

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 4, 1996

CONSOLIDATION COAL COMPANY	:	
	:	
v.	:	Docket No. WEVA 94-235-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

DECISION

BY: Marks and Riley, Commissioners

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), raises the question of whether Consolidation Coal Company (“Consol”) violated 30 C.F.R. § 75.342(b)(2) when the warning light on its methane monitor was not visible to a person who could deenergize the longwall.²



¹ Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. 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 75.342, entitled “Methane monitors,” provides in part:

(b)(1) When the methane concentration at any methane monitor reaches 1.0 percent the monitor shall give a warning signal.

(2) The warning signal device of the methane monitor shall be visible to a person who can deenergize the equipment on which the monitor is mounted.

(c) The methane monitor shall automatically deenergize the machine on which it is mounted when--

(1) The methane concentration at any methane monitor reaches 2.0 percent

Administrative Law Judge Arthur J. Amchan determined that Consol had not violated the standard. 16 FMSHRC 1241 (June 1994) (ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Consol operates the Robinson Run No. 95 Mine, an underground coal mine in Harrison County, West Virginia. On April 19, 1994, Virgil Brown, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), traveled to the 2-D longwall headgate to observe normal operating conditions at the mine. 16 FMSHRC at 1241. Methane sensors on the longwall were connected to a methane monitor attached to a master control box at the headgate. Tr. 35, 163, 167-68; C. Exs. 5(c), 6(a). The methane monitor was set to remove power from all equipment electrically connected to the longwall when methane was detected at 1 percent.³ 16 FMSHRC at 1243. In order to reenergize the longwall, the headgate operator manually reset the methane monitor and master control box. *Id.* at 1243-44. In so doing, the headgate operator would read signals on the monitor and master control box informing him that the deenergization had been caused by the detection of methane. *Id.* at 1244.

Inspector Brown observed that the headgate operator, Bill Bowen, was shoveling a spill near the tailpiece of the conveyor belt, approximately 30 feet away from the methane monitor. *Id.* at 1241-42. The inspector stood next to him and observed that the face of the methane monitor was not visible. Tr. 27. Accordingly, he issued a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of section 75.342(b)(2). 16 FMSHRC at 1242.

Consol contested the citation and the matter proceeded to an expedited hearing before Judge Amchan. At the hearing, the Secretary moved to modify the citation to an order issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), adding an allegation of unwarrantable failure. Tr. 9-10.

The judge determined that Consol had complied with section 75.342(b)(2). 16 FMSHRC at 1245-46. He reasoned that Consol's method of informing the headgate operator that methane levels had reached 1 percent "provides equivalent protection to a warning light that is visible at all times." *Id.* at 1245. The judge noted that, because Consol declined to file a petition for modification under section 101(c) of the Mine Act, 30 U.S.C. § 811(c),⁴ he was constrained to

³ The methane monitors and face telephone system would not be deenergized. 16 FMSHRC at 1243.

⁴ Section 101(c) of the Mine Act provides in part:

Upon petition by the operator . . . , the Secretary may
modify the application of any mandatory safety standard to a . . . ,

determine whether the reference in section 75.342(b)(2) to “warning signal device” included a mechanism by which longwall lights are extinguished, equipment stops, and the operator, by going to the headgate control box, learns that the methane monitor has been tripped. *Id.* The judge concluded that the phrase did encompass such a system, and that his interpretation was consistent with the underlying purposes of the Act and did not compromise miner safety. *Id.* at 1245-46. He also noted that his interpretation was not inconsistent with the dictionary meaning of “device.” *Id.* at 1246. Accordingly, the judge vacated the citation.⁵ *Id.*

The Secretary filed a petition for discretionary review, challenging the judge’s determination, which the Commission granted.

II.

Disposition

The Secretary argues that the judge erred in finding that Consol did not violate section 75.342(b)(2). PDR at 2.⁶ He asserts that evidence was undisputed that the warning signal device on the methane monitor was not visible to a person who could deenergize the longwall. *Id.* at 2, 4-5. The Secretary contends that the judge in effect transformed the contest proceeding into a petition for modification proceeding, thereby improperly circumventing the procedures set forth in section 101(c) of the Act. *Id.* at 6-7. Consol responds that the judge properly found no violation because its methane monitoring system satisfies the requirements and purpose of the standard by providing a visual warning to the headgate operator through the deenergization of equipment,

mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard Upon receipt of such petition the Secretary shall publish notice thereof . . . and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing . . . to enable the operator . . . or other interested party to present information relating to the modification of such standard. Before granting any exception to a . . . standard, the findings of the Secretary . . . shall be made public The Secretary shall issue a decision incorporating his findings of fact therein

30 U.S.C. § 811(c).

⁵ Given his disposition, the judge did not reach the question of whether the citation should be modified to a section 104(d)(2) order.

⁶ Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated his petition for discretionary review as his brief.

extinguishing of lights on the longwall, and the displays visible when the headgate operator manually resets the methane monitor and master control box. C. Br. at 11, 14-15. Consol further argues that it did not receive adequate notice of the Secretary's interpretation and that the Secretary failed to prove that its methane monitoring system was not the kind that a reasonably prudent person would use to comply with the standard. *Id.* at 12-13.

