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SOL (MSHA) V. U.S. STEEL MINING
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August 27, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION	:	
	:	
v.	:	Docket No. WEVA 91-1607
	:	
U.S. STEEL MINING COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY: Backley and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act" or "Act"), the issue is whether U.S. Steel Mining Company, Inc. ("U.S. Steel") violated 30 C.F.R. 75.512-2, a mandatory safety standard applicable to underground coal mines, requiring the examination and testing of electric equipment on at least a weekly basis.(Footnote 1) Following an evidentiary hearing, Commission Administrative Law Judge Roy J. Maurer found that U.S. Steel

1 Section 75.512-2, entitled "Frequency of examinations," provides:

The examinations and tests required by 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition.

Section 75.512, entitled "Electric equipment; examination, testing and maintenance," which repeats section 305(g) of the Mine Act, 30 U.S.C. 865(g), provides:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

~1542

violated the standard. 14 FMSHRC 330 (February 1992)(ALJ). For the reasons that follow, the judge's decision is affirmed.(Footnote 2)

I.

Factual and Procedural Background

U.S. Steel owns and operates the Gary No. 50 Mine located in West Virginia. On March 27, 1991, Larry Cook, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the mine. Cook inspected the records of U.S. Steel's examinations of underground electric equipment, which are required to be maintained by U.S. Steel. Cook determined from the records that high voltage disconnects, vacuum circuit breakers, transformers, and rectifiers were being examined on a monthly basis. Cook issued Citation No. 3741045, alleging that U.S. Steel violated section 75.512-2, because the above items had not been examined weekly.

Citation No. 3741045, as modified, states:

All underground electric equipment was not being examined weekly as required. Records of examinations for high voltage disconnects, vacuum circuit breakers, transformers and rectifiers show that weekly examinations were made for a three month period from October through December 1990. Beginning in January 1991 through this date (3/27/91) only monthly examinations were made and recorded.

Cook also found that the violation resulted from U.S. Steel's moderate negligence, because on July 18, 1990, another MSHA inspector issued a similar citation to U.S. Steel for failure to examine electric equipment on a weekly basis.

The Secretary subsequently proposed a civil penalty for the alleged violation and the matter proceeded to an evidentiary hearing before Judge Maurer. The judge held that U.S. Steel violated section 75.512-2 by failing to examine the items cited by Inspector Cook on a weekly basis. 14 FMSHRC at 333. The judge determined that the cited items were electric equipment within the meaning of the standard. Id. He also held that the Secretary's interpretation of the term "electric equipment" to include the items cited by the inspector is "reasonable and consistent with the objectives of the Mine Act." Id. Accordingly, the judge affirmed the citation and assessed a civil

² The Commission's vote in this case is evenly split. Commissioners Backley and Nelson would affirm the judge's decision. Chairman Holen and Commissioner Doyle would reverse. For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), aff'd, 969 F.2d 1501 (3d Cir. 1992), we conclude that the effect of the split decision is to affirm the judge's decision.

~1543

penalty of \$20. Id. The Commission subsequently granted U.S. Steel's petition for discretionary review, which challenges the judge's decision.

II.

Disposition of the Issues

The issue in this case is whether high voltage disconnects, vacuum circuit breakers, transformers, and rectifiers (the "cited items") are "electric equipment" as that term is used in section 75.512, which requires that "[a]ll electric equipment ... be frequently examined, tested, and properly maintained." If the cited items are "electric equipment," then they must be examined and tested at least weekly under section 75.512-2. Section 75.512 specifies what must be examined and tested ("all electric equipment") while section 75.512-2 sets forth the frequency ("at least weekly").

