CCASE:
KEYSTONE COAL MINING V. MSHA
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

KEYSTONE COAL MINING CORP., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 91-1480-R Citation No. 3687890; 8/21/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Emilie No. 1 Mine Mine ID 36-00821
	:	Docket No. PENN 91-1454-R Citation No. 3687888; 8/14/91
	:	Margaret No. 11 Mine Portal # 2
	:	Mine ID 36-08139
	:	Docket No. PENN 92-54-R Citation No. 3687895; 9/20/91
	:	Emilie No. 1 Mine
	:	Mine ID 36-00821
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 92-114 A.C. No. 36-00821-03761
v.	:	Emilie No. 1 Mine
KEYSTONE COAL MINING CORP., Respondent	:	Docket No. PENN 92-119 A. C. No. 36-08139-03512
	:	Margaret No. 11 Mine No. 2 Portal

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Keystone Coal Company;
Edward H. Fitch, Esq., and Carl C. Charneski, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary of Labor

Before: Judge Weisberger

Statement of the Case

In these consolidated contests and civil penalty proceedings the Secretary (Petitioner) filed petitions for assessment of civil penalty alleging violations of 30 C.F.R. 70.100(a). On February 7, 1992, the Operator (Respondent) filed a Motion for Summary Decision, which was replied to by the Secretary on March 27, 1992. In a telephone conference call between the undersigned and counsel for both parties on April 9, 1992, counsel were requested to provide proper citations in the record to certain assertions set forth in their respective memorandum submitted in connection with the Operator's Motion. On May 5, 1992, an order was issued denying the Motion for Summary Decision.

Subsequent to notice, the cases were heard on June 2, 3, 4, 1992, in Pittsburgh, Pennsylvania, and pursuant to counsels' agreement, on July 21, and 22, 1992, in Falls Church, Virginia.

Both parties filed post hearing briefs on October 9, 1992. On October 9, 1992, American Mining Congress filed a Motion for leave to file an amicus curiae brief, and leave was granted in an order issued October 26, 1992, and the amicus curiae brief, was deemed filed as of a October 9, 1992. Respondent filed a Reply Brief on October 20, 1992. On October 21, 1992, Petitioner filed a Motion for an Extension of Time to file a Reply Brief from November 13, to November 25, 1992, and Respondent objected to this Motion. On October 26, 1992, an order was issued granting Petitioner until November 25, 1992, to file a Reply Brief. On November 25, 1992, Petitioner filed a Reply Brief.

I. Introduction

At issue in these cases are three citations issued by MSHA inspector Brady Cousins on August 14, August 21, and September 20, 1991. Each citation alleges violations of 30 C.F.R. 70.100(a), based on a single respirable dust sample taken during one shift which indicated dust concentrations

exceeding 2.0 milligrams per cubic meter of air (hereinafter referred to as 2.0 mg/m3). Specifically, the issue presented is the validity of the Secretary's Spot inspection program, which commenced July 1991, requiring the citation of an operator for non-compliance based on dust samples obtained in a single shift.

II. Statutory Background

Section 70.100(a) supra, repeats the language of Section 202(b)(2), of Federal Mine Safety and Health Act of 1977 ("the 1977 Act") as follows:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active working of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Emphasis supplied)

"Average concentration" is not defined in the Regulations, but it is defined in Section 202(f) the 1977 Act, 30 U.S.C. 842(f) as follows

> For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of the Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. (Emphasis supplied)

Section 202(f) of the Federal Coal Mine Safety Health Act of 1969 ("the 1969 Act") as pertinent, contains language identical to that set forth in Section 202(f) of the 1977 Act. It reads as follows:

> For the purpose of this subchapter, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active

> workings of a mine is exposed (1) as measured, during the 18 month period following December 30, 1969, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the secretary of Health, Education, and Welfare find, in accordance with the provisions of Section of Section 811 of this title that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

