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MSHA V. KENNECOTT MINERALS
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FMSHRC-WDC
September 16, 1985

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

Docket Nos. WEST 82-155-M
v. WEST 83-60-M

KENNECOTT MINERALS COMPANY,
UTAH COPPER DIVISION

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty cases, arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. $ 801 et seq. (1982), require us to interpret 30 C.F.R. $ 55.9-22, the berm standard applicable to metal and nonmetal open pit mines from 1970 through 1984. 1/ A Commission administrative law judge held that the standard was merely advisory and dismissed the Secretary of Labor's proposal for penalty. 6 FMSHRC 2023 (1982)(ALJ). We disagree. For the reasons that follow, we reverse the judge's decision and remand for assessment of appropriate civil penalties.

These cases arose out of two citations issued to the Kennecott Minerals Company, Utah Copper Division, ("Kennecott") in 1982 and 1983 by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citations alleged that Kennecott had violated 30 C.F.R. $ 55.9-22 by failing to maintain adequate berms or guardrails along an access road to the tailings pond associated with its Magna and Arthur concentrators. Kennecott did not deny that the road lacked berms or guardrails; however, it contested the citations on a

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1/ In the 1984 edition of 30 C.F.R., the standard stated, "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways." In this edition, 30 C.F.R. Parts 56 and 57 contained identical standards applicable to sand, gravel, and crushed stone operations, and metal and nonmetal underground mines. On January 25, 1985, the Secretary of Labor promulgated a recodification combining Parts 55, 56, and 57 into a single new Part 56. New section 56.9022 also states, "Berms or guards shall be provided on the outer bank of elevated roadways."

number of legal grounds. 2/ Following a hearing, the administrative law judge held that the standard did not impose any mandatory requirements on mine operators and that the Secretary's civil penalty proposal therefore could not be sustained.

The judge based his decision on the fact that when the standard was originally promulgated in 1970, it read "Mandatory. Berms or guards should be provided on the outer bank of elevated roadways." 34 Fed. Reg. 3660, 3663 (emphasis added). He pointed out that this language represented a change from the standard as proposed in 1969, which had included the word "shall" instead of "should," and noted that the preamble to the final rule stated, "In a few instances in which the language of a proposed mandatory standard appeared to impose a requirement not within the intendment of the standard, the standard has been rephrased." The judge also stated that Jim Walter Resources, Inc., 3 FMSHRC 2488, 2490 (1981), in which the Commission held that a standard requiring that an ANSI standard "be used as a guide" was merely advisory, was "much akin" to this case. He pointed out that the word "shall" "has almost universally been ... used in regulations to express what is mandatory," and concluded that the Secretary proposed the standard in mandatory form and promulgated it in advisory form." Therefore, he held that the citations must be vacated.

On review, the Secretary argues that the promulgation history of the standard establishes its mandatory nature. He points out that although the word "shall" in the proposed standard was changed to "should" in the final rule, the designation of the standard as "mandatory" was never changed, and that the preamble to the proposed rule clearly states that "where the word 'Mandatory' appears in a standard, the standard is a mandatory one." The Secretary argues that the preamble language that the judge relied upon does not support his holding that the use of the word "should" was intended to make compliance with the berm standard less than mandatory. He notes that the quoted sentence was followed by examples of instances in which a proposed mandatory standard appeared to impose an unintended requirement, and asserts that the changes in those examples, unlike the change in the berm standard, merely "correct obvious mistakes."

In this case, the Secretary claims, it was the use of the word "should" in the promulgated standard that was a clerical error. That error was corrected in the 1974, and subsequent editions of the Code of Federal Regulations, as well as the "Yellow Book", have all included the word "shall" in the standard. 3/ The Secretary also argues that in 1979 all advisory standards for metal and nonmetal mines were either revoked or made mandatory (44 Fed. Reg. 48,490) and

that the judge's

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2/ Most of Kennecott's arguments represented an attempt to establish that the standard was not applicable to the cited location. The administrative law judge rejected Kennecott's position and Kennecott has not renewed it in this appeal.

3/ The "Yellow Book" was a compilation of all metal and nonmetal mine safety and health standards. It was published by the Secretary of the Interior in 1972, and widely disseminated through the mining community.

decision "fails to reconcile the fact that there are no longer any advisory standards." Finally, the Secretary points out that in Secretary of Labor v. Cleveland Cliffs Iron Co., 3 FMSHRC 291 (1981) and Secretary of Labor v. El Paso Rock Quarries, 3 FMSHRC 35 (1981), the Commission upheld citations issued under the berm standard. He argues that by imposing civil penalties in those cases, the Commission found the berm standard to be mandatory.

In support of the judge's decision, Kennecott argues that when the standard was promulgated originally the change in wording from "shall" to "should" "was intended to be significant." It cites the preamble language quoted by the judge, supra, and also claims that the decision in Jim Walter Resources, supra, is applicable to this case. Based on dictionary definitions of "should," and "shall," it argues that, under the standard as promulgated, berms might be "proper" or "expedient," but nevertheless not required. Kennecott also attacks the Secretary's position that the use of the word "should" in the original Federal Register promulgation of the standard was a clerical error which could be informally corrected in the Code of Federal Regulations. It argues that there is no authority for such "informal" corrections by the Federal Register staff and that there is no way of knowing whether the change from "should" to "shall" accurately reflected the intent of the Secretary. It points out that since the combination of the words "Mandatory" and "should" in the berm standard was unique in the Part 55 regulations, "[i]t is just as reasonable to conclude that ... inclusion of the term 'mandatory' was erroneous."