U.S. Steel contends that the judge erred in disregarding the testimony of its expert witness, Randolph Slone, that the cited items are not "electric equipment" but, rather, are components of electrical circuits. Slone testified that electric equipment, for purposes of section 75.512, means "electrical equipment that does a physical task by converting electrical energy to mechanical energy." Tr. 53. U.S. Steel argues that because the cited items are components of electrical circuits that do not perform a physical task, such as propelling machinery or pumping water, they are not electric equipment and are not required to be examined weekly under the standard. In support of its position, U.S. Steel points to proposed electrical regulations issued by MSHA that would require weekly examinations only of low-voltage "mobile and portable electric equipment and circuits" and less frequent examinations of "stationary equipment and circuits." See 54 Fed. Reg. 50062, 50123 (December 4, 1989).

The term "electric equipment" is not defined in the Mine Act or in MSHA's regulations. In reaching his conclusion that the cited items are electric equipment, the judge relied, in part, upon the definition of "equipment (electrical engineering)" offered by the Secretary that is set forth in the IEEE Standard Dictionary of Electrical and Electronic Terms, published by the Institute of Electrical and Electronics Engineers (2d ed. 1977)("IEEE Dictionary"). 14 FMSHRC at 332. That definition states, in pertinent part, that "equipment" is a general term that includes "materials, fittings, devices, appliances, fixtures, apparatus ... used as a part of, or in connection with, an electrical installation." IEEE Dictionary at 236. The cited items are undoubtedly included within this definition. In addition, Inspector Cook, who is an electrical engineer, testified that "electric equipment" is a broad term that applies to "any piece of equipment or installation associated with electrical energy underground." Tr. 17. He further stated that the term is broadly interpreted by the Secretary "to assure that there are no hazards associated with [an electrical] installation." Tr. 19. He testified that the items he cited are pieces of electric equipment notwithstanding the fact that they are also components of an electrical circuit. Tr. 27-28.

The judge reviewed the conflicting evidence presented by the parties and determined that the definition of "electric equipment" offered by MSHA is "reasonable and consistent with the objective of the Mine Act." 14 FMSHRC at 333. The judge adopted MSHA's broad definition in part because he concluded that a regulation should be interpreted to "harmonize with ... rather than conflict with the objective of the statute it implements." *Id.* quoting *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). See also *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989). "Substantial evidence" means "such evidence as a reasonable mind might accept as adequate to support a conclusion." See e.g., *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). We conclude that the record contains substantial evidence to support the judge's finding that the cited items are "electric equipment" as that term is used in the standard. MSHA's interpretation of electric equipment is supported by the definition in the IEEE Dictionary, a recognized electrical dictionary that has been approved as a standard by the American National Standards Institute. The judge credited the testimony of Inspector Cook over that offered by Mr. Slone. Both witnesses are electrical engineers and, in general, the weight given to the testimony of an expert is committed to the broad discretion of the judge. *Ludlow Corp. v. Textile Rubber Chemical Co.*, 636 F.2d 1057, 1060 (5th Cir. 1981). The testimony of Inspector Cook together with the definition in the IEEE Dictionary constitutes "such relevant evidence as a reasonable mind might accept" to support a conclusion that the cited items are electric equipment.

We also agree with the judge that interpreting the standard to include the four cited items is "reasonable and consistent with the objectives of the Mine Act." 14 FMSHRC at 333. Frequent examination and testing of electric equipment is required by section 305(g) of the Mine Act, 30 U.S.C. 865(g). Sections 75.512 and 75.512-2 implement this statutory requirement "to ensure that operators observe and detect any potential electrical hazards and immediately correct any hazardous conditions on electric equipment." Sec. Br. 6. If the cited items are not electric equipment under section 75.512, then they would not be subject to any examination and testing requirement, because no other safety standard would require U.S. Steel to periodically examine and test the cited items for safety defects.(Footnote 3) We give weight to the Secretary's interpretation of the section 75.512 in this case because it is reasonable, consistent with the purposes of the Mine Act and is supported by substantial evidence.(Footnote 4)

3 The cited vacuum circuit breakers, however, apparently would be subject to monthly examination and testing under either section 75.800-3, for high-voltage breakers or section 75.900-3, for low-voltage breakers.

