CCASE:
MSHA V. SEWELL COAL
DDATE:
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 29, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v. Docket No. WEVA 79-31

SEWELL COAL COMPANY
Respondent

DECISION

This case arose when the Department of Labor's Mine Safety and Health Administration (MSHA) sought civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) ("the 1977 Mine Act"), for alleged violations of the cab and canopy standard for underground coal mines, 30 CFR $75.1710-1(a). 1/ The relevant facts are not disputed. Sewell Coal Company was cited by MSHA for failing to equip a roof bolter and a shuttle car with canopies. The alleged violations were abated and the Secretary filed a proposal for civil penalties. 2/

Prior to hearing the Secretary and Sewell agreed to a settlement of the matter. The Secretary filed a motion with the administrative law judge to approve the settlement. 3/ The judge denied the motion. The judge found that Sewell could not comply with the cited standard "without diminishing the safety of the miners and depriving them of the

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1/ 30 CFR $75.1710-1(a) states in pertinent part:

[A]11 self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.

2/ The notice of violation pertaining to the roof drill was

terminated when the section in which the drill was being used was abandoned and the equipment withdrawn from use. The citation pertaining to the shuttle car was terminated when the equipment was replaced with another shuttle car that had a canopy.

3/ Section 110(k) of the 1977 Mine Act, 30 U.S.C. $820(k) states:

No proposed penalty which has been contested before the Commission ... shall be compromised, mitigated or settled except with the approval of the Commission.

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protection afforded by section 318(i) of the mandatory safety standards, 30 U.S.C. $878(i)." He further found that the Secretary's failure to comply with section 318(i) rendered the cab and canopy standard "null, void and unenforceable." He therefore dismissed the petition for assessment of penalty. In a memorandum opinion issued in conjunction with his decision dismissing the penalty petition, the judge set forth his reasons for concluding that he was empowered to pass upon the validity of the standard and for finding the standard invalid.

This case presents us with two important threshold questions: whether the judge had the authority to rule upon the validity of 30 CFR 75.1710-1(a) and, if so, whether he properly found the standard null, void and unenforceable.

I.

The standard at issue was promulgated under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(amended 1977) ("the 1969 Coal Act"), and was adopted on October 3, 1972. 37 Fed. Reg. 20689-90 (1972). Therefore, the question of whether the validity of the standard can be challenged in an enforcement proceeding must first be addressed in terms of the relevant procedures under the 1969 Coal Act. The 1969 Coal Act did not have a specific provision regarding the proper vehicle for challenging the validity of standards adopted by the Secretary. Furthermore, case law involving such challenges is sparse. From our review, it appears that validity challenges were left to be raised in the various types of enforcement proceedings provided for in the Coal Act. See $$106(a)(1), 109. For example, in U.S. v. Finley Coal Co., 345 F. Supp. 62 (D.ED. Ky., 1972), aff'd 493 F.2d 285 (6th Cir. 1974), the defense of improper promulgation of standards was raised and accepted in a criminal proceeding brought under the Coal Act. In Morton v. Delta Mining, Inc., 495 F.2d 38, 43 (3d Cir. 1974), rev'd n other grounds, 423 U.S. 403 (1976), a challenge to the Secretary's penalty assessment regulations was upheld in a penalty collection proceeding. See also Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 865-866 (D.C. Cir. 1978)(Leventhal, concurring), in which it is suggested that, under the Coal Act, the promulgation of a health or safety

standard was appropriately challenged directly in the courts of appeals under section 106 of the Act. Apart from statutory enforcement proceedings, a further possible avenue of relief was the institution of a suit for injunctive relief against the enforcement of allegedly invalid regulations. See National Independent Coal Operator's Ass'n v. Kleppe, 423 U.S. 388 (1976).

Although challenges to the validity of standards under the 1969 Coal Act were left to be raised in enforcement proceedings, the administrative body established by the Secretary of Interior to adjudicate contested cases, the Board of Mine Operations Appeals, declined to review such challenges. The basis for the Board's conclusion was that

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the delegation of authority to it by the Secretary of Interior did not encompass the authority to invalidate rules and regulations issued by the Secretary. Buffalo Mining Co., 2 IBMA 226, 242-245 (1973). Because of this perceived limitation on its authority, the Board stated: "The power to invalidate rules and regulations promulgated by the Secretary is not within the scope of authority of this Board or the Administrative Law Judge. This power resides in the U.S. District Courts and the Courts of Appeals." Peabody Coal Co., 4 IBMA 137, 138 (1975).

