FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 6, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. PENN 2008-51-R
	:	PENN 2008-52-R
v.	:	PENN 2008-53-R
	:	PENN 2008-54-R
CUMBERLAND COAL RESOURCES, LP	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

DECISION

BY: Jordan, Chairman; Young and Cohen, Commissioners

In these contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), Judge Michael Zielinski upheld a violation of 30 C.F.R. § 75.363(a)[1] alleged in an order issued to Cumberland Coal Resources, LP ("Cumberland"). 31 FMSHRC 137, 157-58 (Jan. 2009) (ALJ). Cumberland filed a petition for discretionary review challenging the Judge's finding of violation, which the Commission granted. The Secretary of Labor subsequently filed a response acknowledging that the violation of section 75.363(a) should not be affirmed and requesting that the Commission amend the order

[1] 30 C.F.R. § 75.363(a) provides in part:

> Any hazardous condition found by the mine foreman . . . , assistant mine foreman . . . , or other certified persons designated by the operator for the purpose of conducting examinations . . . , shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. . . .

to allege a violation of 30 C.F.R. § 75.360(b).[2] For the reasons that follow, we deny the Secretary's request, reverse the Judge's finding that Cumberland violated section 75.363(a), and vacate the order.

I.

Factual and Procedural Background

Cumberland operates the Cumberland Mine, a large underground coal mine in Greene County, Pennsylvania. *Id.* at 137. On October 4, 2007, Barry Radolec, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the mine. *Id.* at 138. A few days prior to October 4, a belt move had occurred on the 8 Butt section of the mine. Tr. 242. Typically during a belt move, the area where the belt will be installed will be "fling dusted," that is, rock dust will be distributed by a fling duster placed on a scoop bucket. 31 FMSHRC at 155; Tr. 243. After the belt move, the area will be bulk dusted.[3] 31 FMSHRC at 155; Tr. 241.

When Inspector Radolec arrived at the mine, he reviewed the preshift and onshift report books for the 8 Butt section of the mine. 31 FMSHRC at 138. He noticed several entries indicating that areas of the belt entry from crosscuts 25 to 30 and 11 to 15 needed to be rock dusted. *Id.*; Gov't Ex. 5. The inspector traveled to the 8 Butt section. 31 FMSHRC at 138. At the No. 17.5 crosscut, he observed that the belt had gone out of alignment and that a portion of the belt was rubbing the belt stand.[4] *Id*. The belt was immediately taken out of service so that the alignment could be corrected. *Id*.

Between crosscuts 25 and 30.5, Inspector Radolec observed accumulations of dry black float coal dust, coal fines, and loose coal. *Id*. The loose coal and coal fines were underneath the belt and between the crosscuts. *Id*. There was a thin layer of float coal dust on the belt structures, electric cables, and switches. *Id*. The float coal dust was deposited on rock dust, which Radolec considered to be token in amount. *Id*. Radolec determined that the condition was highly likely to result in a fire that would cause fatalities because the belt presented a potential ignition source, and there were electrical cables, boxes, and switches present. *Id*. Accordingly, the inspector issued Citation No. 7025468, alleging a violation of 30 C.F.R. § 75.400, for failure

[2] 30 C.F.R. § 75.360(b) provides in part that "The person conducting the preshift examination shall examine for hazardous conditions . . . ."

[3] To perform bulk dusting, miners use tanks which blow rock dust through the air. 31 FMSHRC at 141 n.4; Tr. 235.

[4] Radolec issued Citation No. 7025467, alleging a violation of 30 C.F.R. § 75.1725(a), for failure to maintain machinery in a safe condition. *Id.* at 138 n.1. That citation is not at issue on review.

to clean up combustible materials. *Id.* at 139. The inspector indicated that the violation was significant and substantial ("S&S")[5] and caused by the operator's unwarrantable failure to comply with the standard.[6] *Id.* at 139. The inspector specified that the violation was to be abated later that day. Gov't Ex. 4, at 1.