4 The legislative history of the Mine Act provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977),

U.S. Steel's argument that the cited items would be subject to less frequent examination and testing under new electrical standards proposed by the Secretary does not support its position in this proceeding. First, the proposed rulemaking was withdrawn by the Secretary on March 1, 1991, before Inspector Cook issued the citation at issue in this proceeding. See 56 Fed. Reg. 17561 (April 22, 1991). Second, the proposed rulemaking establishes that MSHA was considering changing the existing requirement for weekly safety examinations of all electric equipment to a less frequent examination requirement for certain types of electric equipment. Consequently, the Secretary's actions actually support his position that he has consistently viewed the scope of the safety standard to be inclusive and that the cited items are electric equipment subject to weekly examination.

U.S. Steel's second argument is that the judge "disregarded the undisputed testimony" that the citation issued by Inspector Cook was inconsistent with MSHA's interpretation of the safety standard, as evidenced by MSHA's prior enforcement actions and its interpretive manuals. Pet. for Disc. Rev. at 5-6.(Footnote 5) U.S. Steel argues that the evidence establishes that it has examined the cited items on a monthly basis since at least 1970, and kept records of these electrical examinations as required by MSHA. U.S. Steel submits that MSHA has never cited U.S. Steel for failing to conduct weekly examinations despite the fact that MSHA's inspectors have regularly inspected these electrical examination records. U.S. Steel further alleges that MSHA has never interpreted this safety standard to require weekly examinations of the cited items and that MSHA has not changed the safety standard nor its interpretation of the standard. U.S. Steel characterizes the weekly examination requirement for the cited items as "a decision by a single inspector" rather than a valid interpretation of the standard or a change in MSHA policy. Id. In support of this argument, U.S. Steel asserts that MSHA's official interpretation of the standard in its Coal Mine Inspection Manual: Underground Electrical Inspections, Vol. IV, at 29 (June 1, 1983)("Manual") is inconsistent with Inspector Cook's citation. As a consequence, U.S. Steel maintains that the Commission should not accept Inspector Cook's interpretation of the safety standard because it is inconsistent with MSHA's Manual and its prior enforcement of the safety standard at this mine and at other mines. In sum, U.S. Steel appears to be arguing, by implication, that because it relied to its detriment on MSHA's past enforcement actions and MSHA's Manual, the Secretary should be estopped from citing it for the alleged violation.

The record reveals that U.S. Steel had actual notice of the Secretary's interpretation of sections 75.512 and 75.512-2 at the time Inspector Cook

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reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637 (1978). See also Secretary of Labor v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989).

5 U.S. Steel's Petition for Discretionary Review also constitutes its brief in this proceeding.

~1546

issued the subject citation. On July 18, 1990, more than eight months before Inspector Cook issued his citation, MSHA Inspector Randall Wooten, an authorized representative of the Secretary, issued a citation to U.S. Steel's Gary No. 50 Mine alleging a violation of section 75.512-2 for its failure to conduct weekly examinations of vacuum breakers, transformers and rectifiers. U.S. Steel did not contest the citation, paid the penalty proposed by MSHA, and began examining the cited equipment on a weekly basis. U.S. Steel's general maintenance foreman at the mine, Tom Bailey, testified in the present proceeding that U.S. Steel stopped complying with the July 1990 citation because it believed that the "violation was in error." Tr. 41. He testified that "we [were] fully aware that when we went back from the weekly to the monthly [examinations], that we probably would get another citation." Id. Inspector Cook testified that U.S. Steel conducted weekly examinations of the cited items following Inspector Wooten's citation, but that after December 28, 1990, it began examining them on a monthly basis again. Thus, U.S. Steel did not violate the safety standard in this case because it was unaware that MSHA required weekly inspections of the cited items under the safety standard, but rather because it intended to challenge MSHA's interpretation of the standard.

