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## The Allocation of Authority under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission

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**THE ALLOCATION OF AUTHORITY UNDER THE  
MINE ACT: IS THE AUTHORITY TO DECIDE  
QUESTIONS OF POLICY VESTED IN THE  
SECRETARY OF LABOR OR IN THE  
REVIEW COMMISSION?**

W. CHRISTIAN SCHUMANN\*

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I. INTRODUCTION

One of the longest and best established principles of administrative law is the principle that when a court is called upon to review the action of an administrative agency, the authority of the court is confined to deciding questions of law and does not extend to deciding questions of policy. The United States Supreme Court expressed the foregoing principle in 1941 when it stated in *Phelps Dodge Corp. v. NLRB*<sup>1</sup> that "courts must not enter the allowable area of . . . [an agency's] discretion and must guard against the danger of sliding un-

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1. 313 U.S. 177 (1941).

consciously from the narrow confines of law into the more spacious domain of policy."<sup>2</sup>

The Court repeated the principle on a number of subsequent occasions,<sup>3</sup> and reiterated the principle in 1984 when it stated in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>4</sup> that courts must not decide cases "on the basis of the judges' personal policy preferences" when reviewing the action of an agency "to which Congress has delegated policymaking responsibilities . . . ."<sup>5</sup> The Supreme Court and courts of appeal have applied the principle in a wide variety of situations, including, among others, cases where the courts were called upon to review an agency's interpretation of a statute which it was responsible for administering,<sup>6</sup> cases where the courts were called upon to review an agency's decision as to whether to take enforcement action under such a statute,<sup>7</sup> cases where the courts were called upon to review an agency's decision as to what remedial action to require under such a statute,<sup>8</sup> and cases where the courts were called upon to review an agency's decision as to how to allocate its resources in administering such a statute.<sup>9</sup>

A number of cases arising over the years under the Federal Mine Safety and Health Act of 1977 (Mine Act)<sup>10</sup> have raised the issue of whether the Federal Mine Safety and Health Review Commission (the

2. *Id.* at 194.

3. *See, e.g.,* *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Consolo v. FMC*, 383 U.S. 607, 620-21 (1966).

4. 467 U.S. 837 (1984).

5. *Id.* at 865.

6. *See, e.g.,* *Chevron*, 467 U.S. at 842-45, 864-66.

7. *See, e.g.,* *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958); *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985).

8. *See, e.g.,* *Seven-Up Bottling Co.*, 344 U.S. at 349; *Fibreboard Paper Prod. Corp.*, 379 U.S. at 216; *Consolo*, 383 U.S. at 620-21; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 351-55 (10th Cir. 1989).

9. *See, e.g.,* *Lincoln v. Vigil*, 113 S. Ct. 2024, 1030-32 (1993); *Chaney*, 470 U.S. at 831; *Moog*, 355 U.S. at 413; *In re Barr Laboratories, Inc.*, 930 F.2d 72, 75-76 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 906 (1991).

10. 30 U.S.C. §§ 801 *et seq.* (1988).

Commission), a quasi-judicial body created by the Mine Act to review enforcement actions taken by the Secretary of Labor under the Mine Act, is subject to the long-established principle that when called upon to review the action of an administrative agency, a court must not decide questions of policy. The Secretary has taken the position that the Commission is subject to the principle; the Commission and various parties from the mining industry have taken the position that it is not. In a case decided in 1994, *Energy West Mining Co. v. FMS-HRC*,<sup>11</sup> the District of Columbia Circuit Court of Appeals explicitly considered and decided the issue.

This article will analyze the issue by discussing: (1) the structures and procedures created by the enforcement and review provisions of the Mine Act, (2) the cases which raised the issue prior to *Energy West*, (3) the parties' arguments and the court's decision in *Energy West*, and (4) cases that have raised the issue since *Energy West*. The article will then conclude that the Commission is subject to the same principle as the courts and that when a challenge to an action by the Secretary, "fairly conceptualized, really centers on the wisdom of the . . . [Secretary's] policy," the Commission, like the courts, is required to respect the Secretary's "legitimate policy choices."<sup>12</sup>

## II. THE ENFORCEMENT AND REVIEW SCHEME OF THE MINE ACT

The Mine Act was enacted to improve safety and health in the nation's mines.<sup>13</sup> Congress contemplated that that objective would be achieved primarily through the enforcement of interim safety and health standards which Congress included in the Mine Act itself and improved safety and health standards which the Secretary of Labor was to develop and promulgate in the course of administering the Mine Act.<sup>14</sup> Congress determined that the Mine Act should be implemented

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11. 40 F.3d 457 (D.C. Cir. 1994).

12. *Chevron*, 467 U.S. at 866.

13. 30 U.S.C. § 801(a) (1988).

14. *Id.* See 30 U.S.C. §§ 841-878 (1988) (setting forth the interim safety and health standards); Section 101 of the Mine Act, 30 U.S.C. § 811 (1988) (directing the Secretary to develop and promulgate improved safety and health standards). In addition, Congress contemplated that the Act's objective would be achieved through the enforcement of other re-

through the actions of two entities: the Secretary of Labor (the Secretary), acting through the Mine Safety and Health Administration (MSHA), and the Federal Mine Safety and Health Review Commission.

MSHA is an entity within the Department of Labor which is headed by an Assistant Secretary of Labor who is appointed by the President with the advice and consent of the Senate and is authorized to appoint such employees as he deems necessary for the administration of the Mine Act.<sup>15</sup> Persons appointed as authorized representatives of the Secretary must be qualified by practical experience in mining, by experience as a practical mining engineer, or by education; in addition, to the maximum extent feasible, persons appointed as mine inspectors must have at least five years of practical mining experience.<sup>16</sup> Congress created MSHA "to provide specialized treatment and enforcement of the [Mine Act],"<sup>17</sup> and conferred on MSHA the responsibility "to develop, promulgate, and enforce" safety and health standards under the Mine Act.<sup>18</sup>

The Commission is an entity independent of the Department of Labor which is composed of five members who are appointed by the President with the advice and consent of the Senate<sup>19</sup> and are authorized to appoint such employees as they deem necessary to assist in the performance of the Commission's functions.<sup>20</sup> The members of the Commission are appointed for terms of six years and may be removed

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quirements and prohibitions which Congress included in the Act itself and through the issuance of orders to counteract certain inherently dangerous conditions. *See also* 30 U.S.C. §§ 813, 815(c) (1988) (setting forth requirements regarding inspections, investigations, and recordkeeping and prohibitions against discrimination because of or interference with protected activities, respectively); 30 U.S.C. § 817 (1988) (directing the Secretary to issue orders to counteract dangerous conditions).

15. 29 U.S.C. § 557a (1988). *See also* 30 U.S.C. § 954 (1988).

16. 30 U.S.C. § 954 (1988).

17. S. REP. NO. 181, 95th Cong., 1st Sess. at 36 (1977), *reprinted in* SENATE SUBCOMM. ON LABOR, COMM. ON HUMAN RESOURCES, 95th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 635 (1977).

18. S. REP. NO. 181, 95th Cong., 1st Sess. 11 (1977). *See also* Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 1977 U.S.C.C.A.N. (91 Stat.) 3401, 3411, *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 88 (1977) (remarks of Senator Williams) ("[t]he sole authority for promulgating standards under [the Act] rests with the Secretary of Labor, and the [Act] grants him a broad discretion in determining whether standards are needed and whether they should be promulgated").

19. 30 U.S.C. § 823(a) (1988).

20. 30 U.S.C. § 823(b)(2) (1988).

by the President only for inefficiency, neglect of duty, or malfeasance in office.<sup>21</sup> The members of the Commission are to be appointed from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission.<sup>22</sup> Congress created the Commission to serve as “a completely independent adjudicatory authority”<sup>23</sup> which would “review orders, citations, and penalties”<sup>24</sup> and which, by providing “administrative adjudication” of disputed cases under the Mine Act, would “preserve[] due process and instill[] much more confidence in the program.”<sup>25</sup>

As previously noted, the Mine Act directs the Secretary, acting through MSHA, to develop and promulgate improved safety and health standards for the protection of life and prevention of injuries in the

21. 30 U.S.C. § 823(b)(1) (1988).

22. 30 U.S.C. § 823(a) (1988). The qualifications set forth above were not intended “to limit the selection of members to technicians.” S. REP. NO. 181, 95th Cong., 1st Sess. 47 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 635 (1977). Instead, Congress contemplated that “nontechnicians with the requisite administrative experience or persons whose qualifications are based upon either formal training or practical experience in mine safety and health or related matters would qualify for appointment.” *Id.*

23. *Id.*

24. S. REP. NO. 181, 95th Cong., 1st Sess. 11 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 599 (1977).

25. S. REP. NO. 181, 95th Cong., 1st Sess. 47 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3447. *See also* S. REP. NO. 181, 95th Cong., 1st Sess. 13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3413 (“[t]he Commission serves as the ultimate administrative review body for disputed cases arising under the [Mine Act]”); Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 1977 U.S.C.C.A.N. (91 Stat.) 3401, 3411, *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 89 (1977) (remarks of Senator Williams) (“[t]he procedure for determining operator responsibility and liability is assigned to a truly independent . . . Review Commission, and the process is streamlined so that operators are provided with a fair method of contesting liability.”).

The scheme created by the Mine Act has sometimes been described as a “split-enforcement” scheme. *See, e.g.,* Secretary of Labor, MSHA v. Drummond Co., Inc., 14 FMSHRC 661, 675 n.15 (1992); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions From the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987). *See also* Martin v. OSHRC, 499 U.S. 144, 155 (1991) (discussing the scheme created by the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*). In truth, the Mine Act does not split enforcement authority between MSHA and the Commission. On the contrary, the Mine Act vests all enforcement authority in MSHA and all adjudicatory authority in the Commission. Accordingly, the scheme created by the Mine Act is best described as a “split-authority” scheme rather than as a “split-enforcement” scheme.

nation's mines.<sup>26</sup> The authority to review the validity of such standards is vested exclusively in the United States Courts of Appeals.<sup>27</sup>

The Mine Act directs the Secretary, acting through MSHA, to determine whether mine operators are complying with the safety and health standards which the Secretary has promulgated and with the other requirements imposed under the Mine Act by conducting frequent inspections and investigations in the nation's mines.<sup>28</sup> If upon inspection or investigation an authorized representative of the Secretary (in most instances an MSHA inspector) believes that an operator has violated any such standard or requirement, the Secretary is to issue a written citation to the operator.<sup>29</sup> Similarly, if upon inspection an authorized representative of the Secretary finds that unabated or repeated violations or imminently dangerous conditions exist in a mine, the Secretary is to issue a written order requiring the operator to withdraw all but certain specified categories of persons from the affected area of the mine.<sup>30</sup> If an operator contests a citation or order issued by the

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26. 30 U.S.C. § 811 (1988). *See also* 30 U.S.C. § 813(c), (f), (h) (1988) (authorizing the Secretary to issue regulations regarding inspections and recordkeeping); 30 U.S.C. § 814(e) (1988) (authorizing the Secretary to issue regulations for determining whether a mine operator has a pattern of safety and health violations); 30 U.S.C. §§ 825(a), (d) (1988) (directing the Secretary to issue standards and regulations regarding safety and health training); 30 U.S.C. § 957 (1988) (authorizing the Secretary to issue such regulations as he deems appropriate to carry out the provisions of the Mine Act).

