

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 14, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. PENN 97-113-R
	:	
CANTERBURY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@). At issue is a citation issued by the Department of Labor's Mine Safety and Health Administration (AMSHA@) charging Canterbury Coal Company (ACanterbury@) with violating 30 C.F.R. ' 90.102(a)<sup>1</sup> when it transferred a Part 90 miner,<sup>2</sup> without his written consent, to a position on a different shift rotation in a low dust area of

<sup>1</sup> Section 90.102(a) reads as follows:

Whenever a Part 90 miner is transferred in order to meet the respirable dust standard in ' 90.100 . . . , the operator shall transfer the miner to an existing position at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer. The operator may transfer a Part 90 miner to a different coal mine, a newly-created position or a position on a different shift or shift rotation if the miner agrees in writing to the transfer.

<sup>2</sup> A Part 90 miner is a miner who has been classified under section 90.3 as showing evidence of the development of pneumoconiosis and Awho has exercised the option . . . under

the mine. Administrative Law Judge Gary Melick concluded that Canterbury violated section 90.102(a) and affirmed the citation. 19 FMSHRC 957 (May 1997) (ALJ). The Commission granted Canterbury's petition for discretionary review challenging the judge's decision. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Russell Bollinger was a 46 year-old miner who had worked underground for approximately 21 years. Tr. 22-23. In May 1991, he started working at Canterbury's DiAnne Mine, an underground coal mine in Pennsylvania. Jt. Stip. 6; S. Br. at 2. In October 1994, he became an underground construction foreman at the mine. Jt. Stip. 8. As underground construction foreman, Bollinger worked a three-shift rotation, working on a different shift each week. Jt. Stip. 9. The times and rotation order of his shifts were 11:00 p.m. to 8:00 a.m., 3:00 p.m. to 12:00 midnight, and 7:00 a.m. to 4:00 p.m. Jt. Stip. 10. In May 1995, his chest was x-rayed and his personal physician informed him that he tested positive for pneumoconiosis. Tr. 24, 26; Gov't Ex. 1. He showed his doctor's report to the safety director at Canterbury; however, the company made no changes in his job duties and did not sample his job for dust exposure. Tr. 25. In two subsequent conversations, Bollinger told Canterbury management that he was concerned about dust exposure from his job and asked to be transferred to a position where he would be exposed to less coal dust. Tr. 28. However, Canterbury did not transfer him and no dust samples were taken at his position. *Id.*

Approximately 5 or 6 months after his first positive x ray, Bollinger had a second x ray and the results were forwarded to MSHA. Tr. 26; Jt. Ex. 2. By letter dated August 5, 1996, MSHA informed Bollinger that he was eligible to exercise his right under 30 C.F.R. Part 90 to

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' 90.3 . . . to work in an area of a mine where the average concentration of respirable dust . . . is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights.@ 30 C.F.R. ' 90.2.

work in a low dust area with concentrations not exceeding 1.0 mg/m<sup>3</sup> of air (the dust standard), as required by 30 C.F.R. ' 90.100.<sup>3</sup> 19 FMSHRC at 958; Gov't Ex. 1. MSHA informed Canterbury by letter dated August 28, 1996, that Bollinger was exercising his Part 90 right to work in an area which complied with the dust standard. Jt. Stip. 5.

Bollinger requested that he remain at the position of underground construction foreman and be sampled for dust exposure. Jt. Stip. 14. Canterbury informed MSHA of Bollinger's request and took five dust samples of his position as required by 30 C.F.R. ' 90.207(a). Jt. Stip. 15. The sampling showed an average dust concentration of 1.5 mg/m<sup>3</sup>, which exceeded the dust standard. Jt. Stip. 16. Based on these results, MSHA cited Canterbury for a violation of the dust standard. *Id.*

Bollinger was not qualified for the only other position, general assistant, which existed at the mine on his three-shift rotation. Jt. Stips. 17, 20-22. Canterbury did not attempt to reduce the dust exposure at Bollinger's position. Jt. Stip. 19. Instead, it decided to transfer him to the position of mine examiner, which entailed examining and maintaining air courses in the mine. Jt. Stips. 24-25. Three dust samples were taken of mine examiner positions at the mine prior to Bollinger's transfer. Jt. Stip. 24-26. The sampling showed an average dust concentration of 0.9 mg/m<sup>3</sup>, which complied with the dust standard. Jt. Stip. 26. Canterbury altered the work schedule of the mine examiner position so it would be on the same shift rotation that Bollinger worked as an underground construction foreman. Jt. Stip. 24. On November 5, 1996, it transferred Bollinger to his new position as mine examiner and on November 6, it notified MSHA of the transfer. Jt. Stips. 27-28. Five dust samples were taken of Bollinger's new position and the average dust concentration was 4.0 mg/m<sup>3</sup>, well above the dust standard. Jt. Stips. 29-30.

