FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 11, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2008-712 A.C. No. 15-19076-141789-01
NALLY & HAMILTON ENTERPRISES, INC.	:	

Before: Jordan, Chairman; Duffy, Young, Cohen and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), the Secretary of Labor ("Secretary") issued a citation to Nally and Hamilton Enterprises, Inc. ("Nally") alleging a failure to maintain the reverse warning alarm on a lube truck in violation of 30 C.F.R. § 77.410(c).[1] 31 FMSHRC 689, 690-93 (June 2009) (ALJ). Administrative Law Judge Jerold Feldman concluded that the Secretary had not demonstrated Nally's failure and vacated the citation. The Secretary subsequently filed a petition for discretionary review challenging the judge's decision, which the Commission granted. For the reasons stated herein, we reverse the judge's decision and remand for further findings on gravity and for the assessment of a civil penalty.

I.

Factual and Procedural Background

Nally operates the Chestnut Flats surface coal mine in Bell County, Kentucky. 31 FMSHRC at 690; PDR at 2. From January 3 to January 5, 2008, MSHA Inspector David A. Faulkner conducted an inspection of the Chestnut Flats mine. 31 FMSHRC at 690. During the course of his inspection, Faulkner observed the production pit where trucks and loaders remove

[1] 30 C.F.R. § 77.410(c) provides that "[w]arning devices shall be maintained in functional condition."

the overburden in order to expose the coal seam. 31 FMSHRC at 690; Tr. 23. Lube trucks that carry liquids such as fuel, oil, and antifreeze enter the area to service mobile equipment. 31 FMSHRC at 690; Tr. 22, 29. While there, Faulkner observed a white RD-600SX Mack lube truck service several vehicles. 31 FMSHRC at 690; Tr. 23. At the same time, Faulkner noticed three of the operators whose trucks were being serviced standing adjacent to the mobile equipment on the opposite side of the lube truck. 31 FMSHRC at 690; Tr. 24.

At 2:15 p.m., after the lube truck had completed servicing the mobile equipment, Faulkner inspected the truck and discovered that the back-up alarm was not operational. 31 FMSHRC at 690; Tr. 22, 65. The back-up alarm warns individuals in noisy environments to avoid walking in the truck's path while it is moving in reverse. 31 FMSHRC at 690; Tr. 25. The alarm is particularly important to pedestrians in the area, because it is a high noise environment, and the tanks positioned on the back of the truck obstruct the operator's view. 31 FMSHRC at 690; Tr. 24-26, 31-32, 58. Because of the limited view, the truck operator must rely on his rear and side view mirrors when backing up. 31 FMSHRC at 690; Tr. 24-26; *see also* Tr. 40-41.

As a result of Faulkner's observation, he issued Citation No. 7557475, alleging a significant and substantial ("S&S")[2] violation of 30 C.F.R. § 77.410(c). The "Condition and Practice" section of the citation states:

> The operator failed to maintain the automatic reverse warning device in a functional condition on the White RD-600SX lube truck, S/N 2189, that is in operation at this mine. Warning devices shall be maintained in functional condition. The truck is being used around employees on foot and congested equipment areas while performing routine maintenance.

31 FMSHRC at 690; G. Ex. 2.

According to the 6:00 a.m. pre-shift record, the back-up alarm on the truck was working during the pre-shift examination. 31 FMSHRC at 691. Inspector Faulkner testified that he had no reason to believe that the alarm was not working at that time. *Id*. at 691-92; Tr. 47-49. Nally first learned that the alarm had malfunctioned when it was cited by Faulkner. Tr. 65. Once the operator became aware of the hazard, the truck was taken out of service and fixed. Tr. 62. Nally contested the citation, and the matter proceeded to hearing.

The judge vacated Citation No. 7557475, finding that the Secretary had not demonstrated Nally's failure to maintain the back-up alarm in a functional condition. 31 FMSHRC at 693. In reaching this conclusion, the judge examined the definition of "maintenance," which has been defined as "the labor of keeping something (as building or equipment) in a state of repair or

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard."

efficiency: care, upkeep . . . and [p]roper care, repair, and keeping in good order." *Id*. at 691 (quoting *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076 (10th Cir. 1998) (citation omitted)). He then reasoned that it was necessary to determine the length of time that the alarm had been disabled in order to determine whether Nally had failed to keep the back-up alarm in "good [working] order." 31 FMSHRC at 691.

