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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-92
A.C. No. 42-00121-03659

v.

Deer Creek Mine

UTAH POWER & LIGHT COMPANY,
RESPONDENT

DECISION

Appearances: Susan J. Bissegger, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C.,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Denver, Colorado on June 8, 1988.

The parties filed post-trial briefs.

Summary of the Case

Citation No. 3044971 charges respondent with violating 30 C.F.R. 75.1714. The cited regulation provides as follows:

75.1714 Availability of approved self rescue devices;
instruction in use and location

(a) Each operator shall make available to each miner employed by the operator who goes underground and to visitors authorized to enter the mine by the operator a self-rescue device or devices approved by the Secretary which is adequate to protect such person for one hour or longer.

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(b) Before any miner employed by the operator or visitor authorized by the operator goes underground the operator shall instruct and train such person in the use and location of the self-rescue device or devices made available at the mine. Instruction and training of miners and visitors shall be in accordance with provisions set forth in 30 CFR Part 48.

Stipulation

At the commencement of the hearing the parties stipulated as to the admissibility of certain documents and factors relating to the assessment of a civil penalty (Tr. 4-7).

Findings of Fact

The Secretary's evidence shows that on October 8, 1987 MSHA Inspector Robert L. Huggins tested 15 miners at the Deer Creek Mine to determine if they were properly trained in the use of self contained self rescue devices (SCSR's) (Tr. 18-23). The miners, selected at random, were quizzed by the inspector from a list of structured questions prepared by MSHA's administrator (Tr. 21-24; Ex. P2).

Before he interviewed the miners the inspector reviewed the MSHA memorandum which contains instructions for scoring the results (Tr. 23, 26).

When the inspector found that three of the fifteen miners did not pass the test he issued a citation to UP&L. He believed the three miners were not properly trained on the SCSR storage plan and did not know how long the SCSR would last before exhausting its supply of oxygen (Tr. 45, 49, 54).

The inspector agreed that MSHA's ETS (emergency temporary standard), adopted June 30, 1987, does not refer to the storage plan or the amount of time available when the SCSR is used (Tr. 70).

As a result of his quiz the inspector failed Eddie Wall (shear operator), Eddie Johnson (laborer) and Gordon Ungerman (head gateman on the longwall) because they had two questions wrong. (Tr. 56, 84; Ex. P2, P4, P5, P6).

The three miners could not answer the two following questions: (1) How far from an SCSR can you work while underground? and (2) An SCSR provides protection from bad air for at least how long?

If one question is incorrect a miner could score a 40. If two questions were wrong a miner could score 30. However, the

scoring instructions provide that if a miner misses more than two interview questions he fails the test (Tr. 85, 86). The inspector had some difficulty with inconsistent instructions as to the manner of grading the miners' answers Tr. 85, 90; Ex. P2).

If three people failed out of fifteen this would be an 80 percent passing rate (Tr. 94).

When he interviewed the miners the inspector felt that Eddie Johnson was 'really nervous; further, Eddie Wall may have gotten a little nervous (Tr. 40, 41). Miner Ungerman indicated he should have known the answers or retained the knowledge (Tr. 40). A lot of the miners (of those tested) did not know the SCSR storage plan at the mine (Tr. 44).

UP&L's witnesses consisted of Terry L. Jordan, John Pressett and Dave Lauriski.

JORDAN, UP&L's chief safety engineer and a person experienced in mining and safety, has been involved with SCSR devices since they were required in the early 1980's (Tr. 99-102).

Since 1986 there have been five or six "hands on" training sessions. Every aspect of the SCSR requirements, including the storage plan of the devices and their duration, was covered (Tr.105). When the miners received their annual refresher training each of them was also given a map showing the location of the SCSRs (Tr. 105).

The annual refresher training is different from the special "hands on" training given twice a year on the SCSRs. During the annual refresher training the instructor demonstrates how to don the SCSR. He also covers the storage plan location and the duration of the SCSR. Training of this type took place in 1987 before the citation was issued. The class consisted of 15 to 20 miners (Tr. 105-107).

