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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

March 27, 1979

FILE NO. S-1415

ADMINISTRATIVE LAW:
Granting of Variances by
Mining Board

Brad Evilsizer, Director
Department of Mines and Minerals
Springfield, Illinois 62706

Dear Mr. Evilsizer:

This responds to your letter in which you ask whether the Mining Board of the Department of Mines and Minerals has the authority to exempt a coal mine from the requirements of section 19.06 of the Coal Mining Act (Ill. Rev. Stat. 1977, ch. 96 1/2, par. 1906), which requires a staircase in the escapement or main shaft of a coal mine more than 20 feet deep. It is my opinion that it does not.

As a general rule, a governmental agency "has only the powers granted to it by statute". (Champaign County Board of Review v. Property Tax Appeal Board (1975), 30 Ill. App. 3d 29.) Under the Coal Mining Act, the Mining Board is given no general power to grant exemptions. Instead, the power to exempt coal companies from provisions in the Act is

found in individual sections. Sections 17.01, 17.07 and 31.29 (Ill. Rev. Stat. 1977, ch. 96 1/2, pars. 1701, 1707, 3129) are typical of the sections that allow the Board to grant such exemptions. Section 17.01 reads in part:

> "(a) Away from the pillar for the mine bottom, crosscuts between entries shall not be made more than 60 feet apart without permission of the Mining Board. But such consent shall not be granted except in case of fault or to experiment and test some new method or plan of mining coal.
>
> * * * "

(Emphasis added.)

Section 17.07 reads:

> "If the conditions are such that in the judgment of the Mining Board, expressed in writing, it is considered equally safe and more advantageous to leave a blind pillar between not less than every three rooms, the Mining Board may grant the authority to leave the pillar, subject to review by the Mining Board on complaint of either interested party." (Emphasis added.)

Section 31.29 reads in part:

> "In a gassy mine, all workings which are abandoned after the effective date of this Act, or the date such mine was classified a gassy mine, whichever is later, shall be sealed or ventilated. If such workings are sealed, the sealing shall be done in a substantial manner with incombustible material; however, some other type of material may be used provided prior approval has been obtained from the Mining Board. * * *" (Emphasis added.)

(See, section 16.06 and section 19.15 (Ill. Rev. Stat. 1977, ch. 96 1/2, pars. 1606, 1915), which are representative of sections in which the power to authorize exceptions to the

statutory requirements is given to the State mining inspector. See also, sections 19.03, 19.15, 21.13 and 23.04 (Ill. Rev. Stat. 1977, ch. 96 1/2, pars. 1903, 1915, 2113, 2304), in which the State mining inspector or the Mining Board is given broad authority to allow a safety requirement to be altered or adapted to fit the circumstances.) It thus appears that the Board has the power to exempt a coal company from a requirement of the Coal Mining Act only if the section in which the requirement appears specifically grants the Board the authority to do so.

This conclusion has two bases of support in addition to the language of the Act. The first is the broad grant of power given to the Board by section 2.12. (Ill. Rev. Stat. 1977, ch. 96 1/2, par. 312.) This section allows the Board to:

> " * * * promulgate rules and regulations in connection with methods of coal mining affecting the health and safety of persons employed in the coal mines. The rules and regulations shall be promulgated in accordance with the following procedure and standards:
>
> * * * "

As the section makes clear, the authority to promulgate regulations extends over the scope of the entire Act and is not restricted to making rules about only certain sections of the Act. In contrast to this, there is no similar provision relating to variances. The second basis for my conclusion is

that other acts do give the agencies responsible for their administration broad authority to issue variances to all the requirements of those acts (e.g., Illinois Environmental Protection Act, Ill. Rev. Stat. 1977, ch. 111 1/2, par. 1035). These two reasons together create an inference that the legislature did not intend to give the Board the extensive power it has given other administrators.

In connection with the Board's power to issue rules and regulations, it should be noted that the Board has no power to authorize the replacement of a stairway by an elevator by means of a rule or a regulation. The law is clear that even though administrators have broad discretionary powers in promulgating rules, they may not change or waive express provisions of the governing statutes. (Gapers Inc. v. Dep't of Revenue (1973), 13 Ill. App. 3d 199; Ruby Chevrolet Inc. v. Dep't of Revenue (1955), 61 Ill. App. 2d 147.) Thus, since section 19.06 specifically requires the presence of a stairway, the Board could not make a rule authorizing an escapement shaft without a stairway, even if the alternate type of escapeway were just as safe.

In the materials you submitted with your request for my opinion, you made reference to the Federal Mine Safety and Health Act (30 U.S.C.A. § 801) and to the regulations issued thereunder, specifically 30 C.F.R.

§75.1704-1(b). The provisions of this section, which requires that:

> "Each escape shaft which is more than 20 feet deep shall include elevators, hoists, cranes, or other such equipment, which shall be equipped with cages and buckets. When such facilities are not automatically operated, an attendant shall be on duty during any coal-producing or maintenance shift. An 'attendant' as used in this subsection means a person located on the surface in a position where it is possible to hear or see a signal calling for the use of such facilities and who is readily available to operate such facilities or to readily obtain another person to operate such facilities."

make it necessary to determine whether the Coal Mining Act is pre-empted by the Federal mining act. Traditionally, a determination of pre-emption is based on an analysis of three factors: (1) whether there is a need for national uniformity; (2) whether the State law directly conflicts with the Federal law; and, (3) whether the Federal regulatory scheme is so pervasive as to indicate a congressional intent to pre-empt the State statute. Under such a test, the Coal Mining Act might well have been found to have been pre-empted: although there is no particular need for national uniformity and State law is not so inimical to Federal regulation that compliance with the one would render observance of the other impossible, the comprehensiveness of the Federal standards might well lead to an inference of an intent to pre-empt. Such an outcome is unlikely today, however, for two reasons.

The first is the fact that the Coal Mining Act regulates in the area of health and safety. This is an area in which Federal courts have always deferred to State laws. (Huron Portland Cement Co. v. Detroit (1960), 362 U.S. 440.) The second is that in recent cases, the court has stated that congressional intent to pre-empt a State law must be "clear and manifest". (Goldstein v. California (1973), 412 U.S. 546; New York State Department of Social Services v. Dublino (1973), 413 U.S. 405.) Since section 801(g) clearly refers to Federal cooperation with State efforts to foster safety, it is apparent that no such intent existed. Since there was no such intent and since State law and Federal regulation can both be complied with, there is no Federal pre-emption.

It is therefore my opinion that the State requirement that a stairway be installed is valid and the Board lacked the authority to issue a variance to that requirement.

Very truly yours,

ATTORNEY GENERAL