CCASE:
ALUMINUM COMPANY OF AMERICA V. SOL (MSHA)
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September 22, 1993

ALUMINUM COMPANY OF AMERICA	:	
	:	
v.	:	Docket No. CENT 92-362-RM
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether an accident control withdrawal order ("control order") was properly issued to Aluminum Company of America ("Alcoa") pursuant to section 103(k) of the Mine Act by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA").(Footnote 1) The inspector issued the control order to Alcoa after he determined that an area in Alcoa's Point Comfort Alumina Plant had been contaminated by mercury. Administrative Law Judge Roy J. Maurer vacated the control order after determining that the Secretary failed to establish that an "accident," as that term is defined in the Mine Act, had occurred. 14 FMSHRC 1721, 1723 (October 1992)(ALJ). For the reasons set forth below, we affirm the judge's decision.

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1 Section 103(k) of the Mine Act states:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. 813(k).

I.
Factual and Procedural Background

Alcoa operates an alumina hydrate production facility in Point Comfort, Texas. On August 5, 1992, MSHA Inspector Ralph Rodriguez inspected the plant in response to a miner's complaint filed under section 103(g) of the Mine Act,(Footnote 2) which alleged that workers were being exposed to mercury and other hazardous substances. George Weems, an MSHA industrial hygienist, conducted a health survey of the plant on August 25-26, 1992. As part of his survey, Weems inspected and sampled an area known as R-300, where, according to Alcoa and miner representatives, mercury had previously been used, most probably in the production of chlorine between approximately 1965 and 1979. Tr. 94, 200, 206. Apparently, mercury has not been used at the site since that time.

Rodriguez and Weems observed beads of mercury, each measuring two to three millimeters in size, at several locations inside and outside the R-300 building, including in cracks in foundations that had served as pump mounts and along the exterior wall of the building. Tr. 148-49. MSHA also sampled for and detected mercury vapor in several places in the R-300 area including in the pump foundations. No mercury vapor was detected in the breathing zone or higher than knee level. Soil samples were also taken in the area adjacent to the R-300 building. Inspector Rodriguez cited Alcoa, alleging a violation of 30 C.F.R. 56.20011 for failure to barricade or post signs at the R-300 building.(Footnote 3)

Rodriguez returned on September 4, 1992, and determined that Alcoa had abated the previous citation by posting signs and barricades at the building. He also observed six people working in an area adjacent to the R-300 building. These workers, who were Alcoa's environmental consultants, were using a backhoe to remove a manhole cover from an underground pipe. They were not

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2 Section 103(g) provides, in pertinent part:

> Whenever a representative of the miners ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists ... such ... representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation....

30 U.S.C. 813(g).

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3 Section 56.20011 provides:

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.

wearing protective equipment. Consequently, Rodriguez issued Alcoa a citation alleging a violation of 30 C.F.R. 56.15006 for failure to wear protective equipment when encountering chemical hazards.(Footnote 4)

MSHA issued a report on its health survey of Point Comfort on September 9. Gov. Ex. 7. The report concluded that mercury vapor and metallic (liquid) mercury were present at R-300, but that, according to MSHA's readings, mercury vapor was not present at breathing zone heights. The report also concluded that the ground west of the R-300 building was heavily contaminated with mercury. The report recommended that people entering the area wear protective clothing and equipment and that Environmental Protection Agency ("EPA") procedures be followed in disposing of or cleaning contaminated clothing or equipment.

On September 11, 1992, MSHA Supervisory Inspector Doyle Fink issued the subject control order, which stated:

> Mercury contamination has occurred at all the R-300 facility and area approximately 70 feet west extending to the paved roadway parallel to the R-300 facility to be covered by this 103(k) order. In order to protect the health and safety, all persons are prohibited from entering this area, except with the approval of the District Manager or his representative pending further investigation of the extent of the hazard.

Gov. Ex. 6.