Previously several people, including an MSHA training instructor, commended favorably on the quality of the training (Tr. 108, 122).

Records reviewed by the witness contain summaries of the training received by Johnson, Wall and Ungerman from 1987 before the instant citation was issued (Tr. 120; Ex R10). The summary and the task training forms indicates the following training:

NAME	DATE	INSTRUCTOR	TYPE OF TRAINING
Eddie Wall	3/13/87	Gary Christensen	Hands on Storage plan & duration of use, donning of SCSR
	4/3/87	Herman Nava Jon Pressett	Annual Refresher - Storage plan & duration of use,

	7/21/87	Jon Pressett	demonstration of donning Hands on storage plan & duration of use, donning of SCSR.
Eddie Johnson	7/27/87	Jon Pressett	Newly employed experienced miner, hands on-storage plan & duration of use, donning of SCSR
	9/25/87	Jon Pressett	Annual refresher storage plan, duration of use, demonstration of donning.
Gordon Ungerman	3/6/87	Gary Christensen	Hands on-storage plan & duration of use, donning of SCSR.
	4/3/87	Herman Nava	Annual refresher storage plan, duration of use, demonstration of donning
	7/21/87	Jon Pressett	Hands on-storage plan & duration of use, donning of SCSR.

(Exhibit R10)

Prior to receiving the instant citation the witness didn't have any knowledge indicating the miners did not know the location of the SCSRs (Tr. 123). They received maps showing the location of the SCSRs throughout the mine (Tr. 123).

The witness admitted that Pressett, Christensen and Nava were not included on the current valid training list but they were qualified and their names had been submitted to MSHA (Tr. 147). MSHA had indicated if the names of the individuals doing the teaching had been previously submitted they are approved with retroactive effect. Exhibit R7 lists Pressett and Christensen as approved instructors by a letter dated February 4, 1987 (Tr. 148-149; Ex. R7).

Witness JON PRESSETT, a UP&L safety engineer has been an MSHA approved instructor since October 1979 (Tr. 152, 153).

The witness has done "hands-on" training with miners throughout the mine (Tr. 155-159). Among other facets the training also locates the storage plan on a mine-specific basis (Tr. 160-163). Initially maps were given out and later updated when the belt lines were extended (Tr. 164).

The miners are instructed in the duration of the unit during the "hands-on" training session (Tr. 164). In addition to "hands on" training the company also gave annual refresher training classes. At the annual sessions the storage plan was reviewed in detail and maps were distributed. Team competition and multiple choice tests were used to determine whether the miners had absorbed the information (Tr. 166-168).

Pressett trained Eddie Wall and Gordon Ungerman in annual retraining (Tr. 169, 170; Ex. R13). Seven and one-half hours of Ungerman's training was completed April 3, 1987 (Tr. 175). At the time of the annual refresher training given to Wall and Ungerman in April 1987 the storage plan with an exact map was given the miners, also they discussed the donning of the unit (Tr. 177-178; Ex. R11). In a test given by UP&L miner Wall indicated the SCSR could be used for 60 minutes. In addition, he correctly answered questions relating to the storage plan and the location of the SCSRs underground (Tr. 181, 182).

Ungerman and Wall were in the same training class. Ungerman in a test (by UP&L) correctly indicated the unit would last 60 minutes (Tr. 183, 184).

When Ungerman and Wall completed their SCSR training on April 3, 1987 they were both knowledgeable in the location of the equipment and the duration of its use. The UP&L tests also establish these facts (Tr. 186).

The witness also trained Eddie Johnson who received newly employed miner training as well as an annual retraining class

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(Tr. 193-195). The training of experienced newly rehired miners includes instructions in the storage plan and locations of the units (Tr. 195). Eddie Johnson was also given a map showing where the units are stored underground (Tr. 196). Johnson didn't have any particular problems at the end of the training session (Tr. 198; Ex. R16).

He was knowledgeable in the location, storage, duration and care of the SCSRs (Tr. 202). Miners returning to work received double training if they have been off a year or more (Tr. 200; Ex. R18).

DAVE LAURISKI, UP&L's director of safety and training, is responsible for compliance with all provisions of Title 30 C.F.R. (Tr. 226, 227).