The judge recognized that pre-shift examinations are a means of identifying defects that are in need of repair. *Id*. at 693. In reaching his decision, he relied on the pre-shift report, which indicated that the back-up alarm was working prior to commencement of the shift. *Id*. at 692. He also relied on Faulkner's opinion that the back-up alarm had become dysfunctional sometime between 6:00 a.m. and 2:15 p.m., after the pre-shift examination on January 3. *Id*. at 691-92; Tr. 46-49. The judge stated that "[w]hile ignoring a pre-shift report that noted a defective back-up alarm clearly would constitute a violation of section 77.410(c), Faulkner does not contend that [the] pre-shift examiner determined that the back-up alarm was inoperable." 31 FMSHRC at 692. In addition, the judge found that there was no evidence that repair of the alarm was not performed in a timely manner. *Id*. at 693. He reasoned that "[f]undamental fairness dictates that a mine operator must be given a reasonable period of time to address defects after they are noted by the pre-shift examiner, an opportunity that the evidence reflects was unavailable to [Nally] in this case." *Id*.

II.

Disposition

The Secretary argues that the judge erred in finding that Nally did not violate section 77.410(c). PDR at 6. She submits that Nally violated the standard because the back-up alarm was not functioning when Inspector Faulkner inspected the truck. *Id.* at 7. The Secretary asserts that the plain meaning of section 77.410(c) requires Nally to "keep up," "continue," and "preserve from decline" the functional condition of the back-up alarm. *Id.* at 6-7. She argues that a back-up alarm is not kept-up or continued in functional condition if it does not work, and that the inclusion of "maintain" in the standard makes clear the continuous nature of the requirement and includes an ongoing responsibility on the operator to ensure that warning devices be functional at all times. *Id*. at 7; Sec'y Reply Br. at 2-3. She also suggests that the judge's conclusion that the operator be given a reasonable opportunity to address warning devices is not supported by the standard's language. PDR at 7-10. The Secretary further contends that, in the event that the regulation's meaning is not plain, her interpretation is owed deference because it is consistent with the terms of the standard and compatible with the standard's purpose. *Id.* at 6, 10-11.

Nally responds that the judge did not err because "maintain" is a verb and the words used in defining it are verbs. Nally Br. at 3-4. Specifically, it asserts that "to maintain" necessarily requires some overt or affirmative act or occurrence, and the failure to maintain necessarily requires some willful inaction or omission. *Id.* It contends that because there is no evidence

demonstrating that Nally engaged in any affirmative, willful inaction or omission constituting a failure to maintain the warning device, there was no violation of the standard. *Id.* at 4-5. The operator further argues that when it learned of the inoperative warning device it immediately removed the equipment from service and repaired it. *Id.* at 5. Nally asserts that this immediate action constituted "maintaining" the device in "functional condition," as required by the standard. *Id.* It also contends that it is impossible for it to perform "an act of maintenance . . . if it is without actual or constructive knowledge that the device is inoperative." *Id*. Nally argues that due process requires that it be, at least, in a position to prevent an alleged violation before being charged with it under the Act. *Id.* at 6. The operator further asserts that because the regulation does not define "maintain," it does not provide constitutionally sufficient warning of what it requires. *Id.* at 7. Nally insists that the test is whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the condition at issue. *Id*.[3]

The Secretary replies that nothing in the standard's language suggests a knowledge requirement and that such a requirement is inconsistent with the long-established principle that an operator may be held liable under the Act even if it had no knowledge of the facts giving rise to the violation. Sec'y Reply Br. at 5-6. She states that accepting Nally's argument would "eviscerate the no-fault scheme of the Act." *Id*. at 5-6. The Secretary further contends that Nally's argument that the standard lacks constitutional notice should not be considered because it failed to raise this argument before the judge. *Id*. at 3. If it is considered, the Secretary asserts that the argument fails because the standard's language is not unconstitutionally vague and gives fair notice that the back-up alarm is to be continuously "maintained" in functional condition. *Id*. at 4.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. Unites States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)); *Alan Lee Good,* 23 FMSHRC 995, 997 (Sept. 2001); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman,* 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltd. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C.

