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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 29, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 79-360

KING KNOB COAL COMPANY, INC.

DECISION

This civil penalty case under the 1977 Mine Act, 30 U.S.C. $801 et seq (Supp. III 1979), involves a conflict between a mandatory safety and health standard and MSHA's purported interpretation of that standard in its interim inspector's manual. For the reasons set forth below, we hold that the standard controls over the manual and affirm the administrative law judge's decision.

The essential facts are undisputed. In January 1979, a fatal accident occurred on the haulage road of a King Knob Coal Company strip mine when an employee was struck by one of King Knob's three-quarter ton pickup trucks being driven in reverse. The pickup was used in King Knob's mining operations for transportation purposes. The pickup was not equipped with a backup alarm and as a result King Knob was cited for violating 30 CFR $77.410, which provides:

Mobile equipment; automatic warning devices.
Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

The judge held that the plain language of $77.410 includes pick-ups within the class of regulated vehicles and concluded that "[s]ince King Knob concedes that the subject pickup truck did not have the specified warning device it is apparent that the violation is proven as charged." 2 FMSHRC 1679, 1680 (1980).

The judge rejected King Knob's liability defense that it was entitled to rely on an explanation of $77.410 contained in the 1978 MSHA Interim Mine Inspection Manual. The Manual is an informally promulgated handbook containing "guidelines" to aid inspectors in enforcement of the Mine Act. The guideline explaining $77.410

excepts pickups from the warning device requirement provided that their rear views are "not obstructed." 1/ The judge classified this reliance argument as "essentially one of equitable estoppel" and held that estoppel was inapplicable to the federal government in the discharge of "sovereign," as opposed to "proprietary," functions. 2 FMSHRC at 1680. He found the enforcement of mine safety standards "a unique governmental function for the benefit of the public" and concluded that equitable estoppel could not "be successfully invoked as a defense to violations of the Act and its implementing regulations." Id. However, in determining the appropriate penalty the judge considered the reliance effect of the Manual's exception. Based on his conclusion that the pickup's rear view was unobstructed, he found that "King Knob could have reasonably believed that it was in compliance with MSHA's policy excepting pickup trucks from the backup alarm standard where the operator's view to the rear is not obstructed." Id. at 1682. Therefore, he held that King Knob was not negligent in failing to have a backup alarm on the truck and assessed a nominal penalty of $10. Id.

We first consider the liability issues without reference to the Manual. King Knob contends that $77.410 refers only to heavy off-road vehicles and not to light-weight highway vehicles. King Knob argues that because "loaders," "tractors," and "graders"--other enumerated kinds of "mobile equipment"--are large vehicles, "trucks" must similarly refer to large off-road trucks commonly used for hauling heavy loads at surface mines. King Knob bolsters this argument by noting that where the term "mobile equipment" appears in other sections in the subpart containing $77.410 (Subpart E, "Safeguards for mechanical equipment"), large vehicles are contemplated.

We do not agree. "Trucks" are expressly mentioned as one kind of regulated "mobile equipment." "Truck" is a generic term and, of course, pickups are a familiar type of light truck. Since $77.410 does not

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1/ The Manual provides:

POLICY

Any vehicle being operated on the mine property that is capable of going in reverse shall be equipped with an automatic warning device which shall give an audible alarm when such equipment starts moving in a reverse direction, and remain in operation during the entire reverse movement.

The warning device required by this section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles, where the operator's view directly behind the vehicle is not obstructed. Service vehicles making visits to surface

mines or surface work areas of underground mines are not required to be equipped with such warning device. (Emphasis added). [Interim Mine Inspection and Investigation Manual, Ch. III, p. 205 (March 1978)].

A virtually identical provision was included in a predecessor manual, MESA's 1974 Surface Coal Mine Inspection Manual.

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expressly differentiate among various types of trucks subject to coverage, its plain language extends to pickups. This conclusion is reinforced by the breadth of $77.410's central term, "mobile equipment." In Lucas Coal Company v. IBMOA, 522 F.2d 581, 584-585 (3rd Cir. 1975), the court treated "mobile equipment" as an extensive term encompassing several different vehicles used in a mining operation, specifically bulldozers. We concur in the court's view that "[t]he five examples set forth in $77.410 ... preceded by the words 'such as,' are plainly not all-inclusive as to the section's coverage." 522 F.2d at 585.

Further, the obvious purpose of $77.410 is to protect miners from vehicles of various size moving in reverse. 2/ The standard is premised on the general recognition that a driver's rear view is ordinarily not as good, and hence as safe, as the forward view. Even if their role at a mine is primarily auxiliary, three-quarter ton pickups are nevertheless medium-sized vehicles whose relative speed compared with heavier vehicles constitutes a hazard in the busy mine setting. This clear danger as well as the facially broad reach of both "trucks" and "mobile equipment," lead us to conclude that recognizing the exception for which King Knob contends would constitute amendment rather than interpretation of the standard. Certainly, if the standard's drafters had intended to except light trucks from the overall class of "trucks," they could easily have written the standard to reflect the exception. The answer to King Knob's reliance on other references to mobile equipment in subpart E is that subpart E addresses diverse safety concerns. The various sections within subpart E deal with different problem areas, with each of these areas requiring varying degrees of coverage. Apart from the Manual, therefore, King Knob's three-quarter ton pickup truck used in mining operations was "mobile equipment" within the meaning of $77.410; since King Knob conceded that the pickup lacked a backup alarm, a finding of violation is dictated unless the effect of the Manual provisions compels a different result.

The MSHA Manual's pickup exception injects two issues into what would otherwise be a straightforward analysis of $77.410's coverage: whether we are required to read $77.410 as if the pickup exception were written into it and, even if we are not, whether the existence of the Manual exception estops the government from prosecuting this case.

2/ We note that the standard's mention of "forklifts," which are normally small or medium-sized, indicates that the class of covered vehicles is not exclusively limited to the very large or very heavy.
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Regarding the Manual's general legal status, we have previously indicated that the Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission]." Old Ben Coal Company, 2 FMSHRC 2806, 2809 (1980). In general, the express language of a statute or regulation "unquestionably controls" over material like a field manual. See H.B. Zachry v. OSHRC, 638 F.2d 812, 817 (5th Cir. 1981). We find the OSHRC's analogous treatment of a similar OSHA manual generally applicable: "the guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straightjacket [;they] do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals." FMC Corporation, 5 OSHC 1707, 1710 (1977). This does not mean that the Manual's specific contents can never be accorded significance in appropriate situations. Cases may arise where the Manual or a similar MSHA document reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect. 3/ This case, however, does not present that situation.
We cannot view the Manual commentary on $77.410 as a genuine interpretation or general policy statement; rather, it is clearly an attempted modification of the standard's requirements. The commentary contains an "obstructed view" and pickup exception not even remotely alluded to in the regulation's language. Indeed, as we concluded above, a pickup exception is inconsistent with the standard's broad language. Section 101(a) of the 1977 Mine Act (30 U.S.C. $811(a)) requires all rules concerning mandatory health or safety standards to be promulgated in accordance with $553 of the APA (5 U.S.C. $553). Further, $101(a)(2) requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health

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3/ An agency interpretation is a statement of what the agency thinks a statute or regulation means. Chamber of Commerce of U.S. v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980). General statements of policy are "'statements issued by an agency to advise the public of the manner in which the agency proposes to exercise a discretionary function.'" Amer. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980), quoting Attorney General's Manual on the Administrative Procedure Act, 30 n.3 (1947). Interpretations and general policy statements are distinct from ordinary "legislative" regulations, are excepted from

the APA's notice and comment procedures (infra), and, in general, lack the force and effect of law. Chrysler Corp. v. Brown, 441 U.S. 281, 301-303 & n. 31 (1978). Although a reviewing body is not bound by an interpretation or general policy statement, it may choose to defer to and apply such pronouncements, thereby endowing them with a status that equals or approximates the force and effect of law. Agency expertise, the soundness of the pronouncement in question, and the formality with which the matter was promulgated are all factors which bear on deference. We note that the Manual is a relatively informal compilation not published in the Federal Register, and those factors weigh against deference.

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or safety standard" and to permit public comment on the proposed regulation (emphasis added). Section 553 of the APA requires that to the extent a rule is more than an interpretation or general statement of policy, it is subject to that Act's notice and comment requirements. The Manual's attempted modification of $77.410 was not promulgated in accordance with these requirements. Therefore, the Manual's provisions on $77.410 lack the force and effect of law and $77.410 stands as written. See Chamber of Commerce of U.S. v. OSHA, 636 F.2d at 468-471; Brown Express, Inc. v. United States, 607 F.2d 695, 700-701 (5th Cir. 1979); Firestone Synthetic Rubber & Latex Co. v. Marshall, 507 F. Supp. 1330, 1334-1339 (E.D. Tex. 1981).

