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WESTERN FUELS-UTAH, INC.

v. Docket No. WEST 86-108-R

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

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MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 86-245

WESTERN FUELS-UTAH, INC.

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

DECISION

BY: Backley, Doyle and Lastowka, Commissioners

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act" or "Act"), Commission Administrative Law Judge Roy J. Maurer concluded that a violation of 30 C.F.R. $ 75.200 occurred when a miner employed by Western Fuels-Utah, Inc. ("Western Fuels"), proceeded under unsupported roof at a Western Fuels mine despite his supervisor's order not to do so. 9 FMSHRC 320 (February 1987) (ALJ). Western Fuels petitioned the Commission for review, contending that the judge's decision improperly subjected it to liability for an employee's violative conduct under circumstances in which it should not be held responsible. We adhere to the well-established principle that the Mine Act imposes liability upon operators, without regard to considerations of fault, for violations of the Act committed by their

employees. Accordingly, we affirm.

The facts are undisputed. On February 28, 1986, at 10:50 a.m., a fatal accident occurred at Western Fuels' Deserado underground coal mine in Colorado when an unsupported portion of the mine roof fell on Austin

Mullens, a roof bolting machine operator. On the day of the accident, Mullens was working with section foreman Carson Julius in the mine's East Mains installing roof bolts. (Around 10:25 a.m., the foreman had temporarily relieved Mullens' regular partner, who went to lunch.)

Mullens and Julius were using a double-boom, two-person Norse roof bolting machine equipped with an automatic temporary roof support device ("ATRS"). In performing the bolting operation, the miners would place a metal roof mat or "pan" over the ATRS, tram the roof bolter towards the face, raise the ATRS against the roof, drill roof holes for the roof bolts, and install a row of bolts in the roof through the roof mat. Mullens was operating the left-hand boom of the machine installing bolts on the left side of the machine, and Julius was performing the same function with the right-hand boom on that side of the machine.

The two miners set one roof mat and moved the machine forward to install a second. Julius encountered difficulties in drilling the first bolt hole through the mat adjacent to the right rib. The water flow used to control drilling dust was cut off when the water line to Julius' drill became kinked, and his drill stopped. Mullens was able to install one bolt on the left side of the roof mat. To loosen the taut water line to Julius' drill, the miners lowered the ATRS and backed up the roof bolter. When the ATRS was lowered, the right end of the roof mat, which Julius had not been able to bolt through, fell to the floor. Thus, the area of roof from which the mat fell was at that time unsupported.

After straightening out the water line, the miners moved the bolting machine forward again. While standing under supported roof, Julius attempted to lift the fallen mat with a four.foot rod so that Mullens could advance the bolting machine and raise the ATRS under the mat. Julius was unsuccessful and decided to get a longer rod from the storage area in the middle of the roof bolting machine. Just before turning away, he warned Mullens not to go under the unsupported roof.

As soon as Julius began walking away, however, Mullens went under the unsupported roof about seven feet from the last permanent support and attempted to lift the mat manually. Julius, who was near the middle of the roof bolter at that point, turned and twice shouted at Mullens to get back. Mullens did not respond and moments later a large piece of roof fell, killing him.

An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") subsequently issued Western Fuels a citation

pursuant to section 104(a) of the Mine Act, 30 U.S.C. $ 814(a), charging the operator with a significant and substantial violation of 30 C.F.R. $ 75.200 in that Mullens had proceeded under unsupported roof for reasons other than installation of temporary support. 1/

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1/ Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. $ 862(a), provides in relevant part:

> No person shall proceed beyond the last permanent

The hearing in this proceeding was conducted before former Commission Administrative Law Judge John A. Carlson. Western Fuels contended below that any violation of section 75.200 was wholly due to the negligence of Mullens, a rank-and-file miner, and that his negligent conduct should not subject it to derivative liability for a violation. Following Judge Carlson's death, Judge Maurer was substituted and, without objection, rendered his decision upon the existing record.

In his decision, the judge concluded that Mullens had violated section 75.200 by proceeding under the unsupported roof. 9 FMSHRC at 322. The judge rejected Western Fuels' challenge to the doctrine of liability without fault under the Mine Act. He stated:

> The Commission has consistently and frequently held that an operator is liable, without regard to fault, for violations of the Act or its regulations committed by its employees. An operator's negligence has no bearing on the issue of whether a violation occurred. Rather, it is a factor to be considered in assessing a civil penalty.

Id. Among other authorities, the judge cited the Commission's decision in Asarco, Inc.- Northwestern Mining Dept., 8 FMSHRC 1632 (November 1986), pet. for review filed, No. 86-2765 (lOth Cir. December 3, 1986), in which the Commission reaffirmed the Mine Act principle of liability without fault. The judge thus held that Western Fuels was liable for the violation of section 75.200, and also affirmed MSHA's significant and substantial finding. In considering the statutory civil penalty criteria (30 U.S.C. $ 820(i)), the judge found no negligence on the part of the operator and assessed a civil penalty of $250. 9 FMSHRC at 323-24. With respect to his finding of no negligence, the judge determined that Mullens had walked out under unsupported roof "contrary to the direct orders of his supervisor" (9 FMSHRC at 323), Mullens' violation was not reasonably foreseeable, proper supervision of the employee was present, and "the operator's training program and its history of disciplining its employees for violations of the mandatory safety standard at issue ... [were] adequate." 9 FMSHRC at 324.

