., Inc., 2 FMSHRC 790-91 (April 1980), aff'd without opinion, 642 F.2d 440 (3rd Cir. 1981)(construing 1969 Coal Act).

Asarco argues, however, that each of these cases can be distinguished because of the peculiar facts in this case and the fact that the mandatory standard at issue here expressly requires compliance by the miner himself. Citing section 104(a) of the Mine Act, 30 U.S.C. $ 814(a), Asarco asserts that an operator can be cited for a violation only when an MSHA inspector believes that "an operator has violated [the] Act or any mandatory health or safety standard." (Emphasis added). Asarco notes that section 104(a) is patterned after section 104(b) of the Federal Coal Mine Health 'and Safety Act of 1969, 30 U.S.C. $ 801.et seq. (1976)(amended 1977)(the 'Coal Act"), and that section 104(b) read as follows: "[I]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds there has been a violation of any mandatory health or safety standard ... he shall issue a notice of violation to the operator." 30 U.S.C. $ 814(b) (1976). Asarco contends that by changing section 104 to require the inspector to issue a citation upon belief that the operator has violated the Act or a mandatory health or safety standard, Congress intended that operators and miners each be responsible for compliance and that an operator be cited only for its own violations. We do not find this argument persuasive.

Section 104(a) sets forth the duties of mine inspectors in enforcing the Act. It does not define the scope of the operator's liability. The liability of an operator is governed by section 110(a), 30 U.S.C. $ 820(a), which states: "The operator of a ... mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty...." (Emphasis added). The occurrence of the violation is the predicate for the operator's liability.

Further, section 110(a) of the Mine Act is comparable to section 109(a)(1) of the Coal Act, 30 U.S.C. $ 119(a)(1) (1976). ("The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act ... shall be assessed a civil penalty....") The legislative history of the Coal Act indicates that section 109(a)(1) imposed on the operator liability without fault for

violations of the standards or the statute. In relevant part, the legislative history states:

> The Senate bill provided that, in determining the amount of the civil penalty only, the Secretary should consider, among other things, whether the operator was at fault. The House amendment did

> not contain this provision. Since the conference agreement provides liability for violation of the standards against the operator without regard to fault, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test, in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine.

Conf. Rep. No. 761, 91st Cong., 1st Sess. 81 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 1515 (1975). See also Sewell Coal Co., 686 F.2d 1066, 1071 (4th Cir. 1982); Ace Drilling Coal Co., Inc., 2 FMSHRC at 791; United States Steel Corp., 1 FMSHRC 1306, 1307 (September 1979); Peabody Coal Co., l FMSHRC 1494, 1495 (October 1979); Valley Camp Coal Co., 1 IBMA 196, 200-01 (1972). Neither the Mine Act nor its legislative history reveals any indication that Congress sought to disturb the scheme of operator liability without fault as it existed under the Coal Act. S. Rep. 181, 95th Cong. 1st Sess. at 18 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 606 (1978). This Commission and several courts of appeal have interpreted the Mine Act as being consistent with the Coal Act on this issue of operator liability without fault. See Sewell Coal Co., 686 F.2d at 1071; Allied Products Co., 666 F.2d at 893; A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1977); Southern Ohio Coal Co , 4 FMSHRC at 1462; American Materials Corp., 4 FMSHRC at 419 n. 8; Kerr-McGee Corp., 3 FMSHRC at 2499; El Paso Rock Quarries, Inc., 3 FMSHRC at 38-39. We find no basis for distinguishing the present case. As the court in Allied Products stated: "If the Act or its regulations are violated, it is irrelevant whose act precipitated the violation ...; the operator is liable." 666 F.2d at 894.

As the judge recognized, the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty. Sewell Coal Co., 686 F.2d at 1071; Southern Ohio Coal Co., 4 FMSHRC at 1464; Kerr-McGee Corp., 3 FMSHRC at 2499; El Paso Rock Quarries, 3 FMSHRC at 38-39. Here, when fixing the penalty the judge gave appropriate weight to Asarco's lack of fault in considering the negligence criterion. 4/

4/ Asarco also argues that imputing the negligence of Lysne to it

for purposes of liability violates the equal protection clause of the Fifth Amendment to the United States Constitution. Asarco raises this argument for the first time in its brief on review. Commission Procedural Rule 70(f) states: "If a petition is granted, review shall be limited to the questions raised by the petition." 29 C.F.R. $ 2700.70(f). See also section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. $ 823(d)(2)(A)(iii). Because the constitutional question was raised improperly, we decline to address it.

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Accordingly, the decision of the administrative law judge is affirmed.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford dissenting:

Since the primary purpose of the Mine Act is to prevent fatalities, disabling injuries, and other injuries and illnesses among the Nation's miners, 1/ it is appropriate to weigh the disposition of every contested citation in light of this fundamental public policy.

