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SOL (MSHA) V. EMERY MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
August 11, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION {MSHA),	
v.	Docket Nos. WEST 81-400-R
	WEST 82-48
EMERY MINING CORPORATION	WEST 82-80

DECISION

This consolidated proceeding under the 1977 Mine Act, 30 U.S.C. □ 801 et seq. (1976 & Supp. V 1981), involves the interpretation an application of 30 C.F.R. • 48.8(a). The cited mandatory standard provides that:

> Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section.

The administrative law judge concluded that the regulation requires that refresher training be given once every calendar year, and dismissed the proceeding because the calendar year in question had not ended when the Secretary of Labor issued the withdrawal order that initiated the case. 4 FMSHRC 1450 (July 1982)(ALJ). For the reasons set forth below, we reverse and hold that the key language, "annual refresher training," means that refresher training is to occur within twelve months of the last received training.

The essential facts are not in dispute. On September 9, 1981, a Mine Safety and Health Administration ("MSHA") inspector issued Emery Mining Corporation a withdrawal order under section 104(g)(1) of the Mine Act. 1/ The order stated that five of Emery's miners at one of its underground mines had not received the minimum 8 hours of annual refresher training. The five miners had all received refresher training in June 1980. Thus, at the time of the withdrawal order, fifteen months had elapsed since their last training.

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1/ Section 104(g)(1)(30 U.S.C. • 814(g)(1)) directs the Secretary to issue a withdrawal order withdrawing miners from a mine if the Secretary finds that the miners have not received their requisite training under section 115 of the Act (30 U.S.C. • 825).

The administrative law judge concluded that compliance with

section 48.8(a) is achieved if retraining occurs by December 31 of the calendar year following the calendar year in which the last training had been given. The judge acknowledged that Congress may have intended that refresher training be given within twelve months of the previous training. However, he determined that section 48.8(a) controlled and that the regulation mandates only calendar-year training. In reaching this conclusion, the judge relied upon language in some of the Secretary's other regulations dealing with the training of miners as well as on Emery's training plan approved by MSHA. He specifically found that Emery had notified MSHA that training would be given "By December 31st Annually" on the MSHA form asking "PREDICTED TIME WHEN REGULARLY SCHEDULED RE-FRESHER TRAINING WILL BE GIVEN."

Since this response was approved by MSHA, the judge concluded that only calendar year retraining was mandated. He then applied these findings and conclusions to the sequence of training dates for the five miners involved and held that Emery had not violated section 48.8(a) as to any of the miners. We disagree.

The regulation must be interpreted in light of the statutory provisions that it implements. Section 115(a)(3) of the Mine Act states in relevant part:

> Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that-
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> . . .
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> (3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section....

30 U.S.C. • 825(a)(3)(emphasis added.) We first construe the meaning of the statutory words, "no less frequently than once each 12 months."

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The overall scheme of section 115 is one of sequential, periodic training. A new miner receives 40 hours of training if he is to work underground, or 24 hours if he is to work on the surface. Sections

115(a)(1) & (2). 2/ All miners thereafter must receive at least 8 hours of refresher training, in accordance with the requirement stated in section 115(a)(3), supra. To determine the timing for refresher training "no less frequently than once each twelve months," an operator necessarily must determine when the previous training session occurred. Thus, the scheduling of refresher training is dependent upon a specific event or date - that is, a miner receives refresher training "no less frequently than once each twelve months" from the completion of the previous training session. This interpretation of the statutory words accords with well established principles of construction that periods of time associated with an event or contingency ordinarily imply an anniversary connotation. See, for example. Matter of PRS Products, Inc., 574 F.2d 414, 419 (8th Cir. 1978). More important, a twelve-month interval between training sessions far better accomplishes the safety objectives of section 115 and the Mine Act as a whole than a calendar-year approach, which could permit almost twenty-four month intervals between training.

Because the regulation in issue was promulgated to effectuate the statute, we therefore apply to the regulation the same anniversary interpretation given its statutory counterpart. The operator contends that the Secretary's choice of "annual" as a "catchword for the corresponding statutory phrase" (Sec'y Br. at 6) renders the regulation unclear on its face. Although "annual" could refer to twelve-month

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2/ Sections 115(a)(1) & (2) provide:

... Each training program approved by the Secretary shall provide as a minimum that--

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate, hazard recognition, emergency procedure electrical hazards, first aid, walk around training and the health and safety aspects of the

task to which he will be assigned....
30 U.S.C. • 825(a)(1) & (2).
~1403
intervals, it might also be construed to connote a calendar year beginning January 1 and ending December 31. However, when "annual" is read, as it must be, in conjunction with the clear statutory mandate for refresher training at twelve month intervals, any possible facial ambiguity is dissipated. We therefore hold that 30 C.F.R. • 48.8(a), implementing section 115 of the Act, requires refresher training to be given within twelve months of the last received training. In view of our decision, the Secretary may wish to consider clarifying the regulation through amendment.

We also reject Emery's argument that MSHA's approval of its training plan constituted a "contemporaneous construction" of the regulation in favor of a calendar year interpretation. The judge found that MSHA's approval of Emery's insertion of the words, "By December 31st Annually", in provision number 6 of the plan was tantamount to approval of refresher training on a calendar-year basis. Substantial evidence does not support the conclusion that MSHA knowingly agreed to a retraining plan on a calendar-year basis. Emery and MSHA officials appear to have read provision number 6 to mean the date when Emery would notify MSHA of the specific dates that its miners would undergo refresher training, rather than a date specifying when each miner's refresher training was to occur. 3/ One Emery witness testified that an MSHA representative at a joint meeting of MSHA and Emery officials envisioned that there would be a number of notifications coming out throughout the year as refresher training for miners arose. Tr. 76-77. Moreover, the simple act of

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3/ For example, Emery's assistant training director testified:

Q. [B]ut putting one date in there that just happened to be the last date of the year did not resolve that, did it?
A. Resolve what?
Q. The agency's problem. That plan does not put them on notice when a refresher training is going to take place, does it?
A. No, it does not. Not the December 31st date.
* * * *
Q. [A]nd the fact that the agency was concerned about when they would be notified of a refresher training does not even touch on the subject of the period in between the refresher training does it?
A. No, it doesn't.
Tr. 63, 64.

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approving one operator's training plan would not constitute a

dispositive or consistently-applied national pronouncement by the administrative agency that would amount to a "contemporaneous construction" of the regulation. See Florence Mining Co., 5 FMSHRC 189, 196 (February 1983), petition for review filed, 3rd Cir., March 15, 1983; King Knob Coal Co., 3 FMSHRC 1417, 1420-21 (June 1981).

Emery's "contemporaneous construction" claim could also be read as an estoppel defense, in that MSHA's approval of Emery's training plan, assuming it provided for calendar year retraining, estopped the Secretary from enforcing section 48.8(a) against Emery. We adhere to our position in King Knob Coal Company, supra, that under Federal Crop Insurance Corp. v. Merrill, 332 U.S. 381 (1947), estoppel does not run against the federal government. 3 FMSHRC at 1421 22. We note, however, that some confusion did surround MSHA's approval of Emery's training plan, and the government appears partly responsible for the situation. In King Knob, we held that confusing governmental enforcement mitigated the degree of an operator's negligence in the assessment of civil penalty. 3 FMSHRC at 1422-23. On remand, the judge can apply this mitigating principle in assessing Emery's negligence.

For the foregoing reasons, we reverse the judge's decision. The stipulated facts show a violation of section 48.8(a) as to the five miners in question. We remand for a determination of penalty in light of our decision in King Knob.

L. Clair Nelson, Commissioner

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