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Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. VA-80-145 A.C. No. 44-00294-03039
v.	
EASTOVER MINING CO., RESPONDENT	Mine: No. 1

ORDER TO SHOW CAUSE (FOOTNOTE.1)

A review of the record in this proceeding shows:

1. Section 317(j) of the Mine Safety Law, 30 C.F.R. 75.1710, provides that wherever "the height of the coalbed permits" MSHA may require an operator to install "substantially constructed canopies" on electric face equipment. The legislative history shows Congress intended this authority to be exercised where "the height of the coal permits the installation of such" canopies. H. Rpt. 91-563, 91st Cong., 1st Sess. 57 (1969); Legislative History, Mine Safety Law, Senate Committee on Labor, 94th Cong., 1st Sess. Part 1, 1087 (1975).

2. After consultation with the industry, MSHA issued an "improved" safety standard in October 1972, that established a timetable, based on mining

heights, for installation of canopies. 30 C.F.R. 75.1710-1(a). The term "mining height" as used in the improved standard was intended to mean "coalbed height" as used in the statutory standard.

3. Difficulties in meeting the original timetable necessitated a postponement in the times for compliance. To accomplish this without republishing the schedule, a bulletin issued on September 20, 1973. In this bulletin, MSHA undertook to make a special definition of the term "mining height" as used in the schedule for compliance set forth in 30 C.F.R. 75.1710-1(a). Thus, it was provided that:

> The mining height as used in Section 75.1710-1 will be interpreted as being the distance from the floor to the finished roof less 12 inches. In those areas where the roof is taken in the normal mining cycle, the mining height shall include the thickness of the roof rock taken * * *.
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> For example, if the distance from the floor to the finished roof is 72 inches less 12 inches, then the effective date for that mine to install cabs or canopies is the one for mining heights 60 to 72 inches which would be July 1, 1974 and not January 1, 1974.

The interpretive bulletin made clear that the special definition was to be used only to determine the effective date for compliance in any particular section of a mine and "not if [canopies] are required." With the exception of this bulletin, I can find nothing in the "improved" standard or its subsequent history that warrants a finding that the statutory limitation to "coalbed height" was lawfully revised or amended to require canopies wherever the "extracted height", including the thickness of the roof taken, permits the use of a canopy. Even where the coalbed height permits, the requirement for the use of canopies is dependent on the availability of practical technology,

i.e., canopy designs and hardware that meet the requirements for structural strength and operational safety, including more particularly those design factors affected by human engineering. (FOOTNOTE.2) 37 F.R. 20689.

4. It is MSHA's policy to determine the requirement for canopies on a section-by-section basis with the controlling vertical measurement being that taken at the lowest point on the section.

5. Between October 1972, and July 1977, progress was made in installing canopies on electric face equipment including continuous miners where such equipment was used in coalbed heights of 42 inches or more. Based on research as well as experience gained in the course of MSHA's enforcement, however, it was found that in coalbed heights below 42 inches certain human engineering problems such as impaired operator vision, operator cramping and operator fatigue had not been solved. For these reasons, the requirement for canopies on sections where the coalbed height was less than 42 inches was first extended and, effective July 1, 1977, entirely suspended. 42 F.R. 34876.

6. In this case, the parties are agreed that on the date the violation in question was written, April 10, 1980, the minimum extracted height on the

2 Right 001 Section of the mine was 53 inches, which included the thickness of roof and bottom rock taken. They are also agreed that the coalbed thickness was 38 inches.

I.

MSHA points to the determination of July 7, 1977, 42 F.R. 34876, as indicating an intent to require canopies wherever the "actual height from bottom to top" is 42 inches or more as support for the view that regardless of the coalbed height the canopy requirement is triggered wherever a mine section has an actual extracted height of 42 inches. The difficulty with this is that the suggested revision or amendment of the statutory limitation on MSHA's authority to require canopies was not accomplished in accordance with the rulemaking procedures provided under section 101 of the Mine Safety Law, 30 U.S.C. 811.

In United States v. Finley Coal Company, 493 F.2d 285, 290 (6th Cir. 1974), cert. denied, 419 U.S. 1089 (1974), the court held that a revision, amendment or modification of a statutory standard that has the effect of imposing an additional requirement is invalid and ineffective as an improved standard where the revision, although cast in interpretative or definitional language, was promulgated without compliance with the mandatory consultation procedures set forth in sections 101(a) and (c) of the Act. 30 U.S.C. 811(a) and (c). Here there is little doubt that the requirement for canopies in sections where the extracted height exceeds the coalbed height is substantive in nature and adds significantly to the individual operator's potential civil and criminal liability. Chrysler Corporation v. Brown, 441 U.S. 281, 301-304 (1979).