Section 75.342(b) provides that a methane monitor must give a warning signal when the concentration of methane at the monitor reaches 1 percent. 30 C.F.R. § 75.342(b)(1). The warning signal device of the methane monitor must "be visible to a person who can deenergize the equipment on which the monitor is mounted." 30 C.F.R. 75.342(b)(2). As noted by the judge, "[t]hat person must then de-energize the equipment and take steps to reduce the methane concentration pursuant to [30 C.F.R. §] 75.323(b)." 16 FMSHRC at 1242. Section 75.342(c) requires that the methane monitor automatically deenergize the machine on which it is installed at 2 percent methane.

Here, the evidence is undisputed that the warning signal device on Consol's methane monitor was not visible to the headgate operator at the time of the inspection. When Inspector Brown stood next to the headgate operator, who was approximately 30 feet from the methane monitor, he could not see the warning signal device. Tr. 26-27, 52. Inspector Brown and John Burr, Consol's manager of electrical engineering, testified that a headgate operator, in the course of his duties, would typically travel approximately 30 feet in either direction of the master control box, on which the methane monitor was installed. Tr. 36-37, 49-53, 158-59. The inspector estimated that the warning light would be visible to a person only within 15 to 20 feet of it. Tr. 52. Burr also acknowledged that the methane monitor could not be seen by the headgate operator at all times. Tr. 203-04, 208-09. Thus, the warning signal device of Consol's methane monitor was not visible to a person who could deenergize the longwall in violation of the clear requirements of section 75.342(b)(2).

We reject Consol's argument that its methane monitoring system provided a visible warning in compliance with the standard. The Secretary's regulatory scheme requires human intervention when methane levels reach 1 percent and automatic deenergization of equipment at 2 percent methane. Consol has, in effect, eliminated the requirement for human intervention, placing complete reliance on the methane monitor's capability of automatically deenergizing the longwall. While Consol's reliance on such a system may be justified, we are not the proper agency to make that determination. Rather, section 101(c) of the Mine Act requires that such a determination be made by the Secretary through the modification process. Under that process, an operator may petition the Secretary to modify a standard's application on the basis that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection . . ." 30 U.S.C. § 811(c). The Secretary must then publish notice of such petition, conduct an investigation, provide an opportunity for a public hearing, publish proposed findings, and issue a decision disposing of the petition (*see* n.4). We are adverse to circumventing the protections afforded by the Act's modification procedures. *See Penn Allegh Coal Co.*, 3 FMSHRC 1392, 1398 (June 1981); *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (December 1983).

Moreover, we are unpersuaded by Consol's argument that it failed to receive adequate notice that its methane monitoring system did not comply with the requirements of section 75.342(b)(2). As acknowledged by its witnesses, Consol received actual notice from MSHA over the course of approximately one year preceding issuance of the citation that the warning signal on its methane monitor must be visible to a person who could deenergize the equipment. Tr. 212-13, 234-37. Inspector Brown testified that management had been informed in at least seven meetings that Consol was required to have a visible alarm on the methane monitor and that, if it did not, it would be cited under section 75.342. Tr. 39-40, 90-91.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Consol did not violate section 75.342(b)(2). We remand for consideration of the Secretary's motion to modify the citation to a section 104(d)(2) order⁷ and for the assessment of a civil penalty.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

⁷ Consol's reasonable, good faith belief that the cited conduct was the safest method of compliance with section 75.342(b)(2) is relevant to the determination of whether Consol's violation had resulted from its unwarrantable failure to comply with the standard. *See Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994).

Chairman Jordan, dissenting:

I would affirm the judge¹ because, in my view, he correctly determined that Consolidation Coal Company (Consol) complied with the requirements of 30 C.F.R. § 75.342(b)(2). The standard in question provides that “the warning signal device of the methane monitor shall be visible to a person who can deenergize the equipment on which the monitor is mounted.” Consol was cited because the MSHA inspector determined that the longwall headgate operator, who was approximately 30 feet from the methane monitor, could not see the yellow light which flashes when the methane concentration reaches 1 percent.² 16 FMSHRC at 1242.

Although the headgate operator was not always in sight of the yellow light mounted on the methane monitor, the judge found that Consol had nevertheless provided a “warning signal device” that was visible to the headgate operator at all times. *Id.* at 1245-46. He held that the deenergization of the machinery constituted an adequate visual signal under the standard. *Id.* at 1246.

Under Consol’s system, the headgate operator is visually apprised of the fact that methane has reached 1 percent, because the lighting on the longwall face and the longwall shield goes out, and all the equipment electrically connected to the longwall automatically deenergizes except for the methane monitors and face telephone system. *Id.* at 1243. At the moment this occurs, the headgate operator might not know whether the shutdown was due to methane concentration or a power outage. As the judge pointed out, however, this potential ambiguity is removed when the operator goes to the master control box to try and re-energize the longwall. *Id.* at 1246.

