CCASE:
MSHA V. ALABAMA BY-PRODUCTS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
October 8, 1980

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| SECRETARY OF LABOR, | |
| MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | Docket Nos. SE 79-33<br>SE 79-74<br>SE 79-82 |
| v. | SE 79-108<br>SE 79-110 |
| ALABAMA BY-PRODUCTS CORPORATION | SE 79-123<br>BARB 79-215-P<br>SE 80-8 |

DECISION

The question before us is whether the administrative law judge erred in holding that there is no presently enforceable respirable dust standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. •801 et seq. ( Supp. II 1978) [the 1977 Mine Act]. We conclude that he did.

This controversy arose when the Mine Safety and Health Administration (MSHA) sought civil penalties under the 1977 Mine Act for thirteen alleged violations of 30 CFR •70.100(b). 1/ The facts are not in dispute. The parties stipulated as to the number of samples taken which resulted in each citation. They also agreed as to the average concentrations of dust per cubic meter of air revealed by the combined results of the samples. 2/ These average concentrations of respirable

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1/ 30 CFR •70.100(b) states in pertinent part:

[E]ach operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

That section restates section 202(b)(2) of the former Federal Coal Mine Health and Safety Act of 1969 [the 1969 Coal Act], 30 U.S.C. 842(b)(2) (1976), and section 202(b)(2) of the 1977 Mine Act 30 U.S.C. •842 (b)(2)(Supp. II 1978).

2/ The average concentration is determined through sampling of the in-mine atmosphere with a device which collects respirable dust particles. The type of device most often used, and the one used in

these matters, is the personal sampler. The Interior Board of Mine Operations Appeals [Board] described the sampling device and the procedures used for analyzing the samples it produces as follows:
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dust exceeded the limit of 2.0 milligrams per cubic meter of air set forth in the standard. 3/ The parties also agreed as to the type of devices used to collect the samples and stipulated that the devices had been approved by the Secretary of the Interior and the Secretary of Health, Education and Welfare. 4/ The administrative law judge concluded, however, for reasons discussed below, that 30 CFR □70.100(b) is presently unenforceable. He therefore vacated th citations.

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fn. 2/ cont.
*** [The] device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10 mm. in diameter which is supposed to separate the respirable from the nonrespirable particulates. Theoretically, only the former reaches the filter where the particulates are captured. The filter is the analog of the lobes of a human lung.
The manufacturer of the personal air sampler weighs each filter before sealing it in the device and records the weight on an attached data card. After the sample is collected, the sampler is forwarded to a MESA laboratory. ***
At the laboratory, each sampler is opened and among other things the filter is weighed so that a comparison can be made with the weight recorded on the data card by the manufacturer. Theoretically, the result reflects the weight of the particulates which were being deposited on the lungs of the wearer of the sampler at the time the sample was taken.
[Eastern Associated Coal Corporation, 7 IBMA 14, 30 (1976).]
3/ The average concentrations ranged from 2.1 milligrams to 2.95 milligrams of respirable dust per cubic meter or air.
4/ Section 202(e) of the 1969 Coal Act, 30 U.S.C. •842(e) (1976), provided:
References to concentrations of respirable dust in this title means (sic) the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education and Welfare. As used in this title, the term "MRE instrument"

means the gravimetric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England. "Secretary" was defined by section 102 of the 1969 Coal Act to mean "the "Secretary of the Interior or his delegate." 30 U.S.C. 802(a)(1976). The procedures for the approval of such devices ar set forth in 30 CFR Part 74. Prior to March 8, 1978, the National Institute for Occupational Safety and Health (NIOSH) acted for the Secretary of Health Education and Welfare and the Mining Enforcement and Safety Administration (MESA) acted for the Secretary of the Interior in approving the devices. NIOSH was responsible for determining whether the sampler unit met the performance specifications set forth in 30 CFR •74.3 to ensure the units accurately reflected the concentration of respirable dust in the air at the time the samples were taken. MESA was responsible for determining whether the pump unit met the specifications for intrinsic safety set forth at 30 CFR •18.68 to ensure the units could not cause an explosion.

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To begin our analysis, we look first to the 1969 Coal Act and the history of the respirable dust standard under that Act. One of the prime purposes of the Act was to protect miners from "black lung" or pneumoconiosis. Section 201(b) of the 1969 Coal Act stated:

> Among other things, it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. 5/

Thus, it is clear that one of the essential purposes of this legislation was to prevent miners from contracting pneumoconiosis as a result of inhaling respirable coal dust, and to require mine operators to maintain to the greatest extent possible an atmosphere free from such dust.

To achieve this goal, section 202(b)(2) of the 1969 Coal Act restricted the amount of respirable dust to which miners could be exposed to an average concentration during each shift no greater than 2.0 milligrams per cubic meter of air. (See note 1, supra.) Section 202(e) authorized the Secretaries of Interior and Health, Education, and Welfare to approve devices for collecting respirable dust samples in order to determine whether the statutory limits of

exposure were exceeded. (See note 4, supra.) The 1969 Coal Act also defined "respirable dust" in section 318(k) as "only dust particulates 5 microns or less in size."