27. 30 U.S.C. § 811(d) (1988).

28. 30 U.S.C. § 813(a) (1988). The Mine Act directs the Secretary to inspect every underground coal mine at least four times a year and every surface coal or other mine at least two times a year. *Id.* In addition, the Mine Act directs the Secretary to conduct an investigation whenever a mine accident occurs, to conduct an inspection whenever a miner or miners' representative has reasonable grounds to believe that an instance of noncompliance or an imminently dangerous condition exists and requests an inspection, and to conduct spot inspections at certain specified intervals whenever a mine is found to liberate certain specified quantities of methane or other explosive gases, has had a serious or fatal methane or other gas explosion during the previous five years, or has some other especially hazardous condition. 30 U.S.C. § 813(d), (g), (i) (1988).

29. 30 U.S.C. § 814(a) (1988).

30. 30 U.S.C. § 814(b) (1988) (directing the Secretary to issue a withdrawal order if he finds that an unabated violation exists); 30 U.S.C. § 814(d), (e) (1988) (directing the Secretary to issue a withdrawal order if he finds that certain specified categories of repeated violations exist); 30 U.S.C. § 817 (1988) (directing the Secretary to issue a withdrawal order if he finds that certain specified categories of dangerous conditions exist). *See also* 30 U.S.C. § 814(g) (1988) (directing the Secretary to order the withdrawal of a miner if he finds that the miner has not received the safety training required under the Act).

Secretary, a hearing is to be held before an administrative law judge appointed by the Commission.<sup>31</sup>

After conducting a hearing in accordance with the provisions of the Administrative Procedure Act pertaining to administrative adjudications, the administrative law judge is to issue a decision which is based on findings of fact and which affirms, modifies, or vacates the Secretary's citation or order or directs other appropriate relief.<sup>32</sup> The Mine Act itself does not indicate what standard of review the Commission or its judges are to apply in reviewing the Secretary's citations and orders.<sup>33</sup> The legislative history of the Mine Act, however, states that "[s]ince the Secretary of Labor is charged with responsibility for implementing th[e] Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts."<sup>34</sup>

Any party who is adversely affected or aggrieved by an administrative law judge's decision may file a petition for discretionary review of the decision with the Commission.<sup>35</sup> Review by the Commission is a matter not of right but of the Commission's sound discretion.<sup>36</sup> Section 113(d)(2)(A) of the Mine Act<sup>37</sup> states that petitions for discretionary review may be filed only upon one or more of the following grounds:

- (I) A finding or conclusion of material fact that is not supported by substantial evidence.
- (II) A necessary legal conclusion is erroneous.

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31. 30 U.S.C. §§ 815(a), (d), 817(e), 823(b), (d) (1988). *See also* 30 U.S.C. § 815(c) (1988) (setting forth the procedure to be followed when the Secretary or a miner files a complaint alleging discrimination because of or interference with protected activities).

32. 30 U.S.C. § 823(d) (1988).

33. In contrast, the Act indicates that in assessing penalties for violations under the Act, the Commission and its judges are not bound by the Secretary's proposed penalties and are instead to assess penalties on a *de novo* basis. *See Secretary of Labor, MSHA v. Sellersburg Stone Co.*, 5 FMSHRC 287, 290-92 (1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (discussing 30 U.S.C. §§ 815(a), (d), 820(i) (1988)).

34. S. REP. NO. 181 95th Cong., 1st Sess. 49 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 637 (1977).

35. 30 U.S.C. § 823(d)(2)(A)(i) (1988).

36. *Id.*

37. 30 U.S.C. § 823(d)(2)(A) (1988).



(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.<sup>38</sup>

In addition, Section 113(d)(2)(B) of the Mine Act<sup>39</sup> states that the Commission may order review of a judge's decision on its own initiative, but that it may do so "only upon the ground[s] that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented."<sup>40</sup>

When a petition for discretionary review is granted, the Commission is to limit its review to the questions raised by the petition.<sup>41</sup> When the Commission orders review on its own initiative, the Commission is to limit its review to the issues stated in its order of review.<sup>42</sup> After reviewing the judge's decision, the record below, and the filings on review, the Commission is to issue a decision which remands the case to the judge for further proceedings or affirms, sets aside, or modifies the judge's decision in conformity with the record.<sup>43</sup>

Any party who is adversely affected or aggrieved by a Commission decision may file a petition for review of the decision with an appropriate United States Court of Appeals.<sup>44</sup> After reviewing the Commission's decision, the court may issue a decree which, in whole or in part, affirms, modifies, or sets aside the decision.<sup>45</sup> In reviewing the Commission's decision, the court of appeals is bound by the

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38. 30 U.S.C. § 823(d)(2)(A)(ii)(I)-(V) (1988).

39. 30 U.S.C. § 823(d)(2)(B) (1988).

40. *Id.*

41. *Id.*

42. 30 U.S.C. § 823(d)(2)(A), (B) (1988).

43. 30 U.S.C. § 823(d)(2)(C) (1988).

44. 30 U.S.C. § 816(a) (1988). In addition, the Secretary may file a petition for summary enforcement of an unappealed Commission decision with an appropriate Court of Appeals. 30 U.S.C. § 816(b) (1988). The Secretary may also institute a civil action for certain specified categories of injunctive relief in an appropriate United States District Court. 30 U.S.C. § 818 (1988). The review scheme set forth above represents the exclusive means for obtaining review of the Secretary's enforcement actions under the Mine Act. *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771 (1994).

45. 30 U.S.C. § 816(a)(1) (1988).

Commission's findings with respect to questions of fact if those findings are supported by substantial evidence on the record as a whole.<sup>46</sup>

### III. CASES DECIDED PRIOR TO *ENERGY WEST*

The issue of whether the Review Commission has the authority to decide questions of policy when called upon to review enforcement actions taken by the Secretary of Labor was addressed by the Commission in a number of cases decided prior to the District of Columbia Circuit Court's decision in *Energy West*. The pre-*Energy West* cases arose in a variety of situations.

*Secretary of Labor, MSHA v. Old Ben Coal Co.*<sup>47</sup> arose from the Secretary's action in citing the owner-operator of a mine rather than an independent contractor performing services at the mine for a safety violation committed by an employee of the independent contractor.<sup>48</sup> The owner-operator asserted that the Secretary acted impermissibly in citing it rather than the independent contractor.<sup>49</sup> The Secretary argued that owner-operators are legally liable under the Mine Act for violations attributable to their independent contractors and that, under the provisions of the Administrative Procedure Act pertaining to judicial review, the Secretary's decision to proceed against the owner-operator rather than the independent contractor was exempt from Commission review.<sup>50</sup>

The Commission, relying on Sections 113(d)(2)(A) and (B) of the Mine Act<sup>51</sup> and several passages from the Mine Act's legislative history, held that the Commission's role is distinguishable from the role of a court reviewing agency action and that the Commission's review authority extends to "reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis."<sup>52</sup> The

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46. *Id.*

47. 1 FMSHRC 1480 (1979), *aff'd*, No. 79-2367 (D.C. Cir. Dec. 9, 1980).

48. *Old Ben Coal Co.*, 1 FMSHRC at 1480.

49. *Id.* at 1481.

50. *Id.* at 1481, 1483-84.

51. 30 U.S.C. § 823(d)(2)(A), (B) (1988).

52. *Id.* at 1483-84. In addition to relying on passages from the legislative history itself, the Commission relied on a statement at the nomination hearing for the first members

Commission went on to conclude that the Secretary's decision to proceed against the owner-operator rather than the independent contractor should be reviewed under the standard of whether it "was made for reasons consistent with the purpose and policies" of the Mine Act and that, in the circumstances presented, it was.<sup>53</sup>

*Secretary of Labor, MSHA v. Helen Mining Co.*<sup>54</sup> arose from the Secretary's action in citing a mine operator for refusing to pay a miner for the time he spent participating as a miners' representative in a spot inspection of the mine.<sup>55</sup> The administrative law judge held that the provision of the Mine Act requiring operators to pay miners for time spent participating in inspections does not apply to participation in spot inspections.<sup>56</sup> The Secretary argued that the judge failed to accord appropriate deference to the Secretary's established interpretation of the provision in question.<sup>57</sup>

The Commission, again relying on Sections 113(d)(2)(A) and (B) of the Mine Act<sup>58</sup> and several passages from the corresponding legislative history, held that the Commission "is not entirely in the position of a court"<sup>59</sup> and that the Commission is authorized in reviewing the Secretary's actions to "study a problem afresh and make an independent judgment on matters of law and policy."<sup>60</sup> The Commission concluded that although the Secretary's views of the Mine Act's provisions and his standards and regulations should be accorded "special weight"

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of the Commission that the Commission was created "to 'develop a uniform and comprehensive interpretation of the law' [and] provid[e] 'guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.'" *Id.* at 1484 (quoting from *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. at 1 (1978) (statement of Senator Williams)).

53. *Id.* at 1485-87. One Commission member dissented on the ground that there was "[no] rational relationship between the owner-operator and the wrongdoing alleged in the citation . . . ." *Id.* at 1489.

54. 1 FMSHRC 1796 (1979), *rev'd on other grounds sub nom.* *UMWA v. FMSHRC*, 671 F.2d 615 (D.C. Cir. 1981), *cert. denied*, 459 U.S. 927 (1982).

55. *Id.* at 1796-97.

56. *Id.* at 1797-98.

57. *Id.* at 1798.

58. 30 U.S.C. § 823(d)(2)(A), (B) (1988).