If methane caused the shutdown, the operator will see a computer display advising in plain English that there has been a “methane monitor fault,” and the methane concentration will be indicated by a digital display. *Id.* at 1244. In addition, the yellow warning light on the monitor will be flashing and the solid red trip light and green “power on” light of the monitor will be on. *Id.*

This can be compared to what the operator will observe upon arriving at the control box after a general power loss. In that situation the control box will be dark, the computer display will be blank and all the lights on the methane monitor will be off. *Id.* There will be no digital display showing the methane concentration, and the main conveyer to the outside (which is not electrically connected to the longwall) will have stopped. *Id.* In the case of a methane shutdown, the conveyer is likely to continue operating. *Id.*

¹ Because I affirm and find no violation, I do not address the Secretary’s or my colleagues’ contention that the operator should have applied for a modification of the requirement of the standard.

² 30 C.F.R. § 75.342(b)(1) requires that the methane monitor give a warning signal when the methane concentration reaches 1 percent.

The Secretary has not challenged the judge’s finding that “if the methane monitor shuts down the longwall, there is no way the operator can mistakenly believe that the power went off for some other reason. . . . [A]s soon as he gets to the headgate control box, it will be readily apparent to him whether the methane monitor tripped or the power went out.” *Id.* Thus the judge found, correctly in my view, that Consol provided a “warning signal device” by which the longwall operator is visibly appraised when the methane concentration at any methane monitor reaches 1 percent.

Despite the fact that the standard in question does not refer to any particular kind of “warning signal device,” the Secretary contends that only the small factory-installed methane warning light located directly on the methane monitor complies. The MSHA inspector’s testimony makes clear that this interpretation was the basis for the enforcement action:

[T]he condition [for which I issued the citation] was that the Appalachian monitor has a warning light that is built in with the monitor. That is the warning light for that methane monitor, that little light on the unit. . . . And the . . . person who is supposed to de-energize the machine . . . if it would give a warning at one percent was not in a position in his work area where he could visually see that warning light.

. . . .

. . . The warning signal device of the methane monitor . . . [is] a light that comes on inside the unit. It’s a yellow warning light.

Tr. 30, 63.

Although the Secretary claims he is enforcing the “plain and unambiguous terms” of the standard, PDR at 5, his crabbed interpretation of “warning signal device” is nowhere supported by a reading of the Mine Act or the regulation. His insistence that a “visible warning device on the methane monitor,” *id.*, must be a light is simply not discernible from the plain language of the standard.

In cases where Congress’ intent is clear, we must “give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Unfortunately, the Mine Act provides us no guidance as to the meaning of “warning signal device.” When, as here, the statute is silent, we must determine whether the agency interpretation of the regulation is reasonable and entitled to deference. *Id.*; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). I proceed by noting that the regulation refers only to the warning signal device *of* (not *on*) the methane monitor, and in no way suggests that the warning device must be a light. Furthermore, the Secretary has not cited any legislative history supporting his interpretation, nor has he articulated any safety policy

effectuated by his limited application of the term “warning signal device.”³ An interpretation that narrowly restricts a standard beyond its plain meaning and claims no support in either the history or safety-promoting purpose of the Act is not, in my view, a reasonable interpretation entitled to deference.

Finally, my colleagues (but not the Secretary) claim that “[t]he Secretary’s regulatory scheme requires human intervention when methane levels reach 1 percent.” Slip op. at 4. Since the longwall operator is not “a person who can deenergize the equipment” after being visibly appraised of the presence of methane, they view Consol’s warning signal device as violative of section 75.342(b)(2).

The only reason the longwall operator will be unable to deenergize the equipment after being warned of the presence of methane is that the equipment will already be deenergized. There will be no necessity for the operator to turn it off because the equipment will automatically shut down at 1 percent methane concentration. I cannot agree that because the longwall operator will not need to shut down the equipment when the methane concentration reaches 1 percent, Consol’s warning signal device does not comply with section 75.342(b)⁴. Moreover, an underlying premise of the current Act and its predecessor, the 1969 Coal Act, is that the risk of explosion is reduced by eliminating ignition sources of methane. S. Rep. No. 411, 91st Cong., 1st Sess. 25 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 151 (1975). Accordingly, I decline to embrace an interpretation which effectively *requires* equipment to remain energized when the methane concentration is between 1 and 2 percent so that human intervention can occur.⁵

Mary Lu Jordan, Chairman

³ Indeed, during the trial, government counsel appeared to concede that the warning procedure implemented by Consol provides as much or greater protection than the procedure the Secretary claims is required by the standard. Tr. 260 (“The system devised for Robinson Run reducing the methane monitor trip to one percent may be an inherently safer method than this [regulation].”).

⁴ Notably, the drafters of the regulation explained the requirement of the visible warning as “allow[ing] the operator of the face equipment, or other person, to deenergize the equipment at 1.0 percent, *if necessary*.” 57 Fed. Reg. 20868, 20891 (1992) (emphasis added).

⁵ When methane reaches 2 percent, automatic deenergization is required under section 75.342(c).