FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 29, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
INTERNATIONAL CHEMICAL WORKERS= UNION COUNCIL	:	Docket No. SE 94-362-RM
v.	:	
ASARCO, INCORPORATED	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Marks, Riley, Verheggen, and Beatty, Commissioners

This is a contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), in which Asarco, Inc. (AAsarco@), challenges a citation issued by the Department of Labor=s Mine Safety and Health Administration (AMSHA@). The citation charges Asarco with violating 30 C.F.R. ' 57.5001(a), which specifies the exposure limits for airborne contaminants in metal/nonmetal mines, and 30 C.F.R. ' 57.5005, which addresses the control of exposure to those airborne contaminants. The proceeding had previously been before the Commission on review after Administrative Law Judge Roy Maurer granted Asarco=s motion to dismiss. The Commission vacated the judge=s order and remanded the case to the judge for a hearing on the merits of the citation. *Asarco, Inc.*, 17 FMSHRC 1 (Jan. 1995) (A*Asarco I*@). Following the hearing, the judge granted Asarco=s contest and vacated the citation. 19 FMSHRC 1097 (June 1997) (ALJ). Asarco filed a petition for discretionary review (APDR@) challenging the judge=s determination that MSHA=s use of single shift sampling is a permissible method of determining whether silica dust concentrations exceed the limit set forth in section 57.5001(a). The Secretary of Labor and the International Chemical Workers= Union Council (the AUnion@) filed Aconditional@ petitions requesting review of the judge=s decision in the event the Commission granted Asarco=s petition for review. The Commission granted the petitions filed by Asarco, the Secretary and the Union. For the reasons that follow, we vacate the direction for review.

I.

Factual and Procedural Background

MSHA issued the citation in this proceeding after the agency sampled for airborne contaminants at the Askip tender@ position at Asarco=s Young mine, an underground zinc mine in Tennessee. *Id.* at 1098-99. The citation charged Asarco with violating sections 57.5001(a)[1] and 57.5005.[2] *Id.* at 1097. The citation, based on a single sample taken during an eight-hour shift, alleged that the miner was exposed to 2.3 milligrams of respirable silica-bearing dust per cubic

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[1] Section 57.5001(a) provides in relevant part:

> Except as permitted by ' 57.5005**C**
>
> (a) . . . the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conferences=s publication, entitled ATLV=s Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973,@ . . . .

30 C.F.R. ' 57.5001(a).

[2] Section 57.5005 provides in relevant part: AControl of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air.@ 30 C.F.R. ' 57.5005.

meter of air (Amg/m^3@), which exceeded the permissible level of contaminants. *Asarco I*, 17 FMSHRC at 2-3. The citation further alleged that, although respiratory protective equipment was in use, all feasible engineering controls were not being used to control the employees= exposure to dust, as required by the regulations. *Id.* at 3.

Asarco filed a notice of contest and subsequently moved to vacate the citation based on the Commission=s decision in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994). In *Keystone*, the Commission invalidated MSHA=s spot inspection program **C** under which MSHA would determine whether mine operators violated the standard limiting levels of respirable coal dust in underground coal mines (30 C.F.R. ' 70.100) based on a single dust sample taken during an eight hour shift **C** because the Secretary had failed to engage in notice-and-comment rulemaking in accordance with the Mine Act and the Administrative Procedure Act. *Id.* at 16.

