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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WESTERN FUELSÄUTAH, INC., CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. WEST 86-113-R Order No. 2830082; 3/3/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEST 86-114-R Citation No. 2830083; 3/4/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 86-245(A) A.C. No. 05-03505-03524
v.	Deserado Mine
WESTERN FUELSÄUTAH, INC., RESPONDENT	

DECISION

Appearances: Karl F. Anuta, Esq., and Nancy E. VanBurgel, Esq., Duncan, Weinberg & Miller, P.C., Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Maurer

This consolidated proceeding concerns the contestant, Western FuelsÄUtah, Inc.'s, challenge pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act) of Order No. 2830082 dated March 3, 1986, and Citation No. 2830083 dated March 4, 1986, as well as the related civil penalty proceeding.

Order No. 2830082, as modified, was issued under 104(g)(1) of the Act and alleges a violation of 115(a) of the Act. Additionally, 104(a) Citation No. 2830083, issued the following day, cites the operator for a violation of 30 C.F.R. 48.7. The gist of the violation in both cases, however, is that the company failed to task train a particular section foreman, one Carson Julius, on the roof bolting machine, prior to his operation of that machine.

Since the citation was issued in conjunction with the 104(g)(1) withdrawal order and is based upon the same event, only the citation was assessed by MSHA. The Secretary contends that a civil penalty of $180, as proposed, is appropriate for the violation.

These cases were heard in Denver, Colorado, on April 2, 1987, and both parties have subsequently filed post-hearing briefs which I have considered in the course of writing this decision.

ISSUE

The ultimate issue in these cases is whether the Department of Labor (MSHA) training regulations require supervisory mine personnel subject to MSHA approved State certification requirements to be task trained under 30 C.F.R. 48.7 prior to actually performing mining work involving operation of machinery, such as here, a roof bolting machine.

STIPULATIONS

The parties have made the following joint stipulations of facts in these proceedings:

1. Western owns and operates the Deserado Mine, Identification No. 05Ä03505, which is located in Rangely, Colorado.

2. The mine is subject to the Federal Mine Safety and Health Act of 1977.

3. The Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge have jurisdiction over these proceedings.

4. Carson Julius, a section foreman with nine years of prior mining experience at other mines, had worked at the mine since November 1, 1985. On November 1, 1985, Julius completed eight hours of training under 30 C.F.R. 48.6 for newly employed experienced miners. Before becoming a section foreman at the mine, Julius had worked at the mine as a miner helper, on utility, and on various machines, including the shuttle car, the pack rat, and the Wagner scoop tram.

5. Julius was promoted to section foreman at the mine on February 3, 1986. Supervisors at the mine are subject to MSHA approved State certification requirements. The written criteria applied by Western in selecting section foremen included that the person should be able to operate face equipment in order to properly direct the workforce and that the

individual have on-the-job experience in underground operation of a coal mine, Colorado mine foreman papers, and supervisory skills. Western required that section foremen be capable of training the hourly workforce in the operation of underground face equipment in a safe and productive manner. Julius was certified as a mine foreman by the State of Colorado on May 15, 1980. Julius met all of Western's criteria for promotion to section foreman.

6. The Training Plan of the Mine submitted under 30 C.F.R. 48.3 and approved by the District Manager on May 2, 1984, does not state that supervisors must take task training. The Training Plan does require task training under 30 C.F.R. 48.7 for roof bolters.

7. In the 12 months preceding March 1, 1986, the specific items of equipment on which Julius had been "task trained" under 30 C.F.R. 48.7 were the shuttle car, the pack rat, and the Wagner scoop tram. Julius had operated roof bolting machines in the past under both production and non-production conditions and circumstances. Julius had operated the Lee Norse TDÄ43Ä5Ä4F twin boom roof bolting machine briefly on prior occasions.

8. On February 28, 1986, Julius was section foreman for a crew assigned to mine in the entries and connecting crosscuts off the East Mains working section of the mine. Julius instructed roof bolter Sky Havens to go to lunch and filled-in to operate the right hand boom of the Lee Norse roof bolting machine, working with left boom operator Austin Mullens.

9. At all times relevant to these proceedings, Federal Coal Mine Senior Special Investigator Theodore L. Caughman and Federal Coal Mine Inspector Ervin J. St. Louis were duly authorized representatives of the Secretary.

10. On March 3, 1986, Senior Special Investigator Caughman issued Order No. 2830082 and the accompanying Modification No. 2830082Ä2. The order as modified was issued pursuant to 104(g)(1) of the Act and charged a significant and substantial violation of 115(a) of the Act.

11. The order as modified was terminated by Termination No. 2830082Ä1.

12. On March 4, 1986, Senior Special Investigator Caughman issued Citation No. 2830083. The citation was issued pursuant to 104(a) of the Act and charged a significant and substantia violation of 30 C.F.R. 48.7. The citation was issued in conjunction with the order as modified.

