



STATE OF WEST VIRGINIA
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING
BUREAU OF COMMERCE

1615 WASHINGTON STREET, EAST • CHARLESTON, WEST VIRGINIA 25311-2126 • TELEPHONE: (304) 558-1425 • FAX: (304) 558-1282

CECIL UNDERWOOD
GOVERNOR

MEMORANDUM

STEPHEN F. WEBBER
DIRECTOR

TO: All Regional Offices and Inspectors

FROM: L. Eugene Dickinson, Esq. *LED*

DATE: April 16, 1997

RE: Amended Regulations

Recently, a violation written for CSR § 36-20-4.3(b) was appealed. It then became apparent that the opinion in W. Va. Coal Association, et al., vs. West Virginia Board of Coal Mine Health and Safety et al., copy attached, by the Kanawha Circuit Court has not been circulated. Amendments to certain of the contractor regulations enacted in 1995 were voided; therefore, to the extent they do not conflict with the 1995 voided amendments, the 1991 regulations are the only ones in force.

Please be sure that everyone is aware of the changes in the regulations. If you have any questions please feel free to contact me at (304) 558-1425.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA COAL ASSOCIATION,
WEST VIRGINIA MINING AND
RECLAMATION ASSOCIATION, and
CONTRACTORS ASSOCIATION OF
WEST VIRGINIA,

Petitioners,

v.

CIVIL ACTION NO. 95-MISC-565

WEST VIRGINIA BOARD OF COAL
MINE HEALTH AND SAFETY and ITS
ADMINISTRATOR, and the WEST
VIRGINIA OFFICE OF MINERS' HEALTH,
SAFETY AND TRAINING,

Respondents.

MEMORANDUM OPINION AND ORDER

The West Virginia Coal Association, West Virginia Mining and Reclamation Association and Contractors Association of West Virginia¹ seek a declaration against the West Virginia Board of Coal Mine Health and Safety,² its Administrator, and the Office of Miners' Health, Safety and Training that certain amendments to the West Virginia Code of Administrative Regulations³ are null and void and, therefore, unenforceable, as a consequence of the failure of the Board to comply with *W. Va. Code* § 22A-6-4 and other related statutory and regulatory requirements governing the promulgation of such amendments.⁴ The Associations also substantively

¹ Hereinafter the "Associations."

² Hereinafter the "Board."

³ Hereinafter the "Amended Regulations." The specific amendments subject to challenge were as follows: CSR §§ 36-15-4.1(a) and (h), 36-15-5.1(a) thru (c), 36-20-4.3(a) thru(c), 36-20-4.1, 36-20-4.4, 36-20-8.1, 36-23-3.10, 36-23-3.12, 36-23-3.22, 36-23-7, 36-23-9 and 36-42-4.1.

⁴ The Office of Miners' Health, Safety and Training has also moved for judgment on its alleged "counterclaims," asserting that certain regulations granting that office discretion in the issuance of citations are contrary to the governing statute. The Court need not reach either the merits of that claim or the question of whether it constitutes a counterclaim against the Associations or a cross-claim against the Board since, in its view, in either case, what is being sought is merely an advisory opinion, there being no actual case or controversy involved. On this basis therefore, the Court is of the opinion that the Office of Miners' Health Safety and Training's motion should be and the same is hereby denied.

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CATHY S. BAILEY, CLERK
KANAWHA COUNTY

challenge the Amended Regulations on the grounds that they reduce or compromise the safety of and protection afforded to miners in this State by improperly and illegally delegating to operators⁵ who engage certified independent contractors the State's responsibility for regulating the health and safety practices of such contractors, all in derogation of *W. Va. Code* § 22A-6-1, *et seq.*

This matter is now before the Court on the Associations' Motion for Summary Judgment filed subsequent to the completion of discovery, the issues raised having been thoroughly briefed and argued by counsel for all parties. Based upon the papers and pleadings filed herein, the arguments of counsel, and the deposition testimony elicited during the course of discovery, it is undisputed that, in adopting the Amended Regulations, the Board failed to adhere to the time requirements or otherwise comply with the provisions of *W. Va. Code* §§ 22A-6-4 and 22A-6-5 and related procedural regulations. Even if that action were otherwise permissible under those circumstances set forth in *W. Va. Code* § 22A-6-5(b), it is also undisputed that the Board's failure to comply with the cited procedural requirements (a) was not based upon a vote by the Board to dispense with those requirements⁶ and (b) was not supported by findings of fact and conclusions of law which would justify such action. As a consequence, and notwithstanding the assertions of the Board to the contrary, *W. Va. Code* § 22A-6-5(b) does not excuse or otherwise legitimize the actions of the Board. Accordingly, the Court is of the opinion that the Amended Regulations are void.

The Court is further of the opinion that, even if the procedures followed in adopting the Amended Regulations were not fatally defective, there can be no question but that those Amended

⁵ See *W. Va. Code* § 22A-1-2(a)(8). Hereinafter "production operators."