In Eastern Associated Coal Corporation, 7 IBMA 14 (September 30, 1976), and 7 IBMA 133 (December 20, 1976)(on reconsideration), the Board of Mine Operations Appeals considered a challenge to MESA's administration of the respirable dust program. The Board found a discrepancy between the definition of respirable dust in section 318(k) of the 1969 Coal Act and the definition of concentrations of respirable dust in section 202(e) of that Act. Section 202(e) defined concentrations of respirable dust as average concentrations if measured with an MRE instrument, or equivalent concentrations if measured with another device approved by the Secretaries. By contrast, section 318(k) defined respirable dust as particles 5 microns or less in size. However, the MRE and the approved sampling devices collected and treated as respirable dust particles in excess of 5 microns in size. The Board found that the inconsistency between the statutory definition of respirable dust and the size of dust actually collected by the devices then approved made the respirable dust standard unenforceable.

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5/ Section 201(b) of the 1977 Mine Act provides the same.

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Congress reacted swiftly to the Board's decision. On February 11, 1977, Senate Bill 717 was introduced. S.717, 95th Cong., 1st Sess. (1977). The bill was the latest in a series of legislative efforts to amend the 1969 Coal Act. The bill responded directly to the Eastern decision, repealing section 318(k) and the definition of respirable dust contained therein. Moreover, section 202(e) was amended to read: "References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare." The amended version eliminated any reference to the MRE or its equivalent as devices for determining concentrations of respirable dust. These amendments were to take effect on July 1, 1978. On March 31, 1977, in testimony before the Senate Committee on Human Resources, Arnold Miller, then president of the United Mine Workers of America, stated:

> While proposed section 202(e) goes a long way to eliminate the problems created by recent Interior Board misinterpretations of the respirable dust statutes and regulations, it would not take effect until July 1, 1978, and does not expressly repeal the parts of the regulations that have been misinterpreted. To solve the problem as soon as possible, proposed section 307

[effective date provision] ... should be amended by adding ...
"and except that section 202(e) of the Act shall become
effective immediately" and a section 202(e)(3) should
be added ... as follows:
(3) sections 70.2(i) and 75.2(k) of
title 30 of the Code of Federal Regulations
are hereby repealed. 6/
Hearings before the Subcommittee on Labor of the Committee on Human Resources on S. 717, Senate; 95th Cong., 1st Sess. (1977) at 163. The Senate Committee adopted Miller's suggestion with respect to the effective date of section 202(e). 7/
The committee report described the changes made relative to respirable dust:

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6/ These regulations defined respirable dust in terms of the statutory definition of the 1969 Coal Act--particulates only 5 microns or less in size.
7/ As amended, section 307 of S.717 read:
Effective Date. Sec. 307. Except as otherwise provided, this
Act and the amendments made by this Act shall take effect on the first day of July 1978. *** The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective immediately upon enactment. [Emphasis supplied.]
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Respirable Dust
Section 318 of the Federal Coal Mine
Health and Safety Act of 1969 is amended by
deleting subsection (k) which defines
respirable dust in terms of dust particulates
5 microns or less in size. The new
definition in subsection (e) defines
respirable dust in terms of average
concentration, a method of determining the
amount of dust in a mine atmosphere on the
basis of weight. Since all devices
approved by the Secretary and the Secretary
of Health, Education and Welfare measure
respirable dust on the basis of weight,
rather than particle size, this amendment
is necessary to make the definition of
respirable dust conform to the approved
method of sampling.
Legislative History of the Federal Mine Safety and Health Act of 1977, Subcommittee on Labor of the Committee on Human Resources, Senate, 95th Cong., 2nd Sess. (1978) [Legis. Hist.], at 639.

During the conference between the House and the Senate no change was made in the Senate Committee's provisions concerning respirable dust. 8/ Moreover, the Conference Committee retained the Senate provision making changes in the definition of respirable dust effective immediately upon enactment. 9/

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8/ The Conference Report states:

The Senate bill rewrote the reference to concentrations of respirable dust, to eliminate the reference to the MRE device contained in section 202(e) of the Coal Act, and eliminated a definition of respirable dust contained in section 318(k) of the Coal Act in order to eliminate apparently conflicting definitions of respirable dust which have threatened to interfere with the civil penalty enforcement of the dust sampling program established in section 202 of the Coal Act. The House amendment did not make these changes.

The conference substitute conforms to the Senate bill. [Legis. Hist. at 1341-42.]

9/ The Conference Report states:

The Senate bill provided that the changes in the definition of respirable dust made by section 202 are to become effective immediately. The House amendment did not make these changes in the definition of respirable dust.

The conference substitute ... [provides] that the effective date of the act shall be 120 days after enactment ... and that the revised definition of respirable dust shall become effective upon enactment. [Legis. Hist. at 1346.]

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The legislative history clearly indicates Congressional desire to reverse the affect of the Eastern decision by eliminating the 1969 Coal Act definition of respirable dust, and the allegedly conflicting reference to the MRE device or its approved equivalent. Section 202(e) of the 1977 Mine Act defines concentrations of respirable dust as that dust measured by a "device approved by the Secretary and the Secretary of Health, Education and Welfare."