Inspector Radolec also issued Order No. 7025469, alleging an S&S and unwarrantable violation of section 75.363(a). 31 FMSHRC at 139. The order alleged that Cumberland had "failed to correct immediately a hazardous condition reported in the pre-shift examination book," and identified that condition as that the 8 Butt conveyor belt needed to be rock dusted between crosscuts 25 and 30. Gov't Ex. 6, at 1.

The operator challenged Citation No. 7025468, which alleged a violation of section 75.400, and Order No. 7025469, which alleged a violation of section 75.363(a), in addition to other orders not relevant on review. *See* Tr. 12-18. The matter proceeded to hearing before Judge Zielinski.

The Judge vacated the special findings and affirmed the violations of section 75.400 and 75.363(a) alleged in Citation No. 7025468 and Order No. 7025469, respectively.[7] 31 FMSHRC at 140-58. With respect to Citation No. 7025468, the Judge concluded that Cumberland had violated section 75.400 based on his findings that loose coal and coal fines were present across nearly the entire width of the belt entry in several locations from the No. 25 to the 30.5 crosscuts, and that float coal dust existed on some horizontal surfaces. *Id.* at 142. The Judge also concluded that the area had not been fling dusted after the belt move, and that bulk rock dusting had not progressed to the area. *Id*. He determined that the violation was not S&S, however. *Id.* at 143. The Judge reasoned that although the accumulations presented a hazardous condition by contributing to, or exacerbating, the occurrence of a fire or explosion, the Secretary had failed to prove a reasonable likelihood that the hazard contributed to would result in an injury. *Id*. He also concluded that the violation was not unwarrantable based in part on his finding that preshift

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[5] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[6] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[7] Because the Judge vacated the special findings, he modified Order No. 7025469 to a citation issued under section 104(a) of the Act. 31 FMSHRC at 157-58, 166. We refer to the enforcement action as an order rather than as a citation only as a matter of convenience to better distinguish Order No. 7025469 from Citation No. 7025468.

reports indicating that the area in question needed to be rock dusted did not demonstrate that the examiners considered the area to be hazardous. *Id.* at 156-57.

With respect to Order No. 7025469, the Judge determined that the notations in the preshift reports that areas of the belt entry needed to be rock dusted did not report a hazardous condition that required immediate correction. *Id* at 157. Nonetheless, the Judge held that Cumberland violated section 75.363(a) because the accumulations underlying Citation No. 7025468 were hazardous, and Cumberland should have identified and reported the accumulations in the preshift reports. *Id.* at 157-58. The Judge also concluded that Cumberland's violation of section 75.363(a) was not S&S and was not caused by an unwarrantable failure to comply for the same reasons that he found that the accumulations violation was not S&S or unwarrantable. *Id.* at 158.

Cumberland filed a petition for discretionary review with the Commission, challenging the Judge's determination that it had violated section 75.363(a), and filed a motion requesting oral argument. The Commission granted Cumberland's petition and motion and heard oral argument.

In its petition, Cumberland argues that the Judge erred in finding a violation of section 75.363(a). It asserts that the basis for the Judge's finding of violation, that is, that Cumberland had failed to identify and report accumulations, was flawed since section 75.363(a) does not require the identification and reporting of hazardous conditions. C. Br. at 9-11. The operator also asserts that it was deprived of due process because the Judge determined that there was a violation on a basis other than what the Secretary alleged, and the parties did not address the issue of whether the accumulations were a condition that had to be reported as hazardous. *Id.* at 14-15, 19. Cumberland states that it would have offered other evidence concerning how certified officials interpret "hazard" if the issue had been presented during the hearing. *Id.* at 19-20. It maintains that, in any event, the accumulations were not hazardous. *Id.* at 20-23.