⁶ Counsel for the Board argues that the Board may dispense with the procedural requirements relative to the promulgation of regulations such as this "upon concurrence of at least four members of the board," citing the provisions of *W. Va. Code* § 22A-6-5(b). As the Supreme Court made clear in *UMWA v. Scott*, 315 S.E. 614 (W.Va. 1984), "[o]perating through 'general consensus' is unlawful where the Legislature has mandated that a specific number of Board members must agree" Thus, a formal vote is required in order for the provisions of *W. Va. Code* §§ 22A-6-5(b) to become operative. *Id.* at 622. Here there is no question but that no such vote was ever taken and no findings made as to why it was appropriate to dispense with any of the cited procedural requirements in this instance. As such, reliance on the provisions of *W. Va. Code* § 22A-6-5(b) to excuse the Board's non-compliance with the applicable procedural requirements is misplaced.

Regulations place upon production operators the responsibility for ensuring that independent contractors comply with the State's safety regulations under the threat that the production operators themselves will be penalized if they fail to perform this regulatory function.⁷ This is apparent from the testimony of the Administrator and Chairman of the Board as well as the Director of the Office of Miners' Health, Safety and Training concerning the reasons for and intended effect of the Amended Regulations. This clearly constitutes an illegal delegation of the State's regulatory power and, more importantly, its regulatory responsibility.⁸ More fundamentally, this attempted shift in regulatory authority and responsibility away from those agencies charged with enforcement could easily, and almost unquestionably would, result in a decrease in safety for the State's miners⁹ and is, therefore, in clear violation of the mandate of *W. Va. Code* § 22A-6-4(c)(2). Thus, even absent the procedural defects associated with the promulgation of these regulations, they are improper and illegal.

Accordingly, for the reasons heretofore set forth, the Court hereby **DECLARES** that the Amended Regulations are **NULL** and **VOID** and, consistent therewith, **PERMANENTLY ENJOINS** the Board and the Office of Miners' Health, Safety and Training from undertaking any

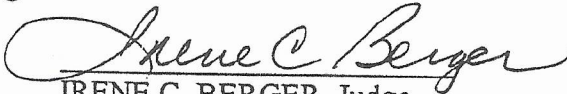
⁷ Both the Director of the OMHS&T as well as the Chairman of the Board testified that the Amended Regulations, when read in conjunction with the provisions of CSR 36-20-7.1, placed upon production operators the responsibility for regulating the activities of independent contractors. This testimony led the Associations to amend their pleadings to challenge the validity of CSR 36-20-7 as so interpreted and applied. Given the ruling of the Court relative to the propriety of the Amended Regulations and the validity of any delegation of the state's regulatory authority, there is no need to go further. Accordingly, CSR 36-20-7, as applied prior to the Amended Regulations, shall remain in full force and effect.

⁸ According to the Administrator of the Board, the genesis for the Amended Regulations stemmed, in part, from the Board's determination that the Office of Miners' Health, Safety and Training had insufficient funding to adequately ensure that independent contractors were versed in or employing proper safety procedures necessary to protect miners in this State. *Harris Depo.* at pp. 80, 81. Throughout these proceedings counsel for the Board and the Office of Miners' Health, Safety and Training have not disputed this testimony. Even if the Court were to assume, for the sake of discussion, that there was such a lack of funding, however, that would in no way justify a shifting of responsibilities imposed by the Legislature away from agencies charged with that responsibility to private citizens.

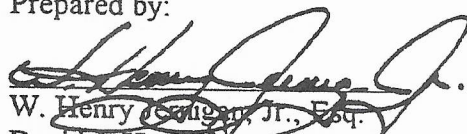
⁹ Notwithstanding the Court's ruling, the OMHS&T is not powerless to ensure the safety of the State's miners. *W. Va. Code* § 22A-1-1 *et seq.* and the companion regulations make clear that the State, through, among other things, the process of registering such contractors, approving their comprehensive mine health and safety programs, and inspecting their work sites, has ample tools by which to ensure that unsafe independent contractors are not permitted to operate within West Virginia.

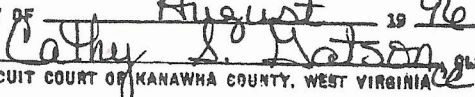
regulatory or other enforcement action based thereon, to all of which the Board, the Administrator, and the Office of Miners' Health Safety and Training object and except. The Court directs that this Order and Judgment be deemed final as to the claims asserted by the parties and entered accordingly, there being no just reason for delay.

ENTERED this 21st day of August 1996.

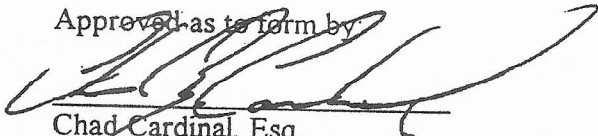

IRENE C. BERGER, Judge
Thirteenth Judicial Circuit

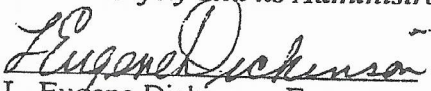
Prepared by:


W. Henry Grogan, Jr., Esq.
David J. Hardy, Esq.
Jackson & Kelly
P.O. Box 553
Charleston, WV 25322
Counsel for Petitioners

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22nd
DAY OF August 19 96

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Approved as to form by


Chad Cardinal, Esq.
Assistant Attorney General
State Capitol, Room E-26
Charleston, WV 25305
*Counsel for the West Virginia
Board of Coal Mine Health and
Safety and its Administrator*


L. Eugene Dickinson, Esq.
Sr. Assistant Attorney General
W. Va. Office of Miners' Health Safety & Training
1615 Washington Street, East
Charleston, WV 25305
*Counsel for the Office of Miners'
Health Safety and Training*

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