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). In this case, however, U.S. Steel knew, as a result of Inspector Wooten's citation, that MSHA required it to examine and test the cited items weekly in order to conform with the standard. Although an operator is free to challenge MSHA's interpretation of a safety standard in a proceeding brought before the Commission, it cannot legitimately contend that it did not have notice of the conduct required if it has been cited previously by an authorized representative of the Secretary for a similar violation of the same standard.

In addition, the Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). As stated above, if the cited items are not subject to weekly safety examinations under section 75.512, they are not subject to any examination requirement under the Secretary's safety standards. U.S. Steel recognizes that it is important to regularly examine and test the cited items because it has been doing so on at least a monthly basis since at least 1970. With the exception of circuit breakers, however, monthly examinations are neither authorized nor required under the Secretary's safety standards. As a consequence, we conclude that a reasonably prudent person would have recognized that the cited items are covered by the Secretary's only applicable examination and testing standard, section 75.512, and that weekly examinations are therefore required pursuant to section 75.512-2.

The Commission has long held that evidence of prior inconsistent enforcement of a safety standard does not constitute a viable defense to a violation and that equitable estoppel does not generally apply against the Secretary. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981); Bulk

~1547

Transportation Services, Inc., 13 FMSHRC 1354, 1361 n. 3 (September 1991). An inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation of the standard that it concludes is correct. U.S. Steel Mining Co., Inc., 10 FMSHRC 1138, 1142 (September 1988). Thus, the fact that U.S. Steel was not cited prior to July 1990 for failing to conduct weekly examinations of the items cited by Inspector Cook is not a viable defense to liability. See Warren Steen Construction, Inc., 14 FMSHRC 1125, 1131 (July 1992). Finally, equitable estoppel would not be applicable under the facts of this case because, as stated above, U.S. Steel became aware that MSHA considered the cited items to be electric equipment at the time it received the first citation in July 1990. See Emery, 744 F.2d at 1417.

We conclude that the language in the Manual does not support the position of U.S. Steel. The Manual provides, in pertinent part, that section 75.512 "requires that each individual piece of electric equipment, including locomotives, personnel carriers, electric track switches and derails, compressors, car hauls, conveyor units, pumps, rock-dusting machines, battery-powered equipment and permissible equipment, be examined and tested." Manual at 29. We agree with the Secretary that the examples of electric equipment provided in the Manual "are not intended to be an all-inclusive list of the types of electrical equipment covered by the mandatory standard." Sec. Br. 6-7. We believe that the general words in the safety standard can be fairly read to include the cited items, in spite of the specific examples used in the Manual. Compare Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152 (November 1989). In addition, the Commission has declined to give legal effect to MSHA interpretive manuals that are inconsistent with the plain language of a safety standard. King Knob, 3 FMSHRC at 1420; See also Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-38 (D.C. Cir. 1986). In any event, the Commission has held that an MSHA interpretation of a safety standard that interferes with an operator's ability to ascertain the true standard of care "will not serve to negate liability for violative conduct" but is "properly considered in mitigation of penalty." U.S. Steel Mining Co., Inc., 6 FMSHRC 2305, 2310 (October 1984); Mettiki Coal Corp., 13 FMSHRC 760, 771 (May 1991). In this case, the judge assessed a civil penalty of \$20, a minimal penalty.

Finally, the record in this case does not contain sufficient proof to establish U.S. Steel's contention that MSHA has cited only the Gary No. 50 Mine for failure to examine and test the cited items on a weekly basis. U.S. Steel's witnesses Bailey and Slone testified that they know of no other instances in which an operator has been cited for failing to weekly examine and test electric equipment similar to the cited items. Slone testified that he called an unspecified number of mine operators about their experience under section 75.512 and was told that such operators had not been cited for failing to examine and test similar electric equipment on a weekly basis. This evidence does not establish U.S. Steel's allegation that the subject citation was an ad hoc "decision by a single inspector" to interpret the standard to require weekly examinations of the cited items at this mine only. (Footnote 6)

6 U.S. Steel also argues that the judge improperly disregarded two decisions that support its position in this case: Leckie Smokeless Coal Co., 5

III.