The company conducted "hands-on" training for the emergency SCSR regulation. In 1987 the employees were trained three separate times (Tr. 230).

It is common that the company's list of MSHA approved instructors is not up to date on a daily basis. When MSHA orally approves an instructor his name is not entered on the training plan until the next update (Tr. 233, 234).

Discussion

The rule of law is clear: in interpreting a regulation it is necessary to give effect to the plain meaning of its words. *Diamond Roofing Co., Inc., v. OSHRC*, 528, F.2d 645, 649 (5th Cir. 1976); *Usery v. Kennecott Copper Corp.*, 577, F.2d 1113, 1119 (10th Cir. 1977); *KCMC, Inc., v. FCC*, 600 F. 2d 546, 549 (5th Cir. 1979).

In the instant case 30 C.F.R. 75.1714(b) requires an operator to "instruct(FOOTNOTE 1) and train(FOOTNOTE 2) in the use of SCSRs. The evidence shows that UP&L did "instruct and train" its miners and particularly miners Wall, Johnson and Ungerman. In fact, the evidence is uncontroverted that UP&L's instructions and training exceeded MSHA's requirements(FOOTNOTE 3) (Tr. R9-R14, R16-R18).

It is the Secretary's position that UP&L failed to adequately train miners Wall, Johnson and Ungerman in the use and location of the SCSRs and therefore violated 30 C.F.R. 75.1714(b)

The Secretary's approach of interviewing miners to test their knowledge certainly probes the extent to which the operator has instructed its miners. But the Secretary's argument cannot prevail. On the record presented here the failure of Wall, Johnson and Ungerman to demonstrate their knowledge in a more persuasive fashion does not establish that UP&L violated the regulation.

Specifically, the regulation does not require that miners demonstrate their knowledge of information relating to the use and location of SCSRs, either at the time of the training or at some later time.

In other situations the Secretary has mandated that knowledge requirements be demonstrated. For example: 30 C.F.R. 48.7(b) requires that "miners . . . shall not operate the equipment . . . until such miners have demonstrated safe operating procedures . . . "; further, 30 C.F.R. 75.153(a)(3) [in electrical work] requires ". . . he attains a satisfactory grade on each of the series of five written tests . . . "; further, in 30 C.F.R. 77.102 [tests for methane, etc] ". . . no person shall be a qualified person for testing for methane . . . unless he has demonstrated . . . "; further, 30 C.F.R. 57.19096 [familiarity with signal code] requires ". . . person responsible . . . shall be familiar with the posted signaling code".

When 75.1714 is read in conjunction with 30 C.F.R. Part 48 it is apparent that the regulations contain a comprehensive framework for miner training programs covering the range from new miner training to hazard training. However, the regulations are conspicuously silent as to what constitutes "adequate" training. This qualitative judgment is apparently left to the discretion of the operator who would be more familiar with specific conditions in its mines and the training needs of its work force.

However, for the reasons stated above, I conclude that UP&L did "instruct and train" its miners within the meaning of 75.1714. Accordingly, it follows that the citation should be vacated.

UP&L raises additional issues concerning the Secretary's guidelines for scoring the answers to the interview questions, and concerning an appropriate remedy for the violation of a training plan. However, inasmuch as UP&L has prevailed on the merits, it is not necessary to review these secondary issues.

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For the foregoing reasons I enter the following:

ORDER

Citation No. 3044971 and all penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

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FOOTNOTE START HERE

~FOOTNOTE_ONE

1. Instruct, to give knowledge or information to; Webster's New Collegiate Dictionary, 1979 at 594.

~FOOTNOTE_TWO

2. Train: to form by instruction discipline or drill; Webster's New Collegiate Dictionary, 1979 at 1229.

~FOOTNOTE_THREE

3. UP&L instituted "hands-on" training for all of its miners over one year before such training was mandated by law (Tr. 130, 131, 229). UP&L emphasizes to all of its miners that any miner may seek individual instruction on proper donning procedures at any time from the safety department or he may simply practice donning an SCSR at any time at the safety department (Tr. 193).