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CLINCHFIELD COAL V. MSHA AND UMWA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 14, 1989

CLINCHFIELD COAL COMPANY

v. Docket No. VA 89-67-R

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

and

UNITED MINE WORKERS OF AMERICA
(UMWA)

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

DECISION

BY: Ford, Chairman; Backley and Doyle, Commissioners

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act" or "Act"), Clinchfield Coal Company ("Clinchfield") seeks review of a withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to section 104(b) of the Mine Act, 30 U.S.C. 814(b), at Clinchfield's McClure No. 1 Mine. The withdrawal order alleges that Clinchfield failed to abate a violation of 30 C.F.R. 75.326 (the application of which had previously been modified by the Secretary of Labor at the McClure No. 1 Mine) by permitting air in excess of 300 feet per minute ("fpm") to be coursed over the belt conveyor systems for ventilation of working places. In its contest, Clinchfield seeks, inter alia, vacation of the withdrawal order and extension of the time for abating the violation until completion of proceedings before the Department of Labor, conducted pursuant to section 101(c) of the Act, 30 U.S.C. 811(c), concerning Clinchfield's separate petition for further modification of section 75.326, as applied at the McClure No. 1 Mine, to remove the 300 fpm limitation. Along with its contest, Clinchfield also seeks from the Commission temporary relief from the withdrawal order pursuant to section 105(b) of the Act, 30 U.S.C. 815(b)

In expedited proceedings on Clinchfield's contest, Commission Administrative Law Judge James A. Broderick permitted the United Mine Workers of America ("UMWA") to intervene. In his written decision in this matter, issued on August 30, 1989, 21 days after completion of a three-day evidentiary hearing, the judge denied Clinchfield's request for temporary relief on the grounds that he was then prepared to rule on the merits of the operator's contest. He vacated the section 104(b) withdrawal order and extended the time for abatement of the violation until commencement of the next hearing scheduled before the Department of Labor with respect to Clinchfield's pending petition for modification. 11 FMSHRC 1568 (August 1989)(ALJ). We granted petitions for discretionary review ("PDR") filed by Clinchfield and the UMWA and granted Clinchfield's request for expedition and oral argument. Following completion of briefing pursuant to an expedited briefing schedule, we heard oral argument on November 8, 1989. For the following reasons, we affirm the judge's vacation of the withdrawal order and his extension of the time for abatement but modify the terms of that extension as explained below.

I.

Factual and Procedural Background

Clinchfield's McClure No. 1 Mine is an underground coal mine located near McClure, Virginia, and has been in operation since 1979. The mine is a gassy mine, liberating more than four million cubic feet of methane per 24-hour period. 1/

Pursuant to a modification petition filed by Clinchfield on December 21, 1979, under section 101(c) of the Mine Act, MSHA, in October 1980, modified the application of 30 C.F.R. 75.326 at the mine by granting Clinchfield permission to use air coursed through belt conveyor entries to ventilate working places. 2/ MSHA's approval, contained in an amended proposed decision and order issued on January 29, 1981, which became effective by operation of law (i.e., was not opposed), did not limit the velocity of air coursed through the belt

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1/ There was a serious explosion in a combined belt/track entry of the mine in 1983. Since 1983 the mine also has been evacuated a number of times because of excessive methane.

2/ 30 C.F.R. 75.326 states in pertinent part:

> In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate active working places. ...

haulage entries for purposes. of ventilating working places. MSHA imposed various conditions, including the installation of an early warning fire detection system based on monitoring carbon monoxide (the "CO system"). 3/

On August 21, 1986, Clinchfield, in a proposed amendment to the modification, requested that the alarm levels of the CO system be raised because its system was having problems with false alarms. MSHA granted the request in a proposed decision And order issued February 10, 1987, which became effective by operation of law. The modification was subject to a number of conditions, however, including a limit of 300 fpm on the velocity of air coursed through the belt entries to ventilate working places.

On July 1, 1987, Clinchfield filed another proposed amendment to the modification, requesting that the maximum velocity limit be increased from 300 fpm to 1,200 fpm. As justification, it indicated that there were large quantities of methane trapped in the coalbed of the mine and that large quantities of air were required to dilute and carry off the methane liberated during mining and from mined surfaces after mining. Clinchfield alleged that the 300 fpm restriction would allow methane to accumulate and result in a diminution of safety. MSHA investigated the request and granted the petition on September 14, 1988, in a proposed decision and order with conditions. No maximum velocity limit was prescribed in the proposed decision and order.

On October 13, 1988, the UMWA filed a request with the Department of Labor for a hearing on the proposed decision and order, challenging elimination of the 300 fpm air velocity limit. The modification proceeding was assigned to a Department of Labor administrative law judge, and a hearing was scheduled to begin in that case on November 13, 1989.

On June 5, 1989, almost two years after Clinchfield had filed its proposed amendment to increase the 300 fpm maximum velocity limit, MSHA inspector James Baker issued a citation to Clinchfield alleging a violation of 30 C.F.R. 75.326, as modified. The citation alleges that the velocity of air being coursed over the belt entries was in excess of 300 fpm. Clinchfield was given until June 30, 1989, to abate the violation alleged in the citation and was subsequently given an extension to July 31, 1989. MSHA extended the abatement time set in the citation on condition that Clinchfield request an expedited hearing on the section 101(c) modification petition seeking the increase in air velocity in the belt conveyor entries. On June 21, 1989, Clinchfield requested an expedited hearing on the section 101(c) petition.

By August 1, 1989, Clinchfield had failed to abate the violation. Inspector Baker then issued an order of withdrawal under section 104(b) of the Mine Act. Specifically, this order prohibited activity in any

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1/ The terms of MSHA's January 29, 1981 decision and order were not implemented until 1983, some time after the 1983 explosion referred to in n. 2, supra.

working place that was ventilated with belt air velocities exceeding 300 fpm.

On August 2, 1989, Clinchfield filed its contest of the section 104(b) withdrawal order, challenging the validity of the order of withdrawal, arguing that compliance with the order's terms would result in a diminution of safety to miners, and requesting expedited proceedings. In addition, Clinchfield argued that the time set for abatement of the order was unreasonable. On August 3, 1989, Clinchfield filed a Motion for Temporary Relief from the withdrawal order, pursuant to section 105(b) of the Mine Act, requesting extension of the time set for abatement until the issues presented in the contest proceeding were resolved. The judge subsequently granted the request for expedition and the UMWA's request to intervene.