Conclusion

For the foregoing reasons, we would affirm the judge's decision.

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

6 (...continued)

IBMA 65 (1975); and Mettiki Coal Co., 11 FMSHRC 2435 (December 1989)(ALJ).
These cases do not address the issues raised in this case.

Chairman Holen and Commissioner Doyle, dissenting:

We respectfully dissent because, in our view, the reasonably prudent person familiar with the mining industry and the protective purposes of the Mine Act could not be expected to know that the cited items, as components of an electrical circuit, are subject to the requirements of weekly inspection of electric equipment set forth in section 75.512-2. We disagree that the failure of U.S. Steel Mining Company, Inc. ("U.S. Steel") to challenge an earlier citation estops it forever from challenging whether section 75.512-2 applies to the cited equipment. We do not share our colleagues' view that this case hinges on whether or not "the record contains substantial evidence to support the judge's finding that the cited items are 'electric equipment' as that term is used in the standard." Slip op. at 4.

A. Background

U.S. Steel was cited by the Secretary of Labor because it was examining and testing certain electrical apparatus on a monthly, rather than weekly, basis. The particular items were high voltage disconnects, vacuum circuit breakers, transformers and rectifiers. The Secretary has taken the position that those items are electrical equipment and, thus, governed by the weekly examination and testing requirements of section 75.512-2 as well as, in the case of the circuit breakers, by the requirements set forth in section 75.800-3.(Footnote 7) U.S. Steel concedes that weekly examinations were not being done but asserts that, because the cited items were components of electrical circuits, they were subject only to monthly examination and testing.

The term "electric equipment" is not defined in the Mine Act or in the regulations. At hearing, the Secretary proffered a definition, not of "electric equipment" but of "equipment (electrical engineering)," set forth in the dictionary published by the Institute of Electrical and Electronic Engineers ("IEEE Dictionary"). Citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945), for the proposition that the Secretary's interpretation of his own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation," the judge found the Secretary's interpretation to be reasonable and consistent with the Mine Act. 14 FMSHRC at 333. He also found the requirements of section 75.800-3 to be in addition to the testing and examination requirements of section 75.512-2 and sustained the violation. Id.

1 Section 75.800-3 reads, in relevant part:

(a) Circuit breakers and their auxiliary devices protecting underground high-voltage circuits shall be tested and examined at least once each month by a person qualified as provided in 75.153;

~1550

Our colleagues affirm the judge's decision on the basis that the definition of "equipment" set forth in the IEEE Dictionary and the inspector's testimony constituted substantial evidence to support the judge's determination that the cited items were electric equipment. Slip op. at 4. They also find that U.S. Steel had notice of this requirement (a finding not made by the judge) because of an earlier citation by this same inspector for a similar violation. Slip op. at 5-6. They also assert that, with the exception of the circuit breakers, the cited equipment is subject to no other inspection requirements and, thus, the reasonably prudent person would have recognized that they are subject to weekly examination pursuant to section 75.512-2. Slip op. at 4-6.

B. Reasonably Prudent Person Test

Although the judge did not state that he found the regulation to be ambiguous, his deference to the Secretary's interpretation of the regulation implies that he did not find it clear on its face. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Bowles v. Seminole Rock Co.*, 325 U.S. at 414. The Secretary effectively conceded that the regulation is ambiguous by arguing that deference is owed to his interpretation. Sec. Br. at 4. Apparently, our colleagues also find the regulation to be ambiguous. They have based their decision on the reasonableness of the Secretary's interpretation of the standard and on his interpretation of the term "electrical equipment." Slip op. at 4.

