FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 12, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 94-197
AMAX COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") charging AMAX Coal Company ("AMAX") with violating 30 C.F.R. § 77.201[2] when the methane reading in an above-ground structure exceeded 1 percent. Former Commission Administrative Law Judge Arthur Amchan concluded that AMAX did not violate section 77.201 and vacated the citation. 17 FMSHRC 48 (January 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's dismissal of the citation. For the reasons that follow, we reverse the judge and remand the case for further proceedings.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 77.201 provides, "The methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

I.

Factual and Procedural Background

On February 2, 1994, MSHA Inspector Arthur Wooten entered the "head house" that was on top of Silo No. 1 at the Wabash Mine. 17 FMSHRC at 49. Silo No. 1 is used to store clean coal after preparation prior to shipping. *Id.* The house, which is approximately 16 by 20 feet, is enclosed and contains electrical equipment, including a 4160-volt conveyor belt, a 220 volt lubrication system, 480 volt heaters, and 120 volt lighting circuits. *Id.* at 50; Tr. 22, 30. The conveyor which carries coal to the silo enters the head house through an enclosure before dumping the coal through an opening into the silo. Tr. 48; Ex. R-50. The head house is constructed with tin sheeting placed over a steel framework. 17 FMSHRC at 50. The floor of the house is approximately 6 feet above the roof of the silo. *Id.* The roof of the silo has several holes in it for ventilation and access. *Id.* AMAX tests for methane in the head house on every shift. *Id.* In the twenty years that the house had been located on the silo, neither AMAX nor MSHA had ever detected measurable amounts of methane. *Id.*

As Wooten entered the head house, his methane detector activated, indicating a methane concentration in excess of 1 percent. Wooten took several readings that ranged from .4 to 1.4 percent. The highest readings were found near a light switch and the opening where the conveyor dumps coal into the silo. Both locations are about 3½ feet off the floor and about 1 foot away from the sides. AMAX's Safety Director, Charles Burggraf, who accompanied Wooten, opened several doors to dilute the methane, and the methane concentration dropped below 1 percent. *Id.* at 49.

Previously, on January 13, 1994, AMAX had experienced a brief ignition at the base of Silo No. 1, where coal was loaded into railroad cars. On February 1, another MSHA inspector had detected a methane concentration of 3.1 percent at the train loading area, about 200 feet below the head house. The next day -- the same day as the citation at issue -- the methane concentration at that location was 4 percent. *Id.* at 50.

Wooten issued a citation alleging a violation of section 77.201. *Id.* at 49. Wooten designated the citation significant and substantial (S&S). *Id.* at 50. In order to abate the violation, he required AMAX to remove two sides of the house to keep concentrations of methane below 1 percent. *Id.* at 49. AMAX accomplished this by shutting down its preparation plant and moving its five employees to the silo where they removed the head house sides. *Id.*

AMAX challenged the penalty assessment, and the case went to hearing. In his decision, the judge stated that the plain language of section 77.201 indicates that a methane reading of 1 percent or more establishes a violation. *Id.* at 50. However, the judge agreed with AMAX that the regulation must be read in context with other parts of section 77.201 and the Secretary's

enforcement policy for the provisions relating to methane accumulations in underground coal mines. *Id.* Section 77.201-2 specifies the corrective action that an operator is required to take when methane readings are 1 percent or higher.[3] The Secretary's Program Policy Manual guidelines for 30 C.F.R. § 75.323[4] specifies that an operator is in violation only if it fails to take corrective action when methane readings exceed 1 percent in underground coal mines. 17 FMSHRC at 51. The judge found that "any interpretation of 77.201 that makes a per se violation of a methane concentration of one percent or more to be an unreasonable one, to which I need not defer." *Id.* at 51. Because there was no evidence that AMAX either failed to act prudently to anticipate the presence of excessive methane or failed to take appropriate and timely corrective action, the judge vacated the citation. *Id.* at 51-52.

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[3] Section 77.201-2 provides:

> If, at any time, the air in any structure, enclosure or other facility contains 1.0 volume per centum or more of methane changes or adjustments in the ventilation of such installation shall be made at once so that the air shall contain less than 1.0 volume per centum of methane.

[4] Section 75.323, which pertains to methane accumulations in underground coal mines, provides in pertinent part:

> (b) Working places and intake air courses. (1) When 1.0 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed--
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> (i) Except intrinsically safe atmospheric monitoring systems (AMS), electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off;
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> (ii) Changes or adjustments shall be made to the ventilation system to reduce the concentration of methane to less than 1.0 percent; and
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> (iii) No other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent.

II.