59. *Helen Mining Co.*, 1 FMSHRC at 1800.

60. *Id.* at 1799. In addition, the Commission again relied on the statement at the nomination hearing which it relied on in *Old Ben Coal Co. Id.* at 1806 n.5.

and “extra attention and respect,” the Secretary’s interpretation of the provision in question was not entitled to acceptance.<sup>61</sup>

*Secretary of Labor, MSHA v. Drummond Co., Inc.*<sup>62</sup> arose from the Secretary’s action in proposing penalties against mine operators with an “excessive history” of safety and health violations in accordance with a program which the Secretary promulgated through the issuance of a “program policy letter” rather than through notice-and-comment rulemaking.<sup>63</sup> The administrative law judge held that the “excessive history” program was invalidly promulgated because, under the provisions of the Administrative Procedure Act pertaining to rulemaking, the program was required to be promulgated through notice-and-comment rulemaking.<sup>64</sup> The Secretary argued that the Commission lacked jurisdiction to review the validity of the “excessive history” program because the program represented an implementation of the penalty regulations which the Secretary had promulgated under the Mine Act and, under the Mine Act, the jurisdiction to review such regulations is vested exclusively in the courts of appeals.<sup>65</sup>

The Commission, relying on Sections 113(d)(2)(A) and (B) and other provisions of the Mine Act, held that the Commission is authorized to review and resolve matters involving questions of policy.<sup>66</sup> The Commission concluded that the “excessive history” program was required to be promulgated through notice-and-comment rulemaking and therefore was invalidly promulgated.<sup>67</sup>

*Secretary of Labor, MSHA v. W-P Coal Co.*<sup>68</sup> arose from the Secretary’s action in citing the owner-operator of a mine rather than the contractor operating the mine on a day-to-day basis for a safety violation occurring at the mine.<sup>69</sup> The administrative law judge held that the Secretary acted impermissibly in citing the owner-operator rather than the contractor-operator because the Secretary did so only

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61. *Id.* at 1802-06. Two Commission members dissented on the ground that the Commission majority’s interpretation of the provision in question was incorrect. *Id.* at 1807-26.

62. 14 FMSHRC 661 (1992).

63. *Id.* at 662-69.

64. *Id.* at 669-71.

65. *Id.* at 671-72.

66. *Drummond Co., Inc.*, 14 FMSHRC at 672-78.

67. *Id.* at 678-90.

68. 16 FMSHRC 1407 (1994).

69. *Id.* at 1407-08.

out of considerations of “administrative convenience” and a desire to collect penalties from a “deeper pocket.”<sup>70</sup> The Secretary argued that both the owner-operator and the contractor-operator were legally liable under the Mine Act for violations occurring at the mine and that, under the decisions of the Supreme Court pertaining to enforcement discretion, the Secretary’s decision to proceed against the owner-operator was effectively unreviewable by the Commission.<sup>71</sup>

The Commission, relying on Sections 113(d)(2)(A) and (B) of the Mine Act<sup>72</sup> and purporting to distinguish the Supreme Court decisions relied on by the Secretary, held that the Commission possesses “general policy jurisdiction” under the Mine Act.<sup>73</sup> The Commission concluded that the Secretary’s decision to proceed against the owner-operator rather than the contractor-operator should be reviewed under an “abuse of discretion” standard and that, in the circumstances presented, it was not an abuse of discretion.<sup>74</sup>

#### IV. THE ARGUMENTS AND THE DECISION IN *ENERGY WEST*

*Energy West Mining Co. v. FMSHRC*<sup>75</sup> arose from the Secretary’s action in citing a mine operator for violating the Secretary’s regulation requiring operators to report certain specified categories of “occupational injuries” to MSHA.<sup>76</sup> The operator and the American Mining Congress (AMC) argued before the Commission that the injury in question, which occurred after the miner had driven onto mine property but before he had started work, was not an “occupational injury” because it was not related to the miner’s work.<sup>77</sup> The Secretary argued that the injury was an “occupational injury” because it occurred at the mine site.<sup>78</sup> Of particular relevance here, the operator and the AMC, relying

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70. *Id.* at 1408-09.

71. *Id.* at 1409.

72. 30 U.S.C. § 823(d)(2)(A), (B) (1988).

73. *W-P Coal Co.*, 16 FMSHRC at 1410.

74. *Id.* at 1410-11.

75. 40 F.3d 457 (D.C. Cir. 1994), *aff’g* 15 FMSHRC 587 (1993).

76. 15 FMSHRC at 587-90.

77. *Id.*

78. *Id.* at 590. The AMC participated both before the Commission and before the Court as an amicus curiae on the side of the operator.

on Sections 113(d)(2)(A) and (B) of the Mine Act,<sup>79</sup> argued that the Secretary's interpretation of the regulation should be rejected as a matter of policy because that interpretation produced imperfect statistics and unfairly focused the government's regulatory efforts on certain mine operators in particular and on the mining industry in general.

The Commission held that the Secretary's interpretation of the regulation was reasonable and therefore should be accepted.<sup>80</sup> Although it expressed the view that the purposes of the Mine Act would be "better served" if the Secretary excluded non-work-related injuries in compiling his statistics,<sup>81</sup> the Commission, citing its previous decision in *Consolidation Coal Co.*,<sup>82</sup> accepted the Secretary's interpretation of the regulation on the ground that "the Commission's task is not to devise the best method of monitoring injuries sustained by miners but to determine whether the Secretary's method, as implemented by the regulations, is reasonable."<sup>83</sup>

The operator appealed the Commission's decision to the District of Columbia Circuit Court of Appeals. Before the court, the parties repeated in amplified form the arguments they had made before the Commission.<sup>84</sup> Because the parties' arguments regarding the issue of whether the Commission has the authority to decide questions of policy represent a comprehensive treatment of both sides of the issue, and because those arguments were before the court when it decided the issue, those arguments are reproduced in essentially verbatim form below.<sup>85</sup> The parties' arguments are followed by a summary of the court's decision.

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79. 30 U.S.C. § 823(d)(2)(A), (B) (1988).

80. *Energy West Mining Co.*, 15 FMSHRC at 591-93.

81. *Id.* at 593.

82. *Secretary of Labor v. Consolidation Coal Co.*, 14 FMSHRC 956 (1992).

83. 15 FMSHRC at 592 (citing *Consolidation Coal Co.*, 14 FMSHRC at 969).

84. *Energy West Mining Co.*, 40 F.3d at 461-64.

85. Because the policy authority issue was addressed primarily in the AMC's amicus brief, the Secretary's brief, and the operator's reply brief, only the arguments set forth in those briefs are reproduced below.

### A. *The AMC's Opening Arguments*

The AMC argued as follows: the Commission reviewed this case as if it were a federal court. It did not feel free to review MSHA's interpretation *de novo* and adopt what it believed to be the most reasonable or harmonious interpretation of the regulations. It made no attempt to harmonize the inconsistency created by MSHA's position. Instead, the Commission deferred generously to MSHA and acted as if the internal inconsistencies implicated by MSHA's interpretation were not within its province.

The Commission felt compelled to ignore its own conclusions that MSHA's interpretation of the reporting regulations results in "flawed," "distorted" and "inaccurate" injury statistics that "unnecessarily compromise[]" the improvement of mine safety, and argued that the purpose of the Act would be better served if the regulations were interpreted to exclude non-work-related injuries. This limited deferential role may be proper for an Article III court. It is not, however, the role Congress intended for the Commission.

#### 1. The Language of the Mine Act

The language of the Mine Act is clear in describing the unique role assigned to the independent Commission by Congress: Section 113(d)(2) of the Mine Act states several times that the Commission is to review questions of "policy."<sup>86</sup> This provision, which defines the Commission's review authority,<sup>87</sup> does not state that the Commission is to adjudicate in a conventional sense. Nor does it suggest that the Commission's policy function is limited to deciding questions of adjudicated policy (*e.g.*, when to default parties for procedural missteps or whether to adopt an exclusionary rule). To the contrary, the Mine Act expressly distinguishes among, and permits Commission review of, questions of "law," "Commission policy" *and* "novel questions of policy."<sup>88</sup>

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86. See 30 U.S.C. § 823(d)(2) (1988).

87. See *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91 (D.C. Cir. 1983) ("[t]he Mine Act explicitly recognizes . . . that the 'review authority of the Commission' is dictated by [S]ection 823(d)(2)").

88. 30 U.S.C. § 823(d)(2)(B) (1988).

The Mine Act shows in other ways that the Commission was not envisioned by Congress to be merely a passive referee in disputes between the Secretary and mine operators:

- The Commission often decides questions of policy and law in proceedings in which the Secretary does not participate, *e.g.*, compensation proceedings brought by miners under Section 111 of the Mine Act, 30 U.S.C. § 821,<sup>89</sup> and discrimination complaints filed by miners under Section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).
- Section 113(d)(2)(B), 30 U.S.C. § 823(d)(2)(B), empowers the Commission to review cases even when no party has sought review.
- Congress expressly ordered the Commission to oversee and approve all penalty settlements that the Secretary proposes to enter into. Section 110(k), 30 U.S.C. § 820(k).
- The Commission is comprised of five presidentially-appointed, Senate confirmed members who serve six-year terms.<sup>90</sup> This is a generous number of members if the Commission's role is to do little more than defer to MSHA and review judges' factual findings using a narrow, substantial evidence test.<sup>91</sup>

In sum, the Mine Act shows that Congress established the Commission to be a unique, hybrid agency—one that decides substantive policy questions in adjudication.

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89. *See* *UMWA v. FMSHRC*, 917 F.2d 42, 47 (D.C. Cir. 1990) (quoting *General Montors Corp. v. NHTSA*, 898 F.2d 165, 171 (D.C. Cir. 1990) and noting in compensation case that FMSHRC was “mindful of ‘policy and administrative concerns’ . . . and wove them into the calculus” and “exercise[d] its discretion in interpreting the statutory scheme in light of its policy judgment and expertise”).

90. 30 U.S.C. § 823(a)-(b)(1)(A) (1988).

91. *See Phelps Dodge*, 709 F.2d at 91.