The Secretary concedes on appeal that the violation of section 75.363(a) should not be affirmed, but maintains that the order should now be amended to allege a violation of section 75.360(b). S. Br. at 2, 9. She states that under Fed. R. Civ. P. 15(b), absent prejudice to the non-moving party, pleadings may be conformed to the evidence if the nonpleaded issue was litigated by express or implied consent of the parties. *Id.* at 17-18. The Secretary contends that the factual issues underlying a section 75.360(b) violation were actually litigated in the S&S and unwarrantable failure determinations in connection with the accumulations violation. *Id.* at 11, 18. The Secretary dismisses Cumberland's argument that it would have offered different evidence and arguments if it had known that the adequacy of the preshift examinations was at issue, maintaining that a party asserting prejudice must do so with specificity. *Id.* at 18.

Cumberland replies that the Commission should deny the Secretary's request to amend the order to allege a violation of section 75.360(b). C. Reply Br. at 7. It submits that Rule 15(b) of the Federal Rules should not be applied to citations and orders because they differ from civil

pleadings in that they must describe conditions with particularity and they require abatement. *Id.* at 3-4. It also asserts that the parties have not litigated the issue of whether Cumberland violated section 75.360(b), and that granting the Secretary's request would result in significant prejudice to Cumberland. *Id.* at 7. Cumberland explains that if it had defended allegations that it violated section 75.360(b), it would have presented evidence regarding whether a reasonable mine examiner would have considered the accumulations to be hazardous such that they required reporting in a preshift book. *Id.* at 7-21. Accordingly, Cumberland requests that the Commission reverse the Judge's finding of violation with respect to Order No. 7024569. *Id*. at 21.

II.

Disposition

The central question on review is whether we should grant the Secretary's request to amend Order No. 7025469 to allege a violation of section 75.360(b). We conclude that, even if the evidence adduced at trial supports a violation of section 75.360(b) as the Secretary asserts, that was not the violation charged or defended against, and there is no basis to justify amendment at this stage in the proceedings.

The Secretary is seeking to amend the order after the Judge has issued his decision to allege that Cumberland had not recorded accumulations in the preshift examination book in violation of section 75.360(b). However, section 75.360(b) sets forth requirements that are different than those set forth in section 75.363(a). While section 75.363(a) requires that a hazardous condition be immediately corrected or posted, section 75.360(b) essentially requires a preshift examiner to find and record a hazardous condition in a preshift examination book. *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 651, 653 (Aug. 2004); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997). If Order No. 7025469 were amended to allege a violation of section 75.360(b), Cumberland would necessarily rely upon different evidence to defend the violation. In addition, the operator would be required to take different measures to abate such an order. Thus, the Secretary is seeking to amend the order to allege a violation of a different standard based on different underlying facts which would require different abatement action after Cumberland has defended a violation of section 75.363(a) at hearing.

The Secretary relies on Federal Rule of Civil Procedure 15(b)(2) to justify an amendment to the citation. Fed. R. Civ. P. 15(b)(2).[8] The Commission's procedural rules provide that "[t]he

[8] Rule 15(b)(2) provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the

Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure." 29 C.F.R. § 2700.1 The Commission has previously recognized that although the Commission's procedural rules do not address amendment of pleadings, the Commission may properly look for guidance to Fed. R. Civ. P. 15 when the Secretary requests leave to amend a citation or order. *Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990). Accordingly, in our jurisprudence we have considered Rule 15(b) in several contexts. *Compare Consolidation Coal Co.*, 20 FMSHRC 227, 235-37 (Mar. 1998) (concluding that the Secretary could not amend a citation post-hearing to include a new theory of violation regarding the cited standard because the trial record did not reflect that the operator understood, or should have understood, that the new theory was being litigated) *with Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (permitting a citation to be amended after hearing to correct a numbering error by the Secretary because the operator fully understood the gravamen of the correct standard, knowingly litigated the citation on that basis, and suffered no prejudice). In this case, we conclude that to the extent that Rule 15(b) permits post-hearing amendment in some cases, it does not apply to the circumstances here.[9]