In *Asarco I*, the Commission reversed the judge=s dismissal of the citation based on the *Keystone* decision. The Commission concluded that the legal basis for the *Keystone* decision limited its application to air sampling in underground coal mines. *Asarco I*, 17 FMSHRC at 5. The case was remanded, and a hearing was held on the merits of the citation. The judge upheld the merits of single-shift sampling as consistent with the regulations at issue. 19 FMSHRC at 1132. However, he vacated the citation on the ground that MSHA failed to maintain and adhere to standardized procedures in its laboratory where the dust samples that were the basis for the citation were analyzed. *Id.* at 1139-41. The judge therefore granted Asarco=s contest. *Id.* at 1142. The judge also granted a motion for declaratory relief, filed by Asarco during the hearing, in which it sought a declaration that the MSHA Denver laboratory cannot reliably report the amount of silica in any single sample that it analyzes under its current procedures. *Id.*

Notwithstanding the judge=s grant of its contest and his issuance of declaratory relief, Asarco petitioned the Commission for discretionary review, challenging the judge=s upholding of single-shift sampling in metal/nonmetal mines. Asarco argued, inter alia, that single-shift sampling is inconsistent with the language of the regulations and is not a reasonable means for determining excessive exposure to silica dust. A. PDR at 3-5. In their conditional petitions for discretionary review, the Secretary and the Union challenged the judge=s issuance of declaratory relief. S. PDR; U. PDR. Both the Secretary and the Union also opposed Asarco=s petition on the ground that Asarco was not a person Aadversely affected or aggrieved by a decision of an admin-istrative law judge.@ S. Opp=n at 3-6 (quoting 30 U.S.C. ' 823(d)(2)(A)(i)); U. Opp=n at 1-2.

II.

Disposition

A threshold issue before us is whether a party who has prevailed before an administrative law judge may nevertheless petition the Commission to review determinations made by the judge that are adverse to a position a party has taken during the proceeding.

In her opposition to Asarco=s petition, the Secretary argues that, because Asarco received all the relief it sought before the judge **C** vacating the citation and granting its motion for declaratory relief **C** Asarco is not aggrieved, and the Commission is without jurisdiction to consider the appeal. S. Opp=n at 3-6; S. Resp. Br. at 1-3. The Secretary asserts that the judge=s determination that single-shift sampling is a permissible enforcement strategy is non-binding and, therefore, Asarco can show no injury other than that it may have to relitigate the issue. S. Opp=n at 5-6. The Secretary also contends that the Commission lacks jurisdiction to hear Asarco=s request for review of a finding that was unnecessary to the judge=s ultimate determination. S. Resp. Br. at 1, 3, 5-8. Finally, the Secretary cautions that recognizing the right of prevailing parties to appeal from portions of decisions with which they are dissatisfied would encourage litigants to file many unnecessary appeals with the Commission. S. Opp=n at 6. In support of the Secretary=s position, the Union argues that Asarco is not an aggrieved party and, therefore, lacks standing to challenge the judge=s finding regarding single-shift sampling. U. Opp=n at 1-2.

Asarco responds that the judge=s finding that single-shift sampling is valid is appealable because it did not prevail on that issue. A. Br. at 15 n.19. Further, Asarco argues that the single-shift testing policy continues to be applied, and the threat of injury to Asarco is real.[3] *Id.* at 16. Asarco states that other cases have been stayed pending a Commission decision regarding single-shift sampling. *Id.* In its reply brief, Asarco disputes the Secretary=s suggestion that it received all the relief it sought before the judge. A. Reply Br. at 29. Finally, Asarco asserts that it falls within judicially-created exceptions to the general rule barring appeal by winning parties. *Id.* at 31.

Section 113(d)(2)(A)(i) of the Mine Act provides, in relevant part, that A[a]ny 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 . . . .@ 30 U.S.C. ' 823(d)(2)(A)(i). AThe phrase >person adversely affected or aggrieved= is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts.@ *Director, Office of Workers= Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 126 (1995).

