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MSHA V. UTAH POWER & LIGHT
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 27, 1989

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

v.

Docket Nos. WEST 87-211-R
WEST 87-224-R

UTAH POWER & LIGHT COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)("Mine Act" or "Act"), involves alleged violations of 30 C.F.R. 75.1704 by Utah Power & Light Company ("UP&L") at its Wilberg Mine located in Orangeville, Utah. 1/

1/ Section 75.1704 essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. 877(f)(1), and provides:

Escapeways.

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or

slope facilities to the surface, as appropriate, and
shall be maintained in safe condition and properly
marked. Mine openings shall be adequately protected to

The primary issue presented is whether the Secretary of Labor may cite a violation of section 75.1704 for failure to comply with the six foot by five foot dimension criteria for escapeways contained in 30 C.F.R. 75.1704-1(a) irrespective of the passability of the escapeways i question. 2/ Commission Administrative Law Judge John J. Morris concluded that the criteria set forth in section 75.1704-1(a) were not mandatory requirements and that the proper test for the adequacy of escapeways is, as provided in section 75.1704, whether they are "maintained to insure passage at all times of any person, including disabled persons...." 10 FMSHRC 71 (January 1988)(ALJ). Accordingly, the judge dismissed a citation issued to UP&L in Docket No. WEST 87-224-R, on the basis that the parties had stipulated that, apart from a failure to comply with the criteria, the cited portion of the escapeway was fully passable by all persons, including disabled persons. The judge also found that the cited portion of the escapeway involved in Docket No. WEST 87-211-R was in violation of section 75.1704 on other grounds, but determined that the violation did not result from UP&L's unwarrantable failure to comply with the standard. We granted the Secretary's petition for discretionary review, which challenges the judge's findings that no violation occurred in Docket No. WEST 87-224-R and that there was no unwarrantable failure in Docket No. WEST 87-211-R. For the reasons that follow, we affirm.

On June 17, 1987, Ted E. Farmer, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), and his supervisor, William Ponceroff, inspected a designated escapeway in the

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> prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

2/ 30 C.F.R. 75.1704-1 provides in pertinent part:

> Escapeways and escape facilities.
>
> This section sets out criteria by which District Managers will be guided in approving escapeways and escape facilities. Escapeways ... that do not meet these criteria may be approved providing the operator can satisfy the District Manager that such escapeways ... will enable miners to escape quickly to the surface

in the event of an emergency.

(a) Except in situations where the height of the coalbed is less than 5 feet, escapeways should be maintained at a height of at least 5 feet (excluding necessary roof support) and the travelway in such escapeway should be maintained at a width of at least 6 feet....

3rd Right Section of the Wilberg Mine. Farmer noted that a water pipe, six inches in diameter, was angled across the escapeway and restricted the travelway at that point to a width of 43 inches. The inspector also noted the presence of an offset two feet higher than the level of the walkway running along one rib, an accumulation of loose coal and rib sloughage on the bottom, and an extension of a rib "toe" into the walkway that restricted the width of the walkway to four feet. He also observed two miners were in the area at the time, working on removing the accumulation. Based on his observations, Inspector Farmer issued to UP&L an order of withdrawal pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), alleging a violation of section 75.1704 that he found to b of a significant and substantial nature and that resulted from UP&L's unwarrantable failure to comply with section 75.1704. This withdrawal order is the subject of Docket No. WEST 87-211-R.

On July 20, 1987, MSHA Inspector Richard Jones inspected another portion of the same escapeway. Inspector Jones observed an "overcast" in the escapeway and found the escapeway to be from four to four and a half feet high. 3/ Although the inspector did not believe that the escapeway was impassable, the height of the escapeway near the overcast did not meet the criteria of section 75.1704-1. Accordingly, he issued to UP&L a citation pursuant to section 104(a) of the Act alleging a violation of section 75.1704.1(a). 4/ This citation is the subject of Docket No. WEST 87-224-R.

In his decision, the judge characterized the principal issue as "whether the 6 foot by 5 foot criteria in [section] 75.1704-1 may be enforced without regard to functional passability in an escapeway." 10 FMSHRC at 71. 5/ The judge noted that the Secretary's uncontroverted evidence showed that UP&L's escapeways, in some instances, were less than five feet high or six feet wide. The Secretary's basic contention was that the operator was required under section 75.1704-1(a) to seek approval from the appropriate MSHA district manager for maintenance of escapeways with non-complying dimensions. 10 FMSHRC at 72.