Under Rule 15(b), amendments are permitted so that pleadings mirror the actual issues that were tried. 3 James Wm. Moore et al., Moore's Federal Practice ¶ 15.18[1], at 15-73 (3d ed. 2002) ("*Moore's*"). In permitting a complaint to be amended post-hearing to include an issue that had not been raised, courts require a showing that the issue was tried with the express or implied consent of the parties. *Id.* Implied consent may be found if the opposing party recognized that a new matter was at issue during the trial and that evidence was introduced to prove that issue. *Id*. at 15-75. Courts may not find implied consent "when evidence supporting an issue allegedly tried by implied consent is also relevant to other issues actually pleaded and

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> evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

[9] We respectfully disagree with the suggestion of our colleague, Commissioner Duffy, that after abatement and termination, a citation or order may only be modified "in cases involving purely technical errors" such as *Faith Coal Co.*, which involved a numbering error. Slip op. at 11. Our precedent has clearly established that the fact of an operator's abatement of a violation does not prevent it from being modified pursuant to Fed. R. Civ. P. 15 for more than purely technical purposes, in appropriate circumstances. *See Cyprus Empire*, 12 FMSHRC at 916 (affirming judge's action permitting the Secretary to modify a citation and holding that "[a]mong the permissible purposes of such amendments are changes in the nature of the plaintiff's claims or legal theories"); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288-90 (Aug. 1992) (reversing judge's conclusion that a citation may not be modified to allege a violation under a different standard after abatement and termination of original citation, holding that modification is permissible under Fed. R. Civ. P. 15(a), absent legal prejudice to the operator, because "a citation or order, even though terminated, remains in effect for purposes of subsequent contest and civil penalty proceedings"), *on remand* 15 FMSHRC 1107 (June 1993) (ALJ) (granting modification since operator failed to show legally recognizable prejudice).

tried." *Id.*; *Acequia, Inc. v. Clinton*, 34 F.3d 800, 814 (9th Cir. 1994). In determining implied consent, courts also consider whether the opposing party had a fair opportunity to defend against the issue and would be prejudiced in presenting its case. *Moore's* ¶ 15.18[1] at 15-76.

The record cannot reasonably be read to support the conclusion that Cumberland implicitly consented to litigating a violation of section 75.360(b).[10] Similar to the operator in *Consolidation Coal*, the trial record does not reflect that Cumberland understood that the Secretary was litigating a violation of section 75.360(b).[11]

Rather, it is clear from the record that Cumberland defended Order No. 7025469 on the basis that it did not violate section 75.363(a). Specifically, Cumberland presented evidence that the failure to rock-dust was recorded in the preshift examination book as a condition, rather than as a hazard,[12] and that Cumberland employees were addressing the condition described in the preshift examination book in a systematic, regular fashion in accordance with the priority they accorded such a non-hazardous condition. Tr. 21-22, 228-30, 233-34, 241, 248, 251-52, 254-55, 434; C. Ex. 3; Gov't Ex. 5 at 49, 58, 78.

Cumberland's counsel did not elicit testimony regarding whether the preshift examinations had been adequate. Indeed, Cumberland's counsel clarified that the operator was not defending a preshift examination violation by asking Inspector Radolec, "Did you cite Cumberland for putting inadequate entries in the book?" Tr. 164. Inspector Radolec testified, "No, I didn't." Tr. 164.

The Secretary seeks to support her unpleaded claim that Cumberland violated section 75.360(b) by relying on evidence that was proffered to prove a pleaded issue, that is, the S&S and unwarrantable violation of section 75.400 alleged in Citation No. 7025468. The Secretary specifies that the violation of section 75.360(b) rests on three factual findings that the Judge made with respect to the special findings associated with the accumulations violation. S. Br. at 11 (stating that the Judge made "three key factual findings . . . during the course of his S&S and unwarrantable failure analyses in connection with the accumulations violation" that are supported

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[10] It is undisputed that Cumberland did not expressly consent to litigating a violation of section 75.360(b).