Our own examination of the standard's language and history convinces us that it is now and always has been a mandatory standard. As the parties point out, the standard was first proposed by the Secretary of the Interior in 1969. 34 Fed. Reg. 639. It was part of a major package of standards applicable to metal and nonmetal mines proposed pursuant to the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. $ 721 et seq. (1976), a predecessor statute to the Mine Act. As proposed, the standard read:

> 55.9-22. Mandatory - OPAC - Berms or guardrails shall be provided on the outer bank of elevated roadways.

The standards included in the 1969 proposal were later promulgated in several stages. The first stage, on July 31, 1969, included standards on which no comments had been received and which were promulgated without change from the proposal. 34 Fed. Reg. 12503 (1969). Included in this group was the "Purpose and Scope" section of Part 55:

> Each standard which is preceded by the word "Mandatory" is a mandatory standard. The violation of a mandatory standard will subject an operator to an order or notice under section 8 of the Act (30 U.S.C. $ 727).

30 C.F.R. $ 55.1.

The second stage promulgation, on February 25, 1970, included the standard at issue. This promulgation was comprised of standards on which comments had been received but which (with one exception noted below) were promulgated without substantive change. All standards that had been proposed as mandatory were promulgated with the designation "Mandatory." 35 Fed. Reg. 3660 (1970). As the parties have noted, the preamble to this promulgation stated:

> For the purpose of clarification, revisions have been made in some of the standards which the advisory committee recommended be mandatory, but no substantive changes have been made except in Standard 55.6-1, which relates to explosives and which is discussed below. In a few instances in which the language of a proposed mandatory standard appeared to impose a requirement not within the intendment of the standard, the standard has been rephrased. For example, proposed Standard 55.4-1 appeared literally to prohibit smoking wherever oil or grease is used; the revised standard relates the prohibition to the hazard involved. Similarly, proposed Standards 55.6-59 and 55.6-60, when read separately, appeared to require that all persons be removed from areas endangered by flyrock from blasting and that shelters be provided; Standard 55.6-160 hereby added to Part 55 combines the alternatives clearly contemplated by the two proposed standards. Changes, some substantive, also have been made in a number of the advisory standards.

As promulgated, section 55.9-22 read:

> Mandatory. Berms or guards should be provided on the outer bank of elevated roadways.

35 Fed. Reg. 3660, 3663.

The standard appeared in this form in the 1970-1973 editions of the Code of Federal Regulations. In the 1974 edition, however, without explanation, and apparently without notice in the Federal Register, the standard appeared with the word "should" changed to "shall." Subsequent editions of the Federal Register have continued to publish the standard containing the word "shall."

The parties have argued extensively over which version of the standard is "correct." We do not find it necessary to resolve this question, however, because we believe that the two versions of the

standard impose identical requirements on mine operators. We consider the most important factor in determining the nature of the standard to be the fact that it has consistently contained the designation "Mandatory." In light of this fact, we hold that the standard always imposed a mandatory requirement on mine operators.

In this case, it is at least arguable that the combination of the designation "Mandatory" with the word "should" created an ambiguity as to how the standard is to be interpreted. In light of this potential ambiguity we have examined the context and history of the berm standard to determine its nature. Our determination that the standard imposed a mandatory duty is based in part on the language of 30 C.F.R. $ 55.1, the Purpose and Scope section of Part 55. As noted above, that section states, "Each standard which is preceded by the word 'Mandatory' is a mandatory standard." It goes on to state that violation of those standards designated mandatory will subject a mine operator to enforcement action by the Secretary. The essential defining characteristic of a mandatory rule is that "failure to comply with [its] requirements ... subjects the noncomplier to affirmative legal liabilities." lA Sutherland, Statutory Construction $ 2503 (3d ed. 1972). In this case the regulatory scheme clearly provides that failure to comply with a provision labelled "Mandatory" will subject an operator to the Act's enforcement mechanisms and penalties.

Further, in light of the arguments made by Kennecott, it is notably inconsistent to argue (1) that the 1970 "should" must prevail over "shall" even though the former word was changed to "shall" in 1974 and so appeared in the standard when these violations occurred, and (2) to argue at the same time that the consistent appearance in the standard of the prefatory word "Mandatory," (which has appeared in the standard from inception), must be charged to mistake.

As set forth above, the regulatory history of the standard supports our conclusion that it imposes a mandatory duty on mine operators. Also, we find it significant that the standard was proposed as mandatory and that no standards proposed as mandatory were promulgated as merely advisory in the relevant rulemaking. On other occasions, the Secretary has amended advisory standards and made them mandatory, but this has been done through full rulemaking procedures. See 35 Fed. Reg. 10299 (1970)(proposal), 35 Fed. Reg. 18587 (promulgation) and 43 Fed. Reg. 40766 (1978)(proposal), 44 Fed. Reg. 48490 (1979)(promulgation). We have not been cited to any instance in which the Secretary proposed a standard as mandatory and promulgated it as advisory.

In reaching this conclusion, we emphasize that we are not approving the "informal correction" process through which the language of the standard apparently was changed in the Code of Federal Regulations. The rulemaking process, as established by the Federal Register Act, 44 U.S.C. $ 1501 et seq., and the Administrative Procedure Act, 5 U.S.C. $ 500 et seq., as well as by the Mine Act and

its predecessor statutes, contemplates that notice be given in the Federal Register of all changes in agency rules. Neither the Secretary nor the Office of the Federal Register itself is free to disregard this requirement. Indeed, the Secretary on other occasions has corrected clerical errors in standards by publishing notice of the corrections in the Federal Register. See e.g., 34 Fed. Reg. 6737 (1969), 34 Fed. Reg. 3947 (1969), and 35 Fed. Reg. 4315 (1970). Rather, our holding in this case is based on the fact that we find that the language of the originally promulgated standard imposed a mandatory requirement consistent with the later-published "corrected" version.

This case is therefore remanded to the administrative law judge for assessment of appropriate penalties. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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