At the hearing before the judge on August 7-9, 1989, Clinchfield took the position that compliance with the withdrawal order would result in a diminution of safety. Clinchfield's independent consultant Donald Mitchell testified that the 300 fpm ceiling represented an unacceptable hazard to the health and safety of the miners in the mine. I Tr. 162, 177; III Tr. 127, 135. Clinchfield also argued before the judge that lifting the 300 fpm ceiling would enhance safety since dilution of methane would be facilitated. Accordingly, in Clinchfield's view, the abatement time was unreasonable under the circumstances and should be extended at least until the section 101(c) proceeding could be heard.

The Secretary took the position that the 300 fpm ceiling may result in a diminution of safety at the mine and that lifting the ceiling would not adversely affect the safety of the miners. MSHA inspector Baker testified that the 300 fpm velocity would not dilute the methane liberated in the mine's belt entries to a safe amount, and that to enforce the 300 fpm velocity "would pose a hazard." I Tr. 44, 51, 53. Baker also testified that additional velocity was necessary to ventilate the faces. I Tr. 60. Baker stated that MSHA officials who worked with him, including his immediate supervisor, subdistrict manager, and district manager, agreed that the 300 fpm ceiling posed a hazard. I Tr. 51-52. Additionally, MSHA District Manager/Supervisory Mining Engineer Robert Elam testified that abatement of the violation would result in diminution of safety to the miners in the mine, indicating that the 300 fpm ceiling was inadequate to move methane out of the mine and to dilute and render it harmless. I Tr. 79-80, 108, 116-17. Thus, in Elam's view, the 300 fpm ceiling diminished safety. I Tr. 110, 126. See also III Tr. 61-62. Elam further testified that increased velocity would help in methane dilution and benefit the mine. I Tr. 124.

The Secretary introduced an affidavit by Jerry L. Spicer, MSHA Administrator for Coal Mine Safety and Health, which states his belief "that the safety of miners at the McClure Mine is enhanced by removing the 300 fpm belt entry air velocity" MSHA-X 4. The Secretary stated that the Commission could: (1) determine, pursuant to section 105(d) of the Act, that the length of the abatement period was unreasonable and modify or vacate the period; or (2) grant temporary relief from the withdrawal order under section 105(b) of the Mine Act.

The UMWA took the position that the 300 fpm ceiling did not result in a diminution of safety at the mine but that lifting the 300 fpm ceiling would. The UMWA submitted that the 300 fpm ceiling was adequate to dilute the methane, especially in conjunction with other alternatives. UMWA international representative Thomas Rabbitt testified that the 300 fpm ceiling could dilute and render harmless methane in the most inby areas in the mine. II Tr. 93, 132-33. While the UMWA implicitly conceded that increasing the air velocity would reduce methane in the working sections, it argued that the adverse effects resulting from the increase in velocity would, nevertheless, result in a diminution of safety to the miners. Rabbitt testified that greater air flow increases the oxygen available to fan a fire, and UMWA Deputy Administrator for Safety Robert J. Scaramozzino agreed that high air velocities would cause quick propagation of a fire. II Tr. 101, 155, 168. The UMWA's witnesses also emphasized that float coal dust involving conveyor belt entries is one of the major fire and ignition sources in a coal mine, and that high air velocities will pick the dust up, suspend it in the air, and disperse it through the entry, thereby aggravating the hazard. II Tr. 155-56, 163, 241, 249; III Tr. 23, 124. UMWA Deputy Administrator in the Department of Occupational Health James Weeks testified that a higher air velocity has the tendency to pick up respirable dust. II Tr. 206-208, 220. UMWA witnesses also testified that higher air velocity would dilute the carbon monoxide necessary to activate the CO system and, as a result, a larger fire would be needed to generate the necessary carbon monoxide, delaying the operation of the sensing and warning system. I Tr. 221-22, 230-31, 249-50; II Tr. 102.

The UMWA also argued that there were a number of alternative methods of methane control available to Clinchfield. These proposals included increasing the number of entries, point feeding, increasing the velocity in the intake entries, drilling degassification holes, putting the track and belt in the next entry, changing the design for developing longwall panels, staggering crosscuts involving roof support, and inducing water into the coal seam.

The Secretary's witnesses rebutted the UMWA's positions by pointing out that all mines are required to control respirable dust and float coal dust, and that if control is inadequate enforcement activities can be instituted by the Secretary. See 30 C.F.R. 70.100, 75.316, and 75.400. II Tr. 218-19; III Tr. 35-36, 44, 56. It was also stated that studies by the Bureau of Mines of the United States Department of Interior indicate no expanded propagation of mine fires when air velocities are increased to as much as 800 fpm. Tr. 107, 119; II Tr. 154; MSHA-X 6. There was also testimony that the higher velocity would actually lead to a more efficient CO detection system because the product combustion would pass more quickly from one sensor to the next. Tr. 118; III Tr. 117, 120, 121. Moreover, the Secretary's witnesses also stated that increasing the number of entries would cause roof control problems in the mine. Tr. 90, 113; III Tr. 59. Finally, the Secretary:s and Clinchfield's witnesses testified that the other alternative methods of methane control proposed by the UMWA were either impractical or ineffective.

After the presentation of concluding oral argument by the parties,

Judge Broderick issued a bench decision, which he incorporated in his written decision issued on August 30, 1989. Initially, the judge indicated that, because he had heard "the entire testimony on the merits," he was denying the motion for.section 105(b) temporary relief. 11 FMSHRC at 1569. The judge noted that Clinchfield did not deny that the alleged violation existed. 11 FMSHRC at 1570. Rather, Clinchfield's argument that the time set for abatement was unreasonable and should be further extended was based upon its assertion that complying with the standard would create a diminution of safety in the mine. The judge stated that Clinchfield and the Secretary had submitted a substantial amount of evidence that enforcement of the 300 fpm limit would result in a serious danger of a methane fire or explosion and that the UMWA had presented a substantial amount of evidence that exceeding the 300 fpm limit would result in a serious danger of propagating any belt fires and increasing float coal dust and respirable dust. 11 FMSHRC at 1571. The judge stated, however, that he did not have jurisdiction to determine whether the belt entry air velocity requirements should be increased or kept at the same level and that the question before him was whether to affirm, vacate, or modify the contested order. Id. The judge indicated:

> ... I am not in any way discounting or minimizing the substantial safety issues raised by the Intervenor, the United Mine Workers of America. Neither am I attempting to weigh the evidence on either side of the issue, which is the responsibility of the authorities charged with deciding the Petition for Modification.

Id. However, the judge concluded as follows:

> On the bases of the substantial evidence submitted by [Clinchfield] Contestant and the Secretary, and particularly that submitted by the Mine Safety and Health Administration, which is the government agency charged with enforcing the Act in the interests of the safety of miners, and because there is a pending petition for modification which is intended to resolve the conflicting views relative to safety and hazards presented by the belt entry air velocity, I hereby order that [the section 104(b)] Order of Withdrawal ... is DISSOLVED.
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> I am ... ruling that in view of the Secretary's position and the evidence introduced in support of it, that complying with the contested citation and order may result in a diminution of safety, and in view of the pending petition for modification, relief should be granted. I am granting it from the terms of the order until this matter is submitted for decision on the Petition for Modification.

