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SOL (MSHA) V. SEWELL COAL CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	Docket No. WEVA 79-31
PETITIONER	A.C. No. 46-01478-03014
v.	
	Sewell No. 1 Underground Mine
SEWELL COAL COMPANY,	Sol. No. 5672 Mine
RESPONDENT	

MEMORANDUM OPINION

This opinion is filed to set forth the Presiding Judge's views with respect to his dismissal of the captioned petition on the ground that the improved mandatory safety standard (30 CFR 75.1710-1(a)) relating to the use of canopies on electric face equipment is null, void and unenforceable. Since invalidity of a standard deprives the Secretary and the Commission of subject matter jurisdiction, the Presiding Judge may, sua sponte, take notice of the jurisdictional defect.

I

The overriding purpose of the Mine Safety and Health Act, 30 U.S.C. 801 et seq., as amended, is to reduce and redistribute

the human costs incident to producing coal to fire the engine of the modern American industrial machine. As Orwell noted:

> Our civilisation * * * is founded on coal, more completely than one realises until one stops to think about it. The machines that keep us alive, and the machines that make the machines, are all directly or indirectly dependent upon coal. In the metabolism of the Western world the coal-miner is second in importance only to the man who ploughs the soil. He is a sort of grimy caryatid upon whose shoulders nearly everything that is not grimy is supported. For this reason the actual process by which coal is extracted is well worth watching, if you get the chance and are willing to take the trouble. [Emphasis in original.]

G. Orwell, The Road to Wigan Pier, 31 (Berkeley-Medallion, 1963, first published in England in 1937).

Having finally taken the trouble, Congress in 1969 passed the Federal Coal Mine Health and Safety Act and under Titles I and III thereof established certain minimum mandatory safety standards, "to protect the health and safety of coal miners, and to combat the steady toll of life, limb, and lung, which terrorizes so many unfortunate families." H. Rep. No. 91-563, 91st Cong., 1 Sess. 2, reprinted in [1969], U.S. Code Cong. & Admin. News 2503.1 2503. (Footnote 1)

See United Mine Workers v. Kleppe, 532 F.2d 1403, 1405-06 (D.C. Cir. 1976), cert. denied, 429 U.S. 858 (1976).

As the same court later noted:

> The part of the Act aimed at assuring the maintenance within mines of appropriate health and safety conditions is built around the concept of the mandatory standard. The legislative history reveals two competing concerns in the minds of persons affected by the legislation, and the mandatory standard concept was adopted as a way of reconciling the appar-apparent inconsistency. On the one hand, Congress' inability to respond rapidly to changing conditions of knowledge and technology made it desirable to create a power of amendment at the agency level. On the other hand, strong fears were voiced by representatives of both industry and labor that a freely exercised power of amendment might result in an unpredictable and capricious administration of the statute, which would redound to the benefit of no one. [Emphasis in original.]
>
> The mandatory standard concept evolved to deal with this dilemma combines a comprehensive set of "interim" mandatory standards, promulgated by Congress, with elaborate consultative procedures for the formulation of additional "improved" mandatory standards. These Section 101 procedures, which may never be used to decrease the level of protection afforded miners under an existing standard, prescribe the precise manner in which the Secretary is to promulgate the new mandatory standards. [Footnotes omitted.]

Zeigler Coal Company v. Kleppe, 536 F.2d 398, 402-03 (D.C. Cir. 1976).

Returning to the theme of a Congressionally-mandated, irreducible, minimum of protection, the court again emphasized that:

> Recognizing also the need for conditions to improve with scientific and technological advancement [Congress] established procedures by which existing standards could be changed, but were careful to provide that the levels of protection afforded miners may not be reduced below standards operative prior to amendment [citing Sec. 101(b), 30 U.S.C. Sec. 811 (b) (1969); Sec. 101(a)(9) of the 1977 Amendments].

Id. at 408.

Accordingly, I conclude that since the statute prohibits the Secretary from promulgating under the guise of an "improved" standard one that decreases the level of protection afforded miners, any action by the Secretary which results in such a diminution of protection is null, void and unenforceable. 5 U.S.C. 706(2)(C).