There is no dispute in this case that Mullens' actions in proceeding under unsupported roof violated section 75.200. On review, Western Fuels challenges only the judge's application of the doctrine of liability without fault to impose upon it liability for Mullens'

violative conduct. Western Fuels advances two interrelated arguments in

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> support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miner.

Western Fuels' approved roof control plan does not permit persons to proceed beyond the last row of permanent support before temporary support is installed unless they are engaged in installing temporary support. Exh. C-1, p. 9 (Item 2.c.).

support of its position: (1) When read together, sections 104 and 110 of the Mine Act do not permit liability to be placed on an operator unless the operator itself or one of its supervisory agents is actually responsible for a violation; and (2) the Act contemplates only "a kind of strict liability" (W.F. Br. 23), limited to situations in which a violation is attributable to the operator or supervisory agent or, if resulting from the conduct of a rank-and file employee, also stems in part from the operator's own negligence or fault. Alternatively, Western Fuels asserts that notwithstanding the doctrine of liability without fault, the Commission should recognize an exception in the form of an affirmative defense of unforeseeable employee misconduct. In our opinion, none of Western Fuels' arguments can be reconciled with the basic principles of liability without fault.

We addressed in detail the subject of liability without fault in our Asarco decision. As we noted in Asarco:

> 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, 2499 (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).

8 FMSHRC at 1634-35. Accord Miller Mining Co. v. FMSHRC, 713 F.2d 487, 491 (9th Cir. 1983). The Mine Act retains the liability without fault structure of its predecessor, the Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976) (amended 1977)("Coal Act"), and the pertinent Mine Act legislative history shows this retention to have been a deliberate action by Congress. See Asarco, 8 FMSHRC at 1635-36, and authorities cited. As we held in Asarco, rather than being "a determinant of liability," the operator's fault or lack thereof "is a factor to be considered in assessing a civil penalty." 8 FMSHRC at 1636, and authorities cited. 2/

2/ As recently stated by the United States Court of Appeals for the

District of Columbia Circuit:

> The Act does permit consideration of fault in one context: section 110(i), 30 U.S.C. $ 820(i), directs the Commission (and implicitly the Secretary), in setting the level of civil penalties for violations of the Act, to consider inter alia, "whether the operator was negligent. The presence of this consideration here only serves to underscore its

Citing section 104(a) of the Mine Act, Western Fuels first argues that an operator may 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...." 30 U.S.C. $ 814(a) (emphasis added). Western Fuels contends that operators and miners are each separately responsible for complying with the Act and that, pursuant to the asserted directive of section 104(a), an operator may be cited only for its own violations. We rejected the identical argument in Asarco. 8 FMSHRC at 1635. While we agree with Western Fuels that section 104(a) and section 110(a), 30 U.S.C. $ 820(a), must be read together, what emerges from such construction, as we held in Asarco, is the liability without fault framework of the Act:

> 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.

Id. Accord Miller Mining, supra, 713 F.2d at 491; Sewell Coal, supra, 686 F.2d at 1071; Allied Products, supra, 666 F.2d at 893. We also demonstrated in Asarco that the legislative history of section 110(a) and its predecessor, section 109(a)(1) of the Coal Act, 30 U.S.C. $ 119(a)(1) (1976)(amended 1977), reflects a clear congressional intent to establish liability without fault in both Acts. 8 FMSHRC at 1635-36.

Western Fuels next asserts that in the previous liability without fault decisions of the Commission and courts, operator fault was always present to some degree. Western Fuels argues that the existing case law is thus consistent with a rule that strict liability does not obtain in circumstances where, as here, operator fault is absent. We disagree. The general doctrine of liability without fault recognized in the referenced decisions has been drawn with sufficient breadth that, by its very terms, it applies to situations in which operators are blameless. The decisions further recognize that the blamelessness of operators in connection with a violation is considered in evaluating operator negligence in terms of the appropriate civil penalty assessment. 30 U.S.C. $ 820(i): see also n. 2 supra. For example, in Asarco, the operator was found liable for a violation even though the violation was

attributable to an employee's "unforeseeable and idiosyncratic" conduct and the operator itself was not negligent in connection with the violation. 8 FMSHRC at 1634, 1636. Similarly, in Southern Ohio Coal, supra, it was stressed that an operator is liable for violations attributable to even the "idiosyncratic and unpredictable" acts of its

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absence in the other provisions of the Act.

