CCASE:
ENERGY WEST MINING V. SOL (MSHA)
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ENERGY WEST MINING COMPANY	:	
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v.	:	Docket Nos. WEST 92-819-R
	:	WEST 93-168
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Backley, Doyle and Holen, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty 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 former Administrative Law Judge Michael A. Lasher, Jr. erred in entering a summary decision in which he concluded that Energy West Mining Company ("Energy West") violated a condition set forth in a decision of the Assistant Secretary of Labor for Mine Safety and Health ("Assistant Secretary") granting modification of a mandatory safety standard.(Footnote 2)

The Commission granted Energy West's petition for discretionary review, which challenged the judge's decision on procedural and substantive grounds, and heard oral argument. For the reasons that follow, we conclude that there were genuine issues of material fact and that, accordingly, the judge improperly disposed of this matter through summary decision. We vacate the judge's decision and remand for appropriate proceedings.

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1 Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission. Chairman Jordan has recused herself in this matter.

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2 The judge's August 10, 1993, decision was not published in the Commission's reports.

I.

Factual and Procedural Background

Energy West owns and operates the Cottonwood Mine, an underground coal mine in Emery County, Utah.(Footnote 3) Pursuant to the modification process in section 101(c) of the Mine Act and the Secretary of Labor's implementing regulations at 30 C.F.R. Part 44, the Assistant Secretary issued the Decision and Order ("D&O") underlying this case on July 14, 1989. Utah Power & Light Co., Mining Div., Docket No. 86-MSA-3.(Footnote 4) The D&O granted a modification of 30 C.F.R.
75.326 (1991),(Footnote 5) permitting the operator to employ a two-entr mining system

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3 This summary is based on the parties' motions and briefs, the official file, and the judge's decision because this matter was decided without an evidentiary hearing. (See also n.8 below.)

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4 Under section 101(c) of the Act, an operator or representative of miners may petition the Secretary of Labor to modify the application of any mandatory safety standard in a mine on the grounds that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine." 30 U.S.C. 811(c). Section 101(c) requires the Secretary to publish notice of such petition, investigate it, provide opportunity for public hearing, publish proposed findings, and ultimately issue a decision disposing of the petition. (For the specific rules, see 30 C.F.R. Part 44.) The Commission is not directly involved in the modification process. See generally Clinchfield Coal Co., 11 FMSHRC 2120, 2129-31 (November 1989).

The petition for modification was originally filed in 1985 by Utah Power & Light Co., Mining Division, the previous operator of the mine. The Administrator for Coal Mine Safety and Health ("Administrator") issued a Proposed Decision and Order ("PDO")(see 30 C.F.R. 44.13) granting the petition based on his determination that longwall development and retreat mining in compliance with section 76.326 would diminish safety and that the proposed alternate two-entry system would guarantee no less than the same level of protection. The United Mine Workers of America ("UMWA") objected to the PDO and requested a hearing. See 30 C.F.R. 44.14. Following the hearing, the Department of Labor administrative law judge denied the petition, concluding that application of section 75.326 would not diminish safety and that the proposed alternate method would not guarantee the same measure of protection. The operator and the Administrator appealed to the Assistant Secretary (see 30 C.F.R. 44.33 & .34), who issued the D&O reversing the judge and granting the petition. See 30 C.F.R. 44.35. The D&O was not appealed to a United States Court of Appeals.

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5 Former section 75.326, entitled "Air courses and belt haulage entries," restated the statutory underground coal mine ventilation standard at section 303(y)(1) of the Act, 30 U.S.C. 863(y)(1). On May 15, 1992, section 75.326 was renumbered as section 75.350 but was otherwise unchanged in the

with the belt entry serving as a return air course during longwall development and retreat mining. As relevant here, section 75.326 required that entries used as intake and return air courses be separated from belt haulage entries and that belt entries not be used to ventilate a mine's active working places.