13. The citation was terminated by Termination No. 2830083Ä01.

14. In February 1982 MSHA distributed to all MSHA district and subdistrict managers and field supervisors a statement in question-and-answer format concerning the extent of the supervisory personnel training exception under Part 48. On November 27, 1984, MSHA issued Policy Memorandum No. 84Ä2 EPD entitled "Training Requirements of 30 C.F.R. Part 48 for Mine Supervisors who Perform NonÄSupervisory Work. On July 1, 1985, MSHA published the "MSHA Administrative Manual 30 C.F.R. Part 48ÄTraining and Retraining of Miners" which incorporated on page 2 MSHA's position relative to supervisors who do non-supervisory work.

15. Western had 38 assessed violations during the 24Ämonth period prior to the issuance of the order and citation at the subject mine, 32 of which have been paid.

16. The assessment of the penalty will not affect Western's ability to continue in business.

17. Western abated the violation in good faith.

18. Western is a large operator with 810,078 tons of production in 1986.

APPLICABLE REGULATIONS

The two particular regulations that are herein involved are reproduced in their entirety below for the convenience of the reader.

30 C.F.R. 48.2(a)(1) provides as follows:

> (a)(1) "Miner" means, for purposes of 48.3 through 48.10 of this Subpart A, any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular, basis. Short term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under 48.6 (Training of newly-employed experienced miners) of this Subpart A may,

in lieu of subsequent training under that section for each new employment, receive training under 48.11 (Hazard training) of this Subpart A. This definition does not include:

(i) Workers under Subpart C of this part 48, including shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations;

(ii) Supervisory personnel subject to MSHA approved State certification requirements; and,

(iii) Any person covered under paragraph (a)(2) of this section.

30 C.F.R. 48.7, the herein cited standard, provides as follows:

(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(1) Health and safety aspects and safe operating procedures for work tasks, equipment, and machinery. The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and

(2)(i) Supervised practice during nonproduction. The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; or

(ii) Supervised operation during production. The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) New or modified machines and equipment. Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different operating procedures.

(4) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph

(a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task.

(d) Any person who controls or directs haulage operations at a mine shall receive and complete training courses in safe haulage procedures related to the haulage system, ventilation system, firefighting procedures, and emergency evacuation procedures in effect at the mine before assignment to such duties.

(e) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.

DISCUSSION

During the investigation of an otherwise unrelated fatal roof fall accident at the Deserado Mine, it was discovered that Mr. Carson Julius, a section foreman at the mine, had instructed one of his miners to go to lunch while he took his place operating one boom of the roof bolting machine. The other boom of the twin boom machine was being operated by Mr. Austen Mullens, who was killed by the roof fall. Mr. Julius had not, at that time, been task trained on this piece of equipment. Although both the order and the citation subsequently issued both recite that this failure to be task trained did not contribute to the cause of the accident, the Secretary nevertheless took and takes the position that under the mine's training plan, Julius should have been task trained as a roof-bolter under 48.7, and the failure of the operator to so train him prior to his operation of the equipment amounts to a significant and substantial violation of the Act and 48.7.

The real dispute in the case, however, concerns the language contained in 48.2(a)(1)(ii) which on its face purports to except supervisory personnel subject to MSHA approved State certification requirements from the definition of "miner", and therefore from the task training requirements of 48.7.

MSHA's Arguments

In support of its position in these proceedings MSHA argues that to come within the above exception, a person must be "supervisory" and subject to MSHA approved State certification requirements. While the Secretary concedes that Julius met the latter requirement, he maintains that a person is "supervisory" only so long as he "supervises." Once that person diverts from supervising to running mining machinery, that person is no longer "supervisory" but rather is a "miner," regardless of his job title. It is argued that MSHA's use of the adjectival form "supervisory" rather than the noun "supervisor" emphasizes that it is the quality about a person and what a person does, i.e., the act of supervising, that is important and not his job title.

Further, MSHA argues that this interpretation of the exception preserves the statutory objectives pertaining to the training of miners because when a person performs a miner's work, such as operating heavy equipment normally operated by a miner, that person, even though perhaps nominally a "supervisor," is plainly exposing himself and others to the hazards incident to mining and is for all practical purposes, a "miner." Therefore, the argument goes that the supervisory personnel exception contemplates that such persons stick to supervising in the narrow sense of the word with only "incidental" assistance to a miner performing a mining task being allowed without Part 48 training.

Additionally, the Secretary argues that MSHA's interpretation of the regulatory exception has been consistent, longstanding and widely noticed to the mining community.