MSHA's interpretation may not be upheld therefore as a mere administrative implementation of the statutory standard. As the court of appeals noted, in such a case what is at issue is not just the agency's authority to interpret or implement the statutory standard but "the very power of the agency to promulgate" a substantive addition to the conduct mandated by the statutory standard. 493 F.2d 290.

The considerations which underlie this construction of the agency's authority to create administrative crimes was further spelled out in United States v. Consolidation Coal Company, 477 F. Supp. 283, 284 (S.D. Ohio 1979):

> If the regulations are so significant that a violation amounts to a crime, then their promulgation would warrant the Section 811(d) formalities. First, common sense dictates that regulations, which if violated, amount to crimes, should be promulgated only after the most serious consideration and an opportunity for those affected for consultation with the rulemakers. It is hard to imagine any rules which are more demanding of pre-promulgation formalities than those which if violated subject persons to criminal sanctions. Moreover, if such a procedure is followed it will have the effect of clearly apprising those concerned of its criminal provisions.
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> The bothersome aspect of the government's position is that it sounds a retreat from an important and traditional philosophical principle: that criminal statutues must be strictly construed and that if a crime is to be established the statute or regulation must reasonably apprise reasonable persons that a failure to obey will amount to a basis for a conviction. We must be mindful that in this case we are not dealing with regulations which carry merely a civil penalty, but rather a criminal sanction for their violation.

As the Court of Appeals for the District of Columbia has observed, the mandatory standard concept evolved to deal with a dilemma perceived by those

most directly affected by the Mine Safety Law, namely, concern "by representatives of both industry and labor that a freely exercised power of [agency] amendment might result in an unpredictable and capricious administration of the statute, which would redound to the benefit of no one." Zeigler Coal Company v. Kleppe, 536 F.2d 398, 402 (D.C. Cir. 1976). The resolution was the adoption of the elaborate consultative procedures set forth in section 101. Compliance with these procedures is a condition precedent to any substantive revision of a mandatory standard. Finley Coal Company, supra, 493 F.2d 290. They operate as a legislative check on the arbitrary exercise of administrative discretion.

I conclude, therefore, that any reliance on the suspension action of July 7, 1977, as a modification of the substantive coverage of the statutory standard is misplaced and that unless the Secretary can find some other support for the claim that the term "coalbed height" was, by valid administrative action, revised or amended to read "extracted height" I shall be constrained to conclude that the improved standard as applied to the facts of this case is invalid. For this conclusion, I need only rely on the principle that administrative rulemaking in disregard of procedural requirements is ultra vires. Finley Coal Company, supra, 493 F.2d 291.

I need not and do not consider whether the suspension action of July 7, 1977, is properly characterized as an "interpretative rule" because such rules do not have the force and effect of law unless promulgated in accordance with the statutory procedural minimums of notice and opportunity for comment prescribed by section 4 of the APA, 5 U.S.C. 553(b) and (c). Chrysler

Corporation v. Brown, supra, at 312-316; Morton v. Ruiz, 415 U.S. 199 (1974); United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 758 (1972). Here that did not occur. See, 42 F.R. 34877.

II.

A subsidiary question is whether assuming the legal efficacy of the claimed definitional change the operator had fair warning of MSHA's intention to abandon the 12-inch tolerance from the actually extracted height as the basis for determining when compliance was due. The record shows that since the minimum extracted height was only 53 inches the operative "mining height" under the September 23, 1973, bulletin was 41 inches.

The Mine Safety Law is remedial and therefore to be liberally construed. But because it is also penal, the due process clause precludes the imposition of sanctions without fair warning of the acts and conduct prohibited. The vagueness doctrine generally requires that a statute or standard having the force and effect of law be precise enough to give fair warning to actors that contemplated conduct is criminal and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. Impermissible vagueness occurs whenever such a provision states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork. Connally v. General Construction Company, 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Colton v. Kentucky, 407 U.S. 104, 107 (1972).

In the case of purely economic regulation, the Supreme Court has usually insisted that a statute be evaluated not only on its face but in the context of the conduct with which a defendant is charged. Boyce Motor Lines v. United States, 342 U.S. 337 (1952); United States v. National Dairy Products, 372 U.S. 29, 31-33 (1963). Thus, unlike a finding of facial vagueness, which results in a standard being declared unenforceable against all operators, a finding that an interpretation urged renders the standard impermissibly vague as applied to a particular violation results only in a vacation of the citation. Secretary v. Peabody Coal Company, 3 FMSHRC ___, Docket No. CENT 80-298, decided February 5, 1981.