## 2. The Legislative History

The legislative history of the Mine Act bears out the plain implications of Congress's language. The adjudicatory body that functioned under the predecessor Coal Act,<sup>92</sup> the Interior Board of Mine Operation Appeals (IBMA), was established by the Secretary of the Interior to carry out his adjudicatory functions. Although the IBMA attempted to review questions of law *de novo*,<sup>93</sup> and its views were given deference by the courts,<sup>94</sup> the Interior Secretary used his supervisory powers to control major IBMA decisions disliked by his enforcement officials<sup>95</sup>-an exercise of power to which the IBMA held itself bound.<sup>96</sup>

Whether to retain this structure caused disagreement in Congress when substantial amendment of the mine safety and health statutes was considered in 1977. The House Committee on Education and Labor reported, and later the full House passed, a bill that would have transferred all administrative authority from the Interior Department to the Labor Department but would have retained the Coal Act's delegation of all administrative authority in a cabinet agency.<sup>97</sup> It rejected a earlier proposal to establish an independent body with policy-review authority.<sup>98</sup>

92. Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976).

93. *See, e.g.*, Eastern Associated Coal Corp., 7 IBMA 133 (1976) (en banc); 1 COAL LAW & REGULATION, 1, 1-50 at § 1.04(9)(b)(iii) (1990) (“[o]f course, the Board could independently decide questions of law.”).

94. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view “must be given some significant weight”).

95. *See* 43 C.F.R. § 4.5 (1977) (regarding the Secretary's “supervisory” powers); Secretarial Order of January 19, 1977, staying effect of Eastern Associated Coal Corp., 7 IBMA 133 (1976), and staying proceedings in nine other cases, described in 1 COAL LAW & REGULATION at 1-50, n.118, § 1.04(9)(b)(iv) (describing Secretarial order).

96. Republic Steel Corp., 5 IBMA 306, 309-11, 1975-76 CCH OSHD ¶ 20,233 (1975), *rev'd on other grounds*, 581 F.2d 868 (D.C. Cir. 1978); Cowin & Co., 6 IBMA 351, 365, 1976-77 CCH OSHD ¶ 21,171 (1976), *remanded on other grounds*, No. 76-1980 (D.C. Cir. May 26, 1978) (Board bound by a Secretarial order, which “expressed the policy of the Department”).

97. H.R. 4287, 95th Cong., 1st Sess. (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 266, 1250-75 (1977). *See also* H.R. REP. NO. 312, 95th Cong., 1st Sess. 21 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 357, 377 (1977) (noting continuation of Coal Act administrative review scheme).

98. H.R. 4287, 95th Cong., 1st Sess. § 114 (1977), *reprinted in* LEGISLATIVE HISTORY

In the Senate, however, Senator Harrison Williams, Chairman of the Senate Labor Subcommittee, introduced a bill establishing an independent body with policy-review authority.<sup>99</sup> High Labor Department officials, including Assistant Secretary Arnold Packer and Solicitor Carin Clauss, testified before the subcommittee, urging the establishment of a body within the Labor Department<sup>100</sup> and offering to draft new legislative language implementing their suggestion.<sup>101</sup> The offer was rejected, for the Senate committee retained the provision establishing the Commission.<sup>102</sup> The bill was passed by the Senate,<sup>103</sup> and the provision on the Commission was accepted in conference committee. The conference committee report went so far as to closely paraphrase the policy-review provisions of the Senate bill.

The Senate committee stated the reasons for the establishment of an independent review body, "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program."<sup>104</sup> That it expected the Commission to play a policy role is indicated by its assurance to the Senate that Commissioners need not be "technicians" but could include persons with "administrative experience" or "practical experience in mine safety."<sup>105</sup> The Senate report also stated:

Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally

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OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 188, 242-47 (1977) (as introduced).

99. S. 717, 95th Cong., 1st Sess. § 114 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 110, 164-70 (1977) (as introduced).

100. *Hearings Before the Senate Subcomm. on Labor, Federal Mine Safety and Health Amendments Act of 1977*, 95th Cong., 1st Sess. 386-87, 391 (1977).

101. *Id.* at 390-91. Ms. Clauss noted that her staff attorneys were already drafting such language.

102. S. 717, 95th Cong., 1st Sess. § 114 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 433, 546-69 (1977) (as reported).

103. S. 717, 95th Cong., 1st Sess. § 114 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 1109, 1125-26 (1977) (as passed).

104. S. REP. NO. 181, 95th Cong., 1st Sess. 47 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 589, 635 (1977).

105. *Id.*

accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts.<sup>106</sup>

This statement does not bear the weight that has come to be placed on it. All that the statement expresses is the Senate Committee's wish that the Secretary's views be given "weight." It does not require that "controlling weight" or "great weight" be given, or that the Secretary's interpretation control as long as it is reasonable. At that time, deference cases under the Coal Act used the "significant weight" standard.<sup>107</sup> Moreover, there was at that time a respected line of cases that permitted adjudicators to examine wholly legal questions *de novo* and reverse administrative interpretations that struck them as incorrect, after giving the interpretation the weight it was due.<sup>108</sup> At most, and read in the context of the assignment of a policy role to the Commission, the statement indicates that the Commission is not to ignore the Secretary's view but weigh it along with all other pertinent considerations.

Shortly after the passage of the Mine Act, the first five Commissioners were appointed by the President and confirmed by the Senate. During their confirmation hearings, the chief architect of the Mine Act, Senator Williams, shed considerable light on the prominent and active role that Congress intended for the Commission:

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 for 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 [Act] and

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106. S. REP. NO. 181, 95th Cong., 1st Sess. at 49 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 637 (1977).

107. *Zeigler Coal Co.*, 536 F.2d at 409.

108. See generally KENNETH C. DAVIS, 5 ADMINISTRATIVE LAW TREATISE § 29:16 (2d ed. 1984) (discussing many Supreme Court decisions permitting *de novo* review of administrative agency interpretations). See also *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982) (Ginsburg, J.), *rev'd sub nom. Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

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.<sup>109</sup>

Thus, the Secretary was to look to the Commission for a "uniform and comprehensive interpretation of the law."<sup>110</sup>

The Supreme Court recently evaluated the role of the Commission in *Thunder Basin Coal Co. v. Reich*.<sup>111</sup> The Court found that the Commission was "established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act."<sup>112</sup> It cited Congress's authorization to the Commission to review policy questions:

The Commission exercises discretionary review over any case involving . . . a 'substantial question of law, policy or discretion'<sup>113</sup> . . . and may review on its own initiative any decision 'contrary to law or Commission policy' or in which 'a novel question of policy has been presented . . . .'<sup>114</sup>

The court stated that the Commission can bring "agency expertise . . . to bear" on statutory questions under the Mine Act,<sup>115</sup> and held that the Commission, unlike the typical administrative agency, is uniquely situated to adjudicate the constitutionality of its enabling legislation.<sup>116</sup> In sum, the text and legislative history of the Mine Act show that the Commission was intended to function as a body that makes policy in adjudication and establishes authoritative interpretations of the Mine Act.<sup>117</sup>

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109. *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978).

110. *Id.*

111. 114 S. Ct. 771 (1994).

112. *Id.* at 780 (quoting Senator Williams' remarks at the nomination hearings).

113. 30 U.S.C. § 823(d)(2)(A)(ii)(IV) (1988).

114. 114 S. Ct. at 776 n.9 (quoting 30 U.S.C. § 823(d)(2)(B)).

115. *Id.* at 780.

116. *Id.*

117. *Martin v. OSHRC*, 499 U.S. 144 (1991), does not require that deference be accorded to the Secretary rather than the FMSHRC. In *Martin*, the court was careful to state: "[W]e take no position on the division of enforcement and interpretive powers within other

### 3. The Case Law

Early in the history of the Mine Act, the Commission understood that its role was to closely review MSHA interpretations and policies. In *Old Ben Coal Co.*,<sup>118</sup> one of the first important cases decided under the Mine Act, the Commission unanimously held that it would not review MSHA actions in the manner of a federal court.<sup>119</sup> The Commission noted that Congress had granted it the power to pass on questions of policy and intended that it “play a major role under the 1977 [Mine] Act by reviewing the Secretary’s enforcement actions and formulating mine safety and health policy on a national basis.”<sup>120</sup>

Soon thereafter, in *Helen Mining Co.*,<sup>121</sup> the Commission refused to accede to MSHA’s merely reasonable interpretation of a Mine Act provision.<sup>122</sup> The Commission held that “Congress . . . invested the Commission with the authority to decide questions of both law and policy . . . and it intended that the Commission do so independently.”<sup>123</sup> The Commission also addressed the passage in the Senate committee report requiring that “weight” be given to the Secretary’s view. After pointing out that it required only that the Secretary’s views be given “weight,” no more, it stated:

In accordance with this expression of congressional intent, we will accord special weight to the Secretary’s view of the 1977 Act and the standards and regulations he adopts. . . . His views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution,

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regulatory schemes that conform to the split-enforcement structure.” 499 U.S. at 158. Importantly, the Occupational Safety and Health Act [hereinafter OSH Act], 29 U.S.C. § 651 *et seq.*, does not grant to the Occupational Safety and Health Review Commission the policy role that Section 113(d) of the Mine Act expressly grants to the Federal Mine Safety and Health Review Commission.

118. 1 FMSHRC 1480, 1483-85 (1979), *aff’d*, No. 79-2367 (D.C. Cir. December 9, 1980).

119. *Id.* at 1483-85.

120. *Id.* at 1484. Commissioner Backley dissented on another ground but stated his agreement with the majority on this point. *Id.* at 1492.

121. 1 FMSHRC 1796 (1979).

122. *Id.* at 1799-1801.

123. *Id.* at 1799.

or standards-making activities, it will not rise to the inappropriate level the Secretary has sought here.<sup>124</sup>

As Judge Tamm Court later noted, this “standard seems about right, albeit a bit amorphous.”<sup>125</sup> Decisions of the court, however, have eroded the Commission’s ability to maintain this policy role, and the Commission has retreated to the far more reserved role reflected in its decision here.

Though the court in *Helen Mining Co.* at one point noted that it need not resolve the deference issue,<sup>126</sup> it stated at another point that the Secretary’s statutory construction is entitled to deference unless not reasoned or supportable.<sup>127</sup> *Helen Mining Co.* did not discuss the text or legislative history of Section 113 of the Mine Act, which gives policy-making powers to the Commission. Instead, it cited *Magma Copper Co. v. Secretary of Labor*,<sup>128</sup> *Whirlpool Corp. v. Marshall*,<sup>129</sup> and the passage in the Senate Committee report requiring that “weight” be given the Secretary’s views.<sup>130</sup> The statement in *Magma Copper* was dictum because the Commission, MSHA and the court all agreed on the issue of statutory construction presented there. Moreover, the court did not examine Section 113 and its legislative history. *Whirlpool Corp.* is an OSH Act discrimination case and did not involve the deference to be accorded statutory interpretations of the Occupational Safety and Health Review Commission (OSH Commission) because that body does not adjudicate discrimination cases.<sup>131</sup> In addition, as noted above, the Senate report indicated only that “weight” should be accorded to the Secretary’s views.