On July 17, 1971, the Secretary of the Interior and the Secretary of Health, Education, and Welfare made the finding required by Section 202(f) as follows:

> Notice of Finding That Single Shift Measurements of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift.
>
> Section 202(f) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801; 83 Stat. 742) provides that the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the period ending June 30, 1971, over a number of continuous production shifts to be determined by the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary of the Interior and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of Section 101 of the Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift, that is, the shifts during which the miner is continuously exposed to respirable dust.
>
> Notice is hereby given that, in accordance with Section 101 of the Act, and based on the data summarized below, the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

> In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2,179 working sections in compliance with the dust standard on the date of the analysis. In accordance with the sampling procedures set forth in Part 70, Subchapter 0, Chapter I, Title 30, Code of Federal Regulations, these current basic samples were submitted to the Bureau over a period of time prior to the date the analysis was conducted. The average concentration of the current 10 basic samples was compared with the average of the two most recently submitted samples of respirable dust, then to the three most recently submitted samples, then to the four most recently submitted samples, etc. The results of these comparisons showed that the average of the two most recently submitted samples of respirable dust was statistically equivalent to the average concentration of the current basic samples for each working section in only 9.6 percent of the comparisons. Figure 1 lists the results of the comparisons and shows that a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971) (K-46 emphasis supplied) ("1971 Notice")(Footnote 1) See, Eastern Associated Coal Corp, 7 IBMA 14, 29 (September 30, 1976). (The Interior Board of Mine Operator's Appeals took cognizance of the July 17, 1971 finding made pursuant to Section 101 of the 1969 Act).

On April 8, 1990, in connection with the promulgation of the Respirable dust standards, 30 C.F.R. 70.100 et seq., the Secretary published the following language in the Federal Register under the heading Discussion of Major Issues:

> The Secretary of the Interior and Secretary of Health, Education, and Welfare conducted continuous multi-shift sampling and single-shift sampling and, after applying valid statistical techniques, determined that a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m3.

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1 Keystone Exhibit 46 (K-46) was submitted, post hearing, by Respondent along with a covering letter, dated September 28, 1992, wherein Respondent requested I take judicial notice of this document. The Secretary in her brief, does not argue that this document is not a proper matter for judicial notice. Hence, I take judicial notice of Keystone exhibit 46, a copy of 36 Fed. Reg. 13286, 13287 (July 17, 1971).

> Accordingly, the Secretary of the Interior and Secretary of Health, Education, and Welfare prescribed consecutive multi-shift samples to enforce the respirable dust standard.

45 Fed. Reg. 23997 (April 8, 1980) (K-25) ("1980 comment").

III. Regulatory Dust Standards

A. Operator Sampling

On April 8, 1980, Regulations were promulgated requiring operators to submit five dust samples, collected on consecutive shifts, on a bimonthly basis for each mechanized mining unit. (30 C.F.R. 207(e) the results of such sampling are reported to the operator and include not only "the concentration of respirable dust ... for each valid sample" but also "the average concentration of respirable dust ... for all valid samples" 30 C.F.R. 70.210(a)(3) and (4) (emphasis supplied). Any citation to the operator is based upon the average of the samples (K-23, p.3). Under 30 C.F.R. 70.208 an operator is required to submit one sample every two months for each designated area. If that sample exceeds the respirable dust standard, the operator is required to take five more samples. 30 C.F.R. 70.208(c). If the average of these five samples exceeds the standard, a citation may then be issued (K-23, p.3, K-25, p. 23992).

In ruling on the challenges to the dust standards promulgated in 1980, the Court of Appeals justified its decision to uphold the standards, in part, upon the fact that:

> All compliance determinations are based upon the average dust concentration of five samples. Id. 70.207(a), 208(c), 210(a)(4). This system minimizes the variability associated with the result of a single sample or several samples taken on a single shift.