This basis for the Board's refusal to entertain a challenge to the validity of a standard does not apply to this Commission. The Commission is an independent adjudicative agency, entirely separate from the enforcing agency, and its authority to review Secretarial action is not subject to the same constraints as were perceived by the Board. Helen Mining Co., 1 FMSHRC 1796, 1798-1801 (1979), pet. for rev. filed, Nos. 79-2518, -2537, D.C. Cir., Dec. 19 & 21, 1979. The Commission has been given primary adjudicative jurisdiction over disputes arising under the Act and is authorized to decide independently questions of fact, law, and policy. 30 U.S.C. $823(d). See Bituminous Coal Operator's Assoc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979); Council of the Southern Mountains v. Donovan, No. 79-2982 (D.D.C., May 19, 1981). The determination of the validity of a standard obviously could be an important step in the resolution of disputes brought before the Commission and, absent some appropriate limitation on our authority to do so, we believe validity challenges should be resolved by the Commission.

The Secretary vigorously asserts, however, that section 101(d) of the 1977 Mine Act is such a limitation of our authority. This section, in pertinent part, provides:

Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth daY after said standard is

promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.... The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard. (Emphasis added.)

This provision by its terms concerns pre-enforcement challenges to standards adopted under the 1977 Mine Act, and did not become effective until March 9, 1978. The 1977 Act is silent with respect to the review of standards previously adopted under the predecessor 1969 Coal Act. We fail to see how section 101(d) of the 1977 Mine Act can be applied retroactively to foreclose a challenge to a standard adopted under the 1969 Coal Act five and one half years before section 101(d)'s effective date. In our view, the 1977 Mine Act leaves intact the avenues available

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under the 1969 Coal Act for challenging the validity of standards adopted under that Act. 4/

Therefore, because challenges to the validity of standards adopted under the 1969 Coal Act were left to be raised in enforcement adjudications, because the Commission stands in a position fundamentally different from the Board of Mine Operations Appeals, and because section 101(d) of the 1977 Mine Act is only prospectively applicable to standards adopted under that Act, we hold that a challenge to the validity of a standard adopted under the 1969 Coal Act can be raised and decided in an adjudication before the Commission. 5/

II.

Turning to the question of the standard's validity, for the following reasons we conclude that the judge erroneously found 30 CFR $75.1710-1(a) to be null, void and unenforceable. The starting point for our analysis is to trace the development of section 318(i) of the 1969 Coal Act to determine its impact, if any, on the adoption of the improved cab and canopy standard.

The provisions of section 318(i) first appeared in Senate bill 2917, as reported was section 206(1)(10). Legis. Hist. at 52-58. 6/ In order to fully understand the requirements of section 318(i) it is necessary to read it in the context of the subsections preceding it (section 206(1)(1)-(9) in S. 2917 as reported, and section 305(a)(1)-(12) as passed), and the relevant legislative history behind these sections. As will be explained below, although most of the discussion in the legislative history concerning sections 305(a) and 318(i) is directed to the former, the discussion also sheds

considerable light on the proper interpretation to be given section 318(i) in this case.

Section 305(a)(1)-(12) and section 318(i) were derived from section 206(1)(1)-10) in S. 2917, as reported. The Senate Committee Report accompanying S. 2917 devoted considerable attention to the need for the provisions of section 206{1)(1)-(10) as a means for controlling ignitions and explosions. Legis. Hist. at 151-161. More specifically, much debate was generated over whether to eliminate the distinction between gassy and non-gassy mines, the appropriate time periods for requiring electric face equipment in all mines to be permissible, and the attendant costs and benefits. Id. The Senate Committee resolved these questions by deciding to eliminate the gassy/non-gassy distinction, require the use of permissible equipment but provide for non compliance permits, and establish field testing procedures and economic assistance. Id.

4/ We note that mandatory standards promulgated under the 1969 Coal Act remain in effect under the 1977 Mine Act until the Secretary of Labor issues a new or revised standard. 30 U.S.C. 961(b).