Thereafter, in *Brock v. Cathedral Bluffs Shale Oil Co.*,<sup>132</sup> the court stated that it had held in *Donovan v. Carolina Stalite Co.*,<sup>133</sup> that the Secretary’s interpretation was entitled to “great deference” by

124. 1 FMSHRC at 1801.

125. *UMWA v. FMSHRC*, 671 F.2d 615, 635 (D.C. Cir. 1982), cert. denied, 459 U.S. 927 (1982) (appealed from *Helen Mining Co.*, 1 FMSHRC 1796 (1979)).

126. 671 F.2d at 623 n.26.

127. *Id.* at 626 n.40.

128. 645 F.2d 694, 696 (9th Cir. 1981).

129. 445 U.S. 1, 11 (1980).

130. 671 F.2d at 626 n.40.

131. See 29 U.S.C. § 660(c)(2) (1988).

132. 796 F.2d 533, 537 (D.C. Cir. 1986).

133. 734 F.2d 1547 (D.C. Cir. 1984).

both the Commission and the courts.<sup>134</sup> In *Carolina Stalite*, however, the court had deferred to the Secretary because it held that a special provision of the Mine Act textually committed the resolution of an MSHA/OSHA jurisdictional dispute to the Secretary, who supervises both agencies.<sup>135</sup> In neither *Cathedral Bluffs* nor *Carolina Stalite* did the court discuss Section 113's grant of a policy role to the Commission. Instead, it assumed that the Secretary was the sole policy maker and the Commission merely an adjudicator.<sup>136</sup>

Since the issuance of these decisions, the Commission has retreated from the vigorous role that it first perceived Congress intended for it. It now applies *Chevron* deference analysis and defers, as it did in *Consolidation Coal Co.*,<sup>137</sup> to MSHA's interpretations.<sup>138</sup> For this reason, the AMC suggests that this question be re-examined. It submits that the above precedents are distinguishable on the grounds that they do not reflect consideration of the text of Section 113 of the Mine Act<sup>139</sup> or the legislative history presented here, and did not have the benefit of the Supreme Court's opinion in *Thunder Basin*. It urges that the court permit the Commission to exercise the interpretive leeway and policy-review role that Congress expected by making the reasonableness of the Commission's interpretation the touchstone for judicial review, while requiring the Commission to give weight to the Secretary's view.<sup>140</sup>

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134. *Cathedral Bluffs*, 796 F.2d at 537. Later, in *Brock ex rel. Williams v. Peabody Coal Co.*, the court went beyond this "great deference" standard and announced: "We accord *Chevron* deference to the Secretary's, not the Commission's interpretation of the Act." 822 F.2d 1134, 1146 n.41 (D.C. Cir. 1987) (citing *Cathedral Bluffs*, 796 F.2d at 533; *Carolina Stalite*, 734 F.2d 1547). See also *Secretary of Labor ex rel. Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989); *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990); and *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1288 (D.C. Cir. 1990) (which at root rely on *Carolina Stalite*).

135. 734 F.2d at 1552 (referring to 30 U.S.C. § 802(h)(1)).

136. See *Cathedral Bluffs*, 796 F.2d at 537 n.2 ("interpretive discretion" resides "with the policymaker rather than the adjudicator").

137. 383 U.S. 607 (1966).

138. See, e.g., *Secretary of Labor v. Keystone Coal Mining Corp.*, 16 FMSHRC 6 (1994) (applying *Chevron*).

139. 30 U.S.C. § 823 (1988).

140. See *UMWA v. FMSHRC*, 917 F.2d 42, 44 (examining reasonableness of Commission interpretation). See also *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53 (D.C. Cir. 1988); *Simpson v. FMSHRC*, 842 F.2d 453, 462 (D.C. Cir. 1988).

The AMC does not argue that the Commission may ignore the plain language of MSHA's regulations. Where MSHA's regulations have ambiguities and internal inconsistencies, or lead to illogical, irrational or unforeseen results, however, it is most consonant with the intent of Congress that the Commission be permitted to apply its own expertise and adopt the interpretation it finds the most reasonable and internally consistent in light of the words and legislative history of a provision, in light of the purpose and policy of the Mine Act, and after giving weight to MSHA's interpretation. The amount of that weight would, as the Commission noted in *Helen Mining Co.*,<sup>141</sup> vary with MSHA's expertise and familiarity with the question.

Accordingly, the AMC asserts that the court should not defer to MSHA's interpretation because it is not the body to whom deference is due, and it should not defer to the Commission's interpretation here because its interpretation is not the independent interpretation that Congress intended. Instead, the court should review the substantive legal issues and vacate the citation on the grounds stated *infra*, or, if necessary, remand the case to the Commission for further proceedings consistent with the role that Congress intended for it under the Mine Act.

### B. *The Secretary's Arguments in Response*

The Secretary argued as follows: Energy West and AMC urge the court to order the Commission to substitute its judgment for the Secretary's regarding how the Secretary's reporting regulations should best be interpreted. AMC asks the court to order that the Commission "review MSHA's decision *de novo* and adopt what it believe[s] to be the *most reasonable* or harmonious interpretation of the regulations." According to Energy West and AMC, the Mine Act gives the Commission authority to review questions of policy or discretion.

To begin, Energy West's and AMC's argument is internally inconsistent. Assuming that the Commission has the authority to decide matters of "policy," an assumption with which the Secretary disagrees, the Commission's decision does not indicate that the Commission failed to exercise such authority. Instead, the Commission's decision indicates that the Commission exercised its purported "policymaking" authority

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141. 1 FMSHRC 1796 (1979).



and decided, as a matter of “policy,” that the Secretary’s interpretation was not so unreasonable that it should be invalidated.<sup>142</sup> In actuality, Energy West and AMC are not complaining that the Commission failed to exercise its purported “policymaking” authority — they are complaining that the Commission exercised its “policymaking” authority and reached a result different than the result they wanted.

In any event, Energy West’s and AMC’s argument is inconsistent with established legal principles of general applicability and with the legislative history and the review provisions of the Mine Act. As a general matter, it is well established that a court does not have the authority to review policy decisions made by an agency that is part of the executive branch.<sup>143</sup> As the Supreme Court stated in *Chevron*:

Courts must . . . [not] reconcile competing political interests . . . on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.

. . . .  
When a challenge to an agency’s construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy . . . the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do.<sup>144</sup>

In *Martin v. OSHRC*,<sup>145</sup> the Supreme Court addressed the question of whether a reviewing court should give deference to the Secretary’s regulatory interpretations or to the OSH Commission’s and concluded that it should give deference to the Secretary’s. In so concluding, the Court stated:

Under the OSH Act . . . Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *independent* administrative authorities.

. . . .  
Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretative

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142. *Energy West Mining Co.*, 15 FMSHRC at 592.

143. *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

144. *Id.* at 865-66.

145. 499 U.S. 144 (1991).

lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.

Because dividing the power to promulgate and enforce OSH Act standards from the power to make law by interpreting them would make *two* administrative actors ultimately responsible for implementing the Act's policy objectives, we conclude that Congress did not expect the Commission to possess authoritative interpretive powers.

[W]e think the more plausible inference is that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context.<sup>146</sup>

Nothing in the Mine Act or the legislative history of the Mine Act establishes that the principles which apply to the courts and the OSH Commission do not apply to the Mine Commission. On the contrary, both the legislative history of the Mine Act and the provisions of Section 113(d)(2)(A)(ii) indicate that they do.

First, the legislative history contains numerous statements indicating that Congress intended the Commission to be a completely separate and purely adjudicatory body.<sup>147</sup> The legislative history indicates that when Congress passed the Mine Act, as with the OSH Act, it intended to establish a scheme in which the Secretary would possess all rulemaking, enforcement, and policymaking authority, and a completely separate review commission would possess "the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context."<sup>148</sup>

146. *Id.* at 151-54 (emphasis in original).

147. See, e.g., S. REP. NO. 181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 599, 635 (1977) (stating that the Senate bill established the Commission as a "completely independent adjudicatory authority" and "as a separate entity" to serve as the "ultimate administrative review body" for disputed cases, and additionally stating that the Senate bill established MSHA within the Department of Labor "to administer" the new Act and established an "independent" Mine Safety and Health Review Commission to "review orders, citations, and penalties"). See also Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 1977 U.S.C.A.N. (91 Stat.) 3401, 3411, reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 89 (1977) (remarks of Senator Williams) (noting that "the procedure for determining operator responsibility and liability is assigned to a truly independent" Commission).

148. *Martin*, 499 U.S. at 154 (emphasis in original).

In addition to addressing the overall scheme of the Mine Act, the legislative history specifically addressed the type of review the Commission was to apply to the actions of the Secretary. On this question, the Senate Report stated:

Since the Secretary of Labor is charged with responsibility for implementing th[e] Act, it is the intention of the Committee, *consistent with generally accepted precedent*, that the Secretary's interpretations of the law and regulations *shall be given weight by both the Commission and the courts*.<sup>149</sup>

The quoted passage is of critical importance for two reasons. First, the statement that the Secretary's positions are to be given weight by "both the Commission and the courts" indicates that the Commission is to give the Secretary the same sort of deference as the courts. Second, the statement that the Commission and the courts are to give the Secretary's positions weight "consistent with generally accepted precedent" indicates that the Commission and the courts are to give the Secretary the same sort of deference called for by the precedent in existence at the time the Mine Act was passed. The precedent in existence when the Mine Act was passed uniformly held that courts cannot review an agency's policy decisions.<sup>150</sup>

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149. S. REP. NO. 181, 95th Cong., 1st Sess. at 49 (1977), *reprinted in* 1977 U.S.C.C.A.N. (91 Stat.) 3401, 3448 (emphasis supplied) (quoted and relied on in *Cannelton Industries*, 867 F.2d at 1435 (Ginsburg, J.)). Energy West's and AMC's reliance on the Supreme Court's recent decision in *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771 (1994), is unavailing. In *Thunder Basin*, the court held that the Mine Act's review scheme precludes a federal district court from exercising subject-matter jurisdiction over a pre-enforcement challenge under the Mine Act. In holding that challenges regarding enforcement activity must follow the administrative route through the Commission instead of going through federal district court, the court in *Thunder Basin* made passing reference to the Commission's subject matter jurisdiction, citing in a footnote nothing more than the verbatim language contained in Section 113(d)(2) of the Mine Act. In no manner did the court discuss, much less affirm, the notion that the Commission is vested with the type of "policymaking" review authority suggested by Energy West and AMC.

150. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (stating that "[b]ecause of the relation of remedy to policy is peculiarly a matter for administrative competence, courts . . . must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy"). *Accord Consolo*, 383 U.S. at 620-21; *Fibreboard Paper Prod. Corp.*, 379 U.S. at 216; *Seven-Up Bottling Co.*, 344 U.S. at 349.

Energy West and AMC rely on Section 113(d)(2)(A)(ii) of the Mine Act as support for the proposition that the Commission has authority to pass judgment on the wisdom of the Secretary's decisions regarding matters of policy and discretion. Energy West and AMC are wrong. Section 113(d)(2)(A) does not address the grounds on which an administrative law judge and the Commission may review and reverse actions of the Secretary. Quite the contrary, Section 113(d)(2)(A) addresses the grounds on which the Commission may review and reverse decisions of administrative law judges.

Specifically, Section 113(d)(2)(A) identifies four grounds other than "policy and discretion" upon which the Commission may grant review of a judge's decision: (1) that a factual conclusion is not supported by substantial evidence;<sup>151</sup> (2) that a legal conclusion is erroneous;<sup>152</sup> (3) that the decision is contrary to law or to the Commission's rules or decisions;<sup>153</sup> and (4) that a procedural error was committed.<sup>154</sup> These four criteria clearly dictate that when a judge's decision contains any of the specified elements, the Commission has the authority to review and reverse the decision. It is only logical to read the "policy and discretion" criterion to mean the same thing, *i.e.*, that when a judge's decision contains a determination of a question of "policy or discretion," the Commission likewise has the authority to review and reverse it.<sup>155</sup>

151. 30 U.S.C. § 823(d)(2)(A)(ii)(I) (1988).

152. 30 U.S.C. § 823(d)(2)(A)(ii)(II) (1988).

153. 30 U.S.C. § 823(d)(2)(A)(ii)(III) (1988).

154. 30 U.S.C. § 823(d)(2)(A)(ii)(IV) (1988).

155. In the same criterion, Section 113(d)(2)(A) states that the Commission may grant review of a judge's decision if the decision involves a substantial "question of law." 30 U.S.C. § 823(d)(2)(A)(ii)(IV) (1988). This element of the criterion should likewise be read to mean the same thing — *i.e.*, that when a judge's decision raises a substantial question as to whether it is in accordance with the law, the Commission has the authority to review and reverse it.

It is also important to note that Section 113(d)(2)(B) of the Mine Act grants the Commission authority to review administrative law judge's decisions *sua sponte* "upon the ground that 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) (1988). Under Section 113(d)(2)(B), the Commission may *sua sponte* review and reverse a judge's decision on the grounds that the decision is contrary to established Commission policy or raises a question on which there is no established Commission policy (*i.e.*, a "novel question of policy.") Thus, Section 113(d)(2) suggests a distinction between Secretarial "policy" (the kind of "policy" made by the Secretary in exercising his rulemaking and enforcement authority under the Act) and "Commission policy" (the kind of "policy" made by the Commission in exercising

It is also logical to read the “policy and discretion” criterion in the foregoing manner because the reading proposed by Energy West and AMC would produce an absurd result. By their nature, virtually every action by the Secretary involves some measure of policy or discretion. Indeed, the more a matter is committed to the Secretary’s policymaking authority and discretion, the more a secretarial action regarding that matter involves a question of “policy or discretion.” As a result, adoption of the reading proposed by Energy West and AMC would make virtually every action by the Secretary reviewable, and ultimately reversible, by administrative law judges and the Commission. Indeed, it would mean that the more a matter was committed to the Secretary’s policymaking authority or discretion, the more a secretarial action regarding that matter could be reviewed and reversed by administrative law judges and the Commission. Such a result would be fundamentally inconsistent with the structure of the Mine Act, which does not provide for an unlimited review by the Commission of every secretarial action.

Congress could have chosen to give the Commission and its administrative law judges authority to review and reverse secretarial actions that involve questions of policy.<sup>156</sup> However, Congress said nothing of the sort in the legislative history or the Act — quite the contrary, it explicitly said in the legislative history that both the Commission and the courts were to review Secretarial actions “consistent with generally accepted precedents.”<sup>157</sup>

In sum, Section 113(d)(2) does not mean that administrative law judges and the Commission have the authority to review and reverse actions of the Secretary that involve questions of “policy or discretion.” Rather, Section 113(d)(2) means just the opposite, and if a judge does

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its adjudicatory authority under the Act to determine how cases should be litigated before the Commission and its judges). The suggestion of such a distinction is strengthened by the fact that Section 113(d)(2) provides that if a judge’s decision involves a question of “policy or discretion” (a question of “Secretarial policy”), an aggrieved party (in all likelihood, the Secretary) can initiate review, but that the Commission itself can initiate review only if a judge’s decision involves a question of “Commission policy.” 30 U.S.C. § 823(d)(2)(A)-(B) (1988).

156. *See Martin*, 499 U.S. at 158 (recognizing that “Congress is free . . . to divide these [enforcement and interpretive] powers as it chooses [in a particular statute]”).

157. S. REP. NO. 181, 95th Cong., 1st Sess. (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 637 (1977).

review and reverse such an action by the Secretary, the Commission has the authority to review and reverse the action of the judge.

### C. *The Operator's Arguments in Reply*

The Operator argued as follows: the Secretary asserts that nothing in the Mine Act or its legislative history establishes that the principles which apply to the courts and the OSH Commission do not apply to the Mine Commission. The argument ignores Sections 113(d)(2)(A)(ii)(IV) and 113(d)(2)(B) of the Mine Act, which repeatedly state that the Commission is to review policy questions. Inasmuch as these provisions have no counterpart in the OSH Act, the principal support for the Secretary's argument, *Martin v. OSHRC*,<sup>158</sup> is inapposite. As the Supreme Court there stated, "[w]e deal in this case only with the division of powers . . . under the OSH Act" and "Congress is . . . free to divide these powers as it chooses."<sup>159</sup>

Additionally, there are reasons why Congress would have chosen to explicitly endow the Commission with greater authority than the OSH Commission. First, because MSHA has more onerous enforcement powers than OSHA, Congress likely felt a need to create an administrative review body with greater powers of oversight. Second, by the time the Mine Act was passed, the OSH Commission's role and powers had already become a point of contention, and Congress likely felt a need to be clearer about the Commission's powers.<sup>160</sup>

The Secretary also argues that the legislative history states that the Commission was to be a "purely" adjudicatory body. However, the legislative history states that the Commission is to be an "adjudicatory authority," not "purely" adjudicatory. Moreover, there is no contradiction between an agency adjudicating and deciding policy questions, for federal administrative agencies have long resolved policy questions in adjudication.<sup>161</sup> That the Commission was to do just that is reflected not only in Section 113(d)(2)'s express grant of a policy role to the Commission, but also in the remarks by the Mine Act's chief architect,

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158. 499 U.S. 144 (1991).

159. 499 U.S. at 157-58.

160. *See, e.g., Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-62 (4th Cir. 1974).

161. DAVIS & PIERCE, ADMINISTRATIVE LAW TREATISE § 6.8 (3d ed. 1994).

Senator Williams. Williams stated that the Commission would “determin[e] operator responsibility and liability” under the Mine Act<sup>162</sup> and “develop a uniform and comprehensive interpretation of the law” to provide guidance to the Secretary.<sup>163</sup>

The Secretary relies heavily on the Senate Committee Report’s statement that “consistent with generally accepted precedent,” the courts and the Commission ought to give “weight” to the Secretary’s interpretations.<sup>164</sup> The Secretary stretches this to mean that, because courts do not review policy decisions, the Commission may not either. The analogy foundered on Section 113(d)(2), which makes clear that, unlike a court, the Commission may review policy questions.<sup>165</sup> The argument also mixed apples and oranges. That the Commission is to give “weight” to the view of the Secretary does not mean that the Commission has no policy role. It means only that the policy role is to be exercised with restraint.

The Secretary argues that Sections 113(d)(2)(A)(ii)(IV) and 113(d)(2)(B) of the Mine Act<sup>166</sup> mean that the Commission’s only role over policy questions is to make sure it never decides them. The Secretary reasons that these provisions permit the Commission to review a judge’s decision that disapproves of a Secretarial policy decision — but only to reverse it. If that is what the “policy” provisions in Sections 113(d)(2)(A)(ii)(IV) and 113(d)(2)(B) mean, they need not exist. The Commission could, without those provisions, review a judge’s determination of a policy issue because the Commission’s authority to decide the policy issue would itself be an issue of “law” under Section 113(d)(2)(A)(ii)(II), (III), or (IV). If, as the Secretary posits, the Commission had no authority to review the Secretary’s decisions, then it would reverse the judge’s decision on that ground. Thus, the Secretary’s construction of Section 113(d)(2) makes its repeated references to “policy” superfluous.

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162. S. REP. NO. 181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 89 (1977).

163. *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm’n Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978) (cited with approval and quoted in *Thunder Basin*, 114 S. Ct. at 780).

164. S. REP. NO. 181, 95th Cong., 1st Sess. (1977).

165. See 30 U.S.C. § 823(d)(2) (1988).

166. 30 U.S.C. § 823(d)(2)(A)(ii)(IV), (B) (1988).

The Secretary also argues that, under Section 113(d)(2), the Commission would be conducting unlimited review of every action the Secretary takes. Neither Energy West nor AMC suggest that the Commission may second-guess Secretarial policy decisions arrived at in rulemaking and embodied in lawful regulations or standards. Such regulations and standards are as binding on the Commission as they are on mine operators, even if they embody policy decisions with which the Commission may disagree. Nor did the Commission so suggest in its early decisions asserting a policy-review role.<sup>167</sup> Instead, these decisions held that where standards or regulations are ambiguous or internally inconsistent, the Commission may consider policy issues in arriving at its *de novo* interpretation, after giving weight to the Secretary's interpretation.<sup>168</sup>

The Secretary's construction of Section 113(d)(2) is also inconsistent with its apparent ancestry, which shows that it was derived from provisions intended to govern the resolution of policy questions in formal adjudication. In 1968, the Administrative Conference of the United States (ACUS) adopted a recommendation applicable to all federal agencies conducting formal adjudications.<sup>169</sup> The ACUS recommendation sets out a model rule with such similarities to Section 113(d)(2) that it evidently served as its model. It states, for example, that agencies may not review a hearing officer's decision unless it involved "[a]n exercise of discretion or decision of law or policy which is important and which the agency should review." That Con-

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167. *Helen Mining Co.*, 1 FMSHRC 1796 (1979).