The question presented here is whether the suspension action of July 7, 1977, gave the operator fair warning that henceforth the 12-inch tolerance from the actually extracted height would no longer apply. I find that it did not because the suspension notice is susceptible not only of the meaning ascribed to it by MSHA but also of meaning that canopies are required only where the actually extracted height less 12 inches exceeds 41 inches. Because of the serious consequences not only to the operator but also to miners forced to work with canopies in mining heights insufficient to accommodate them, I conclude that as a matter of law the latent ambiguity in MSHA's rule or policy must be construed against it. A rule or policy "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." Connally v. General Construction Company, supra, at 391; A. B. Small Company v. American Sugar Refining Company, 267 U.S. 233 (1925); Jordan v. DeGeorge, 341 U.S. 223 (1951).

For these reasons, I conclude that even if the suspension notice of July 7, 1977, were found to be a valid revision or amendment to the statutory standard (see Part I, supra), it may be impermissibly vague and unenforceable as applied to the violation charged.

III.

Substitution of an "actually extracted height" for the "coalbed height" standard results in remarkably disparate treatment of the requirement for canopies on electric face equipment in sections of coal mines with the same coalbed height. The record shows that in this case no requirement for a canopy would have been imposed if the operator had confined his extraction in the three left entries to the coalbed height of 32 to 38 inches, regardless of the extracted or coalbed height on the three right entries. It was only because the operator had to balance his ventilation system and mine coal from the three high entries on the right, 75 to 80 inches, that he claims he was faced with the necessity of mining through the low coal roll on the left with an oversized, 45-inch machine in order to be in a position to rob the three high seams on the right in a safe and economical manner. It was the taking of top rock and bottom to accommodate the oversized machine that resulted in triggering the requirement for a canopy under the "actually extracted height" rule. At the same time, the parties agree that insufficient top was taken to permit use of a canopy that would provide a safe seat. The obvious answer--take more top--both parties disavow as a solution, MSHA because it disclaims authority to require the taking of top to accommodate canopies and the operator because of the health hazard created by rock dust. Declaring irrelevant

the operator's claim that interchange of the oversized miner with a piece of low profile equipment was impractical as a matter of sound mining practice and business judgment, MSHA argues that the solution was either to effect an equipment interchange or utilize a full floater canopy technology allegedly known to the operator and available from the Clinchfield Coal Company.

Without attempting at this time to resolve these disagreements, the threshold issue is whether application of the "actually extracted height" as the trigger for compliance results in treatment of operators with sections where the coalbed heights are less than 42 inches in a manner so unequal or inequitable as to result in a deprivation of due process.

MSHA contends that it does not because while it has no authority to require the use of existing technology to take top or bottom in order to permit use of canopies in sections where the coalbed height is less than 42 inches, it has authority to impose heavy monetary penalties on any operator who fails for any reason to utilize canopy technology available anywhere throughout the industry in sections where the actually extracted height is 42 inches or more. If there is a rational explanation for the disparate treatment of those operators who take top and thereby allegedly trigger application of the canopy requirement and those who do not, the inequality of treatment does not offend due process. See, Secretary v. Kenny Richardson, 3 FMSHRC 8, 18-28 (1980).

MSHA claims that the disparate treatment is rational because it may result in greater safety for miners working in those sections where the actually extracted height exceeds 41 inches. What appears to be questionable if not

irrational is MSHA's refusal to afford this protection to miners who work on sections where the coalbed height is less than 42 inches but where top or bottom could be taken in so as to provide an actually extracted height that would permit the use of canopies.

Thus, what bothers me is not so much the disparate treatment of the operators but the disparate treatment or safety afforded the miners. Consequently, I find that because MSHA's disparate treatment of the operators results in what appears to be a self-imposed and irrational limitation on its authority to enforce the canopy standard, the discriminatory enforcement policy presently in effect is violative of this operator's right to equal treatment under the law.

Accordingly, it is ORDERED that on or before Wednesday, April 15, 1981, the Secretary SHOW CAUSE WHY the captioned civil penalty proceeding should not be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE-ONE

This order was in preparation at the time of receipt of the operator's parallel motion for a summary decision. MSHA's response to this order may include its response to the operator's motion.

~FOOTNOTE-TWO

As recently as January 1981, the United States Regulatory Council reported coal operators complained that:

"Retrofitting existing equipment [with canopies] has proven impractical. They assert that the requirements to do so have resulted in new problems, including reduced visibility and increased "out of service' time for repairs and maintenance. The operators assert that the standards were written without sufficient flexibility and do not allow the use of improved equipment which they feel would not pose the same problems." Cooperation and Conflict, Regulating Coal Production, January 1981, 23.