Accordingly, the judge vacated the contested withdrawal order and modified the underlying citation by extending the time for its abatement until "the date the hearing commences on the pending Petition for Modification." 11 FMSHRC at 1572. As noted, we subsequently granted the PDRs filed by both Clinchfield and the UMWA and heard oral argument.

The UMWA argues in its PDR that the judge erred by failing to make the findings necessary to support his conclusion that the time for abatement should be extended. The UMWA also asserts that even if the judge did enter the necessary findings, substantial evidence does not support them. UMWA PDR at 3-4. Accordingly, the UMWA requests that the decision be reversed and the withdrawal order reinstated.

Further, noting that the effect of the judge's decision is to allow Clinchfield temporary relief from the requirements of section 75.326, the UMWA contends that the decision violates UMWA v. MSHA, 823 F.2d 608 (D.C. Cir. 1987), which, according to the UMWA, prohibits temporary relief from the application of a standard, pending a decision on a petition for modification. UMWA PDR at 5.

In its PDR, Clinchfield argues that the judge's decision does not go far enough. First, the relief granted is inadequate, in that the judge should have extended the abatement period until a final order is issued in the modification proceeding. In the alternative, the Commission should recognize a diminution of safety defense to the alleged violation, find that Clinchfield established that defense, and vacate the citation and order. C. PDR at 7-8.

Second, Clinchfield asserts that the decision is inconsistent with the purposes of the Act because it does not protect the miners from the hazards of compliance once the abatement period ends. Therefore, the Commission should declare invalid the Secretary's policy of refusing to extend further the abatement period and should grant Clinchfield declaratory relief to that effect. C. PDR at 8-13.

In its brief on review, the UMWA primarily argues that the judge's decision must be reversed because the judge failed to make the findings of fact and conclusions of law necessary to support his vacation of the withdrawal order and his conclusion that the time for abatement should be extended. The UMWA asserts that although the judge concluded, in vacating the order, that complying with the contested citation and order may result in a diminution of safety, he made no factual findings to support that conclusion. UMWA Br. at 3-4. The UMWA alternatively argues that, in any event, substantial evidence does not establish that compliance with the cited standard will diminish safety because the record contains testimony regarding ways Clinchfield can comply with the 300 fpm requirement without adversely affecting safety and because there is testimony that non-compliance increases the danger to miners in other areas of the mine. UMWA Br. at 5, 8-10. Therefore, the UMWA contends that the effect of the judge's decision is to grant temporary relief without complying with the statutory requirements of section 105(b), which requires a specific finding that if relief is granted, the health

and safety of miners will not be adversely affected. See 30 U.S.C. 815(b)(2)(C). UMWA Br. at 10-11

In its briefing to the Commission, Clinchfield first asserts that the relief awarded by the judge is inadequate to protect the health and safety of the miners. Clinchfield argues that in light of the judge's finding that limiting the belt air velocity to 300 fpm may create a diminution of safety, it is illogical not to extend the abatement time for the underlying citation until a final order is issued in the modification case. C. PDR (designated as main brief) at 7. Clinchfield also argues that the Commission should recognize a diminution of safety defense to an alleged violation when the defense is necessary to avoid subjecting miners to the greater hazards caused by compliance. C. PDR at 8.

Finally, Clinchfield argues that, because the judge set the termination date of the citation to coincide with the commencement of the modification hearing, the probable result of his decision is that Clinchfield will be faced with another closure order "and the parties' attention will be refocused in the Review Commission forum." C. PDR at 9. To end the threat of duplicative litigation in separate forums, the Commission should grant Clinchfield declaratory relief. Such relief is not prevented by UMWA v. MSHA. supra, which only addresses the validity of the Secretary's procedure for interim relief in a modification proceeding under 30 C.F.R. 44.16. C. PDR at 10. Therefore, Clinchfield requests that the Commission: (1) extend the abatement period until a final order is issued in the section 101(c) modification proceeding; (2) vacate the underlying citation on the grounds that a diminution of safety is a defense to the violation; or (3) grant temporary relief until a final order is issued in the modification proceeding.

The Secretary in her brief asserts that in a contest proceeding, the Commission may consider safety in determining whether an abatement period is reasonable and, further, that the Commission may extend the abatement time if it finds, based on the evidence before it, that compliance will likely diminish safety. Sec. Br. at 9. However, once a petition for modification proceeding commences, the Secretary's position appears to be that the operator ought to seek interim relief in that proceeding. The Secretary argues that MSHA did not err in refusing to extend the abatement time because to do so would be, effectively, to give Clinchfield temporary relief without the procedural safeguards insisted upon by the Court in UMWA v. MSHA. Sec. Br. at 8.

However, the Secretary goes on to note that while the D.C. Circuit in UMWA v. MSHA held that the Mine Act does not authorize the granting of interim relief in a modification proceeding based upon a finding that such relief will not adversely affect the health or safety of miners and without providing the procedural safeguards required by section 101(c), the Court specifically stated that it was not deciding whether the Secretary has the authority to grant interim relief when there is a possibility that application of the standard will increase the danger to miners. Sec. Br. at 5, citing 823 F.2d at 616 n. 6. The Secretary points out that, following UMWA v. MSHA, the Assistant Secretary ruled

in Utah Power and Light Co., slip op. at 8-9 (No 86-MSA-3, August 14, 1987), that MSHA has authority to grant interim relief where application of a standard will result in diminution of safety to miners, provided there is an opportunity for a hearing and/or appeal and provided interim relief is of a limited duration. Sec. Br. at 5.6. Thus, Clinchfield may seek interim relief in the section 101(c) proceeding in accordance with the UP&L guidelines, but the Secretary notes that the operator has not yet done so. Sec. Br. at 7.

It is also important to note that the Secretary states that before the judge, MSHA offered evidence that application of the mandatory standard of the mine would diminish safety. However, the Secretary now avers that she "takes no position on that issue." That question remains to be litigated and decided by the Secretary in the course of the pending section 101(c) modification proceedings. Sec. Br. at 8 n. 2.

II.