The Mine Act further states that review Ashall not be a matter of right but of the sound discretion of the Commission.@ 30 U.S.C. ' 823(d)(2)(A)(i); *see* Commission=s Rules of Procedure, 29 C.F.R. ' 2700.70(a), (b); *see also* S. Rep. No. 181, 95th Cong., at 48 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 636 (1978) (discussing the Commission=s broad discretion in deciding whether to grant review). Agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules. *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). However, in

[3] Asarco also seeks a declaration from the Commission that the Secretary can never prove a violation of the respirable dust standard by use of a single-shift sample. A. Br. at 16.

exercising its discretion, Aan agency receives guidance from the policies that underlie the >case or controversy= requirement of article III,@ including Aexamination of the proper institutional role of an adjudicatory body and a concern for judicial economy.@ *Id.*

We addressed the Aaggrieved person@ requirement of section 113(d)(2)(A)(i) in *Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (Dec. 1989) (A*Mid-Continent I*@). There, we had granted a petition for discretionary review from the American Mining Congress (AAMC@), which was not a party to the proceeding before the judge. In vacating our grant of the AMC=s petition, we eschewed a literal approach to application of the aggrieved person requirement of section 113(d)(2). *Id.* at 2401. We were guided by general principles governing appeals in Atraditional adversarial litigation@ and stated, Awe discern no warrant for an interpretation of section 113(d)=s review procedure that is out of line with normal litigation processes or that is likely to complicate or prolong the resolution of disputes under the Act.@ *Id.* at 2401-02.

In concluding that the AMC lacked standing to file a review petition, we stated:

> Here, literally speaking, there is not a Acase or controversy@ involving the AMC under the Mine Act in the context of the present proceeding. Nor has the AMC demonstrated how the judge=s *dismissal* of the Secretary=s enforcement proceeding has had an adverse impact on it. Instead, the AMC argues that it is Aadversely affected or aggrieved@ because it has an interest in the legal principles involved in this proceeding . . . . However, *every* Commission proceeding, to some extent, involves an interpretation of the Mine Act, a mandatory standard, or some legal principle affecting the enforcement or meaning of the Mine Act. Under the AMC=s position, mining trade associations, mine operators, and miners generally would have a sufficient interest in Commission proceedings to bestow upon them the right to file a petition for review of most administrative law judge decisions. We are confident that Congress, in enacting the Mine Act, did not intend to create such a potential litigation Afree-for-all@ in review proceedings before the Commission.

Id. at 2403-04 (emphasis in original).

The issue in *Mid-Continent I* involved the right of a non-party to file a review petition where the Secretary had vacated the citation and the judge had dismissed the proceeding.[4] Thus,

[4] In *Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (May 1990) (A*Mid-Continent II*@), the Commission addressed Mid-Continent=s request for declaratory relief in the same proceeding. The Commission concluded that the case was moot, reasoning that, once the Secretary vacated the underlying citation, the enforcement action was extinct. *Id.* at 956. In *Mid-Continent II*, the

Mid-Continent I is not directly controlling here, where the judge has issued a decision in a party=s favor. Nevertheless, much of our reasoning in *Mid-Continent I* applies to this case. Extending the right to petition for review by a prevailing party raises the spectre of the Alitigation free-for-all@ that we sought to avoid in *Mid-Continent.* If we were to grant the right to challenge adverse factual findings or legal conclusions to a party who has prevailed before an administrative law judge, the scope of the issues that could be appealed would be broadened significantly from our present practice.

Other statutes with standing requirements similar to the Mine Act support our treatment of appeals by prevailing parties under section 113(d)(2). Section 10(f) of the National Labor Relations Act (ANLRA@) provides that A[a]ny person aggrieved by a final order of the

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issue of whether Mid-Continent was an aggrieved person withing the meaning of section 113(d)(2) was not raised or argued to the Commission. Unlike *Mid-Continent II*, in the instant case the administrative law judge issued a decision from which Commission review could be sought by an Aaggrieved person.@ Subsequent to *Mid-Continent I* and *Mid-Continent II*, the Commission held that the Secretary=s decision to vacate citations is unreviewable. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996); *RBK Constr., Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993).