5/ Thus, the application and effect of section 101(d) of the 1977 Mine Act is left to be determined in an appropriate future case.

6/ References to "Legis. Hist" are drawn from the Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Aug. 1975).

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The section-by-section analysis accompanying the Committee Report further discusses the requirements of section 206(1) and, in relevant part, states:

This section would also define the term "permissible electric face equipment" to mean electric equipment taken int or used inby the last open crosscut of the mine--that is the working place--or parts thereof which meets the Secretary s specifications relative to Preventing the emission of a spark or arc which could cause a mine fire or explosion and which includes other features to prevent, where possible, accidents in the use of equipment.

The present regulations of the Bureau of Mines (Schedule 2G) would continue until changed, but the Secretary must immediately develop practical methods, such as field testing, to facilitate approval, for permissibility both under the present regulations and under revised regulations--to account for the mines required to use permissible equipment by this bill. Such methods would recognize that the primary objective is to prevent mine fires and mine explosions from this equipment. Without sacrificing safety, some types of equipment, such as "home-made" equipment in some

small mines, might be made permissible for this purpose. Efforts in this direction would facilitate approvals of such equipment without the necessity for three year examinations of prototypes in the Bureau of Mines laboratory. (Emphasis added.)
Legis. Hist. at 194-195. See also Legis. Hist. at 159-160.
In a statement of the individual views of two members of the Senate Committee, two members noted their opposition to the elimination of the gassy/non-gassy distinction and the required use of permissible electric face equipment in all mines. Legis. Hist. at 227-233. On the floor of the Senate, considerable debate was focused on this aspect of the bill. The issue was addressed at length. Legis. Hist. at 224-245, 353-355, 360-390, 397-398, 603-664, 668-673, 681-703. The Senate debate was resolved in favor of eliminating the distinction between gassy/non-gassy mines concerning the use of permissible electric face equipment, but extending the effective dates for non-gassy mines and establishing a procedure for granting permits for noncomplying equipment. See Legis. Hist. at 832-839 for text of section 206(1) as passed by Senate.
Section 305 of House Bill 13950 dealt with permissible electric equipment. Legis. Hist. at 985-991. This section was similar to section 206(1) of the Senate Bill in that it eliminated the distinction between gassy/non-gassy mines and provided for noncompliance permits in non-gassy mines. See House Committee Report on section 305(a), Legis. Hist. at 1054, and section-by-section analysis at 1077-1079. See also House Floor Debate at 1171, 1203, 1307, 1340-1242, 1350-1365 and 1379. As is clear from a review of these latter cited portions of the legislative history, the focus of the debate over permissibility requirements was different in the House than in the Senate. Whereas in the Senate most of the debate focused on whether to eliminate the gassy/non-gassy distinction, in the House the debate focused on whether in mines formerly classified as non-gassy, the period provided for achieving permissibility was too long a period.
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In conference, the language of the Senate bill was adopted with technical changes and with changes in the time requirements for compliance. Legis. Hist. at 1527, 1564. The language agreed to in conference was enacted as sections 305(a) and 318(i) of the 1969 Act.
With this background, we can now return to consideration of the judge's interpretation of section 318(i). As enacted section 318(i) provides:
"permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the

electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including, where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of section 305(a) of this title within the periods prescribed therein; (Emphasis added).

As previously discussed, the judge apparently invalidated the standard based on his conclusion that in promulgating the cabs and canopies standard the Secretary failed to adopt specifications pertaining to the design, construction and installation of canopies and, therefore, failed to comply with the underscored provisions of this section. In doing so, we believe the judge erred.

Although section 318(i)'s definition of permissible electric face equipment includes equipment whose non-electric features "are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment", our examination of the legislative history has turned up no explanation as to the meaning or impact of that clause. Instead, as is clear from the summary set forth above, all of the discussion in the legislative history is directed at the electrical features of permissible equipment and the concern for preventing ignitions and explosions. Since nowhere in the legislative history is the meaning or purpose of the "other accidents" phrase specifically or impliedly discussed, we believe it is appropriate to view it simply as a provision that provides the Secretary with the authority to also develop permissible design and construction specifications for the non-electric features of electrical equipment. Thus, if particular specifications for cabs or canopies for electric face equipment were developed by the Secretary, he could make such specifications mandatory components of permissible equipment.