The judge rejected the Secretary's position and determined:

> When Congress enacted the escapeway regulations it established a functional test. The statutory

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3/ An overcast is "an enclosed airway to permit one air current to pass over another one without interruption." Bureau of Mines, U.S. Dep't of Interior, Dictionary of Mining, Mineral and Related Terms 780 (1968).

4/ The citation was subsequently modified to allege a violation of section 75.1704.

5/ At the hearing, the parties stipulated that the term "passability" would be used as an abbreviated expression for the phrase in section 75.1704, "maintained to insure passage at all times of any person, including disabled persons." Tr. 11. We adopt the same shorthand expression for purposes of this decision.

> mandate, now embodied in the regulation, is that escapeways must be "maintained to insure passage at all times of any person, including disabled persons...."
>
> In the instant case the Congressional mandate, as now embodied in the regulation, directly addresses the precise issue in question. Notably, Congress did not establish specific size requirements for escapeways as it has done in other contexts....
>
> ... Congress clearly knew how to mandate specific linear foot requirements when it wished to do so. Its failure to do so here is a confirmation of its intent to require a functional test as expressed in the statutory language.

10 FMSHRC at 73-74. The judge concluded that the language of section 75.1704 is clear on its face and that MSHA cannot, at least without the benefit of further rulemaking, ignore that regulation's passability test and substitute in its place the linear foot criteria for height and width of escapeways. 10 FMSHRC at 74. The judge then considered UP&L's contests as to each of the alleged violations.

In Docket No. WEST 87-211-R, the judge found that the uncontroverted evidence established that the water pipe across the escapeway reduced the escapeway to a width of 43 inches and that loose coal and rib sloughage also restricted the passability of the escapeway. The judge found that these facts established a violation of section 75.1704 and dismissed UP&L's contest of the withdrawal order. As to the inspector's unwarrantable failure finding, however, the judge concluded that the operator's conduct constituted ordinary negligence but not the type of aggravated conduct constituting unwarrantable failure as set forth by the Commission in Emery Mining Corp., 9 FMSHRC 1997 (December 1987) and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2004 (December 1987). 10 FMSHRC at 85. Finally, in Docket No. WEST 87-224-R, the judge sustained UP&L's contest of the section 104(a) citation based upon the parties: stipulation that the inspector believed that the escapeway in question was "adequate and fully passable for all persons including disabled persons." 10 FMSHRC at 85.

The Secretary appealed the judge's finding no violation in WEST 87-224-R and his finding an absence of unwarrantable failure in WEST 87-211-R.

On review, the Secretary first contends that the judge erred in

concluding that the criteria of section 75.1704-1(a) are not mandatory and are unrelated to the "functional passability" of escapeways as set forth in section 75.1704. Stating that section 75.1704-1(a) is a

"reasoned and logical implementation" of the statutory mandate embodied in section 75.1704 to insure passage at all times of any miner, including disabled persons, the Secretary urges reversal of the judge's conclusion to the contrary. PDR 10. UP&L asserts that operators have no legal duty under either section 75.1704 or 75.1704-1 to obtain prior approval from the Secretary for the escapeways mandated by section 75.1704. UP&L asserts that, as a matter of law, it cannot be held liable under section 75.1704 solely for its failure to obtain prior approval for escapeway width and height that do not conform to section 75.1704-l's criteria. Since section 75.1704-1(a) is advisory and imposes no mandatory duty upon an operator, UP&L argues that the Secretary's attempt to enforce the provisions of that subsection through section 75.1704 is an impermissible circumvention of the legally mandated requirements for rulemaking.

I.

We first consider whether the judge properly found in Docket No. WEST 87-224-R that UP&L had not violated section 75.1704. Where the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written unless the legislature or regulator clearly intended the words to have a different meaning. See Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-43 (1984); United States v. Baldridge, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192-93 (9th Cir. 1982). "In statutory interpretation, the ordinary meaning of words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result," Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987), citing In re Trans Alaska Pipeline Rate Case, 436 U.S. 631 (1978).

We find the language of section 75.1704, as relevant here, plain and unambiguous. Section 75.1704 provides that escapeways be "maintained to insure passage at all times of any person, including disabled persons." Thus, the standard establishes a general functional test of "passability," as argued here by UP&L and as found by the judge. Further, section 75.1704 does not by its terms impose upon operators any obligation to seek the Secretary's prior approval for their escapeways. In contrast, we note that the third sentence of section 75.1704 requires that "[e]scape facilities approved by the Secretary ... shall be present at or in each escape shaft or slope...." (emphasis added). The Secretary does not argue that the term "escape facilities" in the standard includes "escapeways." Compare BethEnergy Mines, Inc., 11 FMSHRC 1445, 1450 (August 1989) (section 75.1704 requires operator to provide two designated escapeways from each working section of a mine pursuant to section 75.1704). The Secretary contends, however, that what constitutes a "passable" escapeway is open to widely varying interpretations and that section 75.1704-1(a) was promulgated to

"improve" upon the functional passability standard enunciated in section 75.1704. 6/ While development by the Secretary of more specific

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6/ Section 101(a) of the Mine Act, 30 U.S.C. 811(a), grants the Secretary authority to "develop, promulgate, and revise ... improved

requirements for passability might be a laudable regulatory goal, section 75.1704-1 presently fails to achieve that purpose in an enforceable manner.