While deference may be owed to the Secretary's reasonable interpretation of his regulations, "the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). *Accord Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Those governed by regulations have fair warning only when they can reasonably discern a regulation's meaning. *Western Fuels-Utah*, 900 F.2d 318, 327 (D.C. Cir. 1990) (Edwards, J., dissenting). A regulation "cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp.*, 681 F.2d at 1193, quoting *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). "[I]n order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so ... uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990), quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982).

In determining whether a regulation gives notice of what is required, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement*, 12 FMSHRC at 2416.

2 Nevertheless, citing *King Knob*, 3 FMSHRC 1417, 1420 (June 1981), our colleagues note that the Commission has "declined to give legal effect to MSHA interpretive manuals that are inconsistent with the plain language of a safety standare." slip op. at 7.

C. Regulatory Language and Manual Add to the Confusion

In order to determine whether the regulations would have put the reasonably prudent person familiar with the mining industry on notice that weekly rather than monthly inspections are required, one must read not only Subpart F-Electrical Equipment-General (section 75.500 et seq.) but also Subpart I-Underground High-Voltage Distribution (section 75.800 et seq.), Subpart J-Underground Low- and Medium-Voltage Alternating Current Circuits (section 75.900 et seq.) and MSHA's Coal Mine Inspection Manual: Underground Electrical Inspections, Vol. IV, (June 1, 1983) ("Manual"). After so doing, we can only conclude that the reasonably prudent operator familiar with the mining industry could not be expected to recognize that high voltage disconnects, circuit breakers, transformers and rectifiers, all undisputedly components of an electric power circuit (Sec. Br. at 5-6), must be inspected weekly.

1. Regulatory Language

Sections 75.500-.507 set forth permissibility and filing requirements with respect to "electric face equipment." Section 75.508 requires the operator to show on a map the location and electrical rating of "all stationary electric apparatus...including permanent cables, switchgear, rectifying substations, transformers...and settings of all direct-current circuit breakers..." Section 75.508-2 requires that any changes in the "electrical system" be recorded. If an operator is by now confused as to whether the cited items are "electric apparatus" or part of the "electrical system," section 75.509 indicates that the items are not "electric equipment," because that section is entitled "Electric power circuit and electric equipment; deenergization." It reads, in part: "All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment..." (Emphases added.)

The language in subsequent sections continues to draw the distinction between electric circuits and electric equipment. Section 75.511 deals with repair of "low-, medium-, or high-voltage distribution circuits and equipment." Section 75.518 covers "electric equipment and circuits" and requires that circuit breakers be installed so as to protect "all electric equipment and circuits." Section 75.518-1 again refers to "electric equipment and circuits." (Emphases added.) Sections 75.519 and 75.519-1 require that disconnecting devices be installed in all main "power circuits," while a separate section, 75.520, requires that switches or other controls be provided in all "electric equipment."

3 Our colleagues assert that, if the cited items are not subject to the weekly examination and testing requirements of section 75.512-2, then there is no requirement for examination and testing. Slip op. at 4. On this basis, they conclude that the reasonable prudent person would have recognized that the items were covered by section 75.512-2. Slip op. at 6. It is undisputed that a number of operators, as well as U.S. Steel, were examining items of this type on a monthly basis, pursuant to sections 75.800-3 and 75.900-3. 14 FMSHRC at 332, Tr. at 56-57.

In Subpart I-Underground High-Voltage Distribution, the Secretary has set forth requirements for high-voltage circuits and circuit breakers. The requirements of section 75.800-3, "Testing, examination and maintenance of circuit breakers; procedures" are more comprehensive than section 75.512. Section 75.800-3 sets forth monthly testing and examination requirements for high voltage circuit breakers and their auxilliary devices. Similarly, Subpart J sets forth the requirements for low and medium voltage circuits and circuit breakers, and also provides for monthly testing under section 75.900-3.

2. Manual

The relevant discussion in the Manual does not erase the distinction frequently drawn in the regulations between fixed electric circuits and electric equipment. It provides that:

each individual piece of electric equipment, including locomotives, personnel carriers, electric track switches and derails, compressors, car hauls, conveyor units, pumps, rock-dusting machines, battery-powered equipment and permissible equipment, be examined and tested.

