FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 2005-236-M
IMERYS PIGMENTS, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY: Jordan and Young, Commissioners:

On April 21, 2006, the Commission granted the petition for discretionary review filed by the Secretary of Labor in the above-captioned proceeding. The Secretary's appeal was limited to the issue of the responsibility of the mine operator, Imerys Pigments, LLC ("Imerys"), for the violation committed by the employee of an independent contractor in Citation No. 6095226. The administrative law judge had dismissed the citation against Imerys, relying on the Commission's decision in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005). In addition, the Commission further directed review, on its own motion, on the issue of whether the administrative law judge adequately explained his action in increasing the proposed penalty for Citation No. 6095227.

The Court of Appeals for the D.C. Circuit has reversed the decision of the Commission in *Twentymile Coal Co.*, holding that the Secretary's decision to cite the owner-operator of a mine, as well as its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006).[1] In light

[1] Commissioner Young shares the Chairman's concerns regarding the D.C. Circuit Court's decision in *Twentymile* and agrees with the Chairman's thoughtful analysis of the Mine Act in his concurrence. Regrettably, the Circuit Court has consistently maintained a different view of this Commission and has repeatedly applied *Martin v. OSHRC*, 499 U.S. 144 (1991), to cases arising under the Mine Act, in spite of the differences the Chairman has noted in the respective organic statutes and the "available indicia of legislative intent," *Martin*, 499 U.S. at

of the court's decision, we remand the case to the judge for reconsideration of his dismissal of Citation No. 6095226. The judge shall also further consider on remand his increase in the proposed penalty of $305 to $800, for Citation 6095227, analyzing the penalty criteria in section 110(i), 30 U.S.C. § 810(i), consistent with the Commission's decision in *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

157, reflecting Congress' will to empower the Commission to provide meaningful review of all issues brought before it. Commissioner Young nevertheless declines to join the Chairman's concurring opinion because the *Twentymile* decision is in accord with precedent in the D.C. Circuit and the principle of *stare decisis* controls our decision in the instant case.

Chairman Duffy, concurring:

I join with my colleagues in remanding this matter to the judge for further proceedings consistent with the Court's decision in *Secretary of Labor v. Twentymile Coal Co. and Federal Mine Safety and Health Review Commission*, 456 F.3d 151 (D.C. Cir. 2006). The judge should also reconsider his assessment of a penalty in excess of the Secretary's recommendation. Nevertheless, I respectfully take issue with several of the Court's assumptions used to support its view that, under the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"), this Review Commission lacks "authority to determine policy issues," 456 F.3d at 160, and "is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion." *Id*. at 161.

Indeed, the Court appears to have expansively addressed issues that were not before it. On the perennially disputed issue of whether a blameless mine owner-operator can be held liable for violations committed by its independent contractor, the Court could simply have cited the relevant precedents, found the Commission's reasoning in this case insufficient to overcome those precedents, and have been done with it. Instead, the Court has inappropriately applied the Supreme Court's decision in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991).

The D.C. Circuit, at first blush, correctly renders the view of the Supreme Court in *Martin*:

> *Martin* involved review under the Occupational Safety and Health Act ("OSH Act"), in which, like the Mine Act, "Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities." Under the OSH Act, the former functions are assigned to the Secretary of Labor and the latter to the Occupational Safety and Health Review Commission (OSHRC); under the Mine Act, the former are again assigned to the Secretary of Labor and the latter to the Federal Mine Safety and Health Review Commission (FMSHRC). Under this "split enforcement" structure, the Court held, "enforcement of the Act is the sole responsibility of the Secretary." Moreover, since "Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role."[1]

[1] For reasons that will be made clear below, it is important to note that, in the quote from *Martin,* the only "Commission" to which the Supreme Court is referring is the Occupational Safety and Health Review Commission ("OSHRC"), not this Commission.