The Mine Act sets forth a scheme by which the Secretary's enforcement agency, MSHA, regulates mine operations. MSHA promulgates, pursuant to section 101 of the Act, regulations that establish general and mandatory standards with which all mine operators must comply. See n. 6, supra. MSHA also requires mine operators to adopt comprehensive plans addressing specific subjects such as roof control and ventilation. 30 U.S.C. 862(a) and 863(a). These plans must then be submitted to an MS District Manager for approval. Once approved, the plans are mandatory in the sense that violations of the requirements in the plans constitute violations of the Act. United Mine Workers of America v. Dole, 870 F.2d 662, 667 (D.C. Cir. 1989).

The Secretary argues that section 75.1704-1 implements the second method of enforcement with regard to escapeways and escape facilities. It "sets out criteria by which District Managers will be guided in approving escapeways and escape facilities." According to the Secretary, the language of the regulation contemplates a process by which MSHA District Managers consider certain criteria in deciding whether to "approve" escapeways or escape facilities. However, as UP&L accurately notes, a critical regulatory step is missing. Neither section 75.1704, section 75.1704-1, nor any other regulation requires operators to seek the Secretary's approval for escapeways or to otherwise conform the dimensions of escapeways to five feet in height and six feet in width. Lacking any such statutory or regulatory approval requirements, there can be no violation for failure to conform to the criteria set forth in section 75.1704-1(a) or for failure to seek a District Manager's approval for noncompliance with those criteria. 7/

The Secretary's argument is undercut also by the use of the term "should" in the wording of the criteria, a term that normally signals

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mandatory health or safety standards for the protection of life and prevention of injuries in ... mines."

7/ The U.S. Court of Appeals for the District of Columbia Circuit has explained that similar types of criteria may constitute mandatory safety standards when they afford to miners no less protection than the statutory standard or the improved mandatory standard from which they are derived. United Mine Workers of America v. Dole, supra, 870 F.2d at 667-672. However, in Dole the court considered the validity of roof control plan criteria that implement a statutory and regulatory mandate requiring operators to submit and District Managers to approve roof control plans.

870 F.2d at 670. "While mine operators were not per se required to comply with each and every criterion so that the criteria were not themselves mandatory standards, if the criteria were actually incorporated into an approved plan, the operator was bound to comply with them." 870 F.2d at 670. (emphasis added). Unlike the roof control criteria at issue in Dole, there is no statutory or regulatory mandate that individual mine operators submit in advance plans for escapeways to appropriate MSHA District Managers for approval.

the non-mandatory nature of a regulation. See generally, Jim Walter Resources, Inc., 3 FMSHRC 2488 (November 1981). The Commission has emphasized that when assessing the nature of a regulation the essential question is whether the standard as written imposes a mandatory duty upon operators. For instance, the Commission has found that even the inadvertent use of the word "should" instead of "shall" could be overcome as an indicia of a regulation's non-mandatory nature where the regulatory history of the standard made clear that the standard imposes a mandatory duty on mine operators. See Kennecott Minerals Co., Utah Copper Division, 7 FMSHRC 1328, 1332 (September 1985). The standard at issue, however, was neither proposed as mandatory nor promulgated with a mandatory designation. Compare Kennecott Minerals Co., supra. Rather, as the judge properly observed, the standard simply purports to set forth criteria by which MSHA's District Managers will be guided in approving escapeways, without imposing a commensurate mandatory duty on mine operators to seek such approval. 10 FMSHRC at 23.

If the Secretary desires to require operators to obtain prior approval for escapeways, MSHA can pursue such a requirement through normal rulemaking. See e.g., 30 C.F.R. 75.220 (requiring each mine operator to develop and follow a roof control plan approved by the District Manager); 75.316 (requiring each operator to adopt and the Secretary to approve a ventilation system and methane and dust control plan). Indeed, subsequent to the events giving rise to this case, the Secretary initiated a revision of the escapeways standards. On January 27, 1988, MSHA issued proposed rules governing underground coal mine ventilation, including amended regulations for escapeways. 53 Fed. Reg. 2382 (1988). In explaining the proposal, MSHA stated that it "could establish requirements for escapeways for all miners." Id. at 2408. (emphasis added). The proposed standards would eliminate the approach presently found in section 75.1704-1 and substitute specific requirements for escapeways through mandatory standards. Proposed rule 30 C.F.R. 75.380(a)(4)-(5) states that "escapeways ... shall be ... [m]aintained to at least a height of 5 feet ... [and] ... [m]aintained at least 4 feet wide...." Id. at 2422.