Indeed, as long ago as May 1977, the Interior Secretary's delegate, the Board of Mine Operations Appeals, forecast a decision invalidating the "improved" standard in question. Thus, in upholding a judge's decision finding that contrary to the intent of Congress, enforcement of the "improved" standard diminished the safety of the miners, the Secretary's delegate noted that:

> (The record supports SOCCO's allegations of the following elements of diminution of safety: excessive [equipment] operator fatigue; the dangerous practice of operating equipment from outside the operator's compartment; operators injuring their heads and other parts of their bodies when they lean out of the equipment to see; running into other miners who could not be seen; difficulties in stepping out of operators' compartments creating the danger of being trapped in case of fire; jarring of operators' heads against canopies lowered to provide clearance; and many others.) The problem which we foresee, however, is that excessive litigation will result from this decision. That problem is minor though compared to the fact that the regulation involved will not do justice to the apparent intent of the statute the chief aim of which is to protect miners in circumstances where protection is needed. We are using the device of this Preface to express our hope that rulemaking or some other administrative vehicle can be used to eliminate the dual spectre of unnecessary and costly litigation and the prospective ineffectiveness of this regulation.

Southern Ohio Coal Company, 7 IBMA 331, 355-356 (1977).

Despite these well-founded qualms, the Board, as a creature of the Secretary, shrank from the responsibility of declaring the "improved" standard invalid. With the advent of the new and independent Federal Mine Safety and Health Review Commission on March 9, 1978, however, it is clear that the Presiding Judge has such jurisdiction and authority. (Footnote 2) Congress clearly did not intend the Commission to rubber-stamp violations of invalid standards.

It is true that under section 101(d), 30 U.S.C. 101(d) of the amended Act, Congress has authorized direct review in courts of appeals of improved standards "promulgated under" the new section 101. Furthermore, the period for filing such a review is limited to 60 days after promulgation. Here, the "improved" standard was issued on October 3, 1972, at a time when the limited, preenforcement direct review of section 101(d) did not exist. Thus, unless section 101(d), together with its exclusivity provision is given retroactive effect, it is clear that under established law the Presiding Judge has authority to pass on the validity of the "improved" standard in question. (Footnote 3)

It seems obvious, however, that for all of the policy reasons advanced by the United States Court of Appeals for the Third Circuit in Atlantic & Gulf Stevedores, supra, section 101(d) does not control the question of the Commission's authority to consider the validity of the "improved" standard in question in this case. As noted, section 101(d) is inapplicable to this case since it is limited to improved standards issued under the new section 101, effective March 9, 1978, whereas the "improved" standard in question was promulgated on October 3, 1972, 37 FR 20690, under the provisions of section 101 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 811 (1969). It is also worth noting that section 101(d) requires only persons "who may be adversely affected" to resort to its provisions. Thus, mine operators who were not in business during the 60-day period or who had no reason to believe they were adversely affected, may eventually be faced with enforcement proceedings in which they find it necessary to challenge the validity of "improved" standards issued before 1978. Section 10(b) of the APA, 5 U.S.C. 703 provides that "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." This provision, passed in response to the Court's decision in Yakus v. United States, 321 U.S. 414 (1944), requires the courts to determine in each case whether Congress, by establishing a special review procedure, intended to preclude or to permit judicial review of agency action in enforcement proceedings. Attorney General's Manual on the APA, 100-101 (1947).

More recently, the Supreme Court held that an exclusivity provision does not preclude the courts from determining whether a particular administrative regulation was properly designated as a standard falling within that provision. As the court noted, in an enforcement proceeding the Government has the burden of showing that a standard claimed to be subject to a preclusion and exclusivity provision is the type of standard Congress intended to exclude from judicial review. Adamo Wrecking Co. v. United States, 434 U.S. 275, 282-285 (1978). Consequently, if the effect of 30 CFR 75.1710-1(a) is to reduce the protection afforded the miners by the mandatory safety standard set forth in section 318(i) of the Mine Safety Act, 30 U.S.C. 878(i), it follows that the canopy requirement is not properly designated an "improved standard." It seems likely, therefore, that the courts will strictly construe the exclusivity provision so as to avoid invalidation on constitutional grounds. (Footnote 4)

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Constitutional questions aside, to the extent the exclusivity provision precludes administrative oversight of the Secretary's lawmaking function by an independent commission, it may be politically unwise if not downright pernicious. He is no friend of the administrative process who would immunize the vast and powerful lawmaking authority of an administrative bureaucracy such as the Labor Department from close scrutiny by both the administrative judiciary and ultimately the Article III courts. If the rule of law is to be upheld and is to be made meaningful, the citizen must be afforded the fundamental right to challenge lawless action at any time enforcement threatens to deprive him of his life, liberty or property.

II

Section 318(i) of the mandatory safety standards, (Footnote 5) 30 U.S.C. 878(i) (1969), requires that all features of electrically-operated equipment taken into or used inby the last open crosscut must be designed, constructed and installed, in accordance with the specifications of the Secretary (1) to assure that such equipment will not cause a mine fire or explosion, and (2) to prevent to the greatest

extent possible other accidents in the use of such equipment. In addition, the standard provides that:

> The regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirement of investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary * * *.

Pursuant to this authority, the Secretary continued in effect regulations relating to the construction, design and installation of the electrical features of face equipment, including electric motor-driven or self-propelled mine equipment and accessories, 30 CFR 18.20 through 18.52, (Footnote 6) but never issued regulations relating to the design, construction or installation of cabs or canopies.

Instead, the Secretary invoked the section 101 procedures to issue an "improved" standard 30 CFR 75.1710-1(a) under section 217(j) of the mandatory standards, 30 CFR 75.1710, 30 U.S.C. 877(j) (1969). Section 317(j) provides:

> An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the miners operating such equipment from roof falls and from rib and face rolls.

Ignoring the requirements of section 318(i), the Secretary promulgated 30 CFR 75.1710-1(a) under the guise of an "improved" standard. This regulation delegated to mine operators and equipment manufacturers responsibility for the design, fabrication and installation of canopies on their existing oversized electric face equipment. 37 FR 20689-90. At no time, has the Secretary promulgated specifications for the design, construction and installation of cabs and canopies which require the canopies provide for the safety and comfort of the equipment operators. (Footnote 7) At no time, has the Secretary required manufacturers of mining equipment to design, construct and install canopies "with the safety of the [equipment] operator as the prime requisite." (Footnote 8) At no time, has the Secretary required operators to purchase equipment of a size compatible with the safe use of canopies. In fact, it is the position of the Solicitor that the existing "improved" standard does not require an operator to replace his existing oversized equipment with lower profile equipment compatible with the safe use of canopies. (Footnote 9)

While the Secretary argues that he is at liberty to "ignore" the requirements of section 318(i) and to "choose" to delegate his responsibility for the design, construction and installation of safe canopies to the mine operators, I can find no warrant for this construction in the Act or its legislative history. Instead, I find that as applied to this operator and others similarly situated, the "improved" standard promulgated as 30 CFR 75.1710-1(a) diminishes the safety of the miners below that contemplated by the mandatory standard set forth in section 318(i). On this showing it follows that the "improved" standard, both on its face and as applied, is invalid under section 101(a)(9) of the Act, as amended. (Footnote 10)

In June 1976, after 4 years of experience with the "improved" standard, the Secretary extended the timetable for installation "in order to permit development of additional technology on cab or canopy design in conjunction with accomplishing equipment design changes to adapt cabs or canopies * * *" in mining heights under 42 inches. 41 FR 23199 (June 9, 1976). In July 1977, a year later, the canopy program was indefinitely suspended in mining heights under 42 inches due, in part, to the admitted and persistent lack of feasible solutions to the human engineering problems encountered when mine operators attempted to retrofit canopies on both new and existing equipment. 42 FR 34876-77 (July 7, 1977).

III

The Secretary's abdication of his statutory responsibility has resulted in the development of an ad hoc research and development program which harasses coal operators and makes guinea pigs out of miners who are forced to work under canopies which are untested. (Footnote 11)

Nevertheless, the Secretary has attempted to justify abdication of his responsibility by claiming that because the mine safety laws are to be construed as "technology forcing," the mine operators may

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be forced to bear the burden of research, experimentation, design, fabrication, construction, and installation of canopies. (Footnote 12) Accepting as true that the Act is intended to be technology forcing, the cases previously cited by the Secretary do not support his argument. (Footnote 13)

The ultimate poverty of the Secretary's "technology-forcing" argument is revealed in a recent holding of the Third Circuit. In American Iron and Steel Institute et al. v. OSHA, 577 F.2d 825 (3d Cir. 1978) (Petition for Certiorari filed December 9, 1978), the steel industry claimed, inter alia, that a regulation requiring employers to "research, develop and implement any other engineering and work practice controls necessary to reduce exposure" to coke oven emissions, was unauthorized by the Occupational Safety and Health Act. Over the Secretary's argument that the requirement was valid as "technology forcing," the court held:

> 29 U.S.C. 665(b)(5) grants authority to the Secretary to develop and promulgate standards dealing with toxic materials or harmful agents "based upon research, demonstrations, experiments, and such other information as may be appropriate." Under the same statutory provision the Secretary is directed to consider the latest scientific data in the field. As we have construed the statute, the Secretary can impose a standard which requires an employer to implement technology "looming on today's horizon," and is not limited to issuing a standard solely based upon technology that is fully developed today. Nevertheless, the statute does not permit the Secretary to place an affirmative duty on each employer to research and develop new technology. Moreover, the speculative nature of the research and development provisions renders any assessment of feasibility practically impossible. In holding that the Secretary lacks statutory authorization to promulgate the research and development provision, we note in passing that we need not reach petitioners' challenge to the provision as fatally vague. Accordingly, we hold the research and development provision of the standard to be invalid and unenforceable. [Emphasis supplied.]