Int'l U., UMWA v. FMSHRC and Island Creek Coal Co., No. 87.1136, slip op. at 13 n. 13 (February 23, 1988).

rank-and-file employees (4 FMSHRC at 1462), that such rank-and-file employee negligence is not imputable to the operator for penalty assessment purposes (4 FMSHRC at 1463-64), and that the operator's negligence or lack thereof in such instances must be determined by an examination of the operator's own conduct (4 FMSHRC at 1464-65). The holdings of these decisions and the courts of appeals' decisions cited above cover the full range of liability/negligence circumstances, including those in which the operator is liable for an employee's violation but is without negligence in the context of civil penalty assessment. Accord A.H. Smith Stone Co., 5 FMSHRC 13, 15-16 (January 1983).

Alternatively, Western Fuels asks us to approve an unforeseeable employee misconduct exception to the principle of liability without fault. Such an exception, however, would vitiate the underlying principle. Simply stated, the principle of liability without fault requires a finding of liability even in instances where the violation resulted from unpreventable employee misconduct. As noted, Asarco presented precisely such a situation: the operator, although itself blameless, was held liable for a violation resulting from its employee's unforeseeable and disobedient conduct in failing to comply with supervisory directions to bar down loose ground. 8 FMSHRC at 1631-34, 1636.

Western Fuels' position in this regard is based upon a defense to liability recognized under the Occupational Safety and Health Act of 1970, 29 U.S.C. $ 651 et seq. (1982)("OSHAct"). See, e.g., Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d. 564, 567-71 (5th Cir. 1976). Courts have held that the OSHAct "neither authorizes nor intends" a strict liability standard (Horne, supra, 528 F.2d at 568), and both this Commission and the courts have previously emphasized that liability doctrines drawn from that statute may have no relevance under the Mine Act's scheme of liability without fault. North American Coal Co., 3 FMSHRC 848, 850 n.5 (April 1981) (addressing predecessor scheme of liability without fault under Coal Act); Allied Products, 666 F.2d at 894.

In enacting the Mine Act, Congress formulated a national policy that mine operators were in the best position to further health and safety in the mining industry and that liability without fault would promote the highest degree of operator care. As a key Senate report stated:

> Thus, while miners are required to comply with standards insofar as they are applicable to

their own actions and conduct, ... neither the bill, nor current law contemplates that citations and penalties be issued against miners. Operators have the final responsibilities for affording safe and healthful workplaces for miners. and therefore, have the responsibility for developing and enforcing through appropriate disciplinary measures, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

S. Rep. No. 181,95th Cong., 1st. Sess. 18 (1977), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 606 (1978) (emphasis added). Any appeal to change the Mine Act's principle of liability without fault must be directed not to the Commission but to Congress. Cf. Council of So. Mtns. v. Martin Co. Coal Co., 6 FMSHRC 206, 209 (February 1984), aff'd sub nom. Council of So. Mtns. v. FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985).

For the foregoing reasons, there is no basis for distinguishing this case from prior decisions posing the same issue. The judge properly found from the uncontroverted evidence that a violation of section 75.200 was committed by a Western Fuels employee, and correctly held that Western Fuels was liable for the violation. In considering negligence for civil penalty purposes, the judge appropriately examined Western Fuels' actions in determining that the operator itself was not negligent in connection with the violation. See Asarco, supra. Thus, the judge's decision is consistent with controlling legal principles and is supported by substantial evidence. Accordingly, the judge's decision is affirmed.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

Chairman Ford, dissenting:

One would search in vain for a more compelling set of facts than those presented here against which to re-examine the issue of strict operator liability for all violations under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (the Mine Act). Yet the majority, in affirming the judge's decision, continues to hold an absolutist view on the matter in accordance with Secretary of Labor v. ASARCO, 8 FMSHRC 1632 (November 1986).1/ Here, as in ASARCO. I continue to hold the view that the Mine Act does not preclude an otherwise blameless mine operator from raising a miner's unforeseeable and idiosyncratic misconduct as an affirmative defense when contesting the Secretary's enforcement actions. Accordingly, I respectfully dissent.

My opinion in ASARCO can be briefly summarized as follows:

(1) The Mine Act within its four corners need not be read to impose strict liability on mine operators;

(2) The Mine Act can accommodate a strictly circumscribed affirmative defense based upon unforeseen, idiosyncratic misconduct by a non-managerial employee;

(3) Courts have recognized such an affirmative defense under the analogous Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq.;

(4) Recognition of such a defense best advances the fundamental purposes of the Mine Act.

The rationales underlying these four propositions should not have to be fully rehearsed here. However, given the factual circumstances of this case, the persuasiveness of the legal and policy arguments advanced by the Petitioner, and the majority's continuing reluctance to address the adverse policy implications of its decisions both here and in ASARCO some expansion of the points in my ASARCO dissent is warranted.