Since the training regulations were initially published in 1978, there have been several publications generated by MSHA to assist its training specialists in helping operators set up and maintain training programs under Part 48. One such early question and answer (QÄA) issue on the subject stating that "a state certified supervisor performing the work of a miner would be required to be trained under Part 48." On November 27, 1984, MSHA issued MSHA Policy Memorandum No. 84Ä2 EPD concerning the "Training requirements of 30 CFR Part 48 for Mine Supervisors who Perform NonÄSupervisory Work." This memorandum was distributed to all mine operators

and in pertinent part states that the "exception applies only to the extent that supervisory work is being performed." Specifically, it advises the operators that:

> When supervisors perform or are expected to perform mining tasks, they are "miners" under Part 48 and must receive the required training. For example, if a supervisor operates mining equipment . . . that supervisor must have completed task training as specified by [section] 48.7. . . .

Thereafter, on July 1, 1985, MSHA published the "MSHA Administrative Manual 30 C.F.R. Part 48ÄTraining and Retraining of Miners." This publication includes on page 2 MSHA's position with regard to the herein-involved exception. Like the aforementioned memorandum, the Manual specifically states that "if a supervisor operates mining equipment, or performs extraction, production and maintenance work, that supervisor is a "miner' when performing this work and must have been given task training under section 48.7."

Once this interpretation of the "supervisory exception" is accepted, then it is factually argued in this case that Julius became a "miner" for purposes of the training requirements when he stepped in to take over the roof bolting machine operation for the lunching miner. More specifically, it is argued that Carson Julius was working in an underground mine, personally engaged in the extraction and production process doing roof bolting, a non-supervisory task. He therefore at that particular time was working as a "miner" as that term is defined at 30 C.F.R. 48.2(a)(1). Accordingly, he was a "miner" under that section for purposes of task training and it is stipulated in this record that roof bolters are slated in the Mine Training Plan to receive the 48.7 task training. It is also stipulated that Julius was not task trained on the roof bolting machine prior to his operation of it on February 28, 1986, nor had he been task trained on that type of roof bolting machine in the twelve months preceding February 28, 1986. Thus, because Julius was required to be task trained under 48.7 and plainly was not, violations of 30 C.F.R. 48.7 and 115(a) of the Act are proven.

The Secretary goes on to argue that such violation was a significant and substantial one since by the terms of the Act a miner who has not received the requisite training under the Act is "a hazard to himself and to others." Further, there was a reasonable likelihood that the hazard contributed to would result in injury because statistically supervisors who divert to do nonsupervisory work suffer a disproportionate rate of injury in comparison to coal miners in general and roof bolters in particular have incurred the highest risk of

injury among key mining occupations. The argument goes on that there was a reasonable likelihood that the injury would be of a serious nature or even a fatal injury because roof fall accidents tend to be fatal accidents such as the one that killed Austen Mullens and precipitated the investigation out of which the instant Order and Citation arose.

Finally, based on consideration of the statutory criteria, the Secretary contends that a civil penalty of $180, as proposed, should be assessed against the operator on account of this violation.

Operator's Arguments

The operator concedes that Carson Julius was not task trained on the roof-bolter, but nevertheless maintains that no violation has occurred because the regulations (30 C.F.R. 48.2(a)(1)(ii)) specifically exclude supervisory personnel who have been State-certified from the task training requirement. Julius was State-certified. The operator also concedes that the Secretary has from time to time by various and sundry vehicles promulgated policy statements concerning this particular regulatory exclusion to the effect that the exception applies only to the extent that supervisory work is being performed. However, the operator denies ever actually receiving copies of these documents and in any event characterizes them as nothing more than general statements of policy issued by the agency. None of these policy statements were ever published in the Federal Register or Code of Federal Regulations; nor were they ever explicitly brought to the attention of this operator prior to the issuance of the Order and Citation at bar.

The bottom line of this argument is that the published regulation clearly states the rule, and according to the operator, they complied with the rule, as written. The agency cannot modify the rule and lay additional requirements on the operator by "interpreting" the rule to mean something other than what it clearly states. If MSHA wishes to amend the rule to mandate what may in fact be a reasonable requirement they must first comply with the procedural provisions of the Act regarding adoption and promulgation of regulations. Accordingly, the instant Order and Citation should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I accept the stipulated facts that the parties have agreed to in this matter as true for purposes of this decision. I also find as a fact that Carson Julius, while engaged in operating the roof bolting machine was primarily engaged in a

nonsupervisory task in the extraction and production process although he nominally retained his role as a "supervisor," i.e., a section foreman, throughout the period of this incident.

The Secretary acknowledges that Julius was a generally knowledgeable miner with many years of experience, who was State-certified by Colorado and was a qualified section foreman at the Deserado Mine, but argues that this hardly qualifies one as an experienced operator of a particular piece of mining machinery, such as a roof bolting machine. I agree, and in fact, if Julius cannot be brought within the coverage of the regulatory exception contained in 48.2(a)(1)(ii), he should have been task trained on that roof bolter before he undertook to operate it.