The judge in this case, however, held that the standard is still unenforceable. In reaching his conclusion the judge emphasized testimony before Congress when it considered amending the 1969 Coal Act that catalogued the inadequacies of the procedures for measuring respirable dust and stated his belief that Congress could not have intended to perpetuate those inadequacies. Rather, he thought it sought to correct them under the 1977 Mine Act by repealing the definition of respirable dust contained in the 1969 Coal Act and by requiring the Secretary of Labor and the Secretary of Health, Education and Welfare to approve devices for the collection of

respirable dust in order to redefine the nature of respirable dust.
The question before us is whether the words "device approved by the Secretary and the Secretary of Health, Education and Welfare" is intended to mean a device that has been or will be approved by the Secretary of the Interior or the Secretary of Labor and the Secretary of Health, Education and Welfare or a device to be approved in the future by the Secretary of Labor and the Secretary of Health, Education and Welfare. The judge stated that Congress intended "that the Secretary of Labor and the Secretary of Health, Education and Welfare come up with a new definition" through the approval of collection devices, which they concededly have not done. We disagree.
Our review of the history of the 1977 amendments to the respirable dust provisions of the 1969 Coal Act, as set forth above, convinces us that Congress intended to remove the obstacles presented by the Eastern decision and to approve the Secretary's existing respirable dust program. It sought to accomplish this by sweeping away the impediment presented by section 318(k)--the 5 micron definition--and to define respirable dust through the collection devices which had already been approved by the Secretary of the Interior and the Secretary of Health, Education, and Welfare. 10/
Our view is supported by the Senate Report which describes the deletion of section 318(k) and the effect of the amended section 202(e), as follows: "Since all devices approved by the Secretary [of the and the Secretary of Health, Education, and Welfare measure Interior] respirable dust on the basis of weight, rather than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling." [Legis. Hist. at 639.] Thus, the desired effect, "to make the definition ... conform to the approved method of sampling", depends in the first instance upon devices which had already been approved at the time the amendment was enacted. This language strongly suggests that Congress did not anticipate that any additional approvals would be necessary before the "definition of respirable dust [would] conform to the approved method of sampling."

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10/ This would not, of course, preclude the Secretary of Labor together with the Secretary of Health, Education and Welfare [now the Secretary of Health and Human Services], from in the future approving new collection devices or withdrawing approving of existing devices. Congress left that determination to the Secretaries.



Our view is further supported by section 301(c)(2) of the 1977 Amendments Act, 30 U.S.C. •961(c)(2) (Supp. II 1978), which provides that the existing orders, decisions, determinations, rules, regulations, etc., in effect on the effective date of the Act remain

in effect until modified, terminated, superseded, set aside, revoked or repealed. 11/ We believe that section evinces Congressional intent to provide as much continuity to the enforcement of mine safety and health as possible, with no intention to create enforcement lapses. This provision, if applicable to the existing Secretarial approvals of the respirable dust collection devices, as we believe it is, assured effectuation of the Senate's desire that the definition immediately conform to the approved method of sampling then in effect.

Finally, we reject as unsound the argument that the word "Secretary", as used in section 202(e) of the 1977 Mine Act, means only the Secretary of Labor because section 3(a) defines Secretary as "Secretary of Labor or his delegate." The amendments in section 202 of the 1977 Mine Act were made effective immediately, while the change in definition of "Secretary" did not become effective until 120 days after enactment. Thus, for us to accept that "Secretary" means only. "Secretary of Labor" is to find that Congress intended at least a 120 day lapse in enforcement of the respirable dust provisions. Given the emphasis placed upon those provisions in the Act and the speed with which Congress moved to correct what was viewed as a defect in the 1969 Coal Act, such a result would be untenable. 12/

Therefore, we conclude that Congress has defined respirable dust as that which is collected with a device approved by the Secretary of the Interior and the Secretary of Health, Education and Welfare before

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11/ Section 301(c)(2) of the 1977 Amendments Act provides:

All orders, decisions, determinations, rules, regulations permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

12/ Moreover. the very fact that section 202(e) was made effective immediately upon enactment, while all other provisions took effect 120 days later, is also, in our view, indicative of Congressional desire to have a valid program immediately upon enactment without any additional action on the Secretary's part.



the effective date of section 202 of the 1977 Mine Act or by the Secretary of Labor and the Secretary of Health, Education and Welfare

thereafter. 30 CFR •70.100(b) is a presently enforceable standard. 13/ The judge's decision to the contrary is reversed and the case is remanded for further proceedings consistent with this decision.

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13/ In reaching this conclusion we recognize that until April 8, 1980 the Secretary of Labor continued to use the five micron definition in his regulations. 30 CFR •75.2(k), repealed April 8, 1980, 45 F.R. 24000 (1980). However, that fact does not, in our view, invalidate samples collected before April 8, 1980 which may include particulates above 5 microns in size. The repeal of section 318(k) removed the statutory basis for 30 CFR •75.2(k), and that regulation became a dead letter.

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