Alcoa filed a notice of contest of the control order and an expedited hearing was held before Judge Maurer on October 6, 1992. At the conclusion of the Secretary's case, the judge entered a decision from the bench granting Alcoa's motion to dismiss. The judge subsequently issued a written decision confirming his bench decision. While the judge credited the testimony of the Secretary's witnesses, including expert testimony as to the hazardous nature of mercury (14 FMSHRC at 1721-22), he held that the Mine Act gives the Secretary the authority to issue a section 103(k) order only if there has been an "accident," as that term is defined by section 3(k) of the Mine Act.

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4 Section 56.15006 provides:

> Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.

14 FMSHRC at 1722.(Footnote 5) The judge concluded that the Secretary did not prove that the mercury contamination detected in the R-300 area was the result of an accident and, accordingly, he vacated the section 103(k) order. 14 FMSHRC at 1723. He noted that the Secretary could have protected the safety and health of miners through use of the enforcement mechanisms contained in section 104 of the Mine Act, 30 U.S.C. 814. Id.

The Commission granted the Secretary's Petition for Discretionary Review of the judge's decision.

II.
Disposition of the Issues

The Secretary argues that the judge's interpretation of the definition of the term "accident" in section 3(k) of the Act is contrary to its plain language and the Act's protective purposes. The Secretary maintains that an unplanned and uncontrolled release of mercury, including a gradual release that creates a long-term hazard, is an accident under the Mine Act. The Secretary also maintains that the judge erred in vacating the order on the basis that MSHA could have corrected the hazard using the enforcement mechanisms of section 104 of the Act.

Alcoa argues that the judge correctly concluded that the order was defective because no accident had occurred. It contends that no one was injured as a result of the alleged mercury contamination and that the contamination was otherwise outside the scope of accident in section 3(k). In addition, the Secretary failed to present any evidence that there had been a sudden spill of mercury or an increase in the level of mercury before the issuance of the order. Alcoa argues that, in the absence of an accident, the Secretary is not authorized to issue orders to take control of an area to prevent future injuries.

We agree with the judge that an accident is "a necessary precondition to the issuance of a section 103(k) order." 14 FMSHRC at 1722. The judge dismissed the case because he found that the Secretary did not prove that an accident had occurred in the R-300 area. Thus, the primary issue in this case is evidentiary in nature: whether the Secretary established that the mercury contamination was the result of an accident.

The Secretary maintains that the mercury release qualifies as an accident as that term is defined in section 3(k) of the Mine Act. The Secretary correctly asserts that "a mercury release that involves `injury to, or death of, any person' is an accident" under section 3(k) of the Act.

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5 Section 3(k) provides:

> "accident" includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person....

30 U.S.C. 802(k).

S. Br. 8. The Secretary further argues that the "fact that the extent of injury to miners cannot yet be determined does not mean that the kind of exposure that can produce injury has not already occurred." S. Reply Br. 5. He argues that it would be inconsistent with the protective purpose of section 103(k) to hold that "MSHA could not issue a Section 103(k) order protecting miners from continued exposure until exposure had manifested itself in diagnosable injury." Id. In the evidentiary context of this case, the Secretary's argument is misplaced.

The Secretary established that mercury vapor was present at ground level, but not in a miner's normal breathing zone. The Secretary also established that approximately 10 to 20 small beads of mercury were found in cracks around the foundations and motor mounts. Tr. 174-75, 206. The Secretary did not, however, offer any evidence that miners had been exposed to mercury vapor in violation of the applicable threshold limit value ("TLV")(Footnote 6) or that miners had come in contact with the liquid mercury. The Secretary's position that an injury had occurred, but that the extent of the injury had not yet been determined, has no foundation in the record. The Secretary established neither overexposure to mercury vapor or harmful contact with liquid mercury, nor resulting illness or injury. (Footnote 7)

The Secretary points out that the definition of accident in section 3(k) of the Mine Act "includes a mine explosion, mine ignition, mine fire or mine inundation" even if no injury results.(Footnote 8) S. Br. 7-8. The Secretary does not contend that the events specified in the definition encompass this mercury contamination. Rather, the Secretary argues that the word "includes" in the definition is a term of enlargement. S. Br. 9, n.5. He maintains that an event not specifically listed in the definition falls within the definition of "accident" if it is "similar in nature or present[s] a similar potential for

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6 30 C.F.R. 56.5001 provides that exposure to airborne contaminants (such as mercury vapor) shall not exceed the TLV's established by the American Conference of Governmental Industrial Hygienists.