Board . . . may obtain a review of such order [in an appropriate United States circuit court of appeals] . . . .@ 29 U.S.C. ' 160(f).[5] In *Boeing Co. v. NLRB*, 89 LRRM 2672 (4th Cir. 1975), the court granted the NLRB=s motion to dismiss the petition for review that was filed by Boeing, which had prevailed in the administrative proceeding below and had all unfair labor practice charges against it dismissed. The court held that Boeing could not assert that it was Aaggrieved@ and that the statute did not allow a victorious party to challenge adverse underlying findings and conclusions. *Id.* at 2674. The court reasoned that the adverse findings would have neither collateral estoppel nor res judicata effect in future proceedings involving Boeing, because Aof the general lack of ability of the winning party to obtain as broad a scope of appellate review as is available to the losing party.@ *Id.*; *see also Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697, 698 (5th Cir. 1964) (finding that appellant lacked standing to appeal because, as victorious party below, it Ais not a party aggrieved by the Board=s *order*@) (emphasis in original). We find this rationale persuasive, because in the present case the judge=s decision has neither res judicata nor collateral effect in future cases in which the issue of single-shift sampling may be raised. *See also* Commission Procedural Rule 72, 29 C.F.R. ' 2700.72 (AAn unreviewed decision of a Judge is not a precedent binding upon the Commission.@).

While the Occupational Safety and Health Review Commission (AOSHRC@) has not addressed the situation at issue, it has interpreted in another context the Aaggrieved party@ requirement of the Occupational Health and Safety Act of 1970 (AOSH Act@). The OSH Act regulation concerning OSHRC=s discretionary review also contains language limiting standing before that Commission to parties Aadversely affected or aggrieved by the decision.@ 29 C.F.R. ' 2200.91(b). Applying that regulation, OSHRC denied a request for review of a de minimus violation, noting that A[s]ince complainant does not take issue with the Judge=s disposition and respondent is not specifically prejudiced thereby, the Commission declines to pass upon, modify, or change the Judge=s decision.@ *Westburne Drilling, Inc.*, 5 OSHC (BNA) 1457, 1457 (No. 15631, 1977).

Finally, we find support for our approach in the law governing appeals in the federal court system. The general rule in federal courts is that parties may not appeal adverse portions of district court judgments in their favor. *See California v. Rooney*, 483 U.S. 307, 311 (1987) (AThe Court of Appeal=s use of analysis that may have been adverse to the State=s long-term interests does not allow the State to claim status as a losing party for purposes of this Court=s review.@); 19 James Wm. Moore, *Moore=s Federal Practice* ' 205.04[1], at 205-42 to 205-43 (Donald R. Coquilette et al. eds, 3d ed. 1998) (quoting *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326, 334 (1980)). The Fourth Circuit elaborated that A[a]n injury in fact is required for a party to be aggrieved for purposes of being able to appeal; the party=s desire for better precedent does not by itself confer standing to appeal.@ *HCA Health Servs. of Virginia v.*

[5] Unlike the Mine Act, the NLRA contains no parallel provision governing appeals from administrative law judge decisions to the Board. *See* 29 U.S.C. ' 160(c); 29 C.F.R. ' 102.46.

Metropolitan Life Ins. Co., 957 F.2d 120, 124 (4th Cir. 1992).

Some cases on which Asarco relies recognize that, so long as a prevailing party retains a sufficient stake in continued litigation, it may appeal adverse aspects of a decision. *See* A. Reply Br. at 31-33 (citing *R.T. Vanderbilt v. OSHRC*, 728 F.2d 815 (6th Cir. 1984); *Roper*, 445 U.S. at 334; *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)). While limited exceptions exist to the general rule denying prevailing parties standing to appeal from adverse findings unnecessary to the final adjudication, we find that Asarco=s attempt to fit its request within these exceptions is misplaced. None of the cases cited by Asarco stands for the proposition that a party such as Asarco **C** which has prevailed below, will suffer no collateral effects from our denial of review and which retains no economic interest related to the vacated citation **C** would have standing in federal court to challenge an adverse finding unnecessary to the final determination.