I. The Strict Liability Doctrine

Section 110(a) continues to be a thin reed on which to rest the liability without fault theory. If the Mine Act is to have any organic logic, section 110(a) must be woven into the context provided by sections 104 and 105. The sense and purpose of

section 110(a) is to establish mandatory rather than discretionary civil penalties for violations of the Mine Act or the mandatory standards promulgated thereto. Section 110(a) is not reached, however, until the prerequisites of sections 104 (citing of the operator) and 105 (proving a violation) have been satisfied. Specifically, the entire enforcement scheme does not engage until the following initial condition is met:

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1/ It is encouraging that my colleague in dissent has departed from the ASARCO majority to the extent of his narrowly drawn exception to the strict liability doctrine. The factual circumstances of this case, in my view, compel no other result.

> If upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine ... has violated this Act, or any mandatory safety standard ... he shall ... issue a citation to the operator. 30 U.S.C. 814(a). [Emphasis added.] 2/

In short, a violative act of commission or omission by the operator is necessary before the sanctions of section 110(a) come into play. To hold that strict liability reposes in section 110(a) so that any and all violations can be charged against the operator would render section 104(a) a superfluous nullity. This, despite the fundamental principle that statutes must be read to give effect to every clause. United States v. Menasche, 348 U.S. 528, 538, 99 L.Ed. 615, 624 (1955).

The traditional and immutable position with respect to strict operator liability has been strongly influenced by a single reference in the legislative history of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970). Indeed the lone reference in question has assumed an almost talismanic power. It reads:

> Since the conference agreement provides 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. 3/

2/ The case most often relied upon for the proposition that the Mine Act is unconditionally a strict operator liability statute is Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir., Unit B 1982). With all due respect, however, I question the premise upon which the 5th Circuit's ultimate holding is based. Although section 104(a) requires that an MSHA inspector believe that "an operator ... has violated" the Act or the standards, the Court paraphrased the section as follows: "any failure to comply with the regulations shall result in issuance of a citation to the operator." Id. at 893. The Court's restatement of section 104(a) appears to be fundamentally at odds with the text itself, but the discrepancy nevertheless explains the Court's arrival at its oft-quoted conclusion: "There are no exceptions for fault, only harsher penalties for willful violations." Id.

3/ 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). (Leg. Hist., 1969 Act). The statement is often cited to the "Conference Report" on the 1969 Act, but it is actually from the "Statement of the Managers on the Part of the House." It is reliable only as an indicator of what the House conferees thought the Conference agreement to provide and thought the Senate conferees' positions to be on the final version of the legislation. There is, in fact, no written "conference agreement" to which the Commission and the courts can refer to divine Congressional intent and consensus.

A search of the legislative history of the 1969 Act, however, reveals no basis or antecedent for the above statement. The terms "strict liability" or "vicarious liability" or "liability without regard to fault" were simply not raised in the various committee reports or the extensive floor debates throughout the 94th Congress. Indeed, a review of the relevant history provides evidence of a contrary Congressional view.

For instance, the original vehicle for reform of the 1952 Federal Coal Mine Safety Act was S.2917, introduced on September 17, 1969, by Senator Williams of New Jersey. Leg. Hist., 1969 Act, p. 3. The bill provided discretionary civil penalties for violations of the Act or the mandatory standards. Id., p. 103. During floor debate on the bill Senator Metcalf successfully introduced an amendment to make civil penalties mandatory. Id., p. 677. Later in the floor debate Senator Byrd of West Virginia offered a further amendment to the civil penalty section that, in effect, added as a criterion for assessing civil penalties "whether the operator was at fault." The colloquy surrounding the adoption of the Byrd amendment, however, indicates that Senators Byrd and Metcalf acknowledged circumstances when operators should not be held liable for the independent. acts of rank-and-file miners:

> Mr. Byrd of West Virginia: Mr. President, under section 308 [ultimately section 109 of the 1969 Act], an operator of a coal mine shall be penalized for violations occurring of a mandatory health and safety standard.
>
> I am not opposed to penalties being assessed against operators where the operators are clearly at fault. The language in my amendment would merely require that, before a penalty could be applied, there be a finding that the operator was indeed at fault.
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> Senator Williams of New Jersey: Mr. President, we have thoroughly discussed this amendment with the Senator from West Virginia. It would require the Secretary to consider the fault of the operator, or his lack of fault, in determining the amount of the penalty. It is acceptable to us ....
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> Senator Metcalf: Mr. President, I was the author of an amendment that required a mandatory penalty and, of course, I do not want a mandatory penalty to be placed

> upon a coal operator who is penalized for the inadvertent act of a coal employee. I want only a penalty for the coal operator who is responsible for his own actions. Many times it is the inadvertence of an employee which is responsible for a violation, and I feel that the Senator from West Virginia has made a contribution. Id., pp. 728-729. 4/

4/ Senator Williams' statement, while supporting the majority's view that lack of operator fault can only mitigate the size of the civil penalty, mischaracterizes Senator Byrd's intent. Indeed, in the context of the Byrd/Metcalf exchange it is a non sequitur.