From its inception the Commission has properly focused upon this statutory policy. Here, this policy is better served by a broader consideration of operator safety practices which effectuate this policy than by the majority's reliance on the statutory language of section 110(a) of the 1977 Mine Act and a single legislative reference to the 1969 Coal Act as precluding such consideration. Therefore, I would respectfully suggest that perhaps the Act and case law may not be as constrained as found by the majority with regard to Asarco's defense of "unforeseeable and idiosyncratic employee misconduct."

The defense raised by Asarco has been uniformly recognized as legitimate by OSHRC 2/ and by OSHA appeals bodies under state plans 3/ and has been variously described as "unforeseen employee misconduct,

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1/ Section 2(c) entitled "Findings and Purpose" provides:

> There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

2/ Standard Glass Co., 1 OSHC 1045 (1972); Jensen Constr. Co., 7 OSHC 1477 (1979). The OSHA Act of 1970, 29 U.S.C. section 651 et seq., does not expressly authorize the unforeseeable employee misconduct defense. The federal circuit courts have, however, uniformly adopted the defense on sound policy and legal grounds. As the Ninth Circuit observed in Brennan v. OSHRC, 511 F.2d 1139, 1145 (1975):

> Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine, for the totally independent act of another.

Accord: Penn Power & Light Co. v. OSHRC 737 F.2d 350 (3d Cir. 1984); Daniel Int'l Corp. v. OSHRC 683 F.2d 361 (11th Cir. 1982); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). Cf.

United States v. Park. -21 U.S. 658 (1975)(analogous defense to criminal indictment implied under Federal Food, Drug and Cosmetic Act).

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3/ E.g., Davey Tree Surgery Co. v. Occupat. S&H App. Bd., 167 Cal. App. 3d 1232, 213 Cal. Rptr. 806 (1985).

"employee independent act," "employee negligence," and the like. 4/ In finding for or against the employer when such defense is raised, the administrative law judges and appeals bodies have held the employer's evidence to a strict test. This test concentrates on the adequacy of the employer's general safety training program, the adequacy of the subject employee's specific job assignment safety training, the adequacy of the level of supervisory control, the employer's system of discipline and sanctions imposed on employees who contravene the employer's safety rules, the consistency in applying those sanctions, and the employee's knowledge that he or she has deliberately and knowingly contravened the employer's safety requirements. 5/ Where the employee has been

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4/ The Fifth Circuit's conclusionary rejection of this operator defense in Allied Products v. FMSHRC, 666 F.2d 890 (1982) fails to adequately consider the identity of enforcement and policy similarities between OSHA and the Mine Act. Both statutes require literal employer compliance with mandatory safety and health standards. Both statutes place primary emphasis upon pre-inspection compliance rather than upon post-accident sanctions as the means of achieving hazard free working conditions. Significant!y, both statutes impose compliance responsibilities upon employees. Compare section 5(b) of OSHA with section 2(e) of the Mine Act. In light of these parallelisms, no persuasive legal or policy reason exists for denying mine operators the same defense uniformly recognized under OSHA which regulates excavation and flammable liquid processing work sites as hazardous as some mining activities, particularly, where adoption serves to promote the Mine Act's identical emphasis upon safe work practices by miners as the touchstone for reducing the risk of mine accidents. See S. Rep. No. 181 95th Cong. 1st Sess. at 18 (1977) ("It is the intention of the Committee that [the miner's duty to comply with the Act] will foster the necessary cooperation between miner and operators ... if the nation's mines are to be made truly safe").

5/ Here, Asarco has more than met any burden of showing the adequacy of its safety program. The majority agrees that Asarco's written safety rules, safety procedures with specific emphasis upon ground control, and the training and supervision of its miners were "adequate under all the circumstances." 7 FMSHRC at 1726. The administrative law judge specifically rejected the Secretary's "suggestion that the accident resulted from a supervisory failure." 7 FMSHRC at 1726. Indeed, the administrative law judge found that supervisory dereliction on this record would require a mine operator to provide one to one supervision of all miners at all times.

"Nowhere does the Act or the standard in question suggest such a draconian requirement." 7 FMSHRC at 1726. Asarco comprehensively distributed its safety rules to all miners, including Lysne, who signed them acknowledging receipt, and these rules were reviewed in monthly safety meetings attended by all miners and supervisors including Lysne who began working for Asarco in 1972. Moreover, the administrative law judge also found and the majority agrees that Asarco "was not negligent" and that "Lysne's decision to begin drilling on an obviously unstable face must be regarded as unforeseeable and idiosyncratic." 7 FMSHRC at 1726. Neither acts of omission or commission by Asarco contributed in any way to Lysne's accident.

incapacitated by the alleged misconduct, the cases have also turned on other evidence to satisfy this element.

Since the advent of the "unforeseeable employee misconduct defense" there has been a salutary impact on the degree of excellence of employer s safety training programs within the jurisdiction of OSHA. As a result, safety and health compliance in the workplace has benefitted directly by entertaining this defense. An additional benefit has occurred - that is, the credibility factor throughout the employer community with concomitant heightened respect for the law which directly fosters voluntary pre-inspection compliance focused upon the detection and elimination of preventable hazards. 6/ This is because the employer knows that due consideration will be given to his defense under circumstances where he has done everything reasonably possible to insure a safe workplace, yet the act of an employee subjected him to a citation and that act could not be anticipated.

