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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.O. No. 44-00294-03039
v.	
EASTOVER MINING CO., RESPONDENT	No. 1 Mine

DECISION AND ORDER

This matter is before me on the parties' motion to approve settlement or, in the alternative, on the operator's motion for summary decision. For the reasons set forth below, the motion to approve settlement is denied. (FOOTNOTE.1) The motion for summary decision is granted.

The undisputed facts show that the "coalbed" or height of the coal seam at the lowest point on the section of the mine in question was 38 inches. I find this measurement rather than that of the actually extracted height, 53 inches, was the controlling height for determining the requirement for canopies under Section 317(j) of the Act, 30 C.F.R. 75.1710, 1710-1, and therefore no violation existed at the time the instant citation was written. (FOOTNOTE.2)

MSHA, of course, denies the correctness of this conclusion. MSHA argues that when the initial administrative implementation of the statutory standard (FOOTNOTE.3) was published in 1972 (FOOTNOTE.4) MSHA legislatively added the term "mining height" to the standard and perhaps inadvertently but nevertheless authoritatively changed the plain meaning of the statutory term "coalbed height" to that of "actual height" or "actually extracted height". (FOOTNOTE.5)

The difficulty with this is that there is nothing in the record of the legislative rulemaking proceeding of 1972, at least as reported in the Federal Register, 37 F.R. 20689, to show that the industry was apprised or put on notice of the fact that the plain meaning of the statutory term "coalbed height" was being revised and amended. Adequate notice of the issues to be resolved is an essential of a substantive rulemaking proceeding. Wagner Electric Co. v. Volpe, 466 F.2d 1013 (3d Cir. 1972).

To the contrary, as counsel admits, in September 1973, MSHA for the first time disclosed that its concept of the term "mining height" included the "thickness of the roof rock taken". This instruction to enforcement personnel was not the subject of either a formal or an informal rulemaking proceeding, however, and was not promulgated as either a substantive or interpretative rule in accordance with the provisions of either section 101, 30 U.S.C. 811, of the Mine Safety Law of section 553 of Title 5, section 4 of the APA.

For these reasons, I conclude the plain meaning of the statutory term "coalbed" height" was not revised or amended in accordance with the substantive or procedural requirements of the law at the time the improved standard, 30 C.F.R. 75.1710-1 was promulgated in 1972.(FOOTNOTE.6) I further find that neither the bulletin to enforcement personnel of September 20, 1973, nor the suspension action of July 7, 1977, 42 F.R. 34876, were promulgated in accordance with section 101 of the Act or section 4 of the APA, 5 U.S.C. 553(b), (c). Consequently, none of these actions effected a legally binding change in the statutory limitation on MSHA's authority to require canopies in the section of the coal mine involved in this proceeding. (FOOTNOTE.7)

In enacting the Mine Safety Law Congress made a conscious judgment that notions of fairness require that informed legislative rulemaking be made only after affording interested persons notice and an opportunity to participate. It is obvious that the interepretation contended for by MSHA was not the product of procedures prescribed by Congress as a necessary prerequisite to give it the binding effect of law. See cases cited in Parts I, II, and III of the Show Cause Order issued March 17, 1981, attached as an appendix hereto.

The premises considered, therefore, I find that (1) there is no genuine issue as to any material fact, and (2) that the operator is entitled to summary decision as a matter of law.

Accordingly, it is ORDERED that the captioned petition for penalty be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

In Co-Op Mining Company, 2 FMSHRC 3475 (1980), the Commission held that as a matter of policy a settlement should not be approved where no violation has been shown.

~FOOTNOTE_TWO

Effective July 1, 1977, MSHA determined that in coalbed heights below 42 inches the use of canopies diminished the safety of the miners and were not technologically or anthropometrically feasible. 42 F.R. 34876. The Secretary's Annual Report to Congress for FY 1978 noted that "Progress in installing cabs and canopies has been substantial for equipment used in coalbed heights of 42 inches or more; however, based on research as well as experience gained in the course of MSHA enforcement, certain human engineering problems had not been solved, particularly in coalbed heights below 42 inches ... Because of these unsolved engineering problems the Secretary suspended indefinitely the time period for operators to design and install cabs and canopies on self-propelled electric face equipment used in underground coal mines where coalbed heights are less than 42 inches." Report pp. 11-12. While counsel for MSHA contends that a requirement exists for canopies where the coalbed or mining height after adjustment for roof support is 36 inches, this is clearly erroneous. The elusiveness of MSHA's position is shown by a January 1981 Report of the U.S. Regulatory Council which states that "While local MSHA officials have agreed that canopied equipment in coal seams under 50 inches is "impractical' MSHA officials in Washington require continued experimentation" at seam heights as low as 36 inches.