Only after passage of S. 2917 (October 2, 1969) was a companion bill, H.R. 13950, reported to the floor of the House (October 13, 1969). H.R. 13950 required mandatory civil penalties but did not contain Senator Byrd's language ("whether the operator was at fault") as adopted by the Senate. Thereafter, the legislative history is silent on the fault issue until the "Statement of the House Managers" quoted above. 5/

In sum neither the Mine Act, its predecessor statute, nor the legislative history conclusively establishes strict operator liability without regard to fault. To the extent that Commission and court precedents hold otherwise, I respectfully contend they are mistaken. Furthermore, with the exception of ASARCO, those precedents involved issues that need not have been resolved by resort to a theory of strict liability.

A careful review of the factual circumstances of prior cases reveals that the operator was liable for other related violations 6/; the violative conduct was committed by a managerial employee whose actions as an agent were directly attributable to the operator 7/; or clear evidence existed that the operator knew of the non-managerial employee's violation but acquiesced in it. 8/ In short, liability in these "strict liability" cases could have been found on the basis of demonstrable operator fault.

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5/ It should be noted, however, that on other occasions throughout the legislative history civil penalties are discussed in terms of being assessed against "violators" or "operators found in violation" rather than against operators within whose mines violations occur. See e.g., Leg Hist 1969 Act at 1108, 1110, and 1594.

6/ Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir., Unit B 1982) (faulty hydraulic system, lack of roll-over protection and inadequate berm were the fault of the operator and contributed to the accident involving an employee who disregarded orders not to use the equipment at issue); American Materials Corp., 4 FMSHRC 415 (March 1981)(duty to post or barricade areas over which high voltage lines pass is exclusively the operator's); Kerr-McGee Corp., 3 FMSHRC 2496 (November 1981)(failure of operator to distinguish between safety lines and other materials handling cables contributed to employee's unsafe use of inappropriate equipment).

7/ Sewell Coal Co. v. FMSHRC 686 F.2d 1066 (4th Cir. 1982)(all employees involved in the violations were management personnel); Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982)(foreman failed

to supervise and monitor complicated pillar recovery procedure); Ace Drilling Coal Co., Inc., 2 FMSHRC 790 (April 1980) aff'd without opinion, 642 F.2d 440 (3rd Cir. 1981)(foreman's negligent and violative acts are attributable to the mine operator even if the foreman's conduct is arguably unforeseeable).

8/ El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981)(not strictly an employee misconduct case; nevertheless, operator liable for violations caused by customer's truck drivers since operator allowed trucks without back-up alarms on the property).

Missing from the usual recital of precedents is a Commission case that indicates a chink in the strict liability wall. In Secretary v. Southwestern Illinois Coal Corp., 5 FMSHRC 1672 (October 1983), the Commission held that the precise wording of a safety standard may preclude operator liability if failure to comply is attributed to an employee's "disobedience or negligence" Id. p. 1675. The standard in question provided inter alia that "Each employee ... shall be required to wear ... safety belts and lines where there is danger of falling." 30 C.F.R. 77.1710(g). The inspector cited the operator when he found an employee not wearing a safety belt and line even though the inspector believed there was a falling hazard. Determining that "shall be required to wear" did not mean that safety equipment "shall be worn" a majority of the Commission went on to hold that an operator could escape liability so long as he demonstrated that he had required the equipment to be worn through "sufficiently specific and diligent enforcement." Id. at p. 1676.

Two dissenting members took the majority to task for what the dissenters considered a Commission-created exception to the liability without fault doctrine, particularly since the Secretary had argued for application of the doctrine to his own regulation. Id. pp. 1679-1684. The Southwestern Illinois decision is obviously sound but nevertheless inconsistent with the majority holding here. If, indeed, Congress established an absolute doctrine of strict operator liability then the doctrine applies equally to the Secretary as rulemaker and the Commission as adjudicator. If the Commission is constrained here from carving out an affirmative defense based on employee disobedience, then the Secretary is constrained from promulgating, and the Commission from interpreting standards so as to accomplish the same thing, to wit: 30 C.F.R. 77.1710(g).

II. Affirmative Defense Based on Employee Misconduct

As determined above, in spite of conventional but unexamined "wisdom", the Mine Act can accommodate an operator's affirmative defense against a citation based upon unforeseen or idiosyncratic misconduct on the part of a miner. To assure that such a defense is not seized upon by the operator as a means of shirking his responsibilities under the Act, there must be strictly circumscribed criteria by which the defense is to be judged:

> the adequacy of the operator's general safety training program;

the adequacy of the miner's specific job assignment safety training;

the adequacy of the level of supervisory control;

the operator's system of discipline and sanctions imposed on miners who contravene the operator's safety rules;

the consistency in applying those sanctions; and,

where determinable, the miner's knowledge that he or she has deliberately and knowingly contravened the operator's safety requirements.

