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SOL (MSHA) V. KEYSTONE COAL MINING
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January 4, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 91-1480-R
	:	PENN 91-1454-R
KEYSTONE COAL MINING CORPORATION	:	PENN 92-54-R

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether three citations alleging violations of the respirable dust standard, 30 C.F.R. 70.100(a), issued to Keystone Coal Mining Corporation ("Keystone") pursuant to a "spot inspection program" instituted by the Department of Labor's Mine Safety and Health Administration ("MSHA"), were invalid because MSHA failed to adopt the program through notice-and-comment rulemaking.(Footnote 1) Following an evidentiary hearing, Administrative Law Judge

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1 Section 70.100(a) sets forth the following statutory language of section 202(b)(2) of the Mine Act, 30 U.S.C. 842(b)(2):

> Each 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 ... is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air....

(emphasis added). Section 202(f) of the Mine Act provides:

> For the purpose of this [title], the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the

Avram Weisberger sustained the contests and vacated the citations, concluding that the spot inspection program, upon which the citations were based, was procedurally invalid. 14 FMSHRC 2017 (December 1992)(ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, permitted the American Mining Congress ("AMC") to participate as amicus curiae and heard oral argument. For the reasons that follow, we affirm the judge's decision.

I.
Background

A. Factual and Procedural Background

On July 17, 1971, the Secretary of the Interior and the Secretary of Health, Education, and Welfare published in the Federal Register, pursuant to section 202(f) of the Coal Act, a finding that the sampling of mine atmosphere during a single shift would not accurately measure the average concentration of respirable dust (the "1971 finding"). This notice states in part:

> Notice is hereby given that, in accordance with section 101 of the Act, and based on the data summarized ..., the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.
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> In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2,179 working sections in compliance with the dust standard on the date of the analysis.... [R]esults of the comparisons ... [show] that a single shift measurement would not,

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1(...continued)

> active workings of a mine is exposed (1) as measured, during the 18 month period following December 30, 1969, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health and Human Services, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health and Human Services find, in accordance with the provisions of section [101 of this Act], that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

30 U.S.C. 842(f). Section 202(f) of the Mine Act was carried over without significant change from section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("Coal Act").

> after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971).

Keystone operates the Margaret No. 11 and Emilie No. 1 underground coal mines in Pennsylvania. On August 14, August 21, and September 20, 1991, MSHA Inspector Brady Cousins issued citations to Keystone alleging violations of 30 C.F.R. 70.100(a)(n.1 supra), because respirable dust concentrations of 4.4 milligrams per cubic meter of air ("mg/m3"), 2.8 mg/m3, and 4.7 mg/m3 had been found. 14 FMSHRC at 2024. Each citation was based upon a respirable dust sample taken by MSHA during a single shift on the previous day. G. Exs. 1, 3, 5. The citations were terminated after Keystone submitted three sets of five samples, each with an average dust concentration below 2.0 mg/m3. Keystone contested the citations and the matter proceeded to hearing before Judge Weisberger.

Judge Weisberger concluded that the spot inspection program was invalid because it had not been promulgated through notice-and-comment rulemaking. 14 FMSHRC at 2024. He determined that the 1971 finding precluded the Secretary from making compliance determinations based on single-shift samples. Id. at 2024-25. The judge also determined that, when promulgating final respirable dust regulations in 1980, the Secretary had not superseded the 1971 finding. Id. at 2025-26. The judge concluded that, because the 1971 finding had been made in accordance with the notice-and-comment rulemaking provisions of section 101 of the Coal Act, it could be rescinded only through the corresponding rulemaking provisions of section 101 of the Mine Act, 30 U.S.C. 811. Id. at 2027. Applying principles articulated in Drummond Co., 1 FMSHRC 661 (May 1992), the judge also determined that the spot inspection program had been implemented in contravention of rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 551 et seq. (1988)("APA"). Id. at 2027-29. Accordingly, the judge vacated the citations. Id. at 2029-30.

B. Enforcement of Respirable Dust Standards

In order to determine compliance with the Mine Act's respirable dust standards, MSHA and mine operators collect samples of the atmosphere in underground coal mines.