Disposition of Issues

We cannot improve upon the introductory observation in Judge Broderick's decision that "the overriding value in the Mine Act is the health and safety of the miners, and all Commission decisions interpreting the Mine Act have to keep that overriding value foremost." 11 FMSHRC at 1569. See 30 U.S.C. 801(a). With that statutory objective as our guide, we conclude that the Commission possesses jurisdiction, in appropriate circumstances, to extend the time for abatement of a cited violation, upon reasonable terms and conditions, while a petition for modification of the cited standard is being considered by the Secretary pursuant to section 101(c) of the Act. We further determine that the Secretary also possesses ample enforcement discretion to extend the time for abatement under such circumstances. Finally, we conclude that substantial evidence supports the judge's decision to extend the time for abatement in this matter, although we modify the terms of that extension as set forth below.

We turn first to the jurisdictional question. We note that the Secretary, whose interpretations of the statute, if reasonable, are entitled to deference, takes the position that the Commission has jurisdiction to extend the time for abatement under the kind of circumstances presented by this case. We also note that the UMWA has not asserted that we lack such jurisdiction.

In a contest of a section 104(b) withdrawal order issued for failure to abate a cited violation, the operator, as here, may challenge the reasonableness of the length of time set for abatement or the Secretary's failure to extend that time. See, e.g., Old Ben Coal Co., 6 IBMA 294, 306-307 (1976); U.S. Steel Corp., 7 IBMA 109, 116 (1976); Youghiogheny & Ohio Coal Co., 8 FMSHRC 330, 338-39 (March 1986)(ALJ) ("Y&0"). A considerable body of precedent, arising under the 1969 Coal Act and continuing under the Mine Act, has recognized that in such contests, the degree of danger that any extension of abatement time would cause miners is a relevant factor to be assessed in judicially approving such an extension. See, e.g., Y&0, supra. In a similar vein,

under the 1969 Coal Act, the Interior Board of Mine Operations Appeals ("Board") held. that an operator's filing of a petition for modification "should be a major consideration in determining the reasonableness of the time set for abatement of any alleged violation which relates to the ... standard sought to be modified." Reliable Coal Corp., 1 IBMA 97, 113 (1972). The Board indicated that the time set for abatement of an alleged violation could be extended in an enforcement contest during the pendency of a separate modification proceeding upon a showing by the operator, inter alia, that the petition for modification was filed in good faith, and not for the purpose of postponing or avoiding abatement, and that during the period of the abatement extension "the health and safety of the miners will be reasonably assured." Reliable, supra.

This precedent focuses primarily on the dangers of continued non-compliance with a cited standard during a period of abatement and not, directly at least, on the related question of whether compliance with the cited standard may pose hazards to miners. The latter subject lies at the heart of any petition for modification based on a claim that "application of [a] standard to [a particular] mine will result in a diminution of safety to the miners in such mine." 30 U.S.C. 811(c). We also recognize that Reliable arose under the 1969 Coal Act, when both enforcement and modification jurisdictions were held within the same governmental Department. Nevertheless, we find it a reasonable construction of the relevant statutory language and an appropriate harmonizing of the modification and enforcement processes under the Mine Act to conclude that a challenge to the reasonableness of abatement time may be grounded upon the relative hazards to miners stemming from either immediate or deferred compliance with a cited standard.

Specifically, where an operator has filed a modification petition premised upon diminution of safety with respect to application of a standard, we conclude that the broad concept of the "reasonableness" of the time set for abatement of the violation of the cited standard may appropriately encompass in a contest proceeding an assessment of the relative hazards to miners of immediate compliance or an extension of abatement time. In this regard, we assign considerable weight to the construction of the Act urged on review by the Secretary. See. e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986), citing Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552 (D.C. Cir. 1984). In her brief the Secretary aptly states:

> An operator does have a right ... to contest before the Commission a section 104(b) failure to abate withdrawal order and reasonableness of the abatement time set in a section 104(a) citation. In such a contest, a full record hearing is afforded the parties, with the right of appeal to the Commission and the courts.
>
> It is the Secretary's position that in adjudicating the reasonableness of abatement time in a case where the operator also has a modification petition pending with the Secretary under section 101(c), the Commission may appropriately extend the

> abatement time if it finds from the record evidence before it a likelihood that safety of miners would be diminished by compliance with the cited mandatory standard. The purpose of the Mine Act is to protect miners. In determining whether an abatement period is reasonable, it is certainly proper for the Commission to take into account miner safety and provide adjudicatory relief accordingly under section 105(d). In so doing, the Commission will be acting upon record facts developed after a full opportunity for a hearing to all parties, including those opposing the relief, with rights of any aggrieved party to seek administrative and judicial review. Action by the Commission in this regard would not, therefore, be contrary to otherwise expressed congressional intent.

Sec. Br. at 8-10 (footnotes omitted).

This approach is a sensible harmonizing of the separate enforcement and modification processes in the Mine Act. Although the Mine Act allocates to the Secretary the judicial authority to hear and decide modification petitions, it reserves to the Commission the judicial authority to resolve enforcement contests involving the reasonableness of abatement time. Where a modification petition has not been finally decided, a situation may arise--and, as explained below, we conclude that this case presents that situation--where, because of the hazards posed by immediate compliance, extension of abatement time is called for in order to protect the safety of miners. Given the Act's bifurcated structure in this area, this conclusion represents, in our judgment, a logical extension of the Reliable doctrine.

This conclusion does not conflict with the Commission's decisions in Sewell Coal Co., 5 FMSHRC 2026 (December 1983), and Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981). In those decisions, the Commission held, in general, that diminution of safety may not be raised as a defense to violation in an enforcement proceeding unless the Secretary has first entered a finding of such diminution in a modification proceeding. See Sewell, 5 FMSHRC at 2029. These decisions stand for the general proposition that the proper forum for raising and resolving the issue of diminution of safety is a modification proceeding. The two decisions also manifest a view that the Commission must not infringe upon the Secretary's jurisdiction in a section 101(c) modification proceeding. However, Sewell specifically left open resolution of whether a diminution of safety defense ought to be recognized in "the situation where an enforcement proceeding has been heard before the petition for modification has been finally resolved...." 5 FMSHRC at 2030 n.3. While these two decisions preclude any purported resolution in an enforcement proceeding of a modification petition based upon diminution of safety per se, we do not view them as barring the Commission from weighing the hazards to miners of compliance vs. non-compliance within the context of an extension of abatement time contest.

The Mine Act also clearly contemplates in its enforcement

structure that situations may arise where temporary or other appropriate relief from a withdrawal order is warranted in furtherance of safety and health. Thus, section 105(b)(2), 30 U.S.C. 815(b)(2), permits an operator to seek "temporary relief" from any order issued under section 104 based upon a showing, in part, that "such relief will not adversely affect the health and safety of miners." To similar effect, section 105(d) of the Act, 30 U.S.C. 815(d), permits the Commission, in deciding contests of citations and orders, to "direc[t] other appropriate relief." These provisions are congruent with the result reached today.