American Mining Congress v. Marshall, 671 F.2d 1251, 1259 (10th Cir. 1982).

b. MSHA Sampling

1. Prior to July 1991

With regard to MSHA sampling to determine compliance with Section 70.100(a) supra, the MSHA Underground Manual, (March 9, 1978), (Keystone 21) under the heading Safety and Health Technical Inspection, does not set forth any levels of dust concentration that would be considered out-of compliance on the basis of a single sample. Also, the MSHA handbook provided to inspectors dated Feb 15, 1989, (Keystone 18, June 2 Tr. 114-115), states in the preface that it "...sets forth procedure for MSHA personnel to follow when conducting health surveys, investigations, and inspections of underground and surface coal

mines", and provides that "a decision of non compliance cannot be made on one sample" (K-18, 1-12).

2. Spot inspections after July 1991

In the spring of 1991, a Coal Mine Respirable Dust Task Group ("task group") was established by the Assistant Secretary for Mine Safety and Health, William Tattersall, to "evaluate the agency's respirable dust program" (June 3 Tr. 7). The task group decided to conduct a study to ascertain the actual levels of dust that miners are exposed to (June 3, Tr.8). As part of the study, dust results were to be obtained from a single shift.(Footnote 2)

On June 27, 1991, Assistant Secretary of Labor, William J. Tattersall, announced the creation of a program of special spot inspections to audit coal mines for respirable coal dust sampling, dust control and training (G-18).

The Respirable Dust Spot Inspection and Monitoring Program for Underground Mines, ("Spot Inspection") program was initiated on July 15, 1991. The Spot Inspection program consisted of two parts. Part I of the program involved the actual spot inspection which included the collecting of dust samples, reviewing dust plan parameters and sampling procedures, and interviewing mine personnel. Part II of the program consisted of monitoring the operators' respirable dust sampling activities. Effective July 15, 1991 MSHA inspectors were instructed, as reflected in the "Respirable Dust Spot Inspection Procedures" memorandum and revisions thereto issued to certain MSHA inspectors, that a citation was to be issued in the event of a single shift sample at or exceeding the levels set forth in that document (G-12). Such memoranda were not made part of the MSHA Program Policy Manual, and were not the subject of rulemaking.

The Respirable Dust Spot Inspection Procedures sets forth a table, prepared by Thomas Tomb, a member of the task group who is the Chief of the Dust Division, Pittsburgh Safety and Health Technology Center. The table is based upon a statistical analysis, which led Tomb to conclude that if a single dust sample yields, at a minimum, the level of dust set forth in the table

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2 A question arose in the task group as to what an inspector should do if, when collecting samples as part of the spot inspection monitoring process, the data showed a "very high probability" that the dust exposure exceeded 2.0 mg/m3. (June 3, Tr.57) It was decided that in these circumstances a citation should be issued.

i.e. 2.5 mg/m3, then there is a 95 percent level of confidence that the regulatory standard of 2.0 mg/m3 was exceeded.(Footnote 3)

Pursuant to the CBE spot inspection program, single shift samples obtained by Cousins on August 13, 21, and September 20, 1991, contained the allowing levels of dust respectively. 4.4 mg/m3, 2.8 mg/m3 and 4.7 mg/m3. Cousins applied the figures in the table set forth in the Respirable Dust Spot Inspection Procedures, and issued citations alleging, in each instance, violations of the Regulatory standard i.e. average concentration in excess of 2.0 mg/m3.

IV. Analysis and Discussion

In essence, Respondent and Amicus seek dismissal of these citations on the ground that the spot inspection program, on which they are predicated, is invalid, as inter alia, the policy requiring the issuance of citations based on results of a single sample, was adopted without rulemaking. On the other hand, the Secretary argues, inter alia, that the spot inspection program, including the issuance of citations based on single samples, has been authorized by Congress, is grounded upon accepted scientific principles, and is consistent with the sampling strategy of Federal agencies. For the reasons that follow, I find that rulemaking was required to institute a new policy of issuing citations based on a single sample. Since the new policy was not adopted through rulemaking, it is not valid. Thus, citations issued pursuant to this policy are also invalid. It thereafter is not necessary to decide whether the statistical analysis underlying the new policy provides a reasonable basis for the policy. Even if this analysis is reasonable, it can not support a change in testing policy that has not been promulgated subject to rulemaking.