Furthermore, the legislative history makes clear that the provision in section 318(i) regarding the continuance of the Bureau of Mine regulations and the need for development of further procedures by the Secretary was directed at maintaining the permissibility requirements for electrical equipment then in effect (Bureau of Mines Schedule 2G, 30 CFR Part 18, subpart A through D), and effectuating the expressed congressional desire that further procedures be established for facilitating compliance with the permissibility requirements by small operators. The Secretary accomplished the latter by adding a new subpart E to Part 18, "Field Approval of Electrically Operated Mining Equipment". See Legis. Hist. at 195; 35 Fed. Reg. 19790; and 36 Fed. Reg. 7007.

Thus, we believe that the judge read section 318(i) too broadly in concluding that the Secretary was required to proceed under that section in promulgating a cabs and canopies standard. Section 318(i) should not be read to preclude the Secretary's use of other available statutory options for the promulgation of safety standards. In our view, the Secretary acted properly procedurally in availing himself of the option to improve the statutory cabs and canopies standard (section 317(j)) under the authority of section 101(a) of the Act. (Secretary may develop, promulgate and revise improved mandatory safety standards).

The judge's decision further suggests, however, that in promulgating the standard the Secretary violated one of the substantive mandates of the statute, i.e., section 101(b)'s mandate that no improved mandatory standard shall reduce the protection afforded miners below that provided by any mandatory health and safety standard. This conclusion of the judge appears to be premised on two interrelated bases. First, because the judge believed the Secretary was required to proceed under section 318(i) in promulgating the improved standard, in his view the Secretary's failure to set forth specifications and certification procedures for cabs and canopies necessarily diminishes the level of safety provided for in the statute. In view of our conclusion that the Secretary was not required to proceed under 318(i) in adopting an improved cabs and canopies standard, this ground for invalidating the standard must be rejected.

Second, it also appears that the judge based his finding of a reduced level of protection, at least in part, upon more specific grounds for finding that compliance with the improved standard causes a diminution of safety. In various parts of his memorandum opinion, the judge refers to cases involving petitions for modification of the application of the cabs and canopies standard, and statements by the Secretary and his agents made in extending and suspending the

application of the standard in various mining heights. As discussed below, we believe each of these grounds is an inadequate basis for invalidating the standard.

The judge cites several petition for modification decisions and notes that the "[t]estimony in modification cases as to the burdens placed upon the operators and the hazards to which miners are exposed is voluminous." We conclude that there is no basis in the record for concluding that 30 CFR $75.1710-1 has reduced the protection afforded ~1409
miners. Each of the modification cases cited in the judge's decision contains findings, based upon testimony of record, that enforcement of 30 CFR 75 1710-1(a) as to certain pieces of equipment will, at various specified heights, diminish the safety of the miners to some degree. The issue in such petition for modification cases is whether the standards as applied at the mines involved would result in a diminution of safety to the miners. Section 301(c) of the 1969 Coal Act; section 101(c) of the 1977 Mine Act. This issue is far different from one requiring resolution of the broader question of whether an improved mandatory standard reduces the level of protection afforded miners generally, and in all applications, below that provided by a mandatory statutory standard. It is this more general issue that would have to be resolved before a standard could be declared invalid because it reduces protection below that provided by a mandatory standard. Because the cited modification cases do not involve or resolve the issue of the standard's general effect on existing levels of safety, they provide no support for the judge's action in striking down the standard in the present case.

Nor do we believe the judge properly relied on statements made by the Secretary and his agents in extending and suspending the standard's requirements in certain mining heights. In first extending the effective date for compliance in mining heights of less than 30 inches, the Secretary stated:

[I]n lower mining heights, particularly those below 30 inches, certain human engineering problems have not been fully solved. While these problems vary depending upon the particular mining equipment, they include impaired operator vision, and operator cramping and fatigue. Because of these unsolved engineering problems the Secretary has determined that certain dates should be extended on and after which coal mines having specific mining heights must install canopies or cabs. This action is considered necessary in order to permit development of additional technology on canopy or cab design, in conjunction with accomplishing equipment design changes to adapt canopies or cabs.