Therefore, taking particular account of the Secretary's views in this case, we hold that an operator may challenge the reasonableness of the time fixed for abatement, and the Commission may, in appropriate instances, extend it, upon a showing that: (1) the operator has, in good faith, filed a petition for modification of the cited standard based on its belief that application of the cited standard will diminish the safety or health of miners; and (2) the hazards of immediate compliance outweigh any hazards associated with deferral of the time for abatement. We emphasize that it is not the Commission's province to attempt any determination of the central issue in the modification proceeding, namely, whether application of the standard in the particular mine will result in a "diminution of safety." Plainly, the inquiry we approve today will involve similar issues, but the context here pertains only to the enforcement question of whether a particular time for abatement may reasonably be extended in light of the relative hazards posed to miners. In view of the general teaching of Penn Allegh and Sewell, we further hold that any extension of abatement time must be of reasonable duration and must not infringe upon the orderly procedures of the modification process. We do not read any provision of the Mine Act as specifically prohibiting this result. Rather, we conclude that, as a matter both of reasonable statutory construction in an area in which the Act is silent and of our development of sound policy under the Act (see 30 U.S.C. 823(d)(2)(A)(ii)(IV) & (B)), this determination best effectuates miner health and safety and harmonizes the separate modification and enforcement processes.

The UMWA argues that UMWA v. MSHA prohibits any Commission action that, in effect, amounts to modification of a mandatory standard outside section 101(c) channels. We disagree. First, that decision expressly left open the question of the Secretary's power in modification proceedings to grant interim relief from application of a mandatory standard "when there is a possibility that application of the standard will increase ... danger to the miners" or when an emergency situation obtains. 823 F.2d at 616 n. 6. The modification decision of the Assistant Secretary of Labor in Utah Power & Light Co., No. 86-MSA-3 (petition for modification proceeding)(August 14, 1987)("UP&L"), holds that, indeed, the Secretary may provide such interim relief in the context of a diminution of safety resulting from compliance or in an emergency situation, so long as appropriate procedural due process safeguards are provided for all parties. We would go further for we believe that the Secretary, under these circumstances, has an obligation to grant "interim relief" and not compel compliance even when, as in this case, the operator fails to seek interim relief in the modification

proceeding. 4/ Consistent with both UMWA v. MSHA and UP&L, Clinchfield continues to have the opportunity to seek interim relief in the pending modification proceeding and the Secretary has authority to grant such relief as may be appropriate in the modification forum.

Second, and more to the point, UMWA v. MSHA does not purport to address the power of the Commission to consider an extension of the time set for abatement in a citation or, pursuant to section 105(b) of the Act, temporary relief from a section 104(b) withdrawal order. We conclude that UMWA v. MSHA, by itself, does not preclude the Commission from considering hazard-of-compliance issues in the context of an abatement time contest. The central concern of the Court in that case was what it viewed as the lack of due process attendant upon interim relief in the modification forum. See 823 F.2d at 617-19. Here, by way of contrast, any extension of the time for abatement in the enforcement forum would occur only after notice and adjudicative hearing with appeal rights to the Commission and courts of appeals.

All that we have said leads to a concomitant conclusion that the Secretary also possesses enforcement discretion to extend the time for abatement if she believes it reasonable in light of the relative hazards posed to miners. Indeed, the Secretary exercised that discretion by initially allowing 25 days for abatement and then extending the abatement period by an additional 31 days. The Act specifically reserves to the Secretary the power to set initially a reasonable time for abatement. 30 U.S.C. 814(a) & (b). UMWA v. MSHA does not address this matter, andupon the same grounds articulated above, we hold that, in appropriate cases, the Secretary may extend abatement time to permit the orderly disposition of related modification proceedings. We are puzzled as to why the Secretary departed from that path in the present case. We also note that any such action may be contested by the appropriate representative of miners. Upon a showing that the hazards of any extension outweigh any hazards of compliance, the extension would be subject to disapproval by the Commission.

We now apply these principles to review of the judge's decision. We concur with the judge's refusal to grant Clinchfield section 105(b) temporary relief because we are prepared to rule on the merits of Clinchfield's challenge to the reasonableness of abatement time. The judge properly premised his actions upon Clinchfield's filing of a modification petition. 11 FMSHRC at 1571. He also appropriately declined to advance any purported resolution of the underlying merits of Clinchfield's modification petition. 11 FMSHRC at 1570-71. While the judge spoke in terms of diminution of safety, it is clear from his decision that he examined the relative hazards of immediate compliance vs. extension of abatement time.

It is true that at one point, the judge stated that he was refusing to weigh the evidence on the safety question. 11 FMSHRC at 1571. That statement, however, must be read in proper context. The

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4/ Clinchfield has also utterly failed to explain adequately why it never sought interim relief in the pending modification proceeding.

judge had already indicated that he was not purporting to resolve the underlying merits of Clinchfield's modification petition, and we read his "refusal to weigh" language as an extension of that position. He did conclude, however, that "in view of the Secretary's position and the evidence introduced in support of it, ...' complying with the contested ... order may result.in a diminution of safety, and in view of the pending petition for modification, relief should be granted." 11 FMSHRC at 1571. While we disapprove the formulation of this result in diminution of safety terms, we conclude that the judge did, in fact, weigh the relative hazards and determine that an extension of abatement best promoted safety in this case.

Although the judge's failure to identify more specifically the evidence of the hazards upon which he relied is troubling, the evidence in question, presented by both the operator and the Secretary, has been summarized above. In essence, it shows that permitting Clinchfield a higher fpm ceiling will result in improved methane dissipation and that enforcement of the 300 fpm ceiling could fail to achieve necessary methane dilution. We have carefully examined the record and conclude that the evidence of the operator and Secretary in this regard affords substantial support to the judge's ultimate disposition.

Like the judge, we also acknowledge the UMWA evidence showing a level of hazard associated with any raising of the 300 fpm ceiling. However, the nature of the judicial inquiry in this context involves a weighing of the relative hazards. We are not prepared to conclude that the judge erred in assigning decisive weight to the evidence of the Department of Labor, the agency charged with the responsibility of enforcing the Act and protecting the safety and health of miners.

Finally, we conclude that the extension of time for abatement shall run until the Department of Labor administrative law judge presiding in the modification proceeding rules upon the diminution of safety issue. In our judgment, this approach to extension best respects the separate modification jurisdiction of the Secretary and best facilitates prompt resolution of the major issue dividing the parties -- a determination in the modification forum of whether application of the cited standard at Clinchfield's mine will result in a diminution of safety.

III.

Conclusion

For the foregoing reasons and on the foregoing bases, the decision of the judge is affirmed. The time for abatement of the cited violation is hereby extended as explained above. 5/

Richard V. Backley, Commissioner

5/ Commissioner Nelson did not participate in the consideration or disposition of this case.