Obviously, operator culpability either with respect to related violations or acquiescence in the miner's violative conduct would preclude raising the defense. Furthermore, since the Commission has consistently and correctly attributed the negligent or violative conduct of managerial employees to the operator, the affirmative defense would only be appropriate in cases involving non-managerial employees. See Secretary v. Wilmot Mining Co., 9 FMSHRC 684 (April 1987).

Given these strictures, I do not see the establishment of the affirmative defense as opening the floodgates to spurious claims by mine operators that the violations charged were caused solely by unforeseeable employee misconduct. Secretary's brief p. 24. 9/ I do, however, see a means by which an otherwise blameless operator with a comprehensive safety and training program can defend against unwarranted enforcement actions such as have been taken in this case.

Lastly, as to whether this Commission can judicially fashion an affirmative defense not specifically provided for in the Mine Act, there is persuasive precedent. In a firm line of cases beginning with Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980) rev,d on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981) and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981), the Commission has held that an operator can affirmatively defend against a prima facia case of discrimination under section 105(c) of the Mine Act, 30 U.S.C. 115(c), by proving by a preponderance of the evidence that although the adverse action complained of was motivated in part by the miner's statutorily protected safety activities, the operator was also motivated by unprotected activities and that the adverse action would have been taken in any event for the unprotected activity alone. 2 FMSHRC 2799-2800. This Commission-fashioned defense is not derived from section 105(c) nor from the legislative history of that section, but it is a thoroughly sound means of evaluating discrimination complaints in an equitable manner consistent with the Mine Act's purposes. Likewise, here, equally sound policy reasons exist for fashioning an affirmative defense to citations based on unforeseeable misconduct by miners, provided, of course, that the defense is subjected to the strict scrutiny outlined above. 10/

III. Unforeseeable Employee Misconduct: The OSHA Model

Established policy under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq (1985 and Supp. 1987)(OSHAct) provides the most persuasive analogous context within which

unforeseeable employee misconduct is recognized as an affirmative defense to Secretarial enforcement actions. Both the OSHA statute and the Mine Act require literal employer compliance

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9/ For instance, careful review of the precedents establishing the strict liability doctrine (discussed at p. 11, above) indicates that with the exception of ASARCO the affirmative defense of unforeseeable or idiosyncratic employee misconduct would not have been available.

10/ It is puzzling that both the majority and the Secretary appear to acknowledge the merit of the affirmative defense of employee misconduct

(Footnote continued)

with mandatory safety and health standards. 11/ Both statutes emphasize pre-inspection rather than post-accident compliance as the means for protecting workers from safety and health hazards. Most significantly, both statutes impose compliance responsibilities on employees/miners. Compare: 29 U.S.C. 654(b) and 30 U.S.C. 801(g). As the Secretary points out, miners are not subject to civil penalties under the Mine Act (except as provided in section 110(g)). Secretary's brief, p. 20. As the Secretary might also have indicated, employees are not subject to civil penalties under the OSHAct either.

Yet, even in the absence of an explicit statutory provision for the unforeseeable employee misconduct defense, the Occupational Safety and Health Review Commission and reviewing courts have uniformly adopted the

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Fn. 10/ continued

in circumstances such as those presented here while still rejecting it as unauthorized by the Mine Act. "[I]t would be error to create an unforeseeable employee misconduct defense under the Act even if that defense could have a 'salutary impact on the degree of excellence of employer's training programs.'" Secretary's brief in ASARCO v. Secretary pet. for review, No. 86-2765 (lOth Cir., December 3, 1986) at p. 23. Constrained by what it considers to be unequivocal precedents, the majority opines that Petitioner's sole recourse is to Congress. Majority slip opinion at p. 7. Under section 113 of the Mine Act, 30 U.S.C. 823, however, this independent Commission is authorized - indeed expressly encouraged - to decide "substantial" or "novel" questions of policy. The principal author of the Senate version of the Mine Act stressed this policy-making role during the confirmation hearings for initial members of the Commission: "It is our hope that ... the Commission ... will develop a uniform and comprehensive interpretation of the law [and] will provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law." Nomination Hearing, Members of the Federal Mine Safety and Health Review Com-mission, Before the Senate Committee on Human Resources, 95th Cong., 2d Sess., August 24, 1978, p. 1.

It seems obvious that, without doing violence to the Mine Act, the Commission in its policy-making role can and should decide between a policy of questionable merit (liability without regard to fault) and one of salutary impact (the affirmative defense based upon proof of a rigorous safety program).

11/ Indeed, the presence of the "general duty" clause in the OSHAct,

29 U.S.C. 654(a)(1), and the lack of same in the Mine Act suggests an even stricter standard of accountability for OSHA-governed employers. By its terms the clause places employers "under a duty to the greatest extent possible, to provide a workplace free of hazards" even where those hazards are not addressed by specific mandatory standards. Congress, however, explicitly declined to incorporate a general duty clause in the Mine Act. Senate Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1316-17 (1978).

defense on firm policy and legal grounds. The most forceful expression of the need for and appropriateness of the defense was stated in the Ninth Circuit's opinion in Brennan v. OSHRC, 511 F.2d 1139, 1145 (1985):

> 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. 12/

In contrast, the Secretary's reliance by analogy on federal food and drug legislation is misplaced. First of all, such statutes are aimed at protecting an unsuspecting public from tainted or injurious food and drug products, whereas the Mine Act is aimed at protecting miners who are presumed to have been trained to recognize and avoid hazards by reason of the mandatory training requirements of section 115, 30 U.S.C. 825. 13/

Secondly, the Secretary's citation to United States v. Park, 421 U.S. 658, 95 S.Ct. 1903 (1975) proves too much. The ultimate issue in Park was whether a corporate officer of an admittedly guilty corporation could be held criminally liable for violations of sanitation standards at a food warehouse. Park had argued that the trial court's jury instructions erroneously suggested that he could be found criminally liable strictly by reason of his status as corporate president and even though he did not personally participate in the violations. The Supreme Court upheld the instructions on the basis that Park bore a "responsible relationship" to or had a "responsible share" in the violations. Id. at 672. The Court was no doubt strongly influenced by evidence that Park had been previously advised by letter of similar violations at another warehouse in the same region. Id. at 661. In any event, the Court acknowledged that evidence of powerlessness to prevent or correct the violation could be raised defensively at trial. Id. at 673, citing United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 84 S.Ct. 559 (1964).

Here, the Secretary seeks to hold Western Fuels-Utah liable strictly by reason of its status as operator even though Western Fuels has amply demonstrated that it took affirmative measures to conform its conduct to the level expected by the Supreme Court in Park Furthermore, the record here clearly indicates that Petitioner was powerless to prevent the unforeseeable and aberrant conduct of the miner.

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

13/ It should be emphasized that while the Mine Act mandates comprehensive miner training by operators, the OSHAct does not require that comparable training programs be established by employers. Compare: 30 U.S.C. 825 and 29 U.S.C. 670. This distinction further underscores the appropriateness of the affirmative defense in the Mine Act context provided the operator can establish full compliance with section 115.

IV. Conclusion

Applying the above principles to the circumstances of this case, I would vacate the citation at issue. In arriving at his decision within the constraints of ASARCO the judge below made the following pertinent findings of fact:

> . Western Fuels-Utah had established an adequate safety training program supplemented by a disciplinary program for employee violations of mandatory standards.
>
> . Mullins, decedent, "violated" standard 75.200 by walking out under unsupported roof on his own and in disobedience of three direct orders from his foreman.
>
> . Mullins' conduct was "unforeseeable" and motivated by "some reason perhaps known only to himself."

The record further indicates that Mullins was an experienced miner, that he was familiar with the roof control plan and the prohibitions against going under unsupported roof, and that he participated in a safety meeting on roof hazards and control three hours before the fatal accident.

Measured against the criteria set forth above at p. 12, Western Fuels-Utah has convincingly established an affirmative defense of unforeseeable idiosyncratic misconduct on the part of the miner.

It remains to stress once again the fundamental policy imperative that justifies the adoption of the affirmative defense. In section 2 of the Act, Congress clearly acknowledged that health and safety in this nation's mines could only be achieved through rigorous attention to safety, health and training programs jointly supported and advanced by operators and miners:

> [T]he Committee recognizes that creation and maintenance of a safe and healthful working environment is not the task of the operator alone. If the purposes of this legislation are to be achieved, the effort must be a joint one, involving the miner and his representative as well as the operator.

Leg. Hist. 1977 Act at p. 606.

Recognizing that operators are ultimately responsible for

maintaining safe and healthful mine conditions, for establishing and enforcing safe mining practices, and for ensuring that miners are adequately trained to recognize and avoid mine hazards, the Mine Act and its purposes can still accommodate the narrowly drawn affirmative defense of unforeseeable employee misconduct. In fact, adoption of the defense by this Commission would provide operators with a powerful incentive to evaluate and improve overall safety programs and would hasten the day when the fundamental purposes of section 2 are fully realized.

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I would, therefore, reverse the judge's decision and vacate the citation.

Ford B. Ford, Chairman

Commissioner Nelson, dissenting:

While I agree that the Mine Act generally provides for liability without regard to fault, it is my view that this precept should not be stretched to cover the extraordinary facts of this case -- facts which clearly establish unpreventable employee misconduct. Accordingly, I take the position that my colleagues constituting the majority have erred in failing to recognize and accord proper weight to this narrow exception to the liability without regard to fault doctrine.