At a meeting held between Canterbury management and MSHA officials, it was decided to eliminate the air course maintenance duties of Bollinger's job as mine examiner in an attempt to reduce his dust exposure. Tr. 50-53. After this modification, Bollinger's position was again sampled and the average dust concentration was 1.28 mg/m<sup>3</sup>, which exceeded the dust standard. Jt. Stips. 32-33.

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<sup>3</sup> Section 90.100 states in pertinent part:

[T]he operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner is exposed at or below 1.0 milligrams per cubic meter of air.

On February 3, 1997, without obtaining Bollinger's written consent, Canterbury transferred him to the position of shuttle car operator on a different shift rotation. Jt. Stips. 34, 37-38. Canterbury had notified MSHA by letter dated January 31, 1997, of the planned transfer. Jt. Stip. 35. Dust samples of his new position indicated an average concentration of 1.0 mg/m<sup>3</sup>, which complied with the dust standard. Jt. Stips. 39-40. Canterbury advised MSHA of the sample results by letter dated February 11. Jt. Stip. 41. On March 20, MSHA issued a citation to Canterbury charging that it violated section 90.102(a) when it changed Bollinger's shift rotation without his written consent. Jt. Stips. 42-43. On April 1, Canterbury changed the shift of the general (non-face) mechanic position at the mine to match Bollinger's original three-shift rotation and then transferred him to that position. Tr. 19-20; Jt. Stip. 59; Jt. Ex. 14. Subsequently, MSHA terminated the citation against Canterbury. Tr. 19; Jt. Stip. 58; Jt. Ex. 13.

Canterbury challenged the citation and the case went to hearing. In his decision, the judge concluded that section 90.102(a) clearly does not allow an operator, in order to comply with the dust standard, to transfer a Part 90 miner, without his written consent, to a position on a different shift rotation. 19 FMSHRC at 959. Accordingly, he affirmed the citation. *Id.*

## II.

### Disposition

Canterbury argues that the judge erred in affirming the citation. C. Br. at 20. It contends that section 90.102(a) does not address the issue presented by this case **C** whether a mine operator can transfer a miner to a position on a different shift rotation in order to comply with the dust standard when there is no existing position on the same shift rotation. *Id.* at 5, 17-19. It further argues that the Secretary's interpretation of the standard is not entitled to deference because it is unreasonable and contrary to the intent of Congress as expressed in the underlying provisions of the Mine Act. *Id.* at 7-9. Canterbury asserts that it could not transfer Bollinger as required by section 90.102(a) because a position on his shift rotation was not available at the mine. *Id.* at 5, 10. It argues that, in order to comply with the dust standard, it had to transfer him to a different shift rotation, and, as a consequence, his transfer did not violate section 90.102(a). *Id.* at 5-6, 9-10, 19. Canterbury also asserts that Bollinger's transfer falls within an exception in MSHA's Program Policy Manual, Vol. V, Part 90, section 90.102(a), at 210 (July 1, 1988) (the **APPM**), to the shift transfer restrictions in section 90.102(a). *Id.* at 6-7.

The Secretary argues that the judge correctly held that Canterbury violated section 90.102(a). S. Br. at 11. She contends that the standard clearly and unambiguously prohibits the transfer of a Part 90 miner, in order to comply with the dust standard, to a different shift rotation without the miner's written agreement. *Id.* at 7-8. The Secretary also argues that section 90.102(a) provided Canterbury with alternative ways to comply with the dust standard but that Canterbury failed to use these alternatives. *Id.* at 17-19. She further asserts that the exception in the PPM to the shift transfer restrictions of section 90.102(a) does not apply to Bollinger. *Id.* at

11-13.

The principle question on review is whether Canterbury violated section 90.102(a) when it transferred Bollinger, without his written consent, to a position on a different shift rotation to comply with the dust standard. The Commission has determined 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 or unless such a meaning would lead to absurd results. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). 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. *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990)).

Section 90.102(a) states that an operator may transfer a Part 90 miner to . . . a position on a different shift or shift rotation if the miner agrees in writing to the transfer. It is undisputed that, in order to meet the dust standard, Canterbury transferred Bollinger to a position on a different shift rotation without his written consent. *Jt. Stips*, 34, 38. Based on the plain meaning of the regulation, we conclude that Canterbury violated section 90.102(a) when it transferred Bollinger to a different shift rotation without his written agreement.