1. MSHA's sampling program

a. Multiple-shift sampling

In enforcing the respirable dust standards under the Coal Act and Mine Act, MSHA and its predecessor agency in the Department of the Interior have, for more than 20 years, based determinations of non-compliance on multiple-shift respirable dust samples. Tr. I 92; Tr. II 31; G. Ex. 17, p. 24 (1992 MSHA Task Group Report); K. Ex. 18, pp. 1.11-1.13. (1989 MSHA Handbook for inspectors). The operator is cited if the average dust concentration of five

samples,(Footnote 2) i.e. taken over five shifts, exceeds the applicable dust standard.(Footnote 3) K. Ex. 18, pp. 1.11-1.13; Tr. I 120-25. Noncompliance specifically cannot be determined on the basis of a single-shift sample. K. Ex. 18, p. 1.12; Tr. I 120. Samples are voided for various reasons, including the presence of oversized particles, larger than 10 microns. G. Ex. 17, p. 19; K. Ex. 18, pp. 1.9-1.10. If a filter shows a weight gain of 1.8 mg. or greater over its pre-sample weight, an inspector examines it for oversized particles. Tr. I 97, 126; K. Ex. 19, p. IV-11 (MSHA Guidance Document).

b. Single-shift sampling: the spot inspection program

Since July 15, 1991, MSHA has conducted spot inspections at selected mines. Tr. II 61, G. Ex. 12. Respirable dust has been sampled for five occupations in each mechanized mining unit, during one full eight-hour shift.(Footnote 4) G. Exs. 12, 14. MSHA developed a table for inspectors, setting forth the level of a single-shift dust sample that would require an inspector to issue a citation. G. Ex. 12, pp. 2-3. Inspectors were instructed not to examine samples for oversized particles and not to void samples except for pump malfunctions. Tr. I 162-63; Tr. II 29, 33-36; Tr. III 16; G. Ex. 14, p. 2. These spot inspection procedures were not published in the Federal Register, Code of Federal Regulations, in MSHA's Program Policy Manual, or in any other public document.(Footnote 5)

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2 Two to four samples can give rise to a citation if the average concentration is such that additional samples could not bring a five-shift average within the standard. K. Ex. 18, p. 1.12; Tr. I 120-125.

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3 If a mine has significant quartz in the atmosphere, its applicable dust standard may be lower than 2.0 mg/m3. 30 C.F.R. 70.101.

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4 Following MSHA's issuance of numerous citations for alleged tampering with respirable dust samples, the Secretary of Labor, in April 1991, directed MSHA to review the respirable dust program and to make recommendations for improving it. G. Ex. 17, p. 5. The Assistant Secretary for Mine Safety and Health formed the Coal Mine Respirable Dust Task Group, which developed the spot inspection program. G. Ex. 17, pp. 5-6. Part I of the program established the spot inspection system, which included collection of dust samples on a single-shift basis, review of dust control plans and sampling parameters, and interviews of mine personnel; Part II established monitoring of operators' sampling activities. G. Exs. 12, 13.

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5 MSHA issued an information bulletin announcing that nearly 600 mines had been targeted for spot inspections to provide the Task Group with data for improving the sampling program. G. Ex. 18, pp. 1-2. This bulletin also stated: "Although the primary purpose of the spot inspection program is to evaluate current mining procedures in order to improve the overall dust sampling program, ... MSHA inspectors will write citations on safety or health violations they may find." G. Ex. 18, p. 2.

2. Operator sampling program: multiple shift sampling

Pursuant to 30 C.F.R. Part 70, operators are required to collect, bimonthly, designated occupation dust samples over five full shifts for each mechanized mining unit.(Footnote 6) 30 C.F.R. 70.201, 70.207. The five samples must be collected on consecutive normal production shifts or normal production shifts on consecutive days. Section 70.207. The samples are submitted to MSHA for analysis and compliance determinations. 30 C.F.R. 70.209; G. Ex. 17, p. 16. Multiple-shift sampling by operators was not affected by MSHA's spot inspection program.

II.
Disposition

A. Whether the Spot Inspection Program Required Rulemaking under Section 202(f)

The Secretary argues that the judge erred in finding that rulemaking was required under section 202(f) of the Mine Act for implementation of the spot inspection program. He contends that the spot inspection program did not rescind the 1971 finding and, alternatively, that rulemaking was not required under the Mine Act because section 202(f) requires rulemaking only if the Secretary finds that single-shift sampling will not accurately measure respirable dust exposure. Keystone and AMC respond, in essence, that the spot inspection program was an attempt to circumvent the 1971 finding, and that the 1971 finding constitutes a legislative-type rule that may be amended only through notice-and-comment rulemaking.