Both Asarco (A. Reply Br. at 32) and the dissent (slip op. at 11) point to the Sixth Circuit=s opinion in *Vanderbilt*, which found that OSHRC=s finding that a product sold by Vanderbilt contained asbestos Amay have a substantial effect on the behavior of ceramic manufacturers concerned about the safety of the . . . product,@ thereby supplying the Acase or controversy to consider Vanderbilt=s appeal.@ 728 F.2d at 817. Here, by contrast, the judge upheld a sampling technique that has been in use for over 20 years, thereby maintaining the status quo. *See* 19 FMSHRC at 1135 (A[T]he record is devoid of any indication as to why, after more than 20 years of enforcing Section 57.5001(a) by single samples . . . , a multiple sample position has suddenly surfaced.@). The judge=s decision did not alter the behavior of these litigants or of any third parties. Moreover, Asarco retains the right to challenge the Secretary=s single-shift sampling enforcement policy in a future case where determining whether the dust standard was violated necessitates a ruling on the validity of single-shift sampling. Asarco=s right to challenge the Secretary=s policy is not impaired by our decision today. Thus, we find *Vanderbilt* inapposite.

Likewise, *Roper*, relied upon by Asarco and the dissent, is an example of a limited exception, inapplicable here, to the rule that prevailing parties may not appeal the merits of adverse rulings. The appellants in *Roper* sought review of the judge=s denial of their request for class certification, despite the district court=s award to the plaintiffs of the maximum individual amount. 445 U.S. at 330, 340. The Supreme Court held that the appellants satisfied the Article III case or controversy requirement by retaining a substantial economic interest in their appeal of a ruling denying them class certification, which would have allowed them to Ashift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails.@ *Id.* at 336. Asarco has no such economic interest here.

Electrical Fittings also does not support Asarco=s request for review. That case involved a defendant-appellant=s request for review of the district court=s determination that a patent was valid, despite the district court=s dismissal of the case for failure to prove infringement. 307 U.S.

at 242. The Supreme Court in *Electrical Fittings* remanded the matter, but explicitly limited the remand to the excision from the district court=s decree of the collateral finding that the patent was valid, and specifically declined to review the merits. *Id.* The Court stated that the Second Circuit had jurisdiction Ato entertain the appeal, *not for the purpose of passing on the merits*, but to direct the reformation of the decree.@ *Id.* (emphasis added). The Court stressed that A[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining review of findings he deems erroneous which are not necessary to support the decree.@ *Id.* (citations omitted). By contrast, Asarco seeks review of the merits of single-shift sampling.[6]

Reduced to its essence, the dissent=s main contention is that the resources expended by Asarco and the Secretary in litigating this case warrant the Commission=s review of the single-shift sampling issue, despite both the Secretary=s and the Union=s request to dismiss for lack of jurisdiction, and despite Asarco=s victory before the judge. Slip op. at 10, 12. But A>the inconvenience of having to initiate more than one suit [is not] a hardship sufficient to justify review= when the issues are not otherwise fit for judicial resolution.@ *Webb v. Department of Health and Human Servs.*, 696 F.2d 101, 107 (D.C. Cir. 1982) (alteration in original) (quoting *New York Stock Exchange, Inc. v. Bloom*, 562 F.2d 736, 742 (D.C. Cir. 1977)).[7]

Finally, we take little comfort in the dissent=s explanation (slip op. at 12) that we would retain discretion to reject petitions for discretionary review from prevailing parties in the future. The necessity of reviewing a flood of appeals from prevailing parties for the purpose of deciding whether to grant review would in and of itself create an administrative burden on the Commission,

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[6] We also note that the passage in Moore=s Federal Practice cited by the dissent relies on *Roper* and *Electrical Fittings* as the only examples of cases where parties satisfied Article III despite winning below. Slip op. at 10. As we have explained, Asarco=s Arights@ have not been affected by the judge=s single-shift sampling ruling.