Finally, the Secretary introduced into evidence a memorandum dated May 7, 1987, from former MSHA District Manager John W. Barton to sub-district managers and field office supervisors. The memorandum instructs MSHA's enforcement personnel then under Barton's supervision that escapeways must "meet the height and width requirements" of section 75.1704-1(a) and that "[f]ailure to meet the requirements should result in the issuance of appropriate enforcement action." Gov. Ex. 3. The judge declined to find that the policy expressed in the Barton memorandum is binding departmental policy, and we agree. 10 FMSHRC at 74. Although the Commission has previously recognized that while Secretarial documents may

"reflect a genuine interpretation or general statement of policy whose soundness commands deference and therefore results in [the Commission] according it legal effect," it has declined to do so where the interpretation or policy statement cannot be squared with the plain language of the standard. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). See also Western Fuels-Utah, Inc., 11 FMSHRC 278, 285.86 (March 1989), appeal filed, No. 89-1258 (D.C. Cir. April 20, 1989); United States Steel Corp., 5 FMSHRC 36 (January 1983).

Here, the memorandum from the former district manager is at odds with the express language of sections 75.1704 and 75.1704-1(a).

Therefore, for all of these reasons, we agree with the judge that section 75.1704-1(a) does not impose upon mine operators a mandatory duty to either maintain escapeways in accordance with the subject criteria or to seek prior approval from a district manager for non-conformance with the criteria.

II.

The judge also concluded that the violation of section 75.1704 at issue in Docket No. 87-211-R was not the result of UP&L's unwarrantable failure to comply with the standard. Noting the Commission s holdings in Emery Mining Corp., 9 FMSHRC at 2004, and Youghiogheny & Ohio Coal Co., 9 FMSHRC at 2010, that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act," the judge found that UP&L's conduct in relation to the violation constituted ordinary negligence but not aggravated conduct. 11 FMSHRC at 85. The question is whether substantial evidence supports the judge's finding. We hold that the record supports the judge's finding.

The judge found that uncontroverted evidence established that the six inch water line in the escapeway reduced clearance and that loose coal and sloughage restricted the width of the escapeway. 11 FMSHRC at 84. However, these violative conditions were neither extensive nor longstanding. Randy Tatton, the chief safety engineer at the mine, testified that he measured the escapeway in the vicinity of the water pipe and that while his measurements indicated that the width at the base of the pipe was 48 inches, and the width of the escapeway at the top was 43 inches, the pipe was located on the edge of a crosscut and the crosscut provided added space to pass around the pipe. Tr. 298-300. In addition, Ted Farmer, the inspector who cited the violation, stated that the reduction in the width of the escapeway extended along the escapeway for only six inches, the diameter of the pipe. Tr. 107-08. Further, the condition regarding the pipe had been created during the shift immediately prior to the shift on which the violation was found by the inspector. Tr. 83, 87, 258-60.

As to the presence of the loose coal and rib sloughage, Tatton's unrebutted testimony established that, because sloughage is common in theine, beltmen are routinely assigned to keep passageways clean. (Tr. 225-237). Tatton further testified that, at the time of Farmer's inspection, two beltmen were shoveling loose coal and sloughage from the

cited area and had been doing so for an hour before Farmer arrived.
Tr. 297-298.

Finally, Inspector Farmer:s testimony concerning UP&L's unwarrantable failure in relation to the violation was equivocal. Although he stated that he considered the condition of the escapeway to be the result of a lack of due diligence and indifference, when asked if there was a serious lack of reasonable care on UP&L's part in relation to the violation, he stated, "1 really don t know about that ... I

wouldn't speculate on that at all." Tr. 90.

Given the limited extent of the conditions, the short period during which they existed, the fact that clean-up operations had begun before the inspector arrived, and the inspector's equivocal testimony regarding unwarrantable failure, we conclude that the judge's holding that the violation was not the result of UP&L's unwarrantable failure to comply is supported by substantial evidence.

III.

Accordingly, we affirm the judge's decision finding no violation in Docket No. WEST 87-224-R and finding no unwarrantable failure in Docket No. WEST 87-211-R.

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
L. Clair Nelson, Commissioner

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