The D&O imposed upon the operator a number of additional terms and conditions. See 30 C.F.R. 44.4(c). Condition III(c)(4), the requirement in issue, is contained under the heading "Requirements Applicable to Both Development and Retreat Mining Systems" and provides:

> No later than two years from the date of this Order, and pursuant to a schedule developed by the petitioner and approved by the District Manager, all diesel-powered equipment operated on any two-entry longwall development or two-entry longwall panel shall be equipment approved under 30 CFR Part 36.[(Footnote 6)]

On September 2, 1992, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") cited Energy West, alleging a violation of section 75.326 as modified by the D&O, for failure to comply with Condition III(c)(4) in that three unapproved diesel-powered trucks were being used in the mine. It is undisputed that the trucks had not been approved under Part 36, that miners were working in the 9th Left two-entry panel preparing for installation of the longwall equipment, and that the cited trucks were being used to transport miners and construction equipment to and from that section. See E.W. Br. at 4-5; S. Br. at 3-4.

Energy West contested the citation, the contest was consolidated with the subsequent civil penalty proceeding, and the UMWA was permitted to intervene.

On December 2, 1992, Energy West filed a motion for summary decision with the administrative law judge under former Commission Procedural Rule 64, 29 C.F.R. 2700.64 (1992)("Rule 64"), seeking vacation of the citation on the grounds that there was no genuine issue of material fact and that it was entitled to summary decision as a matter of law.(Footnote 7) In support of its motion,

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fn 5 cont'd.

Secretary's revised underground coal ventilation standards. See 30 C.F.R. Part 75, Subpart D (1993).

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6 30 C.F.R. Part 36 ("Part 36") contains the Secretary's regulations for use of mobile diesel-powered transportation equipment in gassy noncoal mines and tunnels.

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7 In relevant part, Rule 64, entitled "Summary decision of the Judge," provided:

> (a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary

Energy West attached various exhibits, including documents received from the Secretary in discovery and an affidavit from the chief safety engineer at Cottonwood. Essentially, the operator contended that Condition III(c)(4) covered only development and retreat mining, whereas the work in question, installation of longwall equipment, was a separate phase of mining being performed after development was complete and before retreat mining commenced. E.W. Motion for Summary Decision at 1, 5-8.

The Secretary opposed Energy West's motion and filed a cross-motion for summary decision. He argued that the central factual issue was, in fact, in dispute. S. Cross-Motion for Summary Decision at 5. The Secretary contended that, contrary to Energy West's assertions, there were only two stages in the two-entry longwall mining process, longwall development and retreat mining, and that the installation of longwall equipment was inseparable from the development and retreat mining phases. Id. The Secretary argued alternatively that he was entitled to summary decision because his interpretation of the D&O, requiring use of diesel equipment, approved pursuant to Part 36, during all facets of two-entry mining, was proper as a matter of law and entitled to deference. Id. at 8-32. Intervenor UMWA responded in support of the Secretary's position.

The judge denied Energy West's motion for summary decision. Agreeing that the "majority" of material facts were not disputed, the judge found that

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fn 7 cont'd

> decision disposing of all or part of the proceeding.
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> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.
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> (d) Case not fully adjudicated on motion. If a motion for summary decision is denied in whole or part, and the Judge determines that an evidentiary hearing of the case is necessary, he shall, if practicable, and upon examination of all relevant documents and evidence before him, ascertain what material facts are actually and in good faith controverted. He shall thereupon make an order specifying the facts that appear without substantial controversy, and direct such further proceedings as appropriate.

In 1992, Rule 64 was reissued as Rule 67, but the criteria for summary decision remain the same. See 29 C.F.R. 2700.67(b)(1993). Fed. R. Civ. P. 56(c) sets forth these same criteria for summary judgment.

the "most crucial" fact at issue was "hotly contested," i.e., whether, at the time of citation, development of the longwall panel was complete and retreat mining not yet begun. Decision at 3, 4. He noted the operator's contention that the cited work of installing the longwall equipment was neither development nor retreat mining but instead represented a third phase of the operation, "construction" or "set up" work. Id. at 2-3. Referencing the Secretary's position that installation of longwall equipment was an "integral facet" of two-entry longwall development and retreat mining, the judge concluded that these differences "establish a factual dispute between the parties as to whether the installation of longwall machinery constitutes a phase of `longwall development' and/or `retreat mining.'" Id. at 4. On that basis, he denied the operator's motion.