Manual at 29. These examples are dissimilar to the cited fixed equipment and support the operator's view that the regulation is limited to "electrical equipment that does a physical task by converting electrical energy to mechanical energy." Tr. 53. The affirming commissioners recognize that the Manual "interferes with an operator's ability to ascertain the true standard of care." Slip op. at 7. They "agree with the Secretary that the examples of electric equipment provided in the Manual 'are not intended to be an all-inclusive list of the types of electrical equipment covered by the mandatory standard,'" and believe that the "standard can be fairly read to include the cited items, in spite of the specific examples used in the Manual." Slip op. at 7. (Emphasis added.)

Further instructions in the Manual suggest that the regulation does not address fixed electric equipment like the items cited. The Manual states that examination records required by section 75.512 "shall list separately each individual piece of electric equipment in the mine." Manual at 29. No explanation is provided as to how the operator is to identify separately each individual disconnect, circuit breaker, transformer, rectifier, or other component of the mine's electric system.

The record contains no evidence of interpretive bulletins, program policy letters, or other documents from the Secretary that would clarify for the operator what constitutes electrical equipment, electric apparatus, electrical installations, and electric power circuits. Nor does it contain evidence of documents that would put the operator on notice that a high voltage disconnect is more akin to a locomotive or personnel carrier than to a high voltage circuit breaker or that the items addressed under sections 75.512-2 and 75.800-3 are not mutually exclusive.

D. Definition Proposed in Litigation Is Not Relevant

At hearing, the Secretary proffered the definition of "equipment (electrical engineering)" set forth in the IEEE Dictionary in support of his position. The definition provides that equipment is "a general term that includes materials, fittings, devices, appliances, fixtures, apparatus, machines, etcetera, used as a part of, or in connection with, an electrical installation." IEEE Dictionary at 236. That definition, covering fixed installations, appears to include the cited items, but it is at variance with the examples in the Manual, which cover mobile equipment. The IEEE definition addresses the work of electrical engineers, not the work of miners. Its applicability to Section 75.512-2 is questionable because it fails to include many items listed among the examples in the Manual and usually considered by miners to be electric equipment, such as locomotives, rock dusting machines and personnel carriers. Further, there is no evidence in the record that the Secretary has formally or informally adopted the IEEE definition or that the reasonably prudent person familiar with the mining industry would also be familiar with the field of electrical engineering or its dictionary.

E. Previous Citation Does Not Estop Challenge

The judge did not address whether U.S. Steel had notice of a weekly inspection requirement. Our colleagues assert that a previous citation provided actual notice to U.S. Steel and, by implication, that its failure to challenge the earlier citation estops it forever from challenging what it now believes to be erroneous interpretation and enforcement by the Secretary.

If the regulation itself does not give notice to the reasonably prudent operator that weekly as well as monthly inspections are required, presumably there are many operators who are unaware of a weekly inspection requirement. Varying interpretations of the regulation might arise, depending on the enforcement actions of particular inspectors. Operators who chose to challenge a first, rather than a subsequent, citation might well escape liability for that citation. Operators who had been previously cited would be on notice of the Secretary's interpretation, but other operators would not be on notice.

Arguably, notice to the entire mining industry could be provided by way of individual citations, but safety is ill-served by such an approach. It is the language of a regulation and not piecemeal enforcement action that should make clear to operators what is required of them.

~1554

F. Conclusion

The regulations at issue would, in our view, fail to put the reasonably prudent person on notice that electric circuits and their components, circuit breakers and their auxiliary devices, and electric apparatus (all terms used by the Secretary) are all really "electric equipment" and are thus subject to weekly examination. We would reverse the judge and vacate the citation.

Arlene Holen
Chairman

Joyce A. Doyle
Commissioner