168. The Commission decided this case before *Thunder Basin*. That *Thunder Basin* could directly affect the Commission's approach to issues such as those presented in this case is strongly suggested by recent published remarks by the Commission's new chairman, and by its general counsel. In an interview, Chairman Mary L. Jordan stated that *Thunder Basin* "noted there are some differences [between the Mine Act and the OSH Act] and the Commission may have more of a policy role [than the OSHRC]." 1 MINE SAFETY AND HEALTH NEWS 240 (May 20, 1994). General Counsel L. Joseph Ferrara has stated that *Thunder Basin* "pointedly" emphasized the policy provisions in Section 113(d)(2). "In light of *Thunder Basin* . . . no fair assessment of Commission judicial power can ignore or trivialize the agency's policy jurisdiction in section 113." Eastern Mineral Law Foundation, *Special Institute on Mine Safety and Health*, 6.07-6.08 (1994). *Thunder Basin*, he noted, stated that the Commission was to use its "expertise" to interpret the Mine Act and the Secretary's regulations, and that the Commission "was established as an independent review body to develop a uniform and comprehensive interpretation of the Mine Act." *Id.*

169. RECOMMENDATION NO. 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review By the Agency* (codified at 1 CFR § 305.68-6 (1993)).



gress drew upon such a model shows that it expected the Commission to do what other federal agencies have long done — resolve policy questions in formal adjudications.

The other model for Section 113(d)(2) appears to have been Section 8(c) of Senate Bill 1336,<sup>170</sup> introduced by Senator Everett Dirksen and passed by the Senate in 1966. The bill would have amended the Administrative Procedure Act to expressly permit agency review of questions of “policy” on appeal of, or during *sua sponte* review of, initial adjudications.<sup>171</sup> Like the ACUS recommendation, it too would have applied to all agencies, including those that resolve policy questions in adjudication.

In sum, the Commission has a statutory duty to decide the policy questions in order to “develop a uniform and comprehensive interpretation of the Mine Act,”<sup>172</sup> and “to instill[] much more confidence in the program.”<sup>173</sup> The Commission breached that duty. It has stood on the sidelines and bemoaned the Secretary’s actions, first in *Consolidation Coal Co.*,<sup>174</sup> and now here:

[W]e are concerned that the goal of improving mine safety can be unnecessarily compromised when MSHA’s injury statistics are inaccurate. In our view, the purposes of the Mine Act would be better served if the Secretary, in calculating incident rates, were to exclude injuries that are not work-related.<sup>175</sup>

If there is going to be *any* confidence in the program, the Commission must be reminded that it is not a passive umpire but an agency charged by Congress with the duty to advance the health and safety goals of the Mine Act through the performance of its review function under Section 113.

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170. S. 1336, 89th Cong., 1st Sess. § 8(c), 112 CONG. REC. 13730, 13733 (1966).

171. *Id.*

172. *Thunder Basin*, 114 S. Ct. at 780.

173. S. REP. NO. 181, 95th Cong., 1st Sess. 47 (1977).

174. *Secretary of Labor v. Consolidation Coal Co.*, 14 FMSHRC 956, 967, 969 n.8 (1992) (“as a matter of policy, the incident rates calculated by the Secretary for the mining industry should be comparable with the incident rates of other industries;” and “the Secretary’s refusal to change the regulation is] disturbing in light of our conclusions that injury incident rates are distorted and subject to inconsistencies as between operators”).

175. *Energy West Mining Co.*, 15 FMSHRC at 593.

#### D. *The Court's Decision*

The court upheld the Secretary's interpretation of the regulation in question.<sup>176</sup> With respect to the issue of whether the Commission has the authority to decide questions of policy, the court rejected the operator's and the AMC's arguments.<sup>177</sup> The court noted that the Commission had applied a standard of reasonableness in reviewing the Secretary's interpretation of the regulation in *Consolidation Coal*.<sup>178</sup> The court also noted that it had held in *Cannelton Industries, Inc.*<sup>179</sup> that both the court and the Commission owe the traditional degree of deference to the Secretary's interpretations of his regulations and of the Mine Act.<sup>180</sup> The court then concluded that neither Section 113(d)(2)(A) of the Mine Act nor Section 113(d)(2)(B) "offers a convincing argument that Congress intended to deprive the Secretary of the deference which [the court] in *Cannelton Indus[tries]* and the Commission in *Consolidation Coal* have previously afforded [the Secretary's] interpretations of the Act."<sup>181</sup>

#### V. CASES ARISING SINCE *ENERGY WEST*

The issue of whether the Review Commission has the authority to decide questions of policy when called upon to review enforcement actions taken by the Secretary of Labor has been raised in a number of cases arising since the District of Columbia Circuit Court's decision in *Energy West*. Several of the post-*Energy West* cases provide particularly telling illustrations of why, in the Secretary's view, the notion that the Commission has the authority to second-guess the Secretary on questions of policy is inconsistent with the overall scheme of the Mine Act and with common sense.

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176. *Energy Mining West Co. II*, 40 F.3d at 460-63.

177. *Id.* at 463-64.

178. *Id.* at 463 (citing *Consolidation Coal Co.*, 14 F.M.S.H.R.C. at 969).

179. *Secretary of Labor v. Cannelton Indus. Inc.*, 867 F.2d 1432 (D.C. Cir. 1989).

180. *Energy Mining West Co. II*, 40 F.3d at 463 (citing 867 F.2d at 1435, 1439).

181. *Id.* at 464.

*Secretary of Labor, on behalf of Cletis Wamsley, et al. v. Mutual Mining, Inc.*<sup>182</sup> involved a challenge by the Secretary to the Commission's position that unemployment compensation benefits should be deducted from the backpay awarded to victims of unlawful discrimination under the Mine Act. The operator argued that the District of Columbia Circuit Court's decision in *Energy West* is applicable only to cases involving the Secretary's interpretation of his own regulations or of statutory provisions bestowing specific authority on him, and is not applicable to cases involving the Secretary's interpretation of statutory provisions bestowing specific authority on the Commission. The operator then argued that backpay cases fall into the latter category because Section 105(c)(2) of the Mine Act authorizes the Commission, in discrimination cases, to require such relief "as the Commission deems appropriate."<sup>183</sup> The Secretary argued that the court's decision in *Energy West* is applicable in backpay cases and that Section 105(c)(2) of the Mine Act only gives the Commission adjudicatory discretion to decide what relief is appropriate with respect to the factual circumstances of a particular discrimination case.

The Fourth Circuit Court of Appeals upheld the Secretary's challenge to the Commission's position.<sup>184</sup> After reviewing the overall scheme and the legislative history of the Mine Act, the court concluded that the authority "to render authoritative interpretations of the Act" rests with the Secretary<sup>185</sup> and that the Commission "operates as a 'neutral arbiter[]' . . . that possesses 'nonpolicy-making adjudicatory powers.'"<sup>186</sup> The court recognized that Section 113(d)(2)(A) of the Mine Act gives the Commission discretionary jurisdiction over administrative law judges' decisions that raise a "substantial question of law, policy or discretion," but reasoned that "to say that the Commission reviews questions of policy is not to say that it is the final arbiter of such policies [or] to say that the Commission's interpretation of the statute trumps a reasonable interpretation put forth by the Secretary."<sup>187</sup> The court then stated that the jurisdiction granted to the Commission by the Mine Act is "fully consistent with the deference

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182. 1996 U.S. App. LEXIS 6247 (4th Cir. Apr. 3, 1996).

183. 30 U.S.C. § 815(c)(2) (1995).

184. 1996 U.S. App. LEXIS 6247, at \*6-7.

185. *Id.* at \*5.

186. *Id.* at \*6 (quoting *Martin*, 499 U.S. at 154, 155).

187. *Id.*

that [the Commission], and th[e] court, owe to the Secretary's reasonable interpretations of the Act."<sup>188</sup>

*Secretary of Labor v. Mingo Logan Coal Co.*<sup>189</sup> arose from the Secretary's action in citing the owner-operator of a mine rather than an independent contractor performing services at the mine for a failure to provide required safety training to an employee of the independent contractor.<sup>190</sup> The operator, relying on the Commission's decision in *W-P Coal Co.*, argued that the Secretary's decision to proceed against the owner-operator rather than the independent contractor represented an abuse of discretion because it represented an impermissible departure from the Secretary's established enforcement policy.<sup>191</sup>

The Secretary, disagreeing with the Commission's approach in *W-P Coal Co.* and relying on the circuit court's decision in *Energy West*, argued that the Secretary has effectively unreviewable discretion in deciding which of several operators to proceed against and that the Commission does not have the ability to review such decisions on the ground that it has the authority to decide questions of policy.<sup>192</sup> The Secretary argued that the court's decision in *Energy West* is particularly applicable to such enforcement decisions because, as the District of Columbia Circuit Court noted in *Cathedral Bluffs Shale Oil Co.*, "an agency's exercise of its enforcement discretion [is] an area in which the courts have traditionally been most reluctant to interfere."<sup>193</sup>

*Amax Coal Co.*<sup>194</sup> arose from the Secretary's action in citing a mine operator for violating the Secretary's safety standard requiring that the methane content of the air in any surface structure at a coal mine be less than 1.0 percent.<sup>195</sup> The operator, relying on the Su-

188. 1996 U.S. App. LEXIS 6247, at \*6 (citing *Energy West*, 40 F.3d at 463-64).

189. *Secretary of Labor v. Mingo Logan Coal Co.*, No. WEVA 93-392, 1995 WL 138936 (FMSHRC Mar. 24, 1995) (case is pending before the Commission on the operator's appeal of the administrative law judge's decision).

190. 17 FMSHRC at 156.

191. *Id.* at 159.

192. *Id.* The Secretary also argued that, in any event, the decision in question did not represent an abuse of discretion. *Id.* at 160.