[7] Contrary to the dissent=s assertion, we did not Aclearly remand[]@ (slip op. at 10) the issue of single-shift sampling for consideration by the judge. Rather, we Avacate[d] the judge=s order dismissing the citation and remand[ed] for further appropriate proceedings consistent with [our remand decision].@ 17 FMSHRC at 6. Our remand did not require the judge to pass on the merits of single-shift sampling.

even if review is ultimately denied. As an application of sound policy, we think it the wiser course to exercise our discretion under the Mine Act to review judges= rulings in accordance with the well-settled law of standing. Accordingly, we vacate our direction for review granting Asarco=s petition and the Aconditional@ petitions of the Secretary and the Union. Pursuant to 30 U.S.C. ' 823(d)(2)(A)(i), we deny review of the three petitions.

III.

Conclusion

For the foregoing reasons, we vacate the order granting review of Asarco=s petition and the order granting review of the Aconditional@ petitions for discretionary review filed by the Secretary and the Union, and we deny review of the three petitions.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

This case, which was filed with the Commission in 1994, involved extensive discovery, many expert witnesses, a sixteen day trial in 1996, and a voluminous record totaling over four thousand pages. Although my colleagues vacate the order granting review of Asarco=s petition for review, I believe that the Commission should hear the claims raised by Asarco. I therefore respectfully dissent.

Asarco brought this case in large part to challenge the validity of MSHA=s silica dust sampling procedures. It came to the Commission five years ago seeking a meaningful, final resolution of this matter. Both Asarco and the Secretary invested substantial time and money to conduct this litigation. After devoting extensive resources to an issue which the Commission had clearly remanded to the judge, *Asarco, Inc.*, 17 FMSHRC 1, 5 (Jan. 1995), and subsequently losing on that issue, which is central to one of MSHA=s most important and extensive enforcement mechanisms, Asarco can hardly be characterized as a typical prevailing litigant. On the contrary, it either will now have to continue to operate under a system which it claims produces inaccurate samples, or will have to start from scratch and craft a new litigation challenge, in which both Asarco and the Secretary will undoubtedly expend significant resources to replay what has already been presented to the judge in this case. The judge upheld the sampling policy to which Asarco objected, and unless it can obtain a contrary ruling from a body such as the Commission or a court, Asarco will continue to be subject to citations and penalties on the basis of a sampling system which it claims is inaccurate. Consequently, it stands as a party Aadversely affected or aggrieved by a decision of an administrative law judge.@ 30 U.S.C. ' 823(d)(2)(A)(i).

My conclusion that the Commission should review Asarco=s appeal is consistent with the legal principle that

> [I]f a litigated issue was adjudicated expressly adversely to the party prevailing on the merits, even though it was immaterial to the final disposition, that party may retain an interest in the matter sufficient to support appellate jurisdiction. . . . A >stake in the appeal= exists if the collateral ruling affects the prevailing party=s rights and if erroneous would work harm to the prevailing party=s interest.

19 James Wm. Moore, *Moore=s Federal Practice* ' 205.04[1], at 205-42 to 205-43 (Donald R. Coquilette et al. eds, 3d ed. 1998) (quoting *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326, 334 (1980)). Clearly the judge=s ruling on the single sampling issue was adverse to Asarco, and affected its rights. If the judge is wrong and MSHA=s single sample approach is not A>reasonably calculated to prevent excessive exposure to respirable dust=@ (19 FMSHRC

at 1135) (quoting *American Mining Congress v. Marshall*, 671 F.2d 1251, 1256 (10th Cir. 1982)), Asarco=s (as well as countless miners=) interests will be placed severely at risk.

My position is also supported by the Supreme Court=s decision in *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326 (1980), which established an exception to the general rule that prevailing parties may not appeal. In that class action against a bank, the district court denied the motion for class certification. *Id.* at 329. The bank subsequently offered each named plaintiff the maximum amount each could have recovered. *Id.* Although the plaintiffs refused the offer, the district court entered judgment in their favor. *Id.* at 329-30. The Supreme Court affirmed the 5th Circuit=s holding that the case was not moot, on the ground that the plaintiffs held an economic interest in class certification (because they wanted to shift some of the litigation expenses to other class members). *Id.* at 338-40. This was sufficient, according to the Court, to permit the prevailing party to appeal the adverse collateral ruling, since the party retained Aa stake in the appeal satisfying the requirements of Art[icle] III.@ *Id.* at 334.

My refusal to vacate the order granting review of Asarco=s petition is also consistent with *R.T. Vanderbilt Co. v. OSHRC*, 728 F.2d 815 (6th Cir. 1984). In that case, a pottery company was charged with three violations of OSHA=s asbestos standard. *Id.* at 816. The Occupational Safety and Health Review Commission vacated the citation, but found that the talc product manufactured by Vanderbilt (which had intervened) and used to make the pottery contained asbestos fibers. *Id.* at 816-17. Relying on *Deposit Guaranty*, the 6th Circuit rejected OSHRC=s argument that the court had no jurisdiction over the case and that Vanderbilt could not appeal from OSHRC=s decision because it had received all the relief it required (the vacation of the citation against Hull). *Id.* at 817. The 6th Circuit ruled that the Commission=s determination that Vanderbilt=s talc contained asbestos, although not binding in future cases, could significantly affect the actions of ceramic manufacturers concerned about the safety of the product.[1] *Id.*

Although my colleagues rely primarily on *Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (Dec. 1989) (A*Mid-Continent I*@), I find it singularly inapposite. As they acknowledge (slip op. at 5), the Commission in that case was focused on the question of whether a non-party could file a petition for review after the Secretary had vacated a citation and the judge had dismissed the proceeding. However, even though the operator had prevailed below, the Commission did not

[1] My colleagues= attempt to distinguish *Vanderbilt* (slip op. at 7) is misplaced. The significance of *Vanderbilt* does not turn on the fact that it involved a decision which could motivate Athird parties to change their conduct in response to portions of a court=s decision.@ *Id.* Although that was the applicable fact situation in *Vanderbilt*, the Court nowhere intimates that its ruling permitting the appeal should be restricted in this manner.

dismiss its petition, but instead, went on to issue a substantive decision on its request for declaratory relief. *Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (May 1990) (A*Mid-Continent II*@). We denied relief on the grounds that the controversy was speculative, that the operator had not proven that similar incidents had occurred at its mines, or that its claim was

widespread in the industry. *Id.* at 956-57. This is in stark contrast to Asarco, which will continue to be subject to the Secretary=s single sample enforcement process on a daily basis, has asserted that other operators continue to receive single sample citations (A. Reply Br. at 33), and indicates that many similar cases have been stayed pending the outcome of this proceeding. A. Br. at 16. The Commission=s admonition in *Mid-Continent II* that declaratory relief was too abstract and that the operator should wait until a concrete case existed does not apply in the instant proceeding. Here, Asarco has demonstrated Aa substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury.@ *Mid-Continent II*, 12 FMSHRC at 956.

My colleagues speculate that permitting review in this case could create a Alitigation free-for-all.@ Slip op. at 6. Pursuant to our statutory authority, however, the Commission has the unchallenged ability to deny petitions. Hearing this appeal in no way obligates us to grant review of prevailing parties= petitions in subsequent cases. The beauty of the discretionary nature of our review process is that we may use our judgment to select the cases appropriate for Commission adjudication. If we are truly concerned about ensuring the effective use of Commission and party resources we would be well placed to hear this appeal, instead of permitting four years of extensive litigation, and the views of a judge expressed in excruciating detail in a thoroughly written opinion, to be cast aside.

Accordingly, I would not vacate the petition for review, but would decide the case on the merits.

Mary Lu Jordan, Chairman

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