456 F.3d. at 160-61 (citations omitted).

The D.C. Circuit goes on to extrapolate from the Supreme Court's decision in *Martin* a severe limitation on this Commission's separate authority under the Mine Act:

> We have previously, and repeatedly, applied *Martin*'s analysis to the Mine Act. We do so here as well. As is true under the OSH Act, "enforcement of the [Mine] Act is the sole responsibility of the Secretary," and the Commission has no "policymaking role." Instead, "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." "Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.

456 F.3d at 161 (citations omitted; alteration in original).

However, the Court ignores the fundamental caveat expressed by the Supreme Court in *Martin*, i.e., that its decision was limited strictly to the split enforcement structure adopted in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("OSH Act"):

> *We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act*. We conclude from the available indicia of legislative intent that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and *we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure.*

499 U.S. at 157-58 (emphases added).

Seven years after passage of the OSH Act, Congress did, indeed, divide the respective powers of the Secretary and *this* Commission, and it did so along lines far different from and

much clearer than those set forth in the earlier statute. A simple side-by-side comparison of the statutory provisions establishing the two Commissions is most instructive:[2]

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION	**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
Section 113. (a) The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.	Section 12. (a) Establishment; membership; appointment; Chairman The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.
* * *	* * *
(c) The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.	(f) Quorum; official action For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.
* * *	* * *
(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law	(j) Administrative law judges; determinations; report as final order of Commission An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any

[2] For the sake of brevity, non-germane, "housekeeping" sections dealing with such matters as location of offices, authority to hire or transfer administrative law judges, etc., have been deleted from the comparison. Certain provisions of section 12 of the OSH Act have been rearranged to coincide with their counterparts in the Mine Act.

judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period of the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.	motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.
* * *	* * *
(d)(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this Act which shall meet the following standards for review:	(g) Hearings and records open to public; promulgation of rules; applicability of Federal Rules of Civil Procedure Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.
* * *	* * *
(d)(2)(A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.	[No comparable provision]
(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:	

(I) A finding or conclusion of material fact is not supported by substantial evidence.
(II) A necessary legal conclusion is erroneous.
(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
(IV) A substantial question of law, policy or discretion is involved.
(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, ***the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved.*** If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings

[No comparable provision]

except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

(The provisions of section 557(b) of title 5, United States Code, with regard to the review authority of the Commission are hereby expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

* * *

(e) In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony

(h) Depositions and production of documentary evidence; fees
The Commission may order testimony to be taken by deposition in any proceeding pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books,

to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

30 U.S.C. § 823 (emphases added).

papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) Investigatory powers
For the purpose of any proceeding before the Commission, the provisions of section 161 of this title are hereby made applicable to the jurisdiction and powers of the Commission.

29 U.S.C. § 661.

Quoting its prior decision in *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 464 (D.C. Cir. 1994), the D.C. Circuit iterates in *Twentymile* that section 113 of the Mine Act, 30 U.S.C. § 823, "merely states" the grounds upon which a "petitioner may call upon the Commission's power of discretionary review over a decision of an administrative law judge." 456 F.3d at 160. To which petitioner is the court referring? If the Secretary loses on a matter of law, policy or discretion before the administrative law judge, by the court's logic she can appeal to the Commission, which is then bound to vindicate her position. If the Secretary wins on a matter of law, policy or discretion before the administrative law judge, and the mine operator appeals, the Commission is, by the court's logic, likewise bound to vindicate the Secretary's position. Thus,

the court's opinion can be read as having the Commission engage in a kind of adjudicative bait-and-switch whereby mine operators are encouraged to appeal matters of law, policy or discretion even though the Commission is powerless to do anything but side with the Secretary. Under such a reading of the opinion, there is little or no difference between the D.C. Circuit's concept of the split enforcement structure under the Mine Act and the unitary structure of mine safety and health enforcement and adjudication established within the Department of the Interior under the Mine Act's predecessor statutes.[3]