[11] In her post-hearing brief, the Secretary argued that the operator had violated section 75.363(a) and made no mention of section 75.360(b). S. Post-Hr'g Br. at 21-23. In fact, the Secretary noted that the notations, "needs dust[ing]," set forth in the preshift examination books "arguably implicates the adequate preshift provisions of 30 C.F.R. § *75.360(a),*" not section 75.360(b). *Id.* at 22 n.3.

[12] The preshift books used by Cumberland contain two separate sections. One is entitled "Violations Observed and Reported/Violation or Condition," and one is for "Dangers and Hazardous Conditions Observed and Reported." Tr. 100; Gov't Ex. 5.

by substantial evidence and establish a violation of section 75.360(b)); *see also* S. Br. at 3. As noted above, when evidence is relevant to a pleaded issue, it may not be used to support implied consent to litigate an unpleaded issue. *See Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 401 (4th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000) ("'A court will not imply consent to try a claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim.'") (citations omitted).

Basically, Cumberland has had no fair opportunity to defend against an allegation that it violated section 75.360(b). The Secretary had ample opportunity to move to amend the order prior to the hearing, during the hearing, or in her post-hearing brief. However, the Secretary did not move to amend the order until the Secretary filed her response brief on review. S. Br. at 2. The first time that the Secretary specifically referred to evidence to support her claim that Cumberland impliedly consented to litigating a violation of section 75.360(b) was during oral argument before the Commission, after all briefs with the Commission had been filed. Oral Arg. Tr. at 27-37, 42-50. Amending the order at this stage of the proceedings would be contrary to concepts of fundamental fairness that require that every litigant receive adequate notice of charges made against it.

Moreover, Cumberland has adequately demonstrated that it would be prejudiced if the order were amended to allege a violation of section 75.360(b). Cumberland argues that if the Secretary had alleged a violation of section 75.360(b), it would have presented different evidence in its defense. C. Reply Br. at 19. It contends that it would have presented evidence regarding whether a reasonable mine examiner would have considered the accumulations to be hazardous such that they required reporting in the preshift book. *Id*. No preshift examiners gave testimony at the hearing. In fact, Inspector Radolec acknowledged that he had not questioned a single preshift examiner about what was intended by the notation "needs dusted." Tr. 164.

As noted, the Secretary agreed with Cumberland that the Judge had, in fact, erred in finding a violation of section 75.363(a). *See* S. Br. at 9 ("The Secretary acknowledges that the ALJ's finding of a violation under section 75.363(a) should not be affirmed."). We suggest that after making this determination, the Secretary should not have opposed Cumberland's petition challenging the violation.[13] Accordingly, given the Secretary's concession and our conclusion that the order should not be amended to allege a violation of section 75.360(b), we reverse the Judge's determination that Cumberland violated section 75.363(a) and vacate Order No. 7025469.

[13] We are reminded that, "A government lawyer 'is the representative not of an ordinary party to a controversy, . . . but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.'" *Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (citing *Berger v. United States*, 295 U.S. 78 (1935)).

III.

Conclusion

For the foregoing reasons, we deny the Secretary's request to amend Order No. 7025469 to allege a violation of section 75.360(b), reverse the Judge's determination that Cumberland violated section 75.363(a), and vacate Order No. 7025469.

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Mary Lu Jordan, Chairman

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

Commissioner Duffy, concurring:

I, too, would deny the Secretary's request to amend Order No. 7025469, reverse the Judge's finding of a violation of section 75.363(a), and vacate the order, but I would do so on more fundamental grounds. The explicit language of section 104(a) of the Mine Act precludes amendment of the order in these circumstances, so recourse to Federal Rule of Civil Procedure 15(b) would be foreclosed in this instance.