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7 Supervisory Inspector Fink testified that the order was issued because of "perceived concern[s] about the mercury ... to make sure that the employees working there were first in priority...." Tr. 93. He stated that the section 103(k) order was issued to force Alcoa to sample the area, post and barricade it, and make sure that employees entering the area wore protective equipment. Tr. 127. He issued the order to keep "everybody out until we've got time to look at this thing and decide where we're going...." Tr. 134-35, 137. Margie Zalesak, a senior MSHA industrial hygienist, stated that the control order was issued because "the [environmental] contractor did not appear ... knowledgeable in the handling of mercury" to make sure that "anyone going into the area would be protected...." Tr. 204.

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8 "Inundation" is defined as an "inrush of water on a large scale which floods the entire mine or a large section of the workings." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 587 (1968). "Inundation," as used in section 3(k) of the Mine Act, may include the inrush of any liquid or gas. See 30 C.F.R. 50.2(h)(4).

injury or death as a mine explosion, ignition, fire, or inundation." S. Reply Br. 3-4. In general, the Secretary is correct. Whether a specific event is similar in nature must, however, be determined on a case-by-case basis.(Footnote 9)

The Secretary contends that the mercury contamination at Alcoa's facility was similar in nature to the events specifically listed in the definition. The Secretary presented no evidence, however, that the mercury contamination involved in this case was similar in nature or presented a potential for injury similar to that of a mine explosion, ignition, fire or inundation.(Footnote 10) Mine explosions, ignitions, fires and inundations typically are sudden events that pose an immediate hazard to miners and require emergency action. If there is a sudden spill of mercury or other hazardous chemical in an active area of a mine, it may be reasonable for the Secretary to conclude that an accident has occurred. However, the Secretary did not establish such an occurrence at Point Comfort.

The Secretary has issued regulations at 30 C.F.R. Part 50, implementing the accident reporting provisions of section 103 of the Mine Act, 30 U.S.C. 813. In Part 50, the Secretary sets forth the meaning of the ter "accident" for reporting purposes. The Secretary has listed at 30 C.F.R. 50.2(h) events that he considers to be similar in nature and severity to mine explosion, ignition, fire or inundation. Although the list is not exhaustive, it is noteworthy that neither chemical spills nor chemical contamination are included. Moreover, the events listed require quick action. They include an entrapment of an individual for more than 30 minutes; an unplanned inundation of a mine by a liquid or a gas; certain unplanned roof falls; unstable impoundments, refuse piles and culm banks that require emergency action; and damage to hoisting equipment that endangers an individual.

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9 The Secretary argues that the judge concluded that the release of mercury was not an accident because mercury contamination is not included in the list of events in the statutory definition. S. Br. 11-12; S. Reply Br. 6 n.1. We believe that the Secretary has misconstrued the judge's decision. The judge recognized that the events listed in the definition were "not meant to be exclusive or exhaustive." 14 FMSHRC at 1722. The critical determination by the judge, however, was his finding that, short of "torturing the terminology," no accident was shown. 14 FMSHRC at 1723.

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10 The Secretary's witnesses stated that they were not sure of the source of the mercury or quantity present in the R-300 area but that they assumed that the mercury had contaminated the area when chlorine was being produced there. See, e.g., Tr. 94. Industrial hygienist Zalesak described the situation as being very unusual because the contaminated area was not in active production. Tr. 200. She stated that it was unlikely that these beads had been "sitting [on the surface] for 13 years" because mercury "vaporizes off." Id. She assumed that the mercury had been deposited in the area when chlorine was produced and that the mercury was seeping up through cracks in the concrete and around the foundation. Tr. 200, 203, 206.