1. The spot inspection program attempted to rescind the 1971 finding

The Secretary contends that the 1971 finding pertained to operator sampling and that the spot inspection program involves only MSHA sampling and, therefore, the 1971 finding and the spot inspection program are not contradictory.(Footnote 7) The 1971 finding was issued pursuant to section 202(f) of

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6 A designated occupation is the work position determined to have the greatest respirable dust concentration. 30 C.F.R. 70.2(f).

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7 Citing the review restrictions in section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. 823(d)(2)(A)(iii), Keystone argues that the Secretary has improperly raised this argument for the first time on review and that the Commission may not consider it. Although the Secretary did not present this specific argument before the judge, the Secretary had argued that the spot inspection program and the 1971 finding differed. S. Post-Hearing Br. at 23-25. On review, the Secretary has essentially enlarged that contention by presenting another reason to show that they differ. The arguments raised by the Secretary on review are sufficiently related to those presented to the judge that, in effect, they were passed on by the judge. See Dewey v. Des Moines, 173 U.S. 193, 197-98 (1899); United States v. Speers, 382 U.S. 266,

the Coal Act, which defined the phrase "average concentration" of respirable dust for purposes of Title II. This title was carried over to Title II of the Mine Act, which includes the mandatory standards for respirable dust in underground coal mines. Title II applies to both operator sampling and to MSHA actions to ensure compliance, including sampling by MSHA. Section 202(g) specifically provides for MSHA spot inspections.(Footnote 8) Nothing in section 202(f) or section 202(g) suggests that section 202(f) applies differently to MSHA sampling. Thus, the 1971 finding, issued for purposes of Title II, applies broadly to both MSHA and operator sampling of mine atmosphere.

A consistent regulatory history over 20 years also belies MSHA's current assertion that the 1971 finding applied only to operator sampling. MSHA manuals indicate that, apart from the spot inspections begun in 1991, MSHA has never based determinations of non-compliance on single-shift samples. See K. Ex. 18, pp. 1.11-1.13 (1989 MSHA Handbook for inspectors); K. Ex. 21, pp. II-47 through II-54 (1978 MSHA Underground Manual for inspectors).

We reject the Secretary's additional contention that the spot inspection program did not supersede the 1971 finding because the finding pertained to compliance determinations while the program pertained to a broad perspective on dust exposure in mining. It is clear that the spot inspection program also resulted in compliance determinations and the issuance of citations -- as the present case illustrates.

Finally, we reject the Secretary's argument that the spot inspection program did not rescind the 1971 finding because the finding had already been superseded by the preamble to the Secretary's final respirable dust rules issued in 1980.(Footnote 9) The 1980 preamble contains no indication that a new finding

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277 n.22 (1965); Beech Fork Processing, Inc., 14 FMSHRC 1316, 1320-21 (August 1992)(citations omitted). Therefore, we consider the argument.

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Section 202(g) of the Mine Act, 30 U.S.C. 842(g), was carried over without significant change from the Coal Act.

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In pertinent part, the preamble states:

> The Secretary of the Interior and Secretary of Health, Education, and Welfare conducted continuous multi-shift sampling and single-shift sampling and, after applying valid statistical techniques, determined that a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m3. Accordingly, the Secretary of the Interior and the Secretary of Health, Education, and Welfare prescribed consecutive multi-shift samples to enforce the respirable dust standard.

45 Fed. Reg. 23990, 23997 (April 8, 1980).

on single-shift sampling was being made under section 202(f) of the Mine Act. Indeed, the preamble as a whole is replete with language indicating that the final respirable dust standards contemplate multiple-shift samples. See, e.g., 45 Fed. Reg. at 23997. (Multiple samples "upon which compliance determinations are made will more accurately represent dust in the mine atmosphere than would the results of only a single sample....") The 1980 preamble and regulations reaffirmed the 1971 finding that multiple-shift samples were more reliable than single-shift samples for determining compliance with applicable dust standards.(Footnote 10) Moreover, MSHA's subsequent enforcement actions continued to be based exclusively on multiple-shift sampling until July 1991.