The language of the Mine Act and the regulatory history of the standard support this plain meaning approach. The main purpose of Title II of the Mine Act is to protect miners from pneumoconiosis by reducing to the greatest extent possible their exposure to respirable dust. 30 U.S.C. § 841(b). To this end, section 203(b) of the Mine Act, 30 U.S.C. § 843(b), established interim mandatory standards, which gave miners with pneumoconiosis the option of reducing their exposure to respirable dust by allowing them to transfer to positions with lower dust concentrations. However, those standards did not require operators to obtain a miner's written consent, before transferring him to a different shift rotation, in order to comply with the maximum allowable dust concentrations.

In 1980, MSHA noted that few Part 90 qualified miners were exercising their rights to transfer because many of them were concerned about possible repercussions to their work duties, wages, and shift reassignments. 45 Fed. Reg. 80,760, 80,763 (1980). Responding to concerns about the effectiveness of the Part 90 program, MSHA issued final mandatory standards for section 203(b) by amending Part 90. *Id.* at 80,760. The new mandatory standards provide that Part 90 miners should not be exposed to average dust concentrations greater than 1.0 mg/m<sup>3</sup>. 30 C.F.R. § 90.100. They also require that operators obtain Part 90 miners' written consent when transferring them to different shift rotations to comply with the dust standard. 30 C.F.R. § 90.102(a). *See Mullins v. Beth-Elkhorn Coal Co.*, 9 FMSHRC 891, 897 (May 1987) (an operator can transfer a Part 90 miner to a position on a different shift rotation, which complies with the dust standard, provided the miner agrees in writing).

Notwithstanding the foregoing, Canterbury contends that section 90.102(a) does not address the situation where a Part 90 miner must be transferred to comply with the dust standard

but there is no existing position on the same shift rotation at the mine. C. Br. at 5. It argues that, in order to comply with the dust standard, it had to transfer Bollinger to a different shift rotation. *Id.* at 5, 10. However, as the judge correctly pointed out, Canterbury did not have to violate the regulation in order to comply with the dust standard. 19 FMSHRC at 959. For example, it could have complied with the dust standard by improving the dust concentration at Bollinger's original position<sup>4</sup> or it could have attempted to obtain Bollinger's written consent before transferring him to a different shift rotation.<sup>5</sup> Regardless of the alternatives open to Canterbury, however, it is clear from section 90.102(a) that it was prohibited from transferring Bollinger to a different shift rotation without his written consent. *Id.*

Canterbury also argues that Bollinger's transfer to a different shift rotation is covered by an exception in the PPM to the shift transfer restrictions of section 90.102(a). C. Br. at 5-7. The PPM states in pertinent part:

The operator may transfer a Part 90 miner without regard to . . . [the] shift limitations [of section 90.102(a)] *if the respirable dust concentration in the position of the Part 90 miner complies with the dust standard, but circumstances require changes in job assignments at the mine.* Reductions in workforce or changes in operational methods at the mine may be the most likely situations which would affect job assignments.

PPM at 210 (emphasis in original). Canterbury contends that Bollinger's transfer falls within this exception. C. Br. at 6-7. It insists that the lack of an appropriate existing position on Bollinger's original shift rotation is a situation similar to a workforce reduction or change in operational methods. *Id.* However, it is plain from the language of the exception that it only applies when the Part 90 miner's position complies with the dust standard but the operator needs to transfer the miner for reasons unrelated to compliance with the dust standard. PPM at 210; *see also* 45 Fed.

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<sup>4</sup> In the Federal Register preamble, the Secretary stated that, to comply with the dust standard, an operator could transfer a Part 90 miner according to section 90.102(a) or it could implement control measures to lower the concentration of respirable dust in the position currently held by the affected miner . . . @ 45 Fed. Reg. at 80,761.

<sup>5</sup> There is no explicit record evidence indicating that the operator asked for Bollinger's written consent.

Reg. at 80,761, 80,766. Because Bollinger's original position as underground construction foreman and his subsequent position as mine examiner were in violation of the dust standard, the exception clearly does not cover his transfer to the position of shuttle car operator on a different shift rotation.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Canterbury violated section 90.102(a).<sup>6</sup>

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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<sup>6</sup> In light of our disposition, we do not need to address Canterbury's concerns that some bumping may occur under Part 90, which may cause animosity between miners (C. Br. at 13), or the Secretary's interpretation that "existing position" means any position normally found in the coal mining industry (S. Br. at 9-13).



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