Finally, the Secretary argues that section 103(k) should not be limited to sudden occurrences that create immediate hazards but should equally apply to "gradual occurrences that create more long-term hazards" because they create a similar potential for injury. S. Br. 13-14. He contends that, because "gradual occurrences and long-standing conditions" can produce serious injuries, they are "no less amenable than sudden events to the remedial scheme authorized by section 103(k)." S. Br. 14. The Secretary maintains that, since there had been "an unplanned and uncontrolled release of a known toxic chemical," MSHA was authorized to issue the accident control order to prevent injury to any person and to insure that the operator has a plan to return the affected area to normal. Id.

The Secretary may be authorized to issue a control order in the event of a gradual unplanned release of a toxic chemical, but only if there has been an accident as that term is defined by the Mine Act. The Secretary's witnesses did not attempt to relate the hazards associated with the conditions in the area to an event similar to a mine explosion, fire or inundation. While we agree with the Secretary that an accident need not necessarily involve a sudden occurrence that creates an immediate hazard, the evidence in this case fails to support the Secretary's argument that this particular gradual release of a toxic chemical was similar in nature or presented the same potential for injury as the events set forth in the statutory definition of accident.(Footnote 11)

We disagree with the Secretary's argument that the judge vacated the section 103(k) order because MSHA could have achieved the same results through the more usual remedial mechanisms in the Mine Act and that he thereby improperly intruded on the Secretary's enforcement discretion. S. Br. 15-16. The judge's reasoning is based on his determination that the occurrence of an accident had not been proven. 14 FMSHRC at 1722-23.

As the judge noted, however, the Secretary was not without a remedy in this case. As discussed above, the Secretary has standards requiring operators to post or barricade hazardous areas and requiring that protective clothing be worn in areas where chemical hazards are present. 30 C.F.R. 56.20011 & 56.15006; see notes 3 & 4, supra. In addition, the Secreta has standards that limit the exposure of workers to airborne contaminants. See note 6, supra. If Alcoa failed to abate a citation alleging a violation of these standards, MSHA could issue a withdrawal order pursuant to section

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11 Industrial hygienist Weems testified that the conditions at R-300 presented a potential mercury vapor problem because workers could get mercury on their work boots, track the mercury into confined spaces and expose workers to harmful concentrations of mercury vapor. Tr. 154, 164. Industrial hygienist Zalesak testified that mercury can be absorbed through inhalation and through the skin. Tr. 198. At the time the order was issued, however, warning signs and barricades had been posted in the R-300 area in accordance with 30 C.F.R. 56.20011. In addition, it appears that workers did not regularly enter the area because, as Supervisory Inspector Fink testified, the R-300 area was only used "occasionally for storage." Tr. 106. Moreover, MSHA's investigation revealed that there was no detectable mercury vapor in the breathing zone of workers who might enter the area.

104(b) of the Mine Act, 30 U.S.C. 814(b). If Alcoa continued to violate these standards, it would be subject to the sanctions set forth in sections 104(d) and (e) of the Act, 30 U.S.C. 814(d) & (e).

Neither the judge's nor our decision in this case interferes with the Secretary's general authority under section 103 of the Act, 30 U.S.C. 813, to continue his investigation of the mercury release at Point Comfort. We do not disagree with the Secretary's broad interpretation of section 103(k) of the Act. Our conclusion in this case is based solely on the record developed before the judge and we do not suggest that the gradual release of a toxic substance can never qualify as an accident subject to the provisions of section 103(k).(Footnote 12)

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12 On August 4, 1993, the Secretary asked the Commission to take official notice of a document published by the EPA in the Federal Register on June 23, 1993, which indicates that the Point Comfort facility has been included in a list of potential hazardous waste sites warranting further investigation by the EPA. In response, Alcoa asked the Commission to deny the Secretary's request as "improper, irrelevant and untimely." As a general matter, the record on review before the Commission is limited to the record developed before the judge. See e.g., Twentymile Coal Co., 15 FMSHRC 941, 946-47 (June 1993); Union Oil Co. of California, 11 FMSHRC 289, 300-01 (March 1989). The Secretary has not demonstrated the relevance of the EPA document to this proceeding or set forth a compelling reason why the Commission should take official notice of it. Accordingly, the Secretary's request is denied.

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III.
Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner