FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 9, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 99-11-R
ISLAND CREEK COAL COMPANY	:	

BEFORE: Jordan, Chairman; Riley and Verheggen, Commissioners[1]

ORDER

BY: Riley and Verheggen, Commissioners

The Commission issued its decision in this proceeding on July 31, 2000, in which, by a split vote, it affirmed in result the judge's decision that Island Creek Coal Company ("Island Creek") did not violate 30 C.F.R. § 1725(c). *Island Creek Coal Co.*, 22 FMSHRC 823, 825 (July 2000). On August 8, 2000, the Secretary of Labor filed a Motion for Reconsideration pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78, requesting us to reconsider our separate opinions. Island Creek filed a response opposing the petition on August 16, 2000.

This case involved an incident where a miner was standing on a belt to perform repairs to the drive mechanism of an adjacent belt. 22 FMSHRC at 823-24. When the belt on which the miner was standing, the 5-B belt, was energized and began moving, the miner was injured. *Id*. at 824. The Secretary cited the operator under section 1725(c), which requires that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." From the inception of this case, however, the Secretary has asserted that the violation occurred because the 5-B belt was not "locked and tagged out." *See* 22 FMSHRC at 826 (Comm'r Riley), 830 (Comm'r Verheggen). A belt is locked and tagged out when "'a lock and tag are put on the

[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

cathead of a belt at the power source [to ensure] that after the power is turned off on a belt, no one else can turn the power back on.'" *Id*. at 826.

The standard under which a Rule 78 petition should be considered was mentioned briefly in *Morgan v. Arch of Illinois*, 22 FMSHRC 586 (May 2000), in which the Commission noted that the petitioner had "not raised any new arguments concerning the judge's decisions that the Commission [had] not already considered." *Id.* at 586. Federal appeals courts have held that under Rule 40 of the Federal Rules of Appellate Procedure, a petition for rehearing is "appropriate where . . . a petitioner believes the court has overlooked or misapprehended significant facts or legal arguments." *Mancuso v. Herbert*, 166 F.3d 97, 99 (2d Cir. 1999). Courts construing motions for reconsideration made to district courts under Rule 59(e) of the Federal Rules of Civil Procedure have held that such motions "'should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (citations omitted, emphasis in original). Nor should such petitions "be used to raise legal arguments which could and should have been made before [a decision] was issued." *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1267 (11th Cir. 1998). The *Lockard* court noted that "[d]enial of a motion for reconsideration is 'especially soundly exercised when the party has failed to articulate any reason for the failure to raise the issue at an earlier stage in the litigation.'" *Id*. (citation omitted); *see also GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1387 (10th Cir. 1997) ("it is ordinarily inappropriate for a party to raise new legal arguments" in a motion for reconsideration).

Petitions made to the Commission under Rule 78 ought, at the very least, to bring to the Commission's attention facts or legal arguments the petitioner believes were overlooked or misapprehended, *Mancuso*, 166 F.3d at 99, or point to a change in controlling law, *see United States v. Reilly*, 91 F.3d 331 (2d Cir. 1996). Such petitions should also not merely raise arguments the Commission has already considered, *Morgan*, 22 FMSHRC at 586, or attempt to raise new legal arguments, *Lockard*, 163 F.3d at 1267.

The gravamen of the Secretary's argument for reconsideration here is that we failed to reach the issue of whether "the operator violated the standard because the 5-B belt was energized." Mot. at 3. The Chairman also states in her dissent that the Secretary has "made clear" in prosecuting this case the requirement in section 75.1725(c) "that the belt be de-energized." Slip op. at 5.

We find the Chairman's assertion disingenuous. The Chairman herself recognized in the first decision in this case that "the Secretary has argued both below and on review that the regulation required Island Creek to lock and tag out the belt during maintenance work." 22 FMSHRC at 835 (separate opinion of the Chairman and Commissioner Marks). In fact, she went to great lengths in that opinion to distance herself from the Secretary's theory of the case when she and Commissioner Marks stated "we are not bound by the Secretary's theory in making our determination . . . . We cannot let the Secretary's more complicated litigation posture obfuscate

the straightforward fact that Island Creek simply did not block the 5-B belt against motion . . . ." *Id.* Indeed, nowhere in this earlier opinion does the Chairman mention much less discuss what the Secretary had purportedly "made clear throughout this litigation." Slip op. at 4. That is because at the time the Commission first considered this case, like now, the fact was and remains that at no stage of these proceedings has the Secretary ever explicitly argued that one of the bases for her citation was that the 5-B belt was unexpectedly energized. In other words, the Secretary has never argued in the alternative, either before us (including in her petition for discretionary review) or the judge, that even if her argument that "blocked against motion" really means "locked and tagged out" was rejected, that an independent basis for finding Island Creek liable was that the 5-B belt was energized. *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("Each issue [in a petition for discretionary review] 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."). Although the Chairman states that we have "overlooked" the Secretary's argument on this point, there was not anything to overlook because such an argument simply was not there.

We find that a Rule 78 petition is an inappropriate vehicle to raise a legal argument that "could . . . have been made" in the proceedings below. *Lockard*, 163 F.3d at 1267. We find this especially true in light of the Secretary's failure to explain in the instant petition why she failed to raise this argument earlier. *Id*. Accordingly, the Secretary's motion for reconsideration is denied.[2]

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[2] We note with concern that in the instant motion, the Secretary continues to confuse the issue when she states that "the 5-A and the 5-B belts were not locked and tagged out *or otherwise blocked against motion*." Sec'y Mot. at 3 (emphasis added). This statement suggests that locking and tagging out is equivalent to blocking against motion, a proposition we both continue to categorically reject as contrary to the regulation at issue.

Chairman Jordan, dissenting:

In their initial opinions in this matter, my colleagues focused almost exclusively on their disapproval of the Secretary's position that the operator failed to block the conveyor belt against motion because it was not locked and tagged out. *Island Creek Coal Co.*, 22 FMSHRC 823, 825-34 (July 2000). They reiterate this view in their order denying the Secretary's motion for reconsideration. Slip op. at 3 n.2. However, as Commissioner Verheggen explained in his initial opinion in this case, the standard requires that when machinery is being maintained or repaired, "it must be (1) de-energized *and* (2) 'blocked against motion.'" 22 FMSHRC at 831 (emphasis added). Neither the operator nor my colleagues have asserted that only one of these two requirements need to be met to comply with the standard. Nonetheless, my colleagues fail to explain why their rejection of the Secretary's "lock and tag out" theory should provide the operator with immunity from disregarding the second requirement (de-energization) of this regulation.[1]

Whether or not one agrees with the Secretary's argument regarding the definition of "blocked against motion," she has nonetheless made clear throughout this litigation that compliance with both prongs of the standard is necessary. As I noted in my previous dissent in this case, "[t]he Secretary's interpretation of the standard . . . [requires] that belts on which miners are working be deenergized *and* locked out, at least where, as here, the belts are not otherwise blocked against motion . . . ." *Id.* at 836, quoting PDR at 13 (emphasis in original); *see also* Tr. 25 ("There are two requirements in the standard: That the power be off and that the machinery be blocked against motion.") (Argument of Secretary's Counsel); Sec'y Post-Hr'g Br. at 10, 12 ("Since the Contestant failed to lock out and tag out the 5-A and 5-B belts *and did not de-energize the 5-B belt*, it violated section 75.1725(c) . . . . [T]he standard requires that *two* acts must be performed . . . the power must be turned off *and* the machinery must be blocked against motion.") (emphases added); PDR at 12-13 ("The judge erred in failing to address and accept the Secretary's argument that . . . the 5B belt was required to be deenergized and blocked against motion. . . . The Secretary's interpretation of the standard . . . requir[es] that belts on which miners are working be deenergized *and* locked out, at least where, as here, the belts are not otherwise blocked against motion . . . .) (emphasis in original); Sec'y Mot. at 3 ("The Secretary's litigation position in the case has always been that the operator violated the standard both because the 5-B belt was energized *and* because the 5-A and the 5-B belts were not locked and tagged out or otherwise blocked against motion.") (emphasis in original). Thus, the Secretary has consistently maintained that even if the operator fulfills one of the requirements of the standard, it will be in violation if it fails to obey the second as well. *See L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509, 514 (Apr. 2000) (Commission noted that "the two prongs of the

[1] It is undisputed that the 5-B belt was unexpectedly energized. *See Island Creek*, 22 FMSHRC at 824.

test set forth in the 1996 EAJA amendments are conjunctive (i.e., joined by the word 'and'). Thus, for an applicant to prevail, both prongs of the test must be met.").[2]

Although my colleagues have documented at length their firm disagreement — indeed, their undisguised pique — with the Secretary's "lock and tag out theory," they have failed to explain why their dispute with the Secretary over one requirement in the standard should grant the operator license to ignore the other — the explicit additional mandate that the belt be de-energized. This is the legal argument that the Secretary has steadfastly asserted and that my colleagues have clearly overlooked. *See Mancuso v. Herbert*, 166 F.3d 97, 99 (2d Cir. 1999) (petition for rehearing appropriate where significant facts or legal arguments have been overlooked).

For these reasons, and for the reasons stated in my initial opinion in this matter, I would grant the Secretary's motion.

Mary Lu Jordan, Chairman

[2] The Secretary's position that both requirements of the standard must be met to avoid liability is in accord with Commission precedent, as well as common sense. For example, in *Ozark-Mahoning Co.*, 12 FMSHRC 376 (Mar. 1990), the Commission reviewed a decision involving a violation of 30 C.F.R. § 57.12016. The first sentence of that standard required that equipment be deenergized before mechanical work is performed. 12 FMSHRC at 379. The second sentence required the operator to take appropriate measures to prevent reenergization. *Id.* The Commission upheld the judge's ruling that the operator's failure to comply with the first sentence was sufficient to sustain a finding of violation, concluding that the two sentences set forth conjunctive requirements. *Id.*

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