Commissioner Lastowka, concurring in part and dissenting in part:

This Co«mission has jurisdiction over Clinchfield Coal Company's contest of the withdrawal order issued by the Secretary of Labor for Clinchfield's failure to abate a violation within the period of time set in a previously issued citation. 30 U.S.C. 815(d). The Commission lacks jurisdiction, however, over the question of whether application of the cited standard at Clinchfield's mine results in a diminution of safety to the miners at the mine. 30 U.S.C. 811(c). That question is expressly reserved by the Mine Act to the Secretary of Labor. Id. Because the administrative law judge and the majority, under the guise of reviewing the reasonableness of the abatement period set by the Secretary, effectively resolve the diminution of safety issue raised by Clinchfield and thereby improperly thrust themselves into the modification proceedings ongoing before the Department of Labor, I must dissent.

I. The Reasonableness of the Abatement Period

Section 104{a} of the Mine Act provides that a citation issued by the Secretary "shall fix a reasonable time for the abatement of the violation" alleged in the citation. 30 U.S.C. 811(a) (emphasis added). Section 104(b) provides that if on subsequent inspection the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall promptly issue an order requiring the operator ...to immediately cause all persons...to be withdrawn ...until...the Secretary determines that such violation has been abated.

30 U.S.C. 811(b) (emphasis added).

In the present case the Secretary issued a citation charging a violation of 30 C.F.R. 75.326, as modified by the Secretary. The citation charged that the air velocity in Clinchfield's belt entry exceeded the 300 feet per minute (fpm) limit imposed on Clinchfield by the Secretary in conjunction with a previously granted modification of section 75.326. As issued, the citation provided a 25 day period in which compliance with the 300 fpm limit was to be accomplished. The Secretary subsequently extended the abatement period to provide an additional 31 days in which Clinchfield was to abate the violation. Upon expiration of the extended period for abatement set by the Secretary, the violation was found to still exist and the Secretary proceeded to issue a failure to abate withdrawal order pursuant to section 104(b). This withdrawal order is the order contested by Clinchfield and in issue before the Commission.

Where a mine operator contests a failure to abate withdrawal order, the Secretary must prove: 1) the existence of a previously issued citation charging a violation of a mandatory standard, 2) that a reasonable time for abatement of the violation had been provided, 3) the time for abatement had expired, and (4) the violation had not been abated. ln the hearing before the administrative law judge the Secretary proved, indeed it was

undisputed, that Clinchfield failed

to comply with the applicable standard (element 1), the time set by the Secretary for abatement had passed (element 3), and the violation had not been abated (element 4). As to the reasonableness of the period of time fixed in the citation for abatement of the violation (element 2), however, the Secretary's witnesses testified that it was their belief, and that of their supervisors, that abatement of the violation would create a hazard to miners. Thus, far from attempting to establish that the period of time set for abatement of the violation was reasonable, the totality of the Secretary's evidence was that Clinchfield's compliance with the standard would create a hazard, and that in the interest of safety abatement should not occur.

Thus, at the hearing on Clinchfield's contest of the withdrawal order the position of the Secretary, as presented by her witnesses and as summarized by counsel (III Tr. 137-40), was that although MSHA cited Clinchfield for a violation of the standard and shut the mine's operations down because the violation was not abated, Clinchfield's compliance with the order issued by the Secretary will actually threaten the safety of miners.

At this juncture, one might logically ask why MSHA, charged with the duty to enforce the Mine Act for the protection of miners, would nonetheless proceed to initiate enforcement action that MSHA believes will, in and of itself, create a serious safety hazard. MSHA's answer is that it is required to do so, that it is powerless to do otherwise, and, in effect, that this Commission must step in, as did the judge, to save MSHA, Clinchfield and the miners from the deleterious consequences of MSHA's enforcement actions. I must reject this anomalous result and the theories that underpin it.

The Commission is a creature of statute and its adjudicatory powers are derived from Congress' grant of authority to it. Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). Congress has empowered the Commission with authority to adjudicate various types of enforcement disputes arising among the Secretary of Labor, mine operators and miners. One type of dispute over which the Commission has jurisdiction concerns whether the period of time the Secretary has provided for abatement of a violation is reasonable. Mine operators as well as miners may contest the period for achieving compliance with a standard as being unreasonably short or unreasonably long. 30 U.S.C. 815(d). Conversely, Congress empowered the Secretary, not the Commission, with the authority to determine whether the terms of a mandatory standard adopted by the Secretary should be modified insofar as the standard applies to the operations at a particular mine. 30 U.S.C. 811(c); Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981) (disallowing diminution of safety defense in enforcement proceeding where modification petition would have been appropriate but had not been filed); Sewell Coal Co., 5 FMSHRC 2026 (December 1983) (recognizing diminution of safety defense in an enforcement proceeding where Secretary had concluded modification proceedings and had granted modification).

ln the present case, at the hearing before the Commission the parties framed the issue presented by Clinchfield's contest of the withdrawal order as being a challenge to the reasonableness of the 56 day period prescribed by the Secretary for abatement of the violation of 30 C.F.R. 75.326. Clinchfield argued that the abatement period should be extended because compliance would create a hazard to miners.

III Tr. 111-12. The Secretary shared Clinchfield's

concern that abatement would diminish safety and indicated that, if the judge were to find that the abatement period set by the Secretary should be extended, the Secretary would not oppose the judge's action even though MSHA would not extend the period itself. III Tr. 137-40. The UMWA, on the other hand, argued that the question of diminution of safety is to be decided only in a section 101(c) modification proceeding before the Secretary. Tr. 37. The UMWA further argued that abatement of the violation would be safe and that the abatement period set by the Secretary was reasonable. 111 Tr. 143.

ln his decision the judge recognized the Department of Labor's jurisdiction over the issue of whether the standard should be modified but, in view of the Secretary's evidence and assertions before hi«, concluded that an extension of the abatement period was warranted. Thus, by necessary implication the judge found the abatement period prescribed by the Secretary in the citation to be unreasonable. Also, in light of his extension of the abatement period the judge vacated the failure to abate withdrawal order. The majority here affirms the judge's extension of the abatement period and vacation of the withdrawal order.

The judge and the majority err in granting relief in this case on the purported basis that the Commission is exercising its authority under section 105(d) to review the reasonableness of the abatement period set by the Secretary. The problem with this basis for granting relief is that the actual dispute between the parties most assuredly is not over whether the Secretary provided Clinchfield with a reasonable opportunity to abate the violation by bringing its mine into compliance with the cited standard. Quite to the contrary, as the record clearly reflects, Clinchfield's sole argument, not opposed by the Secretary, is that compliance with the standard, whether within the 56-day period provided by the Secretary or some greater period of time, would result in creation of a hazard and, therefore, compliance should not be required at all.