Contrary to the D.C. Circuit's apparent position, the language of section 113 cannot be read to limit the scope of this Commission's oversight to the judge's decision — a sort of in-house quality control function. Section 113(d)(2)(A)(ii), which states that parties may petition for review of administrative law judge decisions, does indeed provide for Commission oversight of an administrative law judge if his decision is "contrary to law, or to the duly promulgated rules or decisions of the Commission." 30 U.S.C. § 823(d)(2)(A)(ii). But, significantly, the subsection also goes on to establish that the Commission is authorized to grant a petition when "[a] substantial question of law, policy or discretion is involved." *Id.* It is particularly noteworthy that there are no statutory limitations on the types of "law, policy or discretion" questions that the Commission is authorized to review in granting parties' petitions. This strongly indicates that Congress intended for the Commission to have broad interpretive and policy-making powers. The D.C. Circuit simply does not directly address the significance of this specific language chosen by Congress. Instead, it glosses over the language in its effort to fit the Mine Act scheme within the split-enforcement mold created for the OSH Act under the *Martin* decision.

The error in the D.C. Circuit's reasoning is made even more apparent by the language in section 113(d)(2)(B) of the Act, which addresses the Commission's authority to grant review of administrative law judge decisions *sua sponte*. That provision authorizes the Commission to grant review *sua sponte* only if "the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented." 30 U.S.C. § 823(d)(2)(B). If the Commission is confined to reviewing only its own internal policies, why is "policy" used twice in the same sentence — once in connection with the Commission and then, again, without qualification? The only reasonable answer is that Congress intended that the Commission be authorized not only to review decisions where established "Commission policy" is being contravened but also decisions involving novel, general policy questions under the Mine Act itself.[4] Otherwise, one must assume

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[3] The D.C. Circuit's position also conflicts with the Senate Committee on Human Resources' view that "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program." S. Rep. No. 95-181 at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 635 (1978).

[4] The very same distinction between "Commission policy" and "policy" in general is contained in the next sentence of section 113(d)(2)(B): "The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved."

that Congress was unable to choose the correct words to describe the Commission's review authority and limit it to purely internal policy matters. Section 113(d)(2)(B) unmistakably demonstrates that Congress intended for the Commission to have a substantial policy-making role under the Mine Act.

Aside from the obviously expanded role of this Commission evident in the enabling provisions of the Mine Act as compared to those of the OSH Act, the legislative history of the Mine Act underscores the conclusion that Congress intended this Commission to have a significant policy-making function:

> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility of assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.
>
> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [A]ct and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res., 95th Cong., 1 (1978).

The above statement by Senator Williams, Chairman of the Human Resources Committee, carries considerable weight with respect to the Commission's policy role under the Mine Act. Senator Williams was the Mine Act's principal author. Senator Williams' statement that the Commission is to "develop a uniform and comprehensive interpretation of the law," "provide guidance to the Secretary in enforcing the [Act]," and ensure that "the Secretary and mine operators understand precisely what the law expects of them" strongly indicates that the Commission is to play a significant interpretive and policy-making role.

Quite importantly, Senator Williams' statement also carried considerable weight with the Supreme Court. In *Thunder Basin Coal Co. v Reich,* 510 U.S. 200 (1994), decided three years after *Martin*, the Supreme Court, citing with approval Senator Williams' statement, held that a mine operator could not circumvent the adjudicative procedures set forth in the Mine Act by

seeking a pre-enforcement injunction against MSHA in a case involving whether non-employee union organizers could represent employees in a non-union mine for purposes of asserting rights under the Mine Act. The Supreme Court rejected the operator's attempt at injunctive relief by emphasizing strongly that the Commission, as an independent review body, could and should decide the merits of the case:

> Petitioner's statutory claims at root require interpretation of the parties' rights and duties under § 813(f) and 30 CFR pt. 40, and as such arise under the Mine Act and fall squarely within the Commission's expertise. *The Commission, which was established as an independent-review body to "develop a uniform and comprehensive interpretation" of the Mine Act, Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978), has extensive experience interpreting the walk-around rights and recently addressed the precise NLRA claims presented here*. Although the Commission has no particular expertise in construing statutes other than the Mine Act, we conclude that exclusive review before the Commission is appropriate since "agency expertise [could] be brought to bear on" the statutory questions presented here.
>
> As for petitioner's constitutional claim, we agree that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes. The Commission has addressed constitutional questions in previous enforcement proceedings.