The Secretary urges that MSHA's interpretation of the regulatory exception is reasonable, preserves statutory objectives, has been consistent and longstanding and has been broadly noticed to the industry.

It is well settled in the law that an agency's interpretation of its enabling statute and its own regulations is entitled to great deference. See, e.g. Emery Mining Corp. v. Secretary of Labor ("MSHA"), 744 F.2d 1411 (10th Cir.1984).

MSHA's interpretation of the exception is certainly reasonable. To require all persons to be task trained on a particular piece of mining machinery before being responsible for its safe operation has a lot of common sense appeal. Just because a person is a "supervisor," even a State-certified one, does not in my opinion confer on that person the technical skill and ability to operate every piece of mining machinery he might encounter in the mine.

MSHA's interpretation of the exception also preserves the statutory objectives of the Act pertaining to the training of miners, that is, that the safety training required by section 115 of the Act is a very important remedial aspect of the Act and that all persons regularly subjected to the hazards of mining should be well trained. It follows then that any exception carved out of the general definition that "any person working in an underground mine and who is engaged in the extraction and production process or who is regularly exposed to mine hazards" is a "miner," and therefore subject to the task training requirement, should be narrowly construed. MSHA's interpretation of the exception that only those "supervisors" who are actually "supervising" are exempt reasonably comports with the proposition that "a regulation must be interpreted so as to harmonize with and

further and not to conflict with the objective of the statute it implements." Emery, supra, at 1414; (quoting, Trustees of Indiana University v. United States, 223 Ct.Cl. 88, 618 F.2d 736, 739 (1980)). I specifically find that MSHA's interpretation is consistent with and obviously furthers the objectives of the Act and is to be preferred.

I further find as a fact that this supervisory personnel exception has been consistently interpreted by the agency from the beginning and as of at least November 1984, when MSHA issued MSHA Policy Memorandum No. 84Ä2 EPD which was distributed to all mine operators, the operators have been on notice that MSHA's interpretation of the exception was to the effect that it applied only to the extent that supervisory work was being performed.

Therefore, I find that viewed in light of the Act's emphasis on the importance of training for those individuals exposed to the hazards of mining, the regulatory exception at bar must be limited to those supervisors who are actually primarily engaged in supervision. The operator's proposed construction of the instant regulatory exception, to the effect that all supervisory mine personnel who have been State-certified are thereafter forever exempt from the task training requirement no matter the mining equipment they might undertake to operate in the future is specifically rejected. That construction is plainly at odds with the clearly intended training objectives of the Act, even though I concur with the operator that it is arguably within the ambit of reasonable interpretation of the regulatory language itself.

Since at the time in question Carson Julius was primarily engaged in operating the roof bolting machine, not supervision, I find that he was required to be task trained on that roof bolting machine prior to undertaking the operation of it in the extraction and production process. Because he was not so trained, violations of 30 C.F.R. 48.7 and 115(a) of the Act stand proven.

A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary . . . must prove: (1) the underlying violation of a

mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safetyÄcontributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). They have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

The violation contributed to a discrete safety hazard. In my view, an untrained or undertrained miner or section foreman is a potential hazard to himself and others assigned to work around him. There was also a reasonable likelihood that the hazard contributed to would result in a serious or even fatal injury. Statistically, supervisors who divert to do nonsupervisory work suffer a disproportionate rate of injury and roof bolters suffer the highest rate of injury among key mining occupations. Here we had a case of a section foreman performing the function of a roof bolter, operating a roof bolting machine, without the requisite task training. I find that operating this particular Lee Norse roof bolting machine is a relatively complex task in a generally high risk area of coal mining. Therefore, I find that his lack of task training could significantly and substantially contribute to the cause and effect of a coal mine safety hazard which could result in serious injury. Therefore, the violation was significant and substantial. The fact that the instant violation had nothing to do with the roof fall death of Austen Mullens, the co-operator of the bolter with Julius, is hardly evidence to support the contention that the lack of training did not or could not contribute to a hazard likely to result in injury.

The violation was serious and resulted from the operator's negligence. I further find that Western Fuels is a large operator with a favorable history of prior violations. The violation here was abated in timely fashion and in good faith. Therefore, based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $180, as proposed.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2830082 and Citation No. 2830083 ARE AFFIRMED. The operator's notices of contest of same ARE DISMISSED.

2. Western FuelsÄUtah, Inc., shall within 30 days of the date of this decision pay the sum of $180 as a civil penalty for the violation found herein.

3. Upon payment of the civil penalty, these proceedings ARE DISMISSED.

Roy J. Maurer
Administrative Law Judge