To conclude, as does the majority, that the 1977 Mine Act and emerging case law preclude the raising of Asarco's defense would seem to detract from the fundamental purpose of the Act as noted above. Such preclusion miscasts the Act in a punitive rather than in its intended preventive role. Certainly, it is incumbent upon all operators to comply fully with the training requirements of the Act and MSHA training regulations. But when the operator knows that its training and safety program will come under the strict microscope of administrative and judicial forums if an "employee negligence" defense to an alleged violation is to be entertained, pure logic and history under OSHA, dictates that the operator's safety training program and its worksite application will be vigorously honed to pass muster, thereby directly benefitting the overall safety and health of all miners. It would indeed be a surprise if, notwithstanding these benefits, Congress still intended to find the conscientious operator guilty of any infraction on the mine property entirely outside that operator's control. 7/

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6/ Anderson, Buchholz, and Allan, "Regulation of Worker Safety Through Standard- Setting: Effectiveness Insights, and Alternatives," 37 Lab. L.J. 731 (1986) (creation of self-enforcement incentives better advance work place safety than detailed safety standards).

7/ No provision of the 1977 Act expressly precludes application of the unforeseeable employee conduct defense which had been adopted by the federal courts under OSHA prior to passage of the Mine Act. Here, the plain language of the Mine Act does not bar adoption of the defense. To be sure Congress in section 110(a) eliminated

administrative discretion in assessing civil penalties for operator violations. But this is not equivalent to legislating that unforeseeable employee conduct can never be a factor in the violation determination.

The Commission decisions cited by the majority purporting to foreclose the unforeseeable employee misconduct defense on the basis of per se operator liability all involved degrees of operator negligence or

(footnote 7 continued)

With this observation in mind, buttressed by the 1977 legislative changes to the 1969 Coal Act in sections 2(e) and (g) emphasizing the "primary", in place of the "sole", responsibility of the operator to prevent unsafe and unhealthy conditions "with the assistance of the miners ...", coupled with the change in section 104(a) mandating a citation upon the inspector's "belief" rather than a "finding" that the operator has violated the Act or regulations adopted pursuant to the Act, I respectfully feel the statutory latitude exists to entertain and sustain the "unforeseeable employee misconduct" defense advanced by Asarco in this case. On the record here, which exhibits not a trace of negligence by Asarco, as found by the majority, I would find no violation of 30 C.F.R. $ 57.3-22, and absent a violation within the scope of section 104(a), section 110(a) imposing mandatory civil penalties cannot be reached and therefore no civil penalty can be assessed.

This analysis is consistent with the statutory framework of the 1977 Mine Act. Under sections 104(a) and 105(a), no citation is issued or civil penalty proposed unless the Secretary "believes" a violation has occurred. In making this determination the "belief" standard of section 104(a) contains well within its parameters latitude for reasonable belief and thus for consideration of the "unforeseeable employee misconduct defense." As in any contested case, the Secretary's belief of a violation is not always upheld. And in such cases, the mandatory penalty provision of section 110(a) is inapplicable because no violation has been found. Thus, it follows that the procedural priority accorded sections 104(a) and 105(a) over section 110(a) precludes reliance upon section 110(a) as per se foreclosing a defense raised in response to the Secretary's initial belief that a violation exists, particularly where, as here, such defense is not ruled out by specific statutory language.

In the mining industry there are varying degrees of excellence in mine safety and health training. There are operators who have successfully avoided any disabling miner injuries over literally millions of man hours worked. Yet, when an operator showing far less attention to health and safety matters suffers a tragic accident, the whole industry suffers. Similarly, the United Mine Workers of America, the Steelworkers, and other labor organizations, including independent company unions and employee groups who have earned respect for their excellent safety and health training and miner compliance programs, all strive to ensure that their coworkers do not, through any aberrant act, reflect adversely on these continuing efforts to maintain a safe and healthy workplace.

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Footnote 7 end.

acts of omission within the operators control either creating or perpetuating the hazard subject to the citation. In each of these cases that defense, even if entertained, could not be sustained because the operator failed to meet the strict requirement of an adequate safety program. Compare H.B. Zachry Co. v. OSHRC, 638 F.2d 812 (5th Cir. 1981)(defense fails because employee skipped scheduled safety meetings and was given inadequate work supervision).

Permitting the defense of "unforeseeable employee misconduct," measured against the stringent standards required herein, will advance significantly the cause of health and safety in the Nation's mines, and will complement and encourage the legitimate extra efforts of the majority of operators and employee organizations to work towards a hazard free mine environment to the greatest extent possible. In contrast, the lack of recognition of these cooperative efforts integral to the defense put forward here will act to preclude the realization of the additional benefits to mine health and safety noted herein. I would allow and sustain Asarco's defense and, therefore, dismiss the citation. 8/

Ford B. Ford, Chairman

8/ Accordingly, I find it unnecessary to reach Asarco's claim of denial of constitutional equal protection.

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Distribution

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