Thus, rather than being a dispute as to whether the period of time fixed by the Secretary for "totally abat[ing]" the violation (30 U.S.C. 814(b)) is reasonable, what Clinchfield and the Secretary have presente to the Commission is the entirely different question of whether compliance with the standard would diminish safety. This is a pure section 101(c) modification issue within the jurisdiction of the Secretary, not the Commission, rather than a properly founded challenge under section 105(d) to the reasonableness of the abatement period. By "weighing the relative hazards" of compliance versus noncompliance and concluding that an extension of the abatement period is warranted, the majority improperly resolves the diminution of safety issue. Therefore, insofar as the majority affirms and modifies the judge's extension of the abatement period, I dissent.

What's in a name? That which we call a rose
By any other name would smell as sweet.

Shakespeare, Romeo and Juliet, Act II, Scene ii.

II. The Secretary's Authority

Before us the Secretary identifies two factors purportedly forcing MSHA to seek Commission relief from the undesirable safety effects caused by its enforcement actions, rather than acting on its own to rectify the problem. First, and primarily, it is claimed that the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in Intern. Union. UMWA v. MSHA, 823 F.2d 608 (D.C. Cir. 1987), forecloses MSHA from itself presently providing Clinchfield any relief in order to avoid the danger caused by compliance with MSHA's order. Second, the Secretary asserts that she is constrained by the Mine Act itself to proceed precisely as she has in the present case. As discussed below, the Secretary's reliance on UMWA v. MSHA as justification for MSHA's actions is misplaced. That decision did not address the situation now before us and does not foreclose action by the Secretary. Further, the Secretary's reliance on MSHA's duties under the Mine Act as explanation for its actions also deserves careful consideration before the anomalous result it leads to is endorsed.

A. The Decision in UMWA v. MSHA

ln UMWA v. MSHA, the D.C. Circuit concluded that, under the facts of the case before it, the procedures the Secretary had followed in granting indefinite interim relief from enforcement of a mandatory standard during the pendency of a petition for modification of the application of a mandatory standard exceeded the Secretary's statutory authority under section 101{c) of the Mine Act. 30 U.S.C. 811(c). The court stated:

> The real issue in this case is whether the Secretary may grant a modification of a mandatory safety standard, without regard to the requirements of section 101{c) of the Mine Act, without an opportunity for a hearing, upon three days' notice to the affected miners, over the opposition of those miners, on the basis of a one-paragraph explanation which does nothing more than paraphrase the challenged regulation, and with no provision for a right to appeal that decision. We think not.

823 F.2d at 617. The court was careful, however, to explain the limits of its holding concerning the Secretary's ability to provide interim relief during the pendency of a petition for modification:

> We do not decide ... whether the Secretary would have authority to grant interim relief from a mandatory safety standard when there is a possibility that application of the standard will increase the danger to the miners. Nor do we decide whether the Secretary would have this authority in an "emergency" situation. Because the basic purpose of the Mine Act is to protect the miner ... this type of situation would present a more difficult issue. Section 14.16(c), however, by its terms is not meant to address this type of

> situation. The only finding regarding the safety of the miner that is required by 41.16(c) is that "the requested relief will not adversely affect the health or safety of miners in the affected mine."

823 F.2d at 616 n.6. The court further observed, "[a]gain, we do not decide whether the Secretary has inherent power to grant interim relief if essential to further the purposes of the Mine Act or under other compelling circumstances." Id. at 619 n.8.

Thus, by the express terms of its decision the D.C. Circuit did not rule that the Secretary lacked the ability to grant interim relief in compelling circumstances, not presented by the case before it, including situations where, due to particular conditions existing at a specific mine, enforcing a standard would increase the danger to miners. Before the Commission, the Secretary has acknowledged the court's limitation of its holding concerning the Secretary's authority to grant interim relief. Sec. Br. at 5. Furthermore, the Assistant Secretary for Mine Safety and Health has ruled, subsequent to the court's decision in UMWA v. MSHA, that MSHA still possesses authority to grant interim relief in "cases where the application of the standard would result in a diminution of safety to miners, or in emergency situations." Sec. Br. at 6, quoting Utah Power & Light Co., 86-MSA-3 (August 14, 1987), slip op. at 8-9. The Assistant Secretary stated:

> Regarding the UMWA's challenge to the validity of the Agency interim relief rules, the D.C. Circuit's decision in the Kaiser and UP&L cases has caused the Agency to reevaluate its interim relief procedures. *** The Court specifically did not address the question of "whether the Secretary would have authority to grant interim relief when there is a possibility that application of the standard will increase the danger to the miners," ... or "in an emergency situation." I have concluded that the Agency has authority to grant interim relief in such circumstances so long as appropriate procedural safeguards are provided for all parties. While noting the issue of the authority of the Secretary in emergency situations was not fully addressed by the Court, this conclusion ensures that prudent and timely relief will be available in instances where the safety of miners is in jeopardy.

UP&L, supra. slip op. at 7-8 (footnotes omitted).

Here, in July 1987 Clinchfield requested that the Secretary modify the cited standard on the ground that compliance would diminish miner safety. In September 1988, the Administrator for Coal Mine Safety and Health approved the modification.2/ The UMWA contested the Administrator's decision in October 1988.

2/ The Administrator's decision makes no reference to the diminution of safety grounds advanced by Clinchfield in support of its petition for modification. Instead, the Administrator stated that the alternative method of compliance approved in the modification "will at all times guarantee no less than the same measure of protection afforded by the

standard." Ex. U-2. As the

Almost two years after Clinchfield's assertion that compliance would diminish safety, and nine months after the Administrator's decision to grant the modification, MSHA nevertheless proceeded to issue a citation for failure to comply with the disputed standard, and a withdrawal order for failure to abate the violative condition.

Although the reason for MSHA's decision to issue a citation at this juncture is unexplained, its motivation for issuing the withdrawal order is clearly set forth in the record. In presenting oral arguments to the judge below, counsel for the Secretary explained:

> As has been testified by our witnesses, and also stated by Mr. Jerry Spicer, the Administrator for Coal Mine Safety and Health, in an affidavit that was submitted in evidence, he felt he could go no further as far as extending the abatement period on that citation. That is under the decision of [UMWA v. MSHA] that to do so would amount to interim relief of a petition for modification.
>
> So therefore, it was his decision and he made that decision known to the district level ... that he had no authority to continue any abatement period on that citation, even though it was recognized by the inspector and district manager and Mr. Spicer in his affidavit indicated, that to go higher than the three hundred feet per minute would not pose a threat to the safety of the miners. As was stated by the testimony here by our witnesses and other witnesses, in fact, there could be a diminution of safety to the miners if that velocity cap is not lifted.