We conclude that the spot inspection program, in basing compliance determinations on single-shift samples, attempted to rescind the 1971 finding in an improper manner. Moreover, as discussed below, we agree with the judge that the attempted rescission was invalid because it was not effected through formal rulemaking.

2. Notice-and-comment rulemaking is required for rescission of the 1971 finding

The Secretary argues, in the alternative, that section 202(f) of the Mine Act requires rulemaking in accordance with section 101 of the Act only when a determination is made that single-shift sampling is not a reliable means of testing atmospheric conditions. S. Br. at 15-16. Invoking Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984), the Secretary contends that this is the clear and unambiguous meaning of section 202(f), and that the Commission must give effect to it. S. Br. at 16-17.

Generally, the first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. If a statute is clear and unambiguous, effect must be given to its language. Id. at 842-43. Deference to an agency's interpretation of a statute may not be applied "to alter the clearly expressed intent of Congress." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)(citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be

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10 AMC challenged the 1980 respirable dust regulations on the basis of inherent sampling variability. The Tenth Circuit Court of Appeals upheld the regulations, stating:

> The Secretary did take steps to reduce the potential for variability. The rule provides for multiple shift sampling.... All compliance determinations are based on the average dust concentration of five samples.

American Mining Congress v. Marshall, 671 F.2d 1251, 1259 (10th Cir. 1982)(citations omitted).

given effect. Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989)(citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "Chevron I" analysis. Id. at 1131. If, however, a statute is ambiguous or silent on a point in question, a second inquiry, a "Chevron II" analysis, is required to determine whether an agency interpretation of the statute is a reasonable one. Id.

Section 202(f) expressly requires notice-and-comment rulemaking with regard to a finding that would reject single-shift sampling. Congress's evident intent, that such a finding be made in accordance with notice-and-comment rulemaking, bespeaks an equal intent that, once such a finding is made, it may be rescinded only through the same formal process. See Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 413 (7th Cir. 1987). The Secretary's argument fails to take into account the fact that the 1971 finding was made.

In the alternative, if section 202(f) is not plain, a Chevron II analysis reveals that the Secretary's interpretation of it as asserted in this litigation is not a reasonable one. Section 202(f) addresses the accurate measurement of respirable dust in a mine's atmosphere and the requirement for notice-and-comment rulemaking if single-shift measurement will not provide such accurate measurement. The Secretary's interpretation here rests on his inference that sampling over a single shift will accurately measure dust exposure. But under the earlier, identical language of the Coal Act, the Secretaries, in the 1971 finding, unequivocally rejected single-shift sampling on the grounds that it does not "accurately represent the atmospheric conditions to which the miner is continuously exposed." 36 Fed. Reg. at 13286. Further, as discussed above, the preamble to the Secretary's final respirable dust rules reaffirmed that multiple-shift samples were more reliable than single-shift samples. Except for inspections conducted under the spot inspection program, the Secretary continues, in both the operator sampling program and the MSHA sampling program, to base compliance determinations on multiple-shift sampling.(Footnote 11) The Secretary's litigation position here is inconsistent with his other formal statements issued in accordance with notice-and-comment procedures and with his other enforcement actions.

We agree with the judge that the 1971 finding may be rescinded only according to notice-and-comment rulemaking requirements.

B. Whether the Spot Inspection Program is Exempt from APA Rulemaking Requirements

The Secretary argues that the judge erred in concluding that rulemaking was required under the APA because the spot inspection program is exempt as a rule of agency practice or procedure or, alternatively, as an interpretative

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11 30 C.F.R. 70.201, 70.207; K. Ex. 18, pp. 1.11-1.13; G. Exs. 12, 13.

rule.(Footnote 12) S. Br. at 18-29. Keystone and AMC respond that the program is not procedural because it has a substantial impact on operators and that it is not interpretive because it seeks to change the definition of "average concentration" rather than merely to explain or clarify existing law. K. Br. at 21-23; AMC Br. at 16-17.

Section 553 of the APA requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, modification, amendment, or repeal. 5 U.S.C. 553. Under the APA, a "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...." 5 U.S.C. 551(4). The APA provides, however, that the notice-and-comment process does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(3)(A).