41 Fed. Reg. 23200 (June 9, 1976).

Later, in a notice published on July 7, 1977, the Secretary

reviewed the status of compliance with the standard, and concluded that

"even though existing technology might bc applicable to some equipment used in mining heights below 30 inches ..., substantial amounts of existing equipment could not be retrofitted and brought into compliance at this time.... To meet and correct this situation MESA is developing specifications for cab and canopy compartment configuration for new mining equipment pursuant to section 318(i) [of the 1969 Act]. These regulations and specifications, when completed, will bc processed and promulgated in accordance with section 101 of the Act."

42 Fed. Reg. 34877. Accordingly, compliance with the cabs and canopies standard was suspended in mining heights less than 30 inches. ~1410

We believe the judge read these statements too broadly. They do not show, contrary to the judge's suggestion, that the standard has generally reduced the level of protection afforded miners. Rather, the statements made in extending and suspending the dates for compliance in certain mining heights--heights lower than those involved in the present case--evidence a recognition of certain problems in lower mining heights as well as a recognition of the documented benefits attained by the standard in mining heights above 30 inches. See 42 Fed. Reg. 34876-77. Therefore, it is our conclusion that, on the basis of the record in this case, the judge did not properly find that 30 CFR $75.1710-1(a) reduced the level of protection afforded by the statutory mandatory standard and thus was void because it contravened section 101(b).

In his decision the judge also appears to have found that the standard is invalid because of its "technology forcing" nature. The judge stated:

... the Federal Coal Mine Health and Safety Act of 1969 and its successor place an affirmative obligation upon the Secretary to conduct the research necessary to ensure that the standards he promulgates enhance, rather than decrease, the level of protection afforded the miners. Like the Occupational Safety and Health Act, the 1969 and 1977 Mine Safety Acts do not permit the Secretary to place an affirmative duty on each operator to research and develop new technology.... Thus, the regulation at issue which requires each operator to conduct such research and development--and thereby places miners at risk--is beyond the authority of the Secretary to promulgate and must be deemed invalid and unenforceable.

This rationale appears to be interwoven with his conclusion, rejected above, that the Secretary was required to develop specifications under section 318(i).

The record in the present case does not support the judge's suggestion that the Secretary did not properly follow the directive of section 101(c) in promulgating the cab and canopy standard. 7/ The preamble to the adoption of the standard at 37 Fed. Reg. 20689 (October 3, 1972), reflects that the statute's notice and comment rulemaking procedures were followed in promulgating the standard. A proposed rule was published (36 Fed. Reg. 5244 (March 18, 1971)), objections were filed, and an evidentiary hearing was held. On the basis of the rulemaking record the Secretary concluded:

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7/ Section 101(c) of the 1969 Coal Act in relevant part provided: [D]evelopment and revision of mandatory safety standards shall be based upon research, demonstrations, experiments, and such other information as may bc appropriate. In addition to the attainment of the highest degree of safety protection for miners, other considerations shall be the latest scientific data in the field, the technical feasibility of the standards, and experience gained under this and other safety statutes.

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(5) Practical technology is available to design and construct a substantial canopy or cab for installation on self-propelled electric face equipment of sufficient strength to protect the equipment operator from a non-massive roof fall.

(6) Although practical technology is available to design and construct a substantial canopy or cab for installation on self-propelled electric-face equipment of sufficient strength to protect the equipment operator from a nonmassive roof fall, it has been shown that in mining heights less than 72 inches, additional research and study is necessary to solve human engineering problems such as reduction of visibility and cramping of the equipment operator. Such research and study is currently being undertaken on behalf of the Bureau of Mines and results will be available in calendar year 1973. Depending upon the results of such research and study, as well as experience gained in the course of enforcement of the Federal Coal Mine Health and Safety Act of 1969 and other pertinent statutes, the timetables, based on mining heights, for the installation of canopies or cabs on self-propelled electric-face equipment, contained in $75.1710-1(a), (2), (3), (4), (5), and (6), may be shortened or lengthened.

(7) Observation of self-propelled electric-face equipment presently in use (including machinery presently equipped with canopies or cabs) shows that practical technology is available to retrofit existing self-propelled electric face equipment with substantially constructed canopies or cabs.

(8) Manufacturers of new self-propelled electric-face equipment need the same amount of time to design and install substantially constructed canopies or cabs on such equipment as do coal mine operators to design and install canopies or cabs on equipment presently in use.
37 Fed. Reg. 20689
On the basis of these findings, the Secretary adopted 30 CFR $75.1710-1 requiring cabs and canopies, establishing a staggered schedule for compliance in descending mining heights, and specifying certain criteria for the construction of such cabs and canopies. In regard to the latter, the standard provides in part:
For the purposes of this section, a canopy or cab will be considered to be substantially constructed if a registered engineer certifies that such canopy or cab has the minimum structural capacity to support elastically: (1) a dead weight load of 18,000 pounds, or (2) 15 p.s.i. distributed uniformly over the plan view area of the structure, whichever is lesser.
30 CFR $75.1710-1(d).
Thus, as adopted the standard combines specification and performance criteria, i.e., it specifies the type of protection required (cabs or canopies) and specifies minimum support specifications, but it leaves to the operator or manufacturers the duty to determine precisely how such performance can bc achieved on each particular type of equipment used.
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Certainly, if the judge suggests that the Secretary is without authority to adopt performance standards under the Act, this suggestion must be rejected. We find no provision in the Act prohibiting the use of performance standards. Indeed, performance standards are recognized as being a valuable and legitimate means of regulation. As has been stated:
Performance standards are generally to be preferred over those which contain specific requirements, as they give employers latitude in selecting a means of compliance which is best suited to their operation.
Diebold, Inc., 3 BNA OSHC 1897, 1900 (1976)(OSHRC), rev'd on other grounds, 585 F.2d 1327 (6th Cir. 1978). Thus, simply because the standard may leave the specific means for achieving compliance up to an operator, does not mean that the Secretary has impermissibly shifted the burden of research to an operator. To the contrary, the findings accompanying the adoption of the standard shows that sufficient practical technology existed warranting adoption of the standard.
The judge relied heavily upon American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978), to support his conclusion that

"the 1969 and 1977 Mine Safety Acts do not permit the Secretary to place an affirmative duty on each operator to research and develop new technology." The judge again appears to have painted with too broad a brush. The Court in American Iron and Steel was interpreting an OSHA standard that combined specification and performance elements in requiring compliance with a specified coke oven emissions exposure limit, and, if after implementation of all engineering and work practice controls compliance was not achieved, mandated that "the employer ... research, develop and implement engineering and work practice controls necessary to reduce exposure. 29 CFR $1910.1024(f)(1)(ii)(b). The Court found the statute did not allow the Secretary to place an affirmative duty upon an employer to research and develop new technology. 577 F.2d at 838. There is, however, no affirmative duty for research and development placed upon an operator in the cabs and canopies standard.

Moreover, the Court found the performance requirements of the standard there challenged to be properly promulgated, stating:

As we have construed the statute, the Secretary can impose a standard which requires an operator to implement technology "looming on today's horizon," and is not limited to issuing a standard solely based upon technology that is fully developed today.

In the present case, the judge found that "canopy technology looms on some future horizon, not today's." This finding, however, is supported by a reference to the suspension of the canopy requirements in heights 30 inches or under, 42 Fed. Reg. 34876, and to decisions granting petitions for modification. The judge ignored the parts of the canopy suspension notice relevant to this case, i.e., the finding of existing practical technology in mining heights above 30 inches. In the notice suspending the standard under 30 inches the Secretary stated:

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The results of the compliance study indicate that considerable progress has been made in meeting the requirements of the standards, except in mining heights less than 30 inches. Of 12,910 pieces of equipment reported to be affected by the requirements in mining heights of 36 inches and above (actual height from bottom to top of 48 inches or more).9,631 pieces of equipment (approximately 75 percent) were in compliance with the standards. In mining heights of 30 inches or more, but less than 36 inches (actual height from bottom to top of 42 inches, but less than 48 inches) 581 of 2,137 pieces of equipment required to meet the standards were reported to be in compliance (approximately 27 percent). Compliance in mines with mining heights below 30 inches (actual height from bottom to top of less

than 42 inches) was negligible.

This study also revealed that cabs or canopies continue to have a tremendous impact on the reduction of injuries or fatalities involving operators of self-propelled electric face equipment, including shuttle cars. Reports indicate that from 1974 through 1976 at least 111 equipment operators have been saved from certain death or serious injury because a cab or canopy protected the operator from falls of roof, face, or rib. Sixty of these "saves" occurred during 1976. Moreover, an analysis of haulage fatalities indicates that the number of equipment operators killed due to being pinned, squeezed, or crushed against the roof, rib, or other equipment, and dislodged posts have also been significantly reduced.