Nonetheless, the judge granted the Secretary's cross-motion for summary decision. He concluded that the Secretary's contention that Energy West must use diesel equipment approved pursuant to Part 36 during "all facets" of its two-entry mining was "consistent" with both the "language and intent" of the D&O and section 101(c) of the Act. Decision at 6. The judge asserted that he could grant the Secretary's cross-motion based on interpretation of the D&O; in contrast, the operator's motion depended on drawing inferences from the evidence referenced in its motion. Id. He opined that the Secretary's cross-motion was "well-reasoned and persuasive" and, by reference, incorporated some 25 pages of it into his decision. Id. Citing the UMWA's response, he reasoned that acceptance of the operator's position would necessitate interpreting the D&O to protect miners from diesel equipment ignition hazards only while coal was being extracted. Id. The judge concluded that "[t]he term `development' ... is broad enough to encompass the entire process of preparing to retreat mine the longwall panel" and "include[s] the activity of setting up longwall equipment...." Id.

Accordingly, the judge granted summary decision in the Secretary's favor, affirmed the citation based on the other undisputed facts, and assessed the $50 penalty proposed by the Secretary.

II.

Disposition

Energy West argues that the judge's interpretation of the D&O was legally erroneous and that, alternatively, if the Commission agrees with the judge that there was a disputed material fact as to the nature of its development/retreat mining operations, summary decision was inappropriate and the case should be remanded for factual resolutions. PDR at 5-10. The Secretary argues that summary decision was proper because the issue of whether installation of longwall equipment constitutes a phase of longwall development or retreat mining subject to Condition III(c)(4) is a question of law, not of fact, and the judge's resolution of that question was legally correct. S. Br. at 8-9, 16-20. The Secretary also notes, however, that, if the Commission agrees with the judge that there was an issue of material fact, "the appropriate recourse" is remand for an evidentiary hearing. Id. at 8-9 n.6. The UMWA rests on its response below.

We conclude that summary decision was inappropriately entered in this case. The Commission has long recognized that:

> Summary decision is an extraordinary procedure .... Under our rules, ... summary decision ... may be entered only where there is no genuine issue as to any material fact and ... the party in whose favor it is entered is entitled to it as a matter of law.

Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). See also, e.g., Clifford Meek v. Essroc Corp., 15 FMSHRC 606, 615 (April 1993). In construing Fed. R. Civ. P. 56, the Supreme Court has indicated that summary judgment is authorized only "upon proper showings of the lack of a genuine, triable issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

Energy West's motion for summary decision was premised on its factual assertion that longwall installation work is distinct from development and retreat mining and that, at the time of citation, the former had been completed while the latter had not commenced. The Secretary vigorously contested these asserted facts, arguing that equipment installation is an integral phase of development and retreat mining and that development was not complete at the mine. Thus, the parties disagree as to whether Condition III(c)(4) was intended to apply to installation or set-up operations. Without a determination of that issue, it cannot be determined whether Energy West was in violation of Condition III(c)(4).(Footnote 8)

The judge recognized that these facts were disputed and, accordingly, denied the operator's motion. He nevertheless granted the Secretary's cross-motion for summary decision. Once the judge found that the central facts were disputed, he was compelled by Rule 64 to deny summary decision and to conduct an appropriate hearing. Because other facts relevant to the question of violation were undisputed, the hearing could have been limited pursuant to Rule 64(d). (Footnote 9)

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8 Given our resolution of this matter, we need not reach Energy West's assertion that the judge committed prejudicial error by incorporating into his decision the Secretary's brief below. We note, however, that wholesale incorporation of a litigant's brief is a questionable judicial practice.

In deciding this case, we have not considered a Proposed Decision and Order regarding another mine, which Energy West's counsel referenced at oral argument and subsequently submitted to the Commission. The Secretary objected to the Commission's consideration of the document, which was not part of the record.

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9 Former Rule 64(d) has since been revised (see 29 C.F.R. 2700.67(d) (1993)), but not in any material way that would have affected the instant case.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand this matter to the Chief Administrative Law Judge for assignment to a judge for appropriate proceedings consistent with this opinion.(Footnote 10)

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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10 Judge Lasher has since retired from the Commission.