193. 796 F.2d at 538.

194. *Secretary of Labor v. Amax Coal Co.*, No. LAKE 94-197, 1995 WL 73774 (FMSHRC Feb. 22, 1995) (case is pending before the Commission on the Secretary's appeal of the administrative law judge's decision).

195. 17 FMSHRC 48, 49-51 (1995).

preme Court's decision in *Thunder Basin Coal Co.* and ignoring the District of Columbia Circuit Court's decision in *Energy West*, argued that even if the Secretary's interpretation of the standard was reasonable, the Commission should reject the Secretary's interpretation because the Commission has the authority to decide questions of policy and the Secretary's interpretation represented an unwise choice of policy.<sup>196</sup>

The Secretary, relying on the court's decision in *Energy West*, argued that the meaning of the standard was plain on its face and beyond interpretation.<sup>197</sup> The Secretary further argued that the court's decision in *Energy West* is particularly applicable to such situations because allowing the Commission in effect to reject the Secretary's "interpretation" of an unambiguous standard on the ground that the Commission believes that the standard is undesirable would be inconsistent with the fact that, under the scheme of the Mine Act, only the Secretary has the authority to develop and promulgate safety and health standards and only the courts of appeals have the authority to review them.

*Western Fuels-Utah, Inc.*<sup>198</sup> arose from the Secretary's action in citing a mine operator for violating the Secretary's safety standard requiring that all communication circuits in an underground coal mine have additional insulation where they pass over or under any power conductor.<sup>199</sup> The operator, relying on the Commission's decisions in *Old Ben Coal Co.* and *Helen Mining Co.* and ignoring the District of Columbia Circuit Court's decision in *Energy West*, argued that even if the Secretary's interpretation of the standard was otherwise reasonable, the Commission should reject the Secretary's interpretation because the Commission has the authority to decide questions of policy and the Secretary's interpretation represented an unwise allocation of the Secretary's resources.<sup>200</sup>

196. *Id.* at 50-52. The operator also argued that, in any event, the Secretary's interpretation did not represent a reasonable reading of the standard. *Id.*

197. *Id.*

198. *Secretary of Labor v. Western Fuels-Utah*, No. West 94-391-R, 1995 WL 371412 (FMSHRC June 21, 1995) (case is before the Commission on the operator's appeal of the administrative law judge's decision).

199. 17 FMSHRC at 756-58.

200. *Western Fuels-Utah*, 17 FMSHRC at 759. The operator also argued that, in any event, the Secretary's interpretation of the standard was not reasonable. *Id.*

The Secretary, relying on the decision in *Energy West*, argued that the Secretary has effectively unreviewable discretion in deciding how to allocate his resources and that the Commission does not have the ability to review such decisions on the ground that it has the authority to decide questions of policy.<sup>201</sup> The Secretary argued that the court's decision in *Energy West* is particularly applicable to such resource allocation decisions because, if the Commission had the authority to second-guess every decision the Secretary makes as to what standards he should promulgate and how his resources should be spent, the result would be a system in which one body would be authorized to decide such questions of policy and a second body would then be authorized to decide exactly the same questions all over again. The Secretary argued that it defies common sense to assume that Congress intended to create such a system when it enacted the Mine Act.

## VI. CONCLUSION

The District of Columbia Circuit Court was clearly correct in concluding that the Commission does not have the authority to decide questions of policy when called upon to review enforcement actions taken by the Secretary of Labor under the Mine Act.<sup>202</sup> If Congress had intended that the Commission be exempt from the long-established principle that judicial bodies are not to decide questions of policy in reviewing the actions of administrative agencies, it surely would have said so either in the Act or in the legislative history. Clearly, however, Congress did not say so in either place. Quite the contrary, the statement in the legislative history that the Secretary's interpretations are to be "given weight by both the Commission and the courts . . . consis-

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201. *Id.* at 760.

202. The court provided little analysis of the operator's and the AMC's arguments in its discussion of the policy authority issue. The brevity of the court's discussion, however, does not indicate that the court's rejection of the operator's and the AMC's arguments was anything less than decisive. On the contrary, the brevity of the court's discussion suggests that the court found the operator's and the AMC's arguments so unconvincing as to call for little discussion.

tent with generally accepted precedent<sup>203</sup> and the review provisions set forth in Sections 113(d)(2)(A) and (B) of the Mine Act themselves indicate that Congress intended that the Commission, like a court, was not to decide questions of policy.

In addition to being supported by the legislative history and the review provisions of the Mine Act, the conclusion that the Commission, like a court, does not have the authority to decide questions of policy is supported by a number of statutorily-established differences between MSHA and the Commission in terms of composition and function.

First, although the Commission plainly has more specialized expertise than an Article III court, members of the Commission are not statutorily required to have and usually do not have formal mining education or practical mining experience. In contrast, MSHA's employees, and particularly MSHA's inspectors, are statutorily required to have such education or experience.<sup>204</sup>

Second, although members of the Commission, unlike Article III judges, are not appointed for life and are removable by the President, they are meant to constitute "a completely independent adjudicatory authority" and are removable only for certain specified causes.<sup>205</sup> The Assistant Secretary for Mine Safety and Health, in contrast, serves at the pleasure of the President and carries out the policymaking role of the executive branch.<sup>206</sup>

Third, because the Commission is an adjudicatory body, the Commission's familiarity with Mine Act issues is limited to those relatively few issues that are raised and resolved in the formal adjudication of cases. In contrast, MSHA, because it is an enforcement agency, is

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203. S. REP. NO. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 637 (1978).

204. *See supra* part II.

205. *Id.*

206. *See Chevron*, 467 U.S. at 865-66 ("While [administrative] agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices. . . . [F]ederal judges-who have no constituency-have a duty to respect legitimate policy choices by those who do.").

familiar with the entire range of Mine Act issues that arise in the day-to-day administration and enforcement of the Mine Act throughout the nation's mines.<sup>207</sup>

Fourth, the Commission has no role in developing and promulgating improved safety and health standards under the Mine Act.<sup>208</sup> MSHA, in contrast, promulgates all such standards — a fact that shows both that MSHA has more experience in the sort of policymaking that goes into the promulgation of such standards and that MSHA has more awareness of the intended purpose of a particular standard.<sup>209</sup>

Finally, the notion that the Commission has the authority to decide questions of policy necessarily assumes that Congress intended when it enacted the Mine Act to create a system in which one body would be authorized to decide questions of policy and a second body would then

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207. See *Martin*, 499 U.S. at 152-53 (concluding that the authority to decide questions of policy under the OSH Act is vested in the Secretary of Labor and not in the OSH Review Commission on the ground, *inter alia*, that “by virtue of the Secretary’s statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations,” and that, as a result, “the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation”); *Mutual Mining*, 1996 U.S. App. LEXIS 6247, at \*6 (“follow[ing] *Martin*’s teachings” in this regard, MSHA’s records indicate that during the five-year period from 1990 through 1994, only about 9.5 percent of the Mine Act violations alleged by the Secretary were contested before the Commission or its judges).

208. See *supra* part II.

209. See *Martin*, 499 U.S. at 152 (concluding that the authority to decide questions of policy under the OSH Act is vested in the Secretary of Labor and not in the OSH Review Commission on the ground, *inter alia*, that “[b]ecause the Secretary promulgates [the OSH Act] standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question”); *Mutual Mining*, 1996 U.S. App. LEXIS 6267, at \*6 (“follow[ing] *Martin*’s teachings”).



be authorized to decide exactly the same questions all over again. Absent some clear indication to the contrary, it defies common sense to assume that Congress intended to create such a redundant and inefficient system.<sup>210</sup> No such indication, clear or otherwise, exists.<sup>211</sup>

It should be emphasized, of course, that to say that the Commission is like a court is in no way to belittle the Commission's role in implementing the Mine Act. Instead, it is to say that the Commission, like a court, plays a role — ensuring that the government acts within the parameters of the law and that private parties receive due process

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210. *Martin*, 499 U.S. at 153-54 (“[b]ecause dividing the power to promulgate and enforce OSH Act standards from the power to make law by interpreting them would make two administrative actors ultimately responsible for implementing the Act’s policy objectives, we conclude that Congress did not expect the Commission to possess authoritative interpretive powers”); *Mutual Mining*, 1996 U.S. App. LEXIS 6267, at \*5 (“[o]nly one of the[] two administrative actors [established by the Mine Act] can retain the ability to render authoritative interpretations of the Act”).

211. On the contrary, the legislative history indicates that Congress intended the review system created by the Act to “streamline” the process of determining operator responsibility and liability and avoid encouraging mine operators “to delay factfinding and the administrative process . . . .” S. REP. NO. 181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 89 (remarks of Senator Williams). “[T]he Committee strongly believe[d] that it [was] imperative that the Commission strenuously avoid unnecessary delay in acting upon cases.” Additionally, “[i]t [was] the Committee’s intention that the Commission and Administrative Law Judges permit parties every reasonable opportunity to adequately develop the record . . . consistent with its duty to resolve matters under dispute in an expeditious manner.” *Id.* at 637.

of law — which is critically important to the administration of justice and, at the same time, limited in scope.<sup>212</sup>

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212. It should be observed in this regard that every item of legislative or post-enactment history ever cited by the Commission or parties from the mining industry in support of the notion that the Commission has the authority to decide questions of policy describes the role of the Commission in terms that also describe the role of a court. See S. REP. NO. 181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 89 (remarks of Senator Williams) (“[t]he procedure for determining operator *responsibility* and *liability* is assigned to a truly independent . . . Review Commission, and the process is streamlined so that operators are provided with a fair method of contesting *liability* . . .”) (emphases added); *id.* at 601 (“The Commission serves as the ultimate administrative review body for *disputed cases* arising under [*the Act*]”) (emphasis added); *id.* at 635 (“an independent Commission is essential to provide administrative *adjudication* which preserves *due process* and instills much more confidence in the program”) (emphases added). See also *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. at 1 (1978) (remarks of Senator Williams) (“the Commission [is to] provide just and expeditious resolution of disputes, and . . . develop a uniform and comprehensive interpretation of *the law*,” so as to “provide guidance to the Secretary in enforcing *the Act* and to the mining industry and miners in appreciating their responsibilities under *the law*” that will enable the Secretary and mine operators to “understand precisely what *the law* expects of them . . .”) (emphases added). All of the cited items speak in terms of deciding questions of *law*; none of the cited items speak in terms of deciding questions of *policy*.