~FOOTNOTE_THREE

Section 317(j) of the Act, 30 C.F.R. 75.1710.

~FOOTNOTE_FOUR

30 C.F.R. 75.1710-1.

~FOOTNOTE_FIVE

The plain meaning of the statutory term is "a bed or stratum of coal". BuMines, Dictionary of Mineral Terms (1968). In response to the pretrial order of January 8, 1981, counsel for MSHA assured the trial judge that the term "mining height" as used in 30 C.F.R. 75.1710-1 was the equivalent of the term "coalbed height" as used in the mandatory standard. It was not until the significance of the difference in the two meanings was disclosed at the prehearing conference that counsel claimed that Congress always intended what MSHA later invented. The crux of the matter is whether MSHA's invention, if such it is, has the force and effect of law and can be the basis for applying civil and criminal sanctions. In its response to the show cause order MSHA argues that ""Mining height' as it is used in 30 CFR 75.1710-1 ... was intended by the Secretary to have the same meaning as that Congress intended by "where the height of the coalbed permits."' (Response, p.5). The legislative history shows Congress intended the phrase to mean "where the height of the coal permits the installation of" canopies. H. Rpt. 91-563, 91st Cong., 1st Sess. 57 (1969).

~FOOTNOTE_SIX

When MSHA published the statutory standard together with its administrative implementation in 1972 simultaneously and without further explanation it must be taken to have ascribed the same meaning to the term "mining height" as Congress had ascribed to the term "coalbed height". This is underscored by the fact that MSHA is without authority to require operators to take top or bottom rock so as to provide space for the installation of canopies where the coalbed height alone does not permit their use. As the record shows, MSHA recognizes that taking top and bottom results in contamination of the coal with noncombustible material that reduces the b.t.u. content and the value of the product. It also creates added health hazards in the form of silica or quartz dust that increases air pollution contaminates in the form of respirable dust. Another consideration that militates against MSHA's claim that by necessary implication the term "coalbed height" includes the thickness of top and bottom rock taken is the fact that operators calculate their capital needs for equipment on the basis of what the core borings show with respect to the thickness of the coal seam. Thus, where, as here, the core samples indicated a thick seam and the operator invested in high profile production equipment the imposition of a requirement to buy low profile equipment to meet a transient condition is seen not only as unfair and unreasonable but as arbitrary and capricious. As Cardozo noted, "Law as a guide to conduct is reduced to the level of futility if it is unknown and unknowable."

~FOOTNOTE_SEVEN

The distinction between legislative and interpretative rules is basic. Chrysler Corp. v. Brown, 441 U.S. 208, 301-304, 313-316 (1979); General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Batterton v. Francis, 432 U.S. 416 (1977); Skidmore v. Swift & Co., 323 U.S. 124. When Congress has delegated to an agency the authority to make rules having the force of law and

the agency acts reasonably and within its delegated legislative power, a reviewing tribunal has no more power to substitute its judgment for that of the agency than it has to substitute its judgment for that of Congress. But to be legislative in character a rule must not only be rooted in a grant of such power by Congress but must be promulgated in conformity with the procedural requirements imposed by Congress. Morton v. Ruiz, 415 U.S. 199, 232 (1974). Rules that are not the product of legislative rulemaking are interpretative. As the Supreme Court observed in Batterton v. Francis, supra, 432 U.S. 425, n. 5 "A court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpreations, based on such factors as timing and consistency of the agency's position and the nature of its expertise." It is not necessary to decide whether the instructional bulletin of September 20, 1973 and the suspension action of July 7, 1977 are properly characterized as "interpretative rules", because these regulations were not properly promulgated as substantive or legislative revisions of the definition of "coalbed height" and therefore do not have the force and effect of law. Chrysler Corp. v. Brown, supra, 441 U.S. at 315-316. Compare, VW v. Federal Maritime Commission, 390 U.S. 261 (1968), in which Justice Stewart delivered the opinion of the Court: "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law'. ... But the courts are the final authorities on issues of statutory construction ... and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' ... "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia."'. See also Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973).