42 Fed. Reg. 34877. We believe this finding shows that an appropriate level of practical cab and canopy technology in fact existed. Therefore, we conclude that the record docs not support the judge's finding that the general performance standard adopted by the Secretary places an illegal burden on mine operators.

Each of the grounds relied upon by the judge have failed; his conclusion that 30 CFR $75.1710-1(a) is null, void and unenforceable is reversed.

III.

Apart from his finding that the standard was invalid, the judge's dismissal of the penalty petition was also based on a finding that "on the dates the aforesaid notice and citation issued compliance with ... 30 CFR $75.1710 1(a) was impossible without diminishing the safety of miners...." The judge made this finding prior to hearing or stipulation of facts. The only relevant materials in the record when this finding was made were the notice and citation. Sewell's response denying the violations, and the Secretary's motion to approve settlement.

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Regarding the notice of violation pertaining to the roof drill, the motion stated:

At the time the Notice was issued, the technology to abate the citation was in an experimental stage. Further, in some instances the use of canopies on Galis drills had caused injuries to employees performing tramming operations. Petitioner recognized the difficulties Respondent was experiencing in attempting to abate the violation and extended the abatement period on three occasions subsequent to the Notice. Abatement finally was achieved by abandonment of the cited ... Section....

Accordingly, although a violation of the cited standard existed, only a nominal penalty for the violation would be

appropriate.

As to the citation concerning the shuttle car, the motion stated:

> At the time of the inspection, no cab or canopy was commercially available for Respondent's use on a shuttle car working in 43-inch high coal. Nevertheless, Respondent was able to provide a shuttle car to work in the cited area which had been specially equipped with a canopy. Respondent has a program to equip all of its underground equipment with cabs or canopies wherever it is possible to do so. In light of Respondent's good faith in attempting to comply with the cited technology forcing standard, Petitioner moves for approval of the $25.00 penalty ..., to which the parties have agreed. (Emphasis added.)

Thus, although the settlement agreement reflects that difficulties were encountered by Sewell in attempting to generally comply with 30 CFR 75.1710-1(a), the agreement falls short of stating that compliance in the specific instances at issue here was not possible without diminishing the safety of miners. In fact, with regard to the second citation the settlement agreement states that Sewell "was able to provide a shuttle car to work in the cited area which had been specially equipped with a canopy." The judge's finding that safe compliance was not possible appears to be directly contrary to this statement.

The judge's finding was based in part on a decision of the Administrator for Coal Mine Safety and Health in a petition for modification case filed by Sewell under section 301(c) of the 1969 Coal Act. Sewell Coal Co., No. M-76-131, April 27, 1979. In that proceeding, the Administrator granted in part and denied in part a petition for modification of the application of 30 CFR $75.1710 1(a) to numerous pieces of electric face equipment in several of Sewell's mines, including the mine in which the violations at issue here arose. The judge's decision provides no clear discussion of the interrelationship between the factual

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matters at issue in this enforcement proceeding and those at issue in the modification case, nor is the legal effect that the grant of a modification petition has on a pending enforcement proceeding discussed. See our decision in Penn Allegh Coal Co., PITT 78-97-P, issued this date. We note that in the present case, unlike the situation before us in Penn Allegh, a petition for modification was filed prior to the issuance of the notice and citation. Id. at n.10. In view of the fact that our decision in Penn Allegh discusses for the first time the relationship between enforcement proceedings and modification proceedings, and because the parties had no opportunity prior to the judge's order of dismissal to present

arguments addressing this issue in the context of the facts of this case, a remand for further proceedings is necessary.

Accordingly, the judge's decision is reversed and the case remanded for further proceedings consistent with this opinion.

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Distribution

Cynthia L. Attwood
Michael A. McCord
Leslie J. Canfield
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

Fletcher A. Cooke
The Pittson Coal Co. Group
Sewell Coal Company
Lebanon, Virginia 24266

Administrative Law Judge Joseph B. Kennedy
Office of Administrative Law Judges
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike
lOth Floor.Skyline Center #2
Falls Church, Virginia 22041