III Tr. at 138. The affidavit of the Administrator for Coal Mine Safety and Health referred to by counsel states:

> *** 7. I did not authorize a further extension of abatement time because to do so would have been tantamount to unilaterally granting Clinchfield interim relief from the responsibility to comply with the 300 fpm belt entry air velocity limit specified by the granted petition for modification. In making this decision, I was aware of legal advice I have received concerning the decision in UMWA v. MSHA, et al., 823 F.2d 6O8 at 618, and the temporary relief provisions of section 105(b)(2) of the Act, 30 U.S.C. 815(b)(2). See also UMWA v. MSHA, supra at 618.

Secretary's witnesses made c!ear at the hearing before the Commission judge, however, compliance with the cited standard would be hazardous. Tr. 44 51-53, 79-80, 108-10, 116-17; see also III Tr. 61-62. Consequently, granting a modification on the basis that the alternative method is at least as safe as the present method makes little sense when that method is dangerous. Therefore, the Administrator's decision is more sensibly read to accord with the views of the Secretary's witnesses and the position expressed by counsel for the Secretary at the hearing before the judge that compliance with the cited standard would diminish safety. See,

e.g., III Tr. at 138.

> *** 9. As evidenced by the proposed decision and order of September 14, 1988 [the Administrator's decision granting modification], and supporting technical information, l believe that the safety of miners at the McClure No. 1 Mine is enhanced by removing the 300 fpm belt entry air velocity limit.

MSHA Ex. 4.

Thus, the express reason and seemingly sole motivation for MSHA's issuance of the disputed withdrawal order is that MSHA was precluded from doing otherwise by the court's opinion in UMWA v. MSHA. Because by its express terms that decision in fact does not so constrain the Secretary' the basis of MSHA's order requiring Clinchfield to comply with a standard that MSHA believes will create a hazard is removed, and the order therefore was improperly issued, constitutes an abuse of discretion and, accordingly, must be vacated.

B. The Requirements of the Mine Act

The Secretary also suggests that issuance of the underlying citation and the withdrawal order was required because the operator was in noncompliance with the terms of a mandatory safety standard and had failed to abate the violation within the time provided. Sec Br. at 6-7. Therefore, even though the inspector characterized the violation as "technical" in nature (Tr. 44), and found that the violation was not "significant and substantial" i.e., it was not reasonably likely to result in an injury of a reasonably serious nature, the Secretary insists that under the Mine Act MSHA was required to initiate enforcement proceedings to achieve compliance even though to do so would result in the creation of a more serious hazard.

Although the Secretary usually is not reticent to claim that the Commission and the courts must give wide latitude to MSHA's enforcement discretion, she disavows here any possibility of even a limited amount of discretion enabling MSHA to refrain from taking enforcement actions that it believes threatens those whose safety MSHA is charged with protecting. I find it difficult to accept that the Mine Act must be interpreted in such a counterproductive manner. As has been stated:

> It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. lt is a "well established principle of statutory interpretation that the law favors rational and sensible construction." it is fundamental, however, that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and the policies of the act in question.

2A Sutherland Statutory Construction 15.12 (4th ed. 1981) (footnotes and citations omitted).

I recognize that the Mine Act by its terms does not give the Secretary broad discretionary authority to selectively enforce mandatory standards. Indeed, section 104{a) provides that if "the Secretary... believes that an operator...has violated this Act...he shall...issue a citation to the operator. 30 U.S.C. 814(a). Nevertheless, even though a decision by MSHA to refrain from citing an operator for a violation may not be the type of determination "committed to agency discretion by law" (5 U.S.C. 701(a)(2); see Heckler v. Chaney. 470 U.S. 821 (1985)), it may still be appropriate, in extremely narrow circumstances, to recognize a carefully bounded discretion permitting the Secretary to consider the adverse safety effects on miners that would result from role enforcement of a particular standard. See UMWA v. MSHA, 823 F.2d at 615 n.5, 616.

For example, in the circumstances of the present case where the mine operator has filed a petition for modification based on diminution of safety, the Secretary's enforcement personnel and technical experts agree that enforcement of the standard will diminish safety, the Administrator has granted a modification from the standard's application and expedited proceedings in review of that determination are being conducted, MSHA should not be compelled to force the operator to take the very action that MSHA believes will create a hazard to miners.

Recognition of such a carefully limited authority is particularly compelling in light of the standard at issue here. The 800 fpm velocity requirement in dispute was not mandated by Congress or promulgated by the Secretary through rulemaking. Rather, the 300 fpm requirement was unilaterally imposed in Clinchfield by the Administrator as part of prior modification of 30 C.F.R. 75.326 granted in February 1987. From January 1981 up until that time, no velocity ceiling had been imposed. Further, under the Administrator's presently proposed decision no velocity limit would be imposed in the future. Thus, the very condition that MSHA presently believes threatens miner safety is the result of unilateral action taken by MSHA in the first instance. Surely, MSHA must have the power to act in this circumstance to provide relief from the hazard its prior action has caused.

I recognize that the Assistant Secretary for Mine Safety and Health has ultimate responsibility for determining whether to grant or deny Clinchfield's petition for modification after all parties, including the UMWA who strenuously opposes the petition, have been given an opportunity to be heard. A decision to not enforce an MSHA-imposed condition now believed by MSHA to be unsafe pending resolution of the expedited modification proceedings would not prejudice the Assistant Secretary's responsibilities in the modification context. Under the Mine Act the Assistant Secretary has enforcement as well as modification duties and both of these responsibilities must be exercised so as to protect the health and safety of miners.

III. Conclusion

For these reasons, I conclude that the real basis for Clinchfield's request for relief is not section 105(d)'s grant of authority to the Commission for review of the reasonableness of the abatement period set by the Secretary, but section 101(c)'s grant of authority to the Secretary to modify a standard

that diminishes the safety of miners. Therefore, I dissent from the majority's affirmance of the administrative law judge's extension of the abatement period.

I concur in result, however, with the majority's affirmance of the judge's vacation of the failure to abate withdrawal order. In my view, under the circumstances of this case, the withdrawal order was improperly issued given the Administrator's erroneous belief that he was compelled to initiate enforcement action despite his belief that to do so would create a danger to miners.

I recognize and do not view lightly the UMWA's argument that compliance with the present standard, rather than the proposed modification, best protects the safety of the miners at the McClure No. 1 mine. The proper forum for weighing the conflicting evidence in this regard, however, is the Department of Labor, not the Commission. ln light of the serious safety question at issue, I encourage the expedited resolution of the pending modification proceeding.

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