Id., 577 F.2d at 838. (Footnote 14)

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As I have stated above, the Federal Coal Mine Health and Safety Act of 1969 and its successor place an affirmative obligation on the Secretary to conduct the research necessary to ensure that the standards he promulgates enhance, rather than decrease, the level of protection afforded the miners. Like the Occupational Safety and Health Act, the 1969 and 1977 Mine Safety Acts do not permit the Secretary to place an affirmative duty on each operator to research and develop new technology. The Secretary recognizes that workable and safe canopy technology looms on some future horizon, not today's.15 Thus, the regulation at issue which requires each operator to conduct such research and development--and thereby places miners at risk--is beyond the authority of the Secretary to promulgate and must be deemed invalid and unenforceable.

Joseph B. Kennedy
Administrative Law Judge

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1 "Yet despite this considerable Congressional attention, our nation still experiences deaths and serious injuries in our mines at a rate which casts shame on an advanced, industrialized society. Every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines." S. Rep. 95-181, 95th Cong., 1 Sess. 4 (1977).

Coal mining has never been a safe occupation, nor is it safe today. Statistics show 91,662 coal miners were killed between 1906 and 1976. If coal mining is considered a means of waging industrial war, it would rank third in the number of dead behind World War I and World War II.

Between 1930 and 1976, coal miners sustained more nonfatal disabling injuries than have all of America's soldiers in all of America's principal wars between the Revolution and Vietnam.

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2 Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541, 548-551 (3d Cir. 1976); Matter of Restland Memorial Park, 540 F.2d 626, 627-628 (3d Cir. 1976); National Industrial Contractors v. OSHRC, 583 F.2d 1048, 1052 (8th Cir. 1978); Bituminous Coal Operators' Association v. Marshall, 82 F.R.D. 350, 353-354 (D.D.C. 1979).

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3 See Secretary of Labor v. Penn Allegh Coal Company, PITT 78-97-P (April 7, 1978), appeal pending. The legislative history states only that the the validity of standards promulgated after March 9, 1978, shall not be subject to collateral attack before

the Commission. S. Rep. 95-181, 9th Cong., 1st Sess. 20 (1977).

~Footnote_four

4 As the court in Atlantic & Gulf Stevedores, supra, noted an exclusivity provision--in effect a binding 60-day statute of limitations--may be unconstitutional since it would subject citizens to fines, penalties, and imprisonment for violations of standards that would otherwise be declared invalid and unenforceable. Id. at 550.

Furthermore, because the prohibition is largely unqualified, it may be unconstitutional on its face. As Mr. Justice Rutledge noted in his dissent in Yakus v. United States:

"Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do.

"* * * The idea is entirely novel that regulations may have a greater immunity to judicial scrutiny than statutes have, with respect to the power of Congress to require the courts to enforce them without regard to constitutional requirements. At a time when administrative action assumes more and more of the law-making function, it would seem the balance of advantage, if any, should be the other way.

"* * * Clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation." 321 U.S. 414, 468-469 (1944).

~Footnote_five

5 Section 301(a) of the Act, 30 U.S.C. 861(a) (1969), states:

"[t]he provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act * * *."

The Act provides the Secretary no exemption from compliance with mandatory standards.

~Footnote_six

6 These regulations require that the electrical features of self-propelled electric face equipment consist of "intrinsically safe circuits" and that such equipment be "safe for its intended use."

~Footnote_seven

7 See Southern Ohio Coal Company, 8 IBMA 55, 57 (1977), reconsideration denied. As to Secretarial findings regarding the availability of canopy technology, the Board stated:

"The Secretary did not find that practical technology is available to design and construct a canopy for installation on self-propelled electric face equipment such as would result in no diminution of safety in any mine, and logically he could not. * * * [A] Secretarial finding that technology exists to install substantially constructed canopies to protect miners from nonmassive roof falls is of no value where the question is whether technology exists for the installation of canopies which do not otherwise diminish safety in that mine." (Emphasis in original.) Id. at 57.