Disposition

The Secretary states that the main issue in this proceeding is whether the judge failed to give plain meaning to the regulation. S. Br. at 1, 4-6. The Secretary argues that, by invalidating the plain meaning of the regulation, the judge essentially acted outside his jurisdiction by engaging in rulemaking under the Administrative Procedure Act. *Id.* at 6-7. The Secretary further argues that, even if the meaning of section 77.201 is not plain and unambiguous, the judge failed to defer to the Secretary's reasonable interpretation of the regulation. *Id.* at 7-11. The Secretary contends that, by interpreting section 77.201 to require remedial action, the judge made superfluous the corrective steps described in section 77.201-1[5] and 77.201-2. *Id*. at 11-12. The Secretary contends that the judge's reliance on the Program Policy Manual guidelines for section 75.323 is misplaced because that section is dissimilar to section 77.201. *Id*. at 12-13. The Secretary explains that the regulations regarding underground mines differ from those involving surface structures because there is a "nonstatic environment" in underground mines, while conditions in surface structures that give rise to methane accumulations are in the operator's control. *Id*. at 13-14.[6] Finally, in response to AMAX's arguments, the Secretary argues that his interpretation of the regulation is entitled to deference, even though the interpretation was enunciated for the first time in litigation, and that the Commission has no independent policy making role under the Mine Act. S. Rep. Br. at 1-5.

AMAX's primary argument on review is that section 77.201 must be read together with other parts of the standard. A. Br. at 6-8. AMAX argues that section 77.201 "is merely a generalized goal within the standard." *Id.* at 8 n. 4. Further, AMAX asserts that a 1 percent methane concentration is not a hazard but rather requires corrective action to ensure that a hazardous condition does not develop. *Id.* at 10. AMAX relies on the caselaw and the Secretary's Program Policy Manual for the regulations in 30 C.F.R. Part 75, which pertain to methane accumulations in underground coal mines, as support for the position that a 1 percent reading is an "action level" at which steps must be taken to lower methane concentrations. *Id.* at

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[5] Section 77.201-1 provides:

> Tests for methane in structures, enclosures, or other facilities, in which coal is handled or stored shall be conducted by a qualified person with a device approved by the Secretary at least once during each operating shift, and immediately prior to any repair work in which welding or an open flame is used or a spark may be produced.

[6] The Secretary further notes that the underground coal mine regulations contain an absolute prohibition against methane in bleeders and return air courses at more than 2 percent. S. Br. at 13 n. 7 (citing 30 C.F.R. § 75.323(e)).

10-13. AMAX further argues that the Secretary's interpretation of the regulation is illogical because it contains a more stringent requirement for addressing methane accumulations in surface structures than in underground mines, and that therefore it is unreasonable and not entitled to deference. *Id.* at 13-18. Finally, AMAX asserts that it acted quickly in response to the methane reading by opening the door to the head house to dilute the concentration. *Id.* at 18

The primary issue on review is whether AMAX violated section 77.201 because methane in an above-ground structure exceeded 1 percent.

The Commission has recognized that, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984)). In determining the meaning of regulations, the Commission thus utilizes "traditional tools of . . . construction," including an examination of the text and the intent of the drafters. *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990) (interpretation of Mine Act provision). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

We conclude that the language of section 77.201 is clear and unambiguous. The first provision of that section states that the methane content of the air of any above-ground structure "*shall* be less than 1.0 volume per centum" (emphasis added). We reject AMAX's argument that, by applying the plain meaning of the regulation to prohibit methane accumulations above 1 percent, the other provisions of the standard are rendered superfluous. Section 77.201-1 provides for methane testing, and section 77.201-2 requires ventilation changes in a structure when methane exceeds 1 percent. Testing for methane and appropriate remedial action for accumulations above 1 percent are important steps in addressing the problem that methane presents. Our reading gives effect to all provisions in section 77.201, *see Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (April 1996), while that of AMAX reads out of the regulation the prohibition against accumulations in excess of 1 percent.

AMAX further argues that section 77.201 cannot be read to prohibit methane accumulations above 1 percent, because the regulations pertaining to methane accumulations in underground mines do not. The judge, while acknowledging the plain meaning of the regulation, agreed with AMAX that the regulation must be read in accordance with the regulations regarding methane accumulations in underground coal mines. 17 FMSHRC at 50. The regulation at issue stands in marked contrast to the regulations involving methane in underground metal/nonmetal mines (30 C.F.R. § 57.22234), and in underground coal mines (30 C.F.R. § 75.323). In each instance, those regulations specify the corrective actions that are required when methane

accumulations exceed 1 percent but do not contain the same express prohibition regarding methane accumulations over 1 percent. For the same reason, AMAX's reliance on the Program Policy Manual provision for section 75.323 is also misplaced.[7]

Based on the foregoing, we conclude that the judge erred when he determined that AMAX did not violate the regulation when the methane in the headhouse exceeded 1 percent, and we reverse his decision.

III.

Conclusion

For the foregoing reasons, we reverse and vacate the judge's decision and remand the case to the Chief Administrative Law Judge for assignment to a judge for further proceedings to dispose of the S&S designation of the citation and to assess an appropriate penalty.[8]

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

[7] Whether, as AMAX argues, such disparate treatment is illogical is not an issue that we need reach in light of our determination that section 77.201 is clear and unambiguous.

[8] Judge Amchan has since transferred to another agency.