FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

August 21, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2008-130-M
Petitioner	:	A.C. No. 40-00170-132631
v.	:	
	:	
EAST TENNESSEE ZINC COMPANY, LLC:		Immel Mine
Respondent	:	
	:	
EAST TENNESSEE ZINC COMPANY, LLC:		CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2007-438-RM
	:	Citation No. 7775339; 08/06/2007
v.	:	
	:	Docket No. SE 2007-439-RM
	:	Citation No. 7775341; 08/06/2007
	:	
SECRETARY OF LABOR,	:	Immel Mine
MINE SAFETY AND HEALTH	:	Mine ID 40-00170
ADMINISTRATION, (MSHA),	:	
Respondent	:	

DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
John Flood, Esq., Ogletree, Deakins, Nash Smoak & Stewart, P.C., Washington, DC, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty (consolidated with related contest proceedings) filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging East Tennessee Zinc Company, LLC, (East Tennessee) with two violations of mandatory standards and proposing civil penalties of $3,806.00 for the violations. The general issue before me is whether East Tennessee violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation Number 7775339 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.20001 and charges as follows:

During an inspection of the topside of the 'big cage", located in the 1600 foot main shaft, marijuana was discovered. The drug was located in the center of the cage in a cigarette package. This site is a regular work area for contractor miners on both 12 hour shifts on various days per week. A hazard of the miners working at this site under the influence of marijuana could contribute to a serious injury or fatality. The confirmation of the marijuana blunts was made by the local sheriffs department drug laboratory. The mine operator did not ensure the contractor conducted any type of drug testing while on this site since April of 2007. The mine operator did not review the contractors policies or procedures concerning drug testing nor did they observe the employees to ensure they were in compliance with this standard.

The cited standard provides in relevant part that ". . . narcotics shall not be permitted . . . in or around mines."

It is undisputed that, during the course of his accident investigation at the Immel Mine on August 6, 2007, Inspector Thomas Galbreath of the Department of Labor's Mine Safety and Health Administration (MSHA) found marijuana "blunts" secreted in a cigarette package and hidden in an obscure area of the "big cage" (an elevator located in the 1600-foot main shaft of the mine) where employees of an independent contractor had been working.

While there is a legitimate dispute and a conflict among authorities as to whether marijuana is a "narcotic", I find in this case that, in any event, Respondent had not "permitted" the substance to be on its mine premises.[1] Accordingly there was no violation as charged.

It is well established, 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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). See also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993).

The regulation at bar does not define the word "permitted". In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.* 18 FMSHRC 686, 690 (May 1996), aff'd, 111 F.3d 963 (D.C. Cir. 1997) (table); *Thompson Brothers Coal Co.* 6 FMSHRC 2091, 2096 (September 1984). In this regard the Commission has utilized *Webster's Third New International Dictionary (Unabridged)* as the source of the ordinary meaning of words. Accordingly, I look to that source for the ordinary definition of the word "permit". "Permit" is defined therein as "to consent to expressly or formally", "grant leave for or the privilege of", "allow", "tolerate", "to give (a person) leave", "authorize", "to make possible", " to give an opportunity". *Webster's Third New International Dictionary* (*Unabridged*) 1683 (2002).

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[1] Respondent's stipulation at hearings that marijuana was a "narcotic" was subsequently withdrawn with the consent of the Secretary.

Accordingly, based on the ordinary definition of the term "permit", I find that the language of the cited standard is clear and unambiguous and that it must be enforced as written. Since there is no evidence in this case that Respondent acted in any of the enumerated ways and, indeed, since the Secretary has acknowledged that Respondent did not actively permit marijuana to be in its mine nor consent to, nor authorize, its presence, I find that there was no violation as charged[2].

In reaching this conclusion I have not disregarded the Secretary's proffer of an alleged "passive" definition of the word "permitted" and reference to two judicial decisions in purported support of that proffer i.e. *SEC v. Bolla,* 401 F. Supp.2d 43, 62-63 D. D.C. 2005) and *National Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1264 and n.27 (D.C. Cir. 1973). However, these judicial interpretations were necessarily derived from the unique legal and factual circumstances of those cases and cannot be considered to be the "ordinary" definition of the word "permitted". Indeed, the Circuit Court in the latter case recognized that the word permission "usually connotes knowing consent" and the usage of the word in a passive sense "may be loose."

Citation Number 7775341 alleges a violation of the standard at 30 C.F.R. § 48.3(f) and charges as follows:

> The operator did not have a copy of the MSHA approved training plan available at the mine site for MSHA and for review by the miners and the representatives. A hazard of the operator attempting to train onsite and not having the plan to follow to assure the miners receive the proper training exists. This hazard could cause a disabling injury to the employees. The operator has a copy of the plan on file in the corporate office located approximately five miles from this mine. Hazard, site specific and refresher training are done on this site at various times.

The cited standard, 30 C.F.R. § 48.3(f), provides as relevant hereto, that "[t]he operator shall make a copy of the MSHA approved training plan available at the mine site for MSHA inspection. . . ."

There is no dispute that on August 1, 2007, during the course of a multi-day investigation into an accident at the Immel Mine, MSHA Inspector Rick Boggs asked Respondent's safety manager, Dennis Hillman, for a copy of East Tennessee's MSHA approved training plan. It is also undisputed that Mr. Hillman told Inspector Boggs that a copy of the subject plan was available at the Respondent's Beaver Creek office. The office is located less than five miles from where the request was made and is a part of the Immel Mine under the Act. The citation was then issued without waiting for the plan to be produced.

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[2] In apparent recognition of the difficulties of enforcing the current standard, the Secretary has proposed new rules that would set forth precisely which substances are prohibited. It would also place the onus of possession of banned substances on the miscreant miner and "provide clear and actionable guidance for mine operators". 73 F.R.52136 (September 8, 2008).

Respondent maintains that since the Beaver Creek office is, under Section 3(h)(1)(c) of the Act, a part of the Immel Mine and that since it is undisputed that a copy of the subject training plan was available at the Beaver creek office, there was no violation as charged.[3] The Secretary does not disagree that the Beaver Creek office is, under the Act, a part of the Immel Mine but argues that since it has given the Beaver Creek office a Federal mine identification number different from that given to the Immel Mine, the Beaver Creek office is not part of the Immel Mine "site" for purposes of the cited standard.

East Tennessee responds by asserting that it was not provided fair notice of this definition of "mine site" now advanced by the Secretary. Whether or not the Secretary's interpretation is entitled to deference as a reasonable or permissible reading of her regulation, I agree that fair notice of the Secretary's interpretation of the term "mine site" was not provided.[4]

Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process. . .prevents. . .deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec*., 53 F.3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses the test of "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

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[3] Section 3 of the Act provides in part as follows:

> (h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form. . . and (c) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, **structures, facilities,** equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, **on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits** in nonliquid form . . . . (Emphasis added).

[4] Because the Secretary has also advocated different definitions of the term "mine site", see e.g. *Secretary v. National Cement Company of California Inc.* et al. No. 08-1312, slip op at 16 (D.C. Cir. July 21, 2009), there are also serious questions as to whether this interpretation represents the Secretary's "fair and considered" judgement and would, in any event, therefore merit deference. See *Akzo Noble Salt, Inc. et al. v. FMSHRC* et al. 212 F.3d 1301, 1304 (D.C. Cir. 2000).

There is no evidence that the Respondent herein or anyone in the mining community ever received actual notice that the Secretary's arbitrary interpretation of the term "mine site" is limited geographically to areas only within a single Federal mine identification number. I further find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific requirement that a copy of the training plan must be made available other that at the "mine" as defined in the Act and, in particular, would be based on a mine identification number- -a number which , in any event, does not provide any definitive geographic boundaries. It is unreasonable to anticipate, without prior notice, that the Secretary's definition of "mine site" would differ from the definition of "mine" under the Act and be limited to only areas with the same Federal identification number. Fair notice was not afforded in this case and, accordingly, Citation No. 7775341 must be vacated.

Even assuming, *arguendo*, that fair notice had been provided and that the Beaver Creek office is found not to be a part of the Immel Mine "site", I find that the copy of the training plan kept at the mine office less than five miles away was "available" within the meaning of the cited standard. It is first noted that the cited standard does not require that a copy of the plan be actually kept at the "mine site" but only that it be made available for inspection. Furthermore, there is no time set forth in the standard within which the mine operator must make the plan available for inspection. The time must therefore be "reasonable" under the circumstances. See *Steele Branch Mining,* 15 FMSHRC 597, 602 (April 1993).

The MSHA inspection group remained at the Immel Mine for several days after its request for a copy of the plan and, since according to the undisputed testimony of MSHA Inspector Galbreath, the need for a copy of the plan was only for purposes of comparison with the actual training that was being performed at the mine, there was clearly no urgent need for a copy of the plan. It may also reasonably be inferred that Respondent could have obtained a copy of the plan within minutes of its request since it was located at the mine office less than five miles away.[5] I find that it is therefore reasonable to infer that a copy of the plan was accordingly "available" within the meaning of the cited standard.

The evidence is also uncontradicted that, when MSHA representatives first requested a copy of the training plan, there was in fact a copy located at the "mine site" as interpreted by the Secretary. This copy of the plan was kept in the file cabinet of mine manager Steele's locked office. As a condition precedent to enforcing this standard I find that it is incumbent upon MSHA representatives to request the plan copy from the mine's authorized custodian of records or from the management official then in charge of the mine. This is essential since only certain mine employees could be expected to know the location of such documents. MSHA's failure to make a proper request for a

[5] In this regard, it is noted that under the Secretary's proffered definition, the training plan for the Young Mine would be "available" at the Young "mine site" even though kept at the Beaver Creek office located 1.6 miles away, because they have the same Federal mine identification number.

copy of the training plan should, for this additional reason, also result in vacating the citation.[6]

ORDER

Citations Number 7775339 and 7775341 are vacated and this civil penalty proceeding is dismissed. The related contest proceedings, Dockets No SE 2007-438-R and SE 2007-439-R are hereby granted.

Gary Melick
Administrative Law Judge
202-434-9977

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[6] It is also noted that in terminating the citation the Secretary stated that "the mine operator now has a copy of the approved training plan on site for review by MSHA, miners and representatives". Since it is undisputed that in fact there always had been a copy of the approved training plan on site, nothing in fact had to be performed in order to abate the citation.