Also, my finding, that the single sample program is not valid as it was not adopted by rulemaking, is dispositive of this case. Thus, it is not necessary to decide the balance of the issues raised by the parties.

A. The 1971 Notice, 36 Fed. Reg. supra

Under Section 202(f) of the 1977 Act, supra, a determination of the "average concentration" of respirable dust for purposes of ascertaining compliance with the mandatory standard of exposure to less than 2.0 mg/m3 (Section 202(b)

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3 In this connection, Tomb testified that each of the three single full-shift samples generated greater than a 97.5 percent "confidence" that the average concentration of the dust in the mine atmosphere for the sampled shift exceeded the dust standard. (June 3, Tr. 90, 166-167)

supra, and Section 70.100(a) supra, is based on a measurement over a single shift unless the Secretary of Interior and Health, Education and Welfare find "...in accordance with the provisions of Section 101 of the Act, that such single shift measurement will not, after applying valid statistical techniques to such measurements, accurately represent such atmosphere condition during such shift".

Thus, under the 1977 Act, the Secretary can cite an operator for a violation of the dust standard based on a single shift sample, unless the Secretary and the Secretary of Health Education and Welfare find that a single shift sample will not accurately represent such atmospheric conditions during such shift. Such a finding has been made in the 1971 Notice.

The 1971 Notice, 36 Fed. Reg. supra, is entitled Notice of Finding that Single Shift measurement of Respirable Dust will not Accurately Represent Atmospheric Conditions During such shift. It clearly and unambiguously provides as follows:

> Notice is hereby given that in accordance with section 101 of the Act, and based on the data summarized below, the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

Thus, reading the 1971 Notice along with Section 202(b)(2) supra, and Section 202(f), supra, it appears that the Secretary is bound not to make dust determinations based on a single shift sample.

In essence, the Secretary argues that the 1980 comment, 45 Fed. Reg. supra, supersedes the 1971 Notice, 36 Fed Reg. supra, inasmuch as the former contains a finding that only single shift samples "near" 2.0 mg/m3 are not reliable.(Footnote 4) The 1980

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4 The Secretary also argues that my order of May 5, 1992, denying Respondent's Motion for Summary Decision, constitutes the law of the case insofar as I noted that the Secretary had not made an explicit finding in accordance with Section 101(a) of the Act, as to what dust concentrations are to be considered "near" 2.0 mg/m3, and found that "...it has not been established that the Secretary has made a finding, in accordance with Section 101[a] of the Act concerning the unreliability of single shift samples in general." Order of May 5, 1992 at 3-4.

The order was based on the record before me at the time which did not contain on any reference by either party, to the

comment does not explicitly refer to the 1971 Notice or its findings. Specifically, it does not explicitly indicate that it is superseding the 1971 Notice. Since the 1971 Notice contains findings made pursuant to Section 101 supra, based on "valid statistical techniques" as required of Section 202(f) supra, it is clear that it can not be rescinded or superseded without prior notice of the proposed rule through publication in the Federal Register and the opportunity for the public to comment (5 U.S.C. 553 (b)(d)). In the 1971 Notice (36 Fed. Reg, supra), it i explicitly stated that "notice is hereby given" that, based on reliable statistical techniques, the Secretary of the Interior and the Secretary of Health, Educational and Welfare "find" that a single shift measurement will not accurately represent the atmospheric conditions to which a miner is exposed. In contrast, the language of the 1980 comment, 45 Fed Reg. supra, under the heading Discussion of Major issues, does not explicitly state that it is giving notice that a finding is made with regard to Section 202(f) of the Act. In contrast, it refers to the fact that the Secretary of the Interior, and the Secretary of Health, Education, and Welfare," conducted" sampling, and after applying statistical techniques, "determined" that a single shift should not be relied on when the dust concentration was near 2.0 mg/m3. Thus, the language is ambiguous. Since the operative verbs, conducted, and determined are in the past tense, it might be concluded that this comment is a reference to the earlier 1971 finding, rather than a new contemporaneous finding based on valid statistical techniques. In this connection, I note that the 1980 comment does not define the term "near 2.0 mg/m3" nor does it set forth any statistical data or techniques that were applied in making the determination referred to. I thus find that the Secretary has not met its burden of establishing that the 1971 Notice was superseded by the 1980 comment.(Footnote 5)