Id. at 214-15 (footnotes and citations omitted; emphasis added.)

Thus, contrary to the D.C. Circuit's version of Mine Act history, the Supreme Court *has* had occasion to opine specifically on the "division of enforcement" model adopted by Congress in the Mine Act. The Supreme court emphasized the Commission's duty to "develop a uniform and comprehensive interpretation" of the Mine Act and the "agency expertise" of the Commission in interpreting the Mine Act. The contrast between the Supreme Court's characterization of the relationship between MSHA and this Commission on the one hand, and OSHA and OSHRC on the other, is compelling.

The D.C. Circuit's contention that the Commission is not authorized to review the Secretary's exercise of her prosecutorial discretion is further belied by section 105(c) of the Mine Act, 30 U.S.C. § 815(c). There, Congress authorizes the Commission to entertain discrimination complaints brought by miners when the Secretary has declined to do so. Under section 105(c), a miner is allowed to file a discrimination complaint if he believes an operator has retaliated against him for the exercise of his safety rights under the Act. The miner first files the complaint with the Secretary who, upon finding discriminatory conduct, files a complaint for relief with the Commission. If, however, on preliminary investigation, the Secretary determines that no discriminatory practice has occurred, the miner retains the right to bring a complaint on his own behalf before the Commission. If the Commission concludes that the complaint is meritorious, it can order appropriate remedies, including directing the Secretary to propose a civil penalty.

Section 105(c) demonstrates clearly the Congressional intent that the Commission is authorized to second guess the enforcement choices made by the Secretary. No such authority resides with OSHRC under the OSH Act, underscoring the view that Congress overtly intended to expand the policy-making and discretionary powers of FMSHRC beyond those granted to OSHRC under the OSH Act.

Moreover, Congress recently confirmed the interpretive and policy-making role of the Commission in the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), Pub. L. No. 109-236, 120 Stat. 493 (June 15, 2006), which amended the Mine Act in certain key respects. Section 2 of the MINER Act amends section 316 of the Mine Act, 30 U.S.C. § 876, by adding a new section (b), entitled "Accident Preparedness and Response." Section 316(b)(2)(G), which is entitled "Plan Dispute Resolution," provides for Commission review of disputes involving accident response plans, which are to be submitted by operators for approval by the Secretary. The provision gives the Commission broad authority to resolve "[a]ny dispute between the Secretary and an operator with respect to the content of the operator's plan or any refusal by the Secretary to approve such a plan . . . ." 120 Stat. at 496. Because such disputes will ordinarily involve issues of legal interpretation and issues of policy regarding how such disputes should be resolved and what plan contents are acceptable, Congress clearly intended that the Commission should exercise a significant degree of independent interpretive and policy-making authority to resolve such disputes. Otherwise, there would be no reason to provide for Commission review. In the absence of a significant interpretive and policy-making role for the Commission, the Secretary could adopt a particular policy with regard to the contents of mine plans, and the Commission would be bound to uphold the Secretary's policy in every instance. Certainly, Congress did not intend that the "plan dispute resolution" process would become a meaningless exercise in which the Commission essentially rubber-stamps the Secretary's policy judgments in each case.

By ignoring the unequivocal caveat expressed by the Supreme Court that its holding in *Martin* should not be applied in the Mine Act context, the D.C. Circuit hears its own "sounds in the [self-imposed] silence" of the Supreme Court. 456 F.3d at 158. Moreover, the D.C. Circuit ignores the obvious expansion of authority granted to this Commission by Congress in the Mine

Act well beyond that granted OSHRC under the OSH Act. Section 113 of the Mine Act allocates resolution of matters of law, policy and discretion to the Review Commission in keeping with the view of Senator Williams, quoted above, and as applied by the Supreme Court in *Thunder Basin.*

Michael F. Duffy, Chairman

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