As Cumberland asserts, citations and orders issued pursuant to section 104 of the Mine Act differ in form and function from pleadings filed in civil cases. Section 104(a) requires that a citation "describe with particularity the nature of the violation, including a reference to the . . . standard . . . alleged to have been violated." 30 U.S.C. § 814(a). The purpose of the particularity requirement in section 104(a) is not only to permit the cited operator to "adequately prepare for a hearing on the matter," but also to allow it "to discern what conditions require abatement." *Empire Iron Mining Partnership*, 29 FMSHRC 999, 1003 (Dec. 2007) (citations omitted).

In contrast, in accordance with the notice pleading standards applicable to civil cases, complaints need only allege a claim for relief in "a short and plain statement." *See* Fed. R. Civ. P. 8(a). Thus, while a citation or order requires an operator to abate the alleged violative condition prior to resolution of the enforcement action, a federal civil complaint does not.

Termination of a citation or order signals that the operator has abated the violative condition, and that the operator is not subject to a section 104(b) withdrawal order for failure to abate that citation. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288 (Aug. 1992). Consequently, notwithstanding that the Commission has held that the Secretary may modify a terminated citation or order in some circumstances, the Secretary may not modify a terminated citation or order to direct further abatement. *Id.* at 1289.

Order No. 7025469 alleges a violation of section 75.363(a), and provides in part that the "operator failed to correct immediately a hazardous condition reported in the preshift examination book," and that the hazardous condition reported was that the area from crosscut Nos. 25 to 30 needed to be rock dusted. Gov't Ex. 6. In order to abate the order, Cumberland's mine foreman received instruction about immediately correcting or posting off the allegedly hazardous condition. *Id.* The order was then terminated on October 4, 2007. *Id.* Cumberland defended against the order by presenting evidence to show that the condition reported in the preshift book (the need for rock-dusting) was not hazardous and did not require immediate corrective action or posting under section 75.363(a). C. Reply Br. at 20.[1]

[1] As my colleagues correctly conclude, the record cannot support the Secretary's assertion that Cumberland impliedly consented to litigating a violation of section 75.360(b). *See Consolidation Coal Co.*, 20 FMSHRC 227, 235-37 (Mar. 1998) (concluding that the Secretary could not amend a citation post-hearing to include a new theory of violation regarding the cited

Given the Commission's decision in *Empire Iron*, *supra*, I am not convinced that the Secretary or the Commission has much latitude to amend a citation or order once abatement has been completed and the citation or order has been terminated, much less in the instant case, where the alleged violation has also already been defended at hearing. The only exception would be in cases involving purely technical errors. *See, e.g., Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (permitting a citation to be amended post-hearing to correct a numbering error by the Secretary because the operator fully understood the gravamen of the correct standard, knowingly litigated the citation on that basis, and suffered no prejudice). It may well be that the requirement of specificity in section 104(a), including citing "with particularity" the standard alleged to have been violated, may trump any further leeway to be afforded the Secretary under the aegis of Rule 15(b).[2]

Consequently, in this case the Mine Act provision certainly forecloses the relief the Secretary seeks under Rule 15(b), and I join with my colleagues in expressing some consternation with her decision to oppose the petition for review and attempt to have the order amended so late in the proceeding.

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Michael F. Duffy, Commissioner

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standard because the trial record did not reflect that the operator understood, or should have understood, that the new theory was being litigated).

[2] While my colleagues cite cases in which the Commission has permitted more than a technical amendment to a citation or order (*see* slip op. at 6 n.9), in doing so the Commission was not directly confronted with an operator's claim that amendment meant it had been required to unnecessarily abate an alleged violation. That claim has been made here (*see* C. Reply Br. at 20), and, given the importance of abatement under the Mine Act, goes to the heart of the concept of "prejudice" that courts examine when deciding to permit amendment under Rule 15(b).

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