1. Spot inspection program is not a procedural rule

In Drummond, the Commission explained the procedural rule exemption to APA requirements: "it covers agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which parties present themselves or their viewpoints to the agency." 14 FMSHRC at 688, quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980). The exception does not apply where agency action encroaches on substantial private rights and interests. 14 FMSHRC at 688 (citation omitted).

The spot inspection program does not merely alter the manner in which parties present themselves or their viewpoints, nor does it merely set enforcement strategy or targets. Rather, it changes the standard of review for determining compliance with respirable dust requirements, resulting in a substantial impact on the rights and interests of operators. See Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979); National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983). Under the spot inspection program, an operator can be cited in circumstances under which it otherwise could not be cited.

Contrary to the Secretary's argument (S. Br. at 21), the APA's procedural rule exemption does not apply to the spot inspection program under American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987). The directives at issue in American Hosp. Ass'n improved the chances of detecting non-compliance with federal reimbursement standards by increasing the "frequency

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12 Keystone argues that the Secretary makes this argument for the first time on review. APA exemptions were explicitly raised before the judge by Keystone and were implicitly raised by the Secretary. K. Post-Hearing Br. at 18-21 & n.11; S. Reply Br. to ALJ at 8. The argument made by the Secretary on review is substantially related to issues that were before the judge. See n.7 supra. Accordingly, we consider the Secretary's argument.

and focus of ... review."(Footnote 13) Id. at 1050. The court based its determination that the procedural rule exemption applied on the fact that this was "not a case in which HHS has urged its reviewing agents to utilize a different standard of review in specified medical areas...." Id. at 1051. It noted further that "[w]ere HHS to have inserted a new standard of review governing ... scrutiny of a given procedure ..., its measures would surely require notice and comment...." Id. In this case, the Secretary has sought to establish a new standard of review in determining compliance with the respirable dust requirements based on single-shift samples and on altered criteria for determining valid samples, a standard that may not accurately determine the quantity of respirable dust in the atmosphere.(Footnote 14)

2. Spot inspection program is not an interpretive rule

In Drummond, the Commission stated that an interpretive rule is an agency statement "as to what [the agency] thinks the statute or regulation means," which "seeks merely to clarify or explain existing law." 14 FMSHRC at 684-85 (citations omitted). In American Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the U.S. Court of Appeals for the D.C. Circuit stated, in relevant part, that a purported interpretive rule has legal effect and is, therefore, substantive if it effectively amends a prior legislative rule.

The spot inspection program does not, as argued by the Secretary, merely interpret section 202(f). S. Br. at 26. Rather, as we have shown, the program attempts to rescind the 1971 finding that single-shift samples are not accurate in determining the "average concentration" of respirable dust in a mine. The 1971 finding was issued as a legislative rule as required under section 202(f), and the spot inspection program attempted substantively to rescind the finding. Accordingly, we reject the Secretary's contention that the spot inspection program is exempt from APA rulemaking requirements as an interpretive rule.

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13 The operator in this case has not challenged the selection of mines for spot inspection. Thus, the Secretary's reliance on United States Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984), which addresses targeting of employers for inspection under the Occupational Safety and Health Act, is also misplaced.

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14 The 1971 finding unequivocally rejected single-shift sampling on the grounds that such sampling was inaccurate, and the preamble to the Secretary's final respirable dust rules reaffirmed that multiple-shift samples were more reliable than single-shift samples. Also, as noted earlier, under the spot inspection program inspectors were instructed not to examine samples for oversized particles and not to void samples except for pump malfunctions. Tr. I 162-63; Tr. II 29, 33-36; Tr. III 16; G. Ex. 14, p. 2.

III.
Conclusion

The spot inspection program constitutes a legislative-type rule. The 1971 finding, which it seeks to contravene, was issued in accordance with the Mine Act's notice-and-comment rulemaking procedures and may be rescinded only in the same manner. We agree with the judge's determination that, because the Secretary failed to implement the spot inspection program in accordance with section 202(f) of the Mine Act and the rulemaking provisions of the APA, compliance determinations under the program are invalid. For the foregoing reasons, we affirm the judge's vacation of the three citations issued under the Secretary's spot inspection program.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner