CCASE:
MSHA V. EASTOVER MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
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SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. VA 80-145

EASTOVER MINING COMPANY

DECISION

In this case we are called upon again to interpret the cab and canopy standard for underground coal mines, 30 C.F.R. $ 75.1710-1(a). 1/ This mandatory standard requires installation of cabs and canopies on self-propelled electric face equipment pursuant to a staggered schedule coordinated with progressively descending "mining heights." In section

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1/ Section 75.1710-1(a) states in part:

[A]11 self-propelled electric face equipment ... 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 subparagraph (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. The requirements of this paragraph (a) shall be met as follows:

(1) On and after January 1, 1974, in coal mines having mining heights of 60 inches or more;

(2) On and after July 1, 1974, in coal mines having mining heights of 60 inches or more, but less than 72 inches;

(3) On and after January 1, 1975, in coal mines having mining heights of 48 inches or more, but less than 60 inches;

(4) On and after July 1, 1975, in coal mines having mining heights of 36 inches or more, but less than 48 inches;

(footnote 1 continued)
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317(j) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979), the statutory standard that section 75.1710-1(a) implements, the Secretary is authorized to require cabs and canopies for such equipment "where the height of the coalbed permits." 2/ The central issues in this case are the meaning and relationship of the key phrases, "height of the coalbed" and "mining heights." For the reasons that follow, we hold that "height of the coalbed" in section 317(j) refers to actual mined height, and that section 75.1710-1(a) therefore properly keys compliance to "mining height." We accordingly reverse the judge's decision, which is premised on a contrary view of the meaning of the statutory language. 3/

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footnote 1 cont'd.

(5) (i) On and after January 1, 1976, in coal mines having heights of 30 inches or more, but less than 36 inches;

(ii) On and after July 1, 1977, in coal mines having mining heights of 24 inches or more, but less than 30 inches;

(6) On and after July 1, 1978, in coal mines having mining heights of less than 24 inches.

In Sewell Coal Company, 3 FMSHRC 1402 (June 1981), we rejected a challenge to the validity of section 75.1710-1(a). We concluded that in promulgating this standard the Secretary had "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." 3 FMSHRC at 1408.

2/ Section 317(j) of the Mine Act. 30 U.S.C. $ 877(j), states:

An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the miners operating such equipment from roof falls and from rib and face rolls.

This language was originally contained in section 317(j) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976) (amended 1977), and was unchanged when the Mine Act was enacted.

3/ The judge's decision is reported at 3 FMSHRC 1155 (April 1981).

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I.

The facts of this case are not disputed. On April 10, 1980, an

MSHA inspector observed a continuous mining machine being operated without a canopy in Eastover's No. 1 mine. 4/ A continuous mining machine is "self-propelled electric face equipment" within the meaning of the standard. The machine was being used in the entry of a section where the coal seam had narrowed due to a roll condition. In order to give the machine sufficient space in which to operate, approximately 15 inches of top and bottom rock were being extracted along with the coal. The floor-to-roof extracted height, or actual mined height, of the entry in question was 53 inches; the height of the coal seam at its lowest point in the entry was 38 inches. 3 FMSHRC at 1155. The inspector cited Eastover for a violation of section 75.1710-1(a), and the Secretary subsequently sought a civil penalty for the alleged violation.

Following a prehearing conference, Eastover moved for summary judgment. The company contended the Secretary had exceeded his authority in promulgating section 75.1710-1 and that as a consequence the standard was without force and effect. The judge issued an order to show cause why the Secretary's penalty petition should not be dismissed. The Secretary responded, asserting the validity of his promulgation of the standard. However, prior to a ruling on the show cause order or a hearing on the merits, the parties agreed to a settlement which the Secretary, on behalf of the parties, moved the judge to approve. 5/ The judge denied the settlement motion and granted Eastover's prior motion for summary judgment.

In his decision, the judge concluded that no violation of section 75.1710-1(a) existed at the time the citation was issued and that, pursuant to our decision in Co-op Mining Co., 2 FMSHRC 3475 (December 1980), the proposed settlement had to be rejected and the case dismissed. In reaching this result, the judge construed the phrase "height of the coalbed" in section 317(j) of the Mine Act to mean height of the coal seam. 3 FMSHRC at 1156. He noted that the Bureau of Mines' Dictionary of Mining, Mineral, and Related Terms defines a coalbed as "a bed or stratum of coal." Id. Although the actual extracted height,

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4/ Eastover had initially operated the machine with a canopy, but had removed it after MSHA alleged that the canopy configuration being used made the machine unsafe for the equipment operator.

5/ Eastover did not expressly withdraw its previous summary judgment motion. The settlement motion does not contain any express admission or denial by Eastover of the alleged violation. However, the settlement motion contains references to the seriousness and good faith abatement of the violation."

