FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 29, 2000

FREEMAN UNITED COAL COMPANY,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. LAKE 2000-102-R
	:	Citation No. 7584882; 6/22/2000
	:	
	:	Docket No. LAKE 2000-103-R
v.	:	Citation No. 7584883; 6/22/2000
	:	
	:	Docket No. LAKE 2000-104-R
	:	Citation No. 7584884; 6/22/2000
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2000-105-R
MINE SAFETY AND HEALTH	:	Citation No. 7584885; 6/22/2000
ADMINISTRATION, (MSHA),	:	
Respondent	:	Crown II Mine
	:	Mine ID 11-02236

SUMMARY DECISION

These cases are before me upon the Contests filed by Freeman United Coal Company (Freeman United) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," to challenge four citations issued by the Secretary of Labor. On July 12, 2000, Freeman United filed a motion for summary decision. The Secretary responded on July 31, 2000, and filed her own cross motion for summary decision. Oral argument was held on September 15, 2000, and the parties thereafter filed supplemental written argument.

Under Commission Rule 67, 29 C.F.R. § 2700.67, a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law.

The citations at bar all allege violations of the standard at 30 C.F.R. § 75.1909(a)(1). That standard provides as follows:

> (a) Non permissible diesel-powered equipment, except for the special category of equipment under § 75.1908(d), must be equipped with the following features:
>
> (1) An engine approved under subpart E of part 7 of this title equipped

with an air filter sized in accordance with the engine manufacturer's recommendations, and an air filter service indicator set in accordance with the engine manufacturer's recommendations.

More particularly Citation No. 7584882, charges as follows:

> The Isuzu QD60 diesel engine used in the Number 04003 Diesel Gator was not being maintained in accordance with Subpart E of 30 C.F.R. Part 7. A legible and permanent approval marking as required by 30 C.F.R. Part 7.90 was installed but had not been supplied by the engine manufacturer.

Citations No. 7584883, 7584884 and 7584885, allege the same violation but with respect to Isuzu 4BD1PW diesel engine used in the 04031 Alpha personnel carrier, Isuzu 4BD1PW diesel engine used in the 04032 Alpha personnel carrier and Isuzu QD60 diesel engine used in the 03107 Taylor Atkinson personnel carrier, respectively.

There is no dispute in this case that the cited diesel powered equipment was non permissible within the meaning of the cited standard and that therefore the cited diesel engines must be approved in accordance with Subpart E of part 7. Under Subpart E at Section 7.90 "[e]ach approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine."

At oral argument on September 15, 2000, the Secretary clarified that she is alleging a violation in the citations at bar only on the basis of her claim that the approval markings required by Section 7.90 must be "supplied by the engine manufacturer." (Tr. 5-6).[1] It is undisputed that the approval markings utilized by Freeman United on the cited equipment were supplied by Freeman United itself and not by the manufacturer. Accordingly there is no dispute regarding the material facts.

In effect however the Secretary seeks to have this Commission rewrite the cited standard to read as follows: "[e]ach approved diesel engine shall be identified by a legible and permanent approval marking *supplied by the engine manufacturer and* inscribed with the assigned MSHA approval number and securely attached to the diesel engine."

The Secretary argues in support of this regulatory rewrite on the premise that the regulation's meaning is not plain and that therefore deference should be given to her interpretation

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[1] Although the Secretary also claims, in her motion and at oral argument, that the cited engines were also not otherwise "approved" - - a claim that is disputed by the operator - - that is accordingly not an issue now before me in the instant cases.

citing *Martin v. OSHRC*, 499 U.S. 144, 148-149 (1991); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460-461 (D.C. Cir. 1994); *Secretary of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989); and *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414-1415 (10th Cir. 1984)
I find however that the premise for Secretary's deference argument, i.e., that the meaning of the regulation is not plain, does not exist. When the meaning of a statutory or regulatory provision is plain, effect must be given to its language. *Chevron U.S.A. Inc. v N.R.D.C.*, 467 U.S. 837, 843-45 (1984).

The Secretary also argues that a statute or regulation that is intended to protect the health and safety of individuals, such as the regulation at issue herein, must be interpreted in a broad manner to actually achieve that goal citing *Cannelton Industries*, 867 F. 2d at 1435. *Donovan v. Stafford Const. Co.*, 732 F. 2d 954, 959-960 (D.C. Cir. 1984); and *Brennan v. OSHRC*, 491 F. 2d 1340, 1344 (2nd Cir. 1974). This rule of construction is not without limit however and is not a license to rewrite a clearly worded regulation whose plain meaning cannot reasonably be disputed.

Therefore, considering the plain language of Section 7.90, there is nothing to preclude the use on the cited diesel engines of approval markings supplied by Freeman United itself. Accordingly there are no violations as alleged in the citations at bar. Under the circumstances, Freeman United's Motion for Summary Decision must be granted and the Secretary's Cross Motion for Summary Decision must be denied.

ORDER

Citation Nos. 7584882, 7584883, 7584884 and 7584885 are hereby vacated.

Gary Melick
Administrative Law Judge

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