The majority opinion correctly acknowledges that in Asarco Incorporated - Northwest Mining Department, 8 FMSHRC 1632 (November 1986), this Commission reaffirmed that under the Mine Act a mine operator may be held liable for a violation even though the operator was not at fault. I joined the majority in the _Asarco opinion because I believed, and still do, that Congress enacted a liability without regard to fault scheme in the Mine Act as an incentive for mine operators to comply with the Act's safety and health requirements. My position in this case is consistent with my position in Asarco as it is only in the present case that the issue of unpreventable employee misconduct is addressed squarely by the Commission. In that regard, the majority misreads Asarco (to the extent it suggests that in Asarco the Commission rejected the unpreventable employee misconduct defense) in stating that there "the operator was found liable for a violation even though the violation was attributable to an employee's 'unforeseeable and idiosyncratic' conduct and the operator itself was not negligent in connection with the violation." Slip op. at 5. While the administrative law judge in Asarco found the miner's decision to begin drilling the unstable face to be unforeseeable and idiosyncratic, that finding was treated by the Commission as collateral background material. 8 FMSHRC at 1634. When the Commission got down to the business of deciding Asarco, our focus was upon the liability without regard to fault structure of the Mine Act and not upon whether there exists a narrow exception to that doctrine --i.e., the unpreventable employee misconduct defense. See 8 FMSHRC at 1634-36. In fact, other than one reference to the administrative law judge's use of "unforeseeable and idiosyncratic" conduct, that term is notably absent in our Asarco decision. The majority also cites Southern Ohio Coal Company, 4 FMSHRC at 1462, incorrectly for the proposition that the Commission "stressed" that an operator is liable for the "idiosyncratic and unpredictable" acts of its employees. Slip op. at 5-6. Although the Commission rejected the operator's argument in Southern Ohio that such employee conduct relieves it of liability for Mine Act violations, the Commission did

so noting only "It is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees." 4 FMSHRC at 1462. The unpreventable employee misconduct defense received no substantive treatment by the Commission in Southern Ohio and, to repeat, is faced squarely for the first time in this case.

Generally speaking, by making a mine operator responsible for a violation, regardless of fault, Congress sought to instill in the mine operators a keen awareness not only for identifying hazards already present in the mine, but also for anticipating hazards which might occur sometime in the future. Congress, however, did not place the burden for mine safety and health upon the operators alone. In section 2(e) of the Mine Act, Congress provided that "operators...with the assistance of miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in [the] mines." 30 U.S.C. Sec. 801(e) (emphasis added).

Nevertheless, despite this safety and health partnership between the miners and the operators, given the circumstances in Asarco we noted again that Congress chose to place the ultimate responsibility for a violation on the mine operator, even if that operator appeared to be free of negligence. This assignment of responsibility makes good sense because it is the operator who controls the daily activities at the mine and it is the operator who is in the best position to correct existing hazards and to prevent the occurrence of future hazards. It does not make good sense, however, and I believe it was not intended by Congress, to extend the liability without regard to fault doctrine to a situation where the mine operator operated its mine in the safe and responsible manner expected by Congress and where -- but for an unpreventable and intentional act by a disobedient employee -- there would have been no violation. Such an inflexible extension of the liability without regard to fault doctrine serves no useful safety and health purpose. It serves only to punish the safety and health conscious operator who, no matter how encompassing its precautionary efforts may have been, could not have prevented the violative event caused by an employee unforeseeable.

The facts of the present case illustrate this point well. Here, the administrative law judge found that "the evidence in this record is undisputed that the decedent, Mullens, walked out under the unsupported roof on this own, contrary to the direct orders of his supervisor." 9 FMSHRC at 323 (emphasis added). The judge also found that Mr. Mullens' actions in proceeding under the unsupported roof were not foreseeable and that Mullens was supervised properly. Id. In addition, the judge stated, "I have carefully examined the record concerning the operator's training program and its history of disciplining its employees for violations of the mandatory standard at issue herein and find both to be adequate." 9 FMSHRC at 324. The judge concluded that "it was Mr. Mullens' own negligence, not that of the operator, which caused his death." Id

In sum, it is undisputed that Mullens proceeded under the unsupported roof immediately after his supervisor ordered him not to do so. Mullens' actions were contrary not only to his supervisor's instructions, but they also were contrary to his general safety training and company policy as well.

Inasmuch as Western Fuels-Utah could not have prevented the violation that occurred in this case and inasmuch as section 2(e) of the Mine Act places a part of the responsibility for safety and health on the shoulders of the miners, I am convinced that Congress did not intend for the liability without regard to fault doctrine to apply to this exceptional situation. Moreover, I find little comfort in the Commission majority's holding that Western Fuels-Utah's lack of negligence was a matter to be considered more appropriately at the penalty assessment stage. If a mine operator has done all that it reasonably could be expected to do to ensure the safety and health of its miners, and if a violation occurs only as the result of unpreventable employee misconduct, reducing the amount of the penalty to be levied upon an otherwise blameless operator does not undo the injustice of the operator's having been found liable for the violation in the first instance.

Accordingly, for these reasons I respectfully dissent.

L. Clair Nelson, Commissioner

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