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floor to roof, in the mine entry in question was 53 inches, the

height of the coalbed or coal seam was 38 inches. Taking 38 inches as "the controlling height for determining the requirement for canopies," the judge stated that the Secretary had suspended the cab and canopy requirement in "coalbed heights below 42 inches" and concluded that no violation existed at the time the citation was written. Id. at 1155. 6/

6/ Enforcement of some of the standard's requirements was suspended in 1976 and 1977. In order to place the suspension in proper prospective, we briefly review the history of the standard, both under the Coal Act when the standard was promulgated by the Secretary of Interior, and since the enactment of the Mine Act.

In 1971, acting under the authority of section 101(a) of the 1969 Coal Act, the Secretary of Interior proposed an improved mandatory canopy standard that made no reference to mining height or coal seam height. 36 Fed. Reg. 5244 (1971). Based on objections received, the Secretary scheduled a hearing to determine whether there should be a "staggered installation schedule ... dependent upon the mining height of the particular mine." 37 Fed. Reg. 12643 (1972). After the hearing, the Secretary concluded that technological problems mandated a staggered schedule of compliance keyed to descending "mining heights." 37 Fed. Reg. 20689 (1972). The latter phrase was not defined in either the Secretary's notice of the hearing or his subsequent findings. Section 75.1710-1(a) was thereafter published with the compliance schedule contained in subparagraphs (1) through (6). In an internal memorandum dated September 20, 1973, the Secretary for the first time expressly defined "mining height," and described it as "the distance from the floor to finished roof less 12 inches."

During the early enforcement history of section 75.1710-1(a), it was discovered that certain human engineering problems arose when canopies were installed at the lower mining heights. Accordingly, on June 9, 1976, the Secretary of Interior extended the dates for compliance with regard to "mining heights" of less than 30 inches--that is, the heights covered in section 75.1710-1(a)(5)(ii) and (6). 41 Fed. Reg. 23200 (1976). In this suspension notice, the Secretary retained the definitional approach to "mining height" set forth in his 1973 memorandum. Application of that definition meant that the suspension was directed to heights of less than 42 inches, since the 30 inches referred to in the standard was a remainder after subtraction of 12 inches. On July 7, 1977, the dates for compliance in sections with mining heights of less than 30 inches (that is, 42 inches from floor to finished roof) were indefinitely suspended to allow time to develop specifications for cab and canopy compartment configurations at those lower heights. 42 Fed. Reg. 34876 (1977). After.the Mine Act became effective, the Secretary of Labor continued in effect the Secretary of Interior's suspension notice and

adopted (with minor refinements) his definitional approach to "mining height." MSHA Policy Memorandum No. 80-4C (August 22, 1980).
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The judge rejected the Secretary's various arguments that "mining height" as used in the standard, meant the actual extracted or mined height--that is, the distance from the roof to the floor. 3 FMSHRC at 1156-58. The judge reviewed the record of rulemaking as reported in the Federal Register and found nothing to show that the "plain meaning" of the statutory term coalbed height had been revised or amended. The judge acknowledged that the Secretary of Interior's enforcement instructions issued on September 30, 1973, and his suspension of the enforcement of section 75.1710-1(a)(5)(ii) and (6) (n. 6 above) indicated that "mining height" meant actual mined height. However, the judge found that neither was issued in accordance with substantive or procedural rule making requirements. Consequently, he concluded, neither effected a "legally binding change" in the authority, granted by section 317(j), to require canopies on the basis of the "height of the coalbed." Id. Thus, the judge determined that the interpretation presently contended for by the Secretary had no valid legal basis, and that the Secretary of Interior, in promulgating the standard, "must be taken to have ascribed the same meaning to the term 'mining height' as Congress had ascribed to the term 'coalbed height'." Id. at 1157 n. 6.

II.

The two central issues in this case are the meaning of the phrase, "height of the coalbed" in section 317(j), and whether "mining height" in section 75.1710-1(a) is consistent with that statutory language. To understand the meaning of section 317(j) we look not only to its words, but also to the intent underlying the words.

The statutory canopy standard first appeared in the Senate and House bills that ultimately became the 1969 Coal Act. 7/ A prime motive in enactment of the 1969 Coal Act was to "[i]mprove health and safety conditions and practices at underground coal mines" in order to prevent death and serious physical harm. Legis. Hist. at 128. One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of fatalities in underground mines. 8/

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7/ Section 217(f) of S. 2917 and section 317(k) of H.R. 13950 stated:

