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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 3, 1979

SECRETARY OF LABOR

v. Docket No. PITT 78-97-P

PENN ALLEGH COAL COMPANY, INC.

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by the Secretary of Labor is granted. The issues on review are those raised by the Secretary's petition, including:

- 1) Whether the administrative law judge erred in concluding that the standard at issue, 30 CFR §75.1710-1(a) is null, void and unenforceable";
- 2) Whether the administrative law judge committed prejudicial errors of procedure by allegedly:
(a) placing the burden of proving available canopy technology on the Secretary; (b) refusing to allow the Secretary to present certain evidence regarding available canopy technology; (c) taking official notice, sua sponte and without notice, of the record and decision in Florence Mining Co.. No. M. 76-115, etc. (October 31, 1977); and failing to provide the Secretary with a reasonable opportunity to submit countervailing records and decisions for consideration.

The Secretary has also filed a motion to strike and expunge from the record a document issued by the administrative law judge on May 11, 1978, captioned, "Supplemental Memorandum Opinion on Invalidity of Canopy Standard." For the reasons that follow, the

motion is granted.

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A hearing on the present case was held on April 6, 1978. At the conclusion of the hearing, the judge read into the record his decision and order. On April 7, 1978, the judge issued a written "Memorandum Decision" reiterating the previous day's bench decision and adopting and confirming that decision. On April 12, 1978, the official record of the proceedings was certified to the Commission in accordance with Interim Procedural Rule 56. 1/

On May 5, 1978, twenty-eight days after the issuance of the written decision, the Secretary filed his petition for discretionary review with the Commission. On May 11, 1978, the administrative law judge issued the supplemental memorandum opinion that is the subject of the Secretary's motion to strike.

The supplemental memorandum opinion states that it was "filed to set forth more fully the Presiding Judge's views with respect to his finding of April 6, 1978, declaring the improved safety standard (30 CFR 75.1710-1(a)) relating to the use of canopies on electric face equipment null, void and unenforceable." The supplemental opinion sets forth at length the judge's views concerning the background behind the adoption of the standard at issue, the validity of that standard as adopted, and the authority of the judge to rule on the standard's validity.

Section 113(d)(1) of the Federal Mine Safety and Health Act of 1977 2/ provides:

An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission ... assigned to such administrative law judge..., and shall make a decision which constitutes his

1/ 29 CFR §2700.56. This rule provides: "Within 5 days after a written decision has been rendered by a Judge, the docket clerk shall certify the official record of the proceedings to the Commission."

2/ 30 U.S.C. §801 et seq. (hereinafter "the Act").

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final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the

Commission has directed that such decision shall be reviewed by the Commission.... [Emphasis added.]

Section 113(d)(2)(A)(i) of the Act provides:

Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision.... [Emphasis added.]

It is clear that the written decision issued on April 7, 1978, is the "decision" constituting the judge's "final disposition of the proceedings" within the meaning of section 113(d) of the Act. 3/ The decision was issued by the judge and served upon the parties and the Commission; the record was certified to the Commission; and the Secretary filed a petition for discretionary review with the Commission within the statutorily prescribed period. In these circumstances, the Commission will not consider the further discussion of the issues undertaken by the judge and issued as a "supplemental memorandum opinion".

The statutory scheme for Commission review of judges' decisions contemplates that the first opinion of a judge announcing his final disposition of the proceedings will provide guidance to the aggrieved parties in the drafting of their petitions for discretionary review. Section 113(d) (2)(A)(iii) of the Act requires that objections in a petition to the judge's decision be supported by detailed

3/ See also Interim Rules of Procedure 54 and 55, 29 CFR §§2700.54 and 55.

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citations to the record and legal authorities, and confines Commission review to questions raised by the petition, where the direction only grants a petition. The filing by the judge of multiple opinions impedes the efforts of the aggrieved parties to timely comply with the requirements for petitions, encourages the hasty drafting of inferior petitions, and thus impairs the usefulness of this crucial document to the Commission. Moreover, the judge's action may create confusion as to the status of the issues, the deadlines for filing and granting of petitions and the exercise by the Commission of its power to direct review on its own motion. In short, the judge's action threatens the smooth functioning of the Commission's review process.

We further observe that the judge's issuance of a supplemental opinion may leave the impression that he failed to fully consider the case when he issued his first opinion, and that his first opinion did not adequately state the reasons for his decision. It may also unnecessarily detract from the appearance of his impartiality if his supplemental opinion anticipates and, fortuitously or not, "rebutts" contentions made in a petition for discretionary review.

For these reasons, the motion to strike filed by the Secretary is granted.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner