FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 9, 2001

NOLICHUCKEY SAND COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. SE 99-101-RM
v.	:	Citation No. 7777862; 1/28/99
	:	
SECRETARY OF LABOR,	:	Docket No. SE 99-102-RM
MINE SAFETY AND HEALTH	:	Citation No. 7777863; 1/28/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 99-103-RM
	:	Citation No. 7777864; 1/28/99
	:	
	:	Docket No. SE 99-104-RM
	:	Citation No. 7777865; 1/28/99
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	:	Docket No. SE 99-105-RM
	:	Citation No. 7777866; 1/28/99
	:	
	:	Docket NO. SE 99-106-RM
	:	Citation No. 7777867; 1/28/99
	:	
	:	Pit No. 436
	:	Mine ID 40-00806

DECISION

Before: Judge Avram Weisberger

Appearances: Adele L. Abrams, P.C., Calverton, Maryland, for the Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Respondent.

Introduction

These cases are before me based upon a decision of the Commission in this matter, 22 FMSHRC 1057 (September 2000) which vacated my initial decision, 21 FMSHRC 681 (June 1999), and remanded for "further consideration".

At issue in this proceeding is the validity of six identical citations, each alleging a violation of 30 C.F.R. Section 56.14109, which, as pertinent, provides that "unguarded" conveyors be equipped with either emergency stop devices or railings. In essence, it is the position of Nolichucky that the threshold requirement of Section 56.14109 was not met, since the conveyors were not unguarded, as they were all equipped with structural trusses measuring at least forty-two inches in height.

In its decision the Commission, noted that the term "unguarded" was not defined in 30 C.F.R. Part 56, subpart M, and that there was "... nothing in the Legislative History of Section 56. 14109 provides guidance in determining whether the cited conveyors should be considered unguarded." (22 FMSHRC supra at 1062.) In addition, the Commission noted that "... the Secretary's witnesses failed to present a coherent interpretation of when a belt is considered 'unguarded' "(22 FMSHRC supra at 1062.) In this connection, the Commission noted the testimony of MSHA Inspector Hobbs that "if a conveyor is high enough to where it doesn't create a hazard, then a railing or stop-cord does not have to be provided", and the Secretary's stipulation that previous inspectors had treated all of Nolichucky's belts as complying with the standard because the belts were equipped with forty-two inch trusses. (22 FMSHRC supra at 1062). The Commission also noted a statement in the Secretary's Program Policy Manual that "... the conveyor installation or framework cannot be considered an allowable guard even though it may conform to the standard railing height of forty-two inches. IV MSHA, U.S. Department of Labor, Program Policy Manual, Part 56/57 at 55a - 55b (1991)". (22 FMSHRC supra at 1062). The Commission took cognizance of its prior holding that, ... "when interpreting an ambiguous regulation, differences normally owed to the Secretary's litigation position before the Commission. Akzo Noble Salt, Inc. v. FMSHRC, 212 F 3rd 1301, 1304(D.C.) Cir. 2000)." (22 FMSHRC supra at 1062).

In its Remand, the Commission specifically directed the undersigned "... to secure from the Secretary an authoritative interpretation of what constitutes an unguarded conveyor within the meaning of 56.14109 ... . Upon obtaining the Secretary's interpretation, we direct the Judge to apply traditional principles of regulatory interpretation to determine if the Secretary's interpretation is reasonable and entitled to deference." Further, the Commission, directed as follows: "[a]fter obtaining the Secretary's interpretation, the Judge, on remand, must decide whether the operator was on notice of the regulation's requirement. In addressing the notice issue, the Judge must also reconcile the Secretary's claim that Inspector Hobbs provided actual notice to the operator, with her claim that it is unreasonable for operators to rely on the oral assertions of MSHA inspectors when applicable regulations and government manuals provide notice of the operators' obligations." (22 FMSHRC supra at 1063). Finally, the Commission ordered that if it is found that the threshold requirements of Section 56.14109 supra exist, then the undersigned "must examine both the stop cord and railing compliance options set forth in subsections (a) and (b) of the standard." (22 FMSHRC supra at 1063).

The Secretary's "authoritative interpretation" of what constitutes an unguarded conveyor within the meaning of Section 56.14109.

Pursuant to a directive of the undersigned to the Secretary, as set forth in a conference call with counsel for the Secretary and counsel for Nolichucky, the Secretary's counsel filed a Program Information Bulletin No. P00-15 ("bulletin") ("issue date" October 23, 2000). In a statement filed with the bulletin, the Secretary's counsel indicated that this bulletin "has been issued by the Secretary in response to the Commission's Remand Order of September 15, 2000." The bulletin, which states that it is from Earnest C. Teaster, Jr., Administrator for Metal and Non-Metal Safety and Health, sets forth that it "... restates the Secretary of Labor's 'authoritative interpretation' of 30 C.F.R. Section 56.14109(a) and (b)(1) . ... [and that] "[t]he Secretary's authoritative interpretation is the interpretation stated in the Mine Safety and Health Administration (MSHA) Program Policy Manuel (volume IV, parts 56 and 57, subpart M, 55a - 55b (June 18, 1991))." Specifically, the bulletin states that it is restating language from the PPM which "provides that neither the conveyor installation or framework can be considered an allowable guard, irrespective of its height or its conformance with standard railing heights." The record indicates that the bulletin the Secretary has filed, sets forth that the Secretary's authoritative interpretation of Section 56.14109 supra, is the interpretation set forth in its Program Policy Manual. Hence, the PPM is the Secretary's authoritative interpretation of Section 56.14109 supra.

The Secretary's interpretation is reasonable and entitled to deference.

In general, deference is warranted only when the language of the regulation is ambiguous Auer v. Robbins, 519 U.S. 452 (1997). In its decision, the Commission, in its discussion of the law regarding deference, and prior to setting forth the scope of its remand relating to obtaining from the Secretary an "authoritative interpretation", referred to Akzo Noble Salt, supra, which held that deference is normally owed to the Secretary's position before the Commission, "when interpreting an ambiguous regulation." (Emphasis added). (22 FMSHRC supra at 1062) In this connection, the Commission noted that the term "unguarded" was not defined in the regulation, and that the Legislative History of Section 56.14109 not provide any guidance in determining whether the conveyors be considered unguarded. I thus conclude that the Commission's decision sets forth, as the rule in this case, that the cited standard regarding the scope of the term "unguarded" was ambiguous. Hence, in the case at bar, deference is warranted.

The Secretary's interpretation that the conveyor belt was not guarded by the forty-two inch structural truss, is in harmony with the common meaning of the term "guarded", and the meaning of that term in the mining industry. Thus, the *Dictionary of Mining, Mineral and Related Terms ("DMMRT")* (1968 edition), defines "guarded" as, pertinent, as follows: "... covered, shielded, fenced, enclosed, or otherwise protected by suitable covers or casings, barrier rails, screens, or mats or platforms to remove the likelihood of either dangerous contact or approach by persons or objects to a point of danger." In the same fashion, *Webster's Third New International Dictionary (1993 Ed.) ("Webster's")*, defines "unguarded", as pertinent, as "1 a: unprotected by a guard ... .". "Guard", as pertinent, is defined in *Webster's* as "6: a fixture or attachment designed to protect or secure against injury ... .". Thus, under both the common

meaning of the term "unguarded", and its meaning in the mining industry, the structural truss, which does not cover or shield the conveyor, and which is not been shown to have been designed to protect against injury, would still leave the conveyor unguarded. Hence, the Secretary's interpretation is reasonable.

Nolichucky's argument that since the Secretary's interpretation, as set forth in the PPM was not arrived at after a formal adjudication, or notice and comment rule making, it is entitled only to respect and is not entitled to deference, is without merit. Nolichucky's reliance on Christensen v. Harris County, 529 U.S. 576, (2000), is misplaced. In Christensen, supra, the issue was whether deference should be accorded an interpretation by an agency of a statute where the interpretation is set forth in a policy document. In contrast, in the case at bar, as in Auer v. Robbins, 519 U.S. 452 (1997), the issue presented was whether an agency's policy statement interpreting its own regulation should be given deference. In Auer, supra, it was held that an agency's interpretation of its own regulation is entitled to deference. 519 U.S. supra, at 461. Thus, under Auer supra, the Secretary's authoritative interpretation, set forth in the PPM, is entitled to deference.

The operator was not on notice of the regulation's requirements.

It is the law of this case, as established by the Commission, that the cited standard is ambiguous i.e., as to whether, under the regulatory standard, the conveyor at issue, whose structural trusses were forty-two inches in height, were still unguarded, and hence within the perview of the requirements of Section 56.14109 supra. The Secretary's authoritative interpretation of this standard, as set forth in the PPM, appears to have been issued on June 18, 1991. There is no evidence that Nolichucky had either knowledge or notice of the terms of the PPM. I note the Secretary's assertion that MSHA Inspector Hobbs provided Nolichucky with actual notice on January 1999 that the conveyors were not in compliance with Section 56.14109 supra, since they had neither railings nor stop cords. However, I do not find much merit in this argument, considering the Secretary's stipulation that

> . . . statements were made to Mr. Bewley or citations were not issued for violations of that standard in the past based upon this 42-inch built structure interpretation meaning that that would be sufficient to constitute a guard for the purpose of that standard. In other words, the standard refers to unguarded conveyors, and apparently inspectors, in the past, Mr. Nichols' predecessor in the position of field office supervisor apparently okayed or acquiesced in that interpretation. (Sic.) (Tr. 26-27).

Thus, although Nolichuckey had been informed by Inspector Hobbs on January 19 that the conveyors were not in compliance with Section 56. 14109 supra, and citations for these conditions were issued nine days later, there is no evidence that Nolichuckey, prior to the date cited, had notice of the authoritative interpretation of the Secretary as set forth in the PPM.

Further, it is significant to note that Nolichuckey had been informed in the past by MSHA inspector that the conveyors at issue were in conformity with Section 56, 14109(a) because the forty-two inch structural truss constituted a sufficient guard, and that the MSHA Field Office Supervisor acquiesced in this interpretation. Thus, it can not be found under these circumstances that Nolichuckey had notice of the Secretary's authoritative interpretation set forth in the PPM. Indeed, even the Commission noted, 22 FMSHRC supra at 1063, that "... we do not know what the Secretary's interpretation of the regulation is or what it requires, ..." . If the Commission, after reviewing the record in this case had no knowledge of the Secretary's interpretation of the regulation or what it requires, then certainly, a fortiori, it would be a deprivation of due process to hold that Nolichuckey, prior to litigation of this matter, and, on the date cited, had notice of the Secretary's authoritative interpretation of the cited standard, and what it required.

Conclusion

Since it is the law of the case that the cited standard was ambiguous, the Secretary's interpretation is entitled to deference. However, since Nolichuckey did not have notice of the Secretary's authoritative interpretation, it can not be held responsible for having violated the cited standard (See Phelps Dodge Corp. v. FMSHRC, 681 F 2nd 1189 (9th Cir. 1982).

ORDER

It is **Ordered** that the notices of contest are sustained, and that the citations at issue served to Nolichuckey on January 28, 1999 be **Dismissed**.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

Adele L. Abrams, P.C., 4061 Powder Mill Road, Suite 700, Calverton, MD 20705

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862

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