This holding means that we will apply $77.410 as construed above without reference to the Manual. However, this disposition does not completely resolve the liability issue in this case. Even if the Manual's pickup and obstructed view language has no legal effect, King Knob argues that the Secretary is estopped from finding a violation because King Knob was equitably entitled to rely on the "pickup exception." 4/

King Knob's argument has some force. The Manual's Introduction invites trust by stating in part that:

> The Manual is also intended to acquaint the mining industry, State inspection agencies, Federal agencies and other interested persons and organizations with the administration of the Act and Regulations. [Id. at vii.]

There is no disclaimer in the Introduction warning an operator that the Manual is not a source of law binding on the Secretary, the Commission, or courts. Nevertheless, we cannot accept King Knob's position.

The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not

expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Lazy F.C. Ranch, 481 F.2d 985, 987-990 (9th Cir. 1973), United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent

4/ In connection with the estoppel issue, we find that substantial evidence supports the judge's finding that the pickup's rear view was unobstructed. Thus, King Knob fits squarely within the Manual's purported exception. We reject the Secretary's argument on review that the pickup's tailgate constituted an obstruction. Since all pickups have tailgates, recognizing tailgates as "obstructions" would make the Manual's commentary virtually meaningless.

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with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty (as the judge did here).

Even the decisional trend which recognizes an estoppel defense refuses to apply the defense "if the government's misconduct [does not] threaten to work a serious injustice and if the public's interest would ... be unduly damaged by the imposition of estoppel" (emphasis added). United States v. Lazy F.C. Ranch, 481 F.2d at 989. In view of the availability of penalty mitigation as an avenue of equitable relief, we would not be persuaded that finding King Knob liable--the Manual not-withstanding--would work such a "profound and unconscionable injury" (Lazy F.C. Ranch, 481 F.2d at 989) that estoppel should be invoked. Finally, the record is devoid of any showing that King Knob actually relied on the Manual's exception, rather then merely being "entitled" to rely on it. Courts have required that actual reliance be shown. See, for example, United States v. Georgia-Pacific Co., 421 F.2d at 96-97 n. 4.

In sum, we find the Manual commentary to be without legal effect reject King Knob's estoppel arguments, and therefore affirm the judge's liability findings on the basis of our construction of $77.410 above. In reaching this result, we do not adopt the judge's "sovereign/proprietary" governmental function distinction, which we deem unnecessary to resolution of liability.

We agree with the judge's handling of the penalty issue. MSHA's equivocal enforcement policy made it difficult and confusing for a reasonable operator to know the true standard of care imposed by $77.410, and, hence, whether it was in a state of violation or compliance. Even though King Knob did not show actual reliance on the Manual, the proper negligence question is either what it actually knew, or what it should (or could) have known, concerning the appropriate standard of care. We think that the confusion caused by the Manual interfered with King Knob's ability to ascertain the true standard of care and therefore placed it in a position where it could have believed it was in compliance. Penalizing King Knob for confusion caused by MSHA strikes us as unfair and harsh. Under these circumstances, we agree with the judge that King Knob was not negligent. We also find support in United States v. American Greetings Corp., 168 F.2d 45, 50 (N.D. Ohio 1958), aff'd per curiam, 272 F.2d 945 (6th Cir. 1959). There, the Court imposed liability despite estoppel claims, but reduced the penalty under analogous circumstances of an agency's "misleading" a respondent.

We emphasize that our decision prospectively obviates future confusion surrounding the meaning and scope of $77.410. The decision will also alert the public to the need for using the Manual, and similar

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materials, with caution. We also express the hope that this opinion will encourage MSHA to use its Manual in a responsible manner. In our view, such materials should contain, at the least, a precautionary statement warning users of their informality and non-binding nature. As this case unfortunately demonstrates, less than careful dissemination of such materials can cause enforcement and compliance confusion and, at worst, can diminish the protection of the Act and implementing regulations.

For the foregoing reasons, we affirm the judge's decision

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