4 cont'd.

1971 Notice (36 Fed Reg. supra). As such the order is not the law of the case with regard to the entire record presently before me, including the 1971 Notice. (36 Fed. Reg. supra).

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5 The Secretary also argues that the 1971 Notice, 35 Fed. Reg, supra, should be accorded no weight, inasmuch as the instant single shift sampling strategy "bears no resemblance to the Bureau of Mines data discussed in the 1971 Federal Register Notice " (Post Hearing Brief, at 25). In other words, it is argued that "...the type of measurement discussed in the 1971 Federal Register Notice is not at all like this single shift measurement at issue in this case".

I find that any deficiencies in the statistical data relied on by the Secretaries of Interior, Health, Education and Welfare as set forth in the 1971 Notice (K-25) do not negate the fact

Therefore, if the 1971 Notice has not been superseded, then applying Section 202(f) supra, it might be concluded that a measurement of the "average concentration" can not be made over a single shift.(Footnote 6)

B. The Requirement for Rulemaking

The finding in 1971, 36 Fed. Reg. supra, that compliance determinations can not be based on a single sample, was explicitly issued as rulemaking under Section 101 of the 1969 Act, as specifically required by Section 202(f) (K-46). Hence, if rulemaking is required and was utilized in making such a finding, it is clear that rulemaking is similarly required to rescind the 1971 finding. As discussed above, infra IV(A), the evidence does not clearly establish that the 1971 finding was explicitly by rescinded by rulemaking, i.e., the 1980 comment, 45 Fed. Reg. supra.

In addition, for the reasons that follow, I find that rulemaking pursuant to the APA was required to promulgate a program providing for compliance determinations based on a single sample. Notice and comment are required by the APA when an agency is engaged in rulemaking defined as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). A "rule" is broadly defined by the APA as: "the whol or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy... ."5 U.S.C. 551(4). A wide variety of statements issued by agencies meet this broad definition. See, e.g., Batterton v. Marshall, 648 F.2d 694, 704-705 (D.C. Cir. 1980) (where the agency's selection of a statistical methodology was found to constitute a rule under the APA); Pickus v. United States Bd. of Parole, 507 F.2d 1107,

5 cont'd.

that they made an explicit unequivocal finding, in accordance with Section 202(f) supra of the 1969 Act, that a single shift measurement will not accurately reflect the atmospheric conditions to which miners are exposed.

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6 Due to the ambiguity of the 1980 comment. 45 Fed. Reg. supra, as to whether it was intended to supersede the 1971 finding as it pertains to dust concentrations not "near" 2.0 mg/m3, I do not base my decision regarding the validity of single sample testing solely on a finding that the 1971 notice was not superseded by the 1980 comment. Instead, for the reasons that follow, I conclude that a program requiring the issuance of citations based on single safe testing is not valid, as it was not put into effect through APA rulemaking.