An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the

operator of such equipment from roof falls and from rib and face rolls.
Senate Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part 1 Legislative HistorY of the Federal Coal Mine Health and Safety Act of 1969 as Amended Through 1974, at 79 and 1013 (1975)("Legis. Hist.").
8/ See Legis. Hist. at 134, 136, 148, 149, 210, 538-547, 610, 1125-1126.
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To combat the roof fall problem, Congress devised a two pronged plan. One remedial course of action was aimed at reducing the number of falls by requiring operators to adopt various roof control practices, including comprehensive roof control plans. 9/ The second important remedial provision authorized the Secretary to protect miners from those falls that did occur by requiring the installation of cabs or canopies on electric face equipment. In the express words of section 317(j), the devices were to be installed "to protect the miners operating such [electric face] equipment from roof falls and from rib and face rolls." The devices were to be installed where "the height of the coalbed permits."
As the judge noted, the word "coalbed" may be used in mining parlance to mean bed or stratum of coal. We conclude, however, that when the drafters used the word "coalbed" as a benchmark for the canopy requirement, they were not referring literally to the height of the coal bed, but were conditioning installation on the actual height of the material being extracted. Although the legislative history does not contain an express explanation as to why the phrase was used, Congress was concerned with protecting miners under actual mining conditions. In practice, sound mining methodology and safety considerations often dictate extraction of more or less than the entire coal seam itself. Common sense suggests that in practice it is the actual extracted height in the entry rather than the coal seam height that provides the space in which to accommodate a canopy. Thus, given Congress' expressed desire to protect life and limb, we conclude that the drafters used the term "height of the coalbed" to indicate that the Secretary could require canopies where the actual extracted or mined height permitted. 10/
This conclusion is reinforced by examining the practical consequences of interpreting "height of the coalbed" in its technical sense, for such an interpretation yields results that impair the protection Congress so

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9/ See Legis. Hist. 150, 1125-1126.
10/ The House Committee on Education and Labor in its report on H.R. 13950 stated that section 317(k) of that bill, which is identical to

section 317(j) of the Act:

> authorize[d] the inspector to require protective cabs on face equipment where the height of the coal permits installation of such cabs to protect the operator from roof falls, and from rib and face rolls.

Legis. Hist. at 1103. The judge cited to this statement in support of his conclusion that Congress intended the phrase "where the height of the coalbed permits" to mean that canopies would be required where the height of the stratum of coal permits. 3 FMSHRC at 1156. We are not convinced. The lack of consistency in the use of terms emphasizes to us that the drafters were not using "height of the coalbed" in its technical, geologic sense, but rather in a colloquial fashion to indicate the Secretary could require canopies where the extracted height provided sufficient room for their use.

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urgently sought to provide. For example, because of adverse top or bottom conditions an operator may be compelled to take top or bottom rock when extracting coal. If the coal seam height were lower than that at which canopies were required but the extracted height were higher, no canopy protection would be mandated. The same result would follow if, as here, an operator took top or bottom rock because the mining equipment was higher than a thin coal seam which was being mined.

In mines where it is good practice not to mine the entire coal seam but to leave top or bottom coal, the judge's interpretation could also lead to a literal requirement that canopies be provided although the floor to ceiling space could not safely accommodate them. This could subject miners to the danger of the canopies striking roof support or to the danger of being crushed while trying to see around too low a canopy. In short, we conclude that the phrase "height of the coalbed" refers to the actual mined or extracted height from floor to roof, rather than to the height of the coal seam itself.

The Secretary's use of the phrase "mining height" in section 75.1710-1(a) is thus entirely consistent with Congress' intent. The plain meaning of the term "mining height" connotes extracted height--that is, the height mined. Thus, the phrase fulfills the intent of its authorizing provision, section 317(j). We accordingly reject the judge's suggestion (3 FMSHRC at 1156-57) that the Secretary revised or amended the meaning of the statutory term "height of the coalbed" when he promulgated the regulation. 11/

III.

In light of the foregoing, we cannot affirm the judge's conclusion that the record on which the parties' proposed settlement is premised shows that no violation occurred. There is no dispute that the cited continuous miner lacked a canopy and that the actual extracted

or mined height in the entry where the machine was being used was 53 inches. Such a height would be subject to the non-suspended provisions of section 75.1710-1(a). In short, the judge's conclusion that no violation occurred cannot stand.

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11/ We likewise reject the judge's suggestion of procedural infirmities in the standard's promulgation. The judge takes issue with what he perceives to be a lack of notice to operators of the meaning of the term "mining height." 3 FMSHRC at 1157-58. Yet, as we have concluded above, that term in and of itself connotes extracted height. Furthermore, the chief issue discussed at the public hearing on the proposed canopy standard (n. 6 above) was whether "substantially constructed canopies [should] be required on a staggered installation schedule, dependent upon the mining height of the particular mine." (Emphasis added) 37 F.R. 11779 (1972). Eastover participated in this hearing, and has never argued in the present case that it was misled by the Secretary's use of this phrase. The Secretary, in using a term which faithfully reflected what Congress intended and which itself gave notice of its meaning, did not act in violation of substantive or procedural rulemaking requirements.

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For the foregoing reasons, we reverse the judge's rejection of the proposed settlement and his granting of the earlier summary judgment motion. In the interest of judicial economy, we have considered the parties' settlement motion at this time. 29 C.F.R. $ 2700.30. The Secretary originally proposed a penalty of $150 for the violation. The parties have proposed that a $75 penalty would be appropriate. The settlement motion and the stipulation to which it refers set forth reasons in support of the proposed settlement and information relevant to the six statutory penalty criteria in section 110(i) of the Mine Act. We have examined the reasons proffered by the parties and have weighed the statutory criteria. We conclude that the settlement agreement comports with the purposes and policies of the Act, and the motion for approval of the settlement is granted.

Richard V. Backley, Commissioner

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