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8 Robert E. Barrett (former Administrator, MESA), Special Study on Cabs and Canopies, 5 (August 15, 1975).

~Footnote_nine

9 See Florence Mining Company, et al. v. MESA, M 76-115, et al. 56-62 (October 31, 1977). This decision became final for the Department of the Interior when the Solicitor withdrew MESA's appeal to the Board of Mine Operations Appeals on December 13, 1977.

~Footnote_ten

10 Section 101(b) (now section 101(a)(9)) provides:

"No improved mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners below that provided by any mandatory health or safety standard."

~Footnote_eleven

11 Testimony in modification cases as to the burdens placed upon the operators and the hazards to which miners are exposed is voluminous. See Florence Mining Company, et al. v. MESA, M 76-115 et al. (October 31, 1977); Bishop Coal Company, et al. v. MESA, M 76-13, et al. (December 16, 1977), appeal pending; Penn Allegh Coal Company v. MESA, M 76-27 (June 15, 1977), appeal pending; Southeast Coal Company v. MESA, M 76-33 (May 4, 1977), appeal pending; Southern Ohio Coal Company v. MESA, M 76-349 (October 29, 1977), affirmed as modified, 7 IBMA 331 (May 23, 1977), reconsideration denied, 8 IBMA 55 (June 30, 1977). A description of the ad hoc compliance procedure is contained in Robert E. Barrett, Special Study on Cabs and Canopies (August 15, 1975), and in memorandum from the Deputy Assistant Administrator, dated July 11, 1977, which establishes guidelines for the granting of extensions of any 104(b) notices (104(a) citations under the 1977 Act) if the coal operators demonstrate good faith attempts to install canopies on some pieces of equipment on some

sections of some mines.

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12 Neither former Administrator Barrett nor the Secretary is unaware of the meaning and force of section 318(i). In his Special Study on Cabs and Canopies, page 9, Mr. Barrett recommended that all equipment manufacturers should be put on notice that MESA will strictly enforce section 318(i). In the most recent suspension of the canopy requirements, the Secretary observed:

"[M]ine operators have been forced to attempt to retrofit new equipment, which in many cases involves major changes and alterations in the design of the operator's compartment and the machine to resolve human engineering problems. To meet and correct this situation, MESA is developing specifications for cab and canopy compartment configurations for new mining equipment pursuant to section 318(i) of the [1977 Act]." 42 FR 34877 (July 7, 1977).

I take this to mean that equipment manufacturers eventually will be required to construct equipment according to human engineering specifications established by the Secretary; that this equipment will bear a plate certifying that it is "permissible"; and that operators will not be permitted to use equipment not bearing a permissible plate. It is to be hoped that the Secretary will also specify on the permissible plate the minimum mining height in which the particular piece of equipment plus canopy may be used with safety.

~Footnote_thirteen

13 See Chrysler Corporation v. Department of Transportation, 472 F.2d 659, 675, 678 (6th Cir. 1972) (agency required to provide objective criteria for testing newly-developed technology as well as objectively defined performance criteria for automobile manufacturers required to develop and install "airbags"); Society of the Plastic Industry v. OSHA, cert. denied, 421 U.S. 992 (1975), 509 F.2d 1301, 1309-1310 (2d Cir. 1975) (small numbers of vinyl choloride and polyvinyl chloride manufacturers required to utilize existing innovative technologies to reduce exposure to carcinogens). Both AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975), and HUD v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), held that the Occupational Safety and Health Act is technology forcing. But neither states that a regulation promulgated in the guise of forcing technology is valid per se.

If the Secretary had heretofore imposed on mine equipment manufacturers the responsibility for developing, designing and constructing canopies under section 318(i), the regulatory scheme might well be deemed technology forcing. However, delegating the research and development responsibility to each coal operator is analogous to the Secretary of Transportation requiring car dealers, not manufacturers, to develop, design and install airbags. Car dealers would not--and

coal operators do not--have the requisite research and development resources.

~Footnote_fourteen

14 The Secretary of Labor did not seek review of this holding. The pertinent language of 29 U.S.C. 665(b)(5) tracks the language of section 101(c) of the 1969 Act; section 101(a)(6)(A) of the 1977 Act.

~Footnote_fifteen

15 See 42 FR 34876 (suspension of canopy requirements); Southern Ohio Coal Company, 7 IBMA 331, 355-356, reconsideration denied, 8 IBMA 55, 57 (1977).