1112-13 (D.C. Cir. 1974) (Board of Parole's guidelines limiting discretion and affecting private interests deemed substantive, not interpretive). Prows v. United States Department of Justice, 704 F. Supp. 272 (D.D.C. 1988), aff'd 938 F2d 274 (D.C. Cir. 1991) (where the Federal Bureau of Prisons' issuance of a program statement affecting the financial obligations of prison inmates was a rule subject to notice and comment requirements); Waste Management, Inc. v. EPA, 669 F. Supp. 536, 538 (D.D.C. 1987) (where the deferral of ocean incineration permits pending the promulgation of new regulations was found to constitute a rule under the APA).

The Commission, in Drummond Company Inc., 14 FMSHRC 661 (May 5, 1992) recently addressed the issue of whether MSHA was required to comply with the APA in adopting its policy concerning "excessive history" penalties. In Drummond, supra, the Commission addressed a program policy letter (PPL) which had been issued to all operators. The Commission described the test for whether an agency must comply with the APA as follows:

> Advance notice and public comment are required for rules that are substantive or legislative, and thus bear the force of law. Id. In the words of the Batterton Court, legislative rules manifest the following qualities:
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> > Legislative rules . . . implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect. 648 F.2d at 701-02 (footnote omitted).
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> 14 FMSHRC at 684.

The Commission, in Drummond, supra in analyzing whether the program policy letter at issue was a substantive rule requiring compliance with the APA took cognizance of the "two criteria" test set forth by the D.C. Circuit in American Bus Ass'n v. United States 627 F.2d 525, 529 (D.C. Cir. 1980) quoting Texaco v. FPC, 412 F.2d 740, 744 (3d Cir. 1969). The Commission in Drummond supra, noted that the first criteria is whether the pronouncement acts prospectively, and the second criteria is "...whether a purported policy statement genuinely leaves the agency and its decision makers free to exercise discretion" 14 FMSHRC supra at 686 quoting American Bus Ass'n, supra at 529.

Applying these principles, the Commission in Drummond, 14 FMSHRC, supra, held that a policy letter, setting forth a program for increased penalties based on excessive history, affects private interests in a substantial and present manner, and as such is subject to rulemaking.

Applying the above analytical framework to the case at bar, I agree with the argument of amicus that "An agency statement that establishes an entirely new basis for the issuance of a citation unquestionably meets the APA's expansive definition of a rule. This is particularly true when the existing standards and MSHA's longstanding practices and procedures base compliance determinations upon multiple samples".(Footnote 7)

Specifically, prior to the implementation of the spot inspection program, a citation would not have been issued based on a single shift sample. In contrast, the spot inspection program unequivocally deprives an inspector of discretion as it clearly mandates that a citation shall be issued of a single sample measures exceeds the appropriate value set forth in a table provided to inspectors (GX 12 P.2). In the event such a citation is issued, as in the case at bar, the operator becomes liable to pay a civil penalty. Prior to the spot inspection program, no such liability would have been incurred as no citations were issued on the basis of a single sample. Hence, the spot inspection program definitely affects private interests in a substantial manner.(Footnote 8)

Therefore since Petitioner did not engage in APA rulemaking in setting forth its procedures for the spot inspection program requiring citations to be issued based on a single shift sample, the procedures are not valid, and the citations issued pursuant to these procedures are to be vacated.

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7 In this connection, I note, as set forth by amicus, that "An operator is required to submit five samples every two months for each MMU (mechanized mining unit) on which compliance is determined. See, C.F.R. 70.207. It submits one sample for each designated area. If such samples exceed the standard, it is required to submit five additional samples on which compliance is determined. See 3 C.F.R. 70.208(c)." (Parenthesis added.)

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8 For these reasons I reject Petitioner's argument that the spot inspection program only changes the "manner" in which the Secretary will prove a violation, and does not violate the operator's substantive rights.

ORDER

It is ORDERED that Docket Nos. PENN 92-114 and PENN 92-119 be DISMISSED. It is further ORDERED that the following Notices of Contests be sustained: Docket Nos. PENN 91-1454-R, PENN 91-1480-R, and PENN 92-54-R. It is further ORDERED that Citation Nos. 3687890, 3687888, and 3687895 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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