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[3] Nally also contends that the Secretary's petition for discretionary review should be denied because it failed to separately number each issue presented for review as required under 29 C.F.R. § 2700.70(d). Nally Br. at 9. This argument is without merit because the Secretary only presented one question for review, i.e., whether the judge erred in finding no violation of 30 C.F.R. § 77.410(c). *See* PDR at 1-2.

Cir. 1984); *see also Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton Indus., Inc.*, 26 FMSHRC 146, 151 (Mar. 2004).

The Commission has not previously interpreted section 77.410(c). Accordingly, we shall begin with an examination of the standard's language as this "is the starting point for its interpretation." *Sedgman*, 28 FMSHRC 322, 329 (June 2006)*; Jim Walter Res.*, 28 FMSHRC at 987; *Alan Lee Good,* 23 FMSHRC at 997. Section 77.410(c) requires that "[w]arning devices shall be maintained in functional condition." 30 C.F.R. § 77.410(c). The term "maintained" is not defined in 30 C.F.R. Part 77. In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *Sedgman*, 28 FMSHRC at 329; *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765. "Maintain" is defined as "to keep in state of repair, efficiency or validity: preserve from failure or decline." *Sedgman*, 28 FMSHRC at 329 (quoting *Webster's Third New International Dictionary* 1362 (1993)); *Lopke Quarries,* 23 FMSHRC at 707-08; *Jim Walter Res.*, 19 FMSHRC at 1765; *Jim Walter Res.*, 28 FMSHRC at 987-88; *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997). It is also helpful to consider the definition of "functional," which means "capable of performing; operative." *The American Heritage Dictionary of the English Language* 711 (4th ed. 2009).

Although not interpreted in the context of section 77.410(c), the Commission has consistently construed "maintain" in relation to other standards to require a continuing functioning condition. In *Lopke Quarries*, the Commission, in affirming the judge's finding of a violation, examined Webster's definition of "maintained" and determined that based on its plain meaning, "the inclusion of the word 'maintain' in the standard . . . incorporates an ongoing responsibility on the part of the operator . . . ." 23 FMSHRC at 707-08. *See also Alan Lee Good*, 23 FMSHRC at 996-98 (affirming the judge's finding that, because the regulation required that braking systems on equipment be "maintained in a functional condition," and the operator conceded that the parking brake was inoperative, the evidence established that there was a violation of the cited standard); *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979) (finding that a violation of section 77.404(a) was established where the operator admitted the presence of a hydraulic leak and, therefore, admitted that the forklift was not maintained in "safe operating condition"); *Jim Walter Res.*, 19 FMSHRC at 1765-66 (affirming a judge's finding that a "monitor was not being 'maintained' in 'proper operating condition,'" as required by 30 C.F.R. § 75.342 where the operator intentionally routed air believed to contain methane on a path that would prevent methane monitor detection). *See also Sedgman*, 28 FMSHRC at 329-30.

Consistent with analogous Commission precedent, we apply the ordinary meaning of "maintain" and conclude that the term is not ambiguous as it is employed in section 77.410(c). We also find that its literal meaning is less complicated than what is suggested by the operator. Inclusion of the term "maintain" makes clear that warning devices shall be capable of performing on an uninterrupted basis and at *all* times. Congruent with our holding in *Lopke Quarries*, to "maintain" imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.

Moreover, reading the standard to require that operators "preserve from decline" the functional condition of back-up alarms is wholly consistent with the safety objectives of the Mine Act. It fits squarely within the intended purpose of the standard, which is to provide unsuspecting pedestrians with a potentially life-saving warning against the obvious danger of being run over. Because the operator's vision is impaired when the truck is moving in reverse in a noisy environment, the back-up alarm provides a critical warning to an individual who might be crouching, kneeling, have his back turned to the vehicle, or simply be distracted.

Nally has conceded that when Inspector Faulkner performed the inspection, the back-up alarm on the truck was not working. 31 FMSHRC at 690; Tr. 65; Nally Br. at 2. Consequently, the alarm was not being "preserve[d] from failure or decline," as it was not "capable of performing" or "operative" at the time of Faulkner's inspection. Based on these facts, we conclude that Nally violated the standard.

We further conclude that the judge, by reasoning that an operator should be accorded a "reasonable period of time to address defects after they are noted by the pre-shift examiner" (31 FMSHRC at 693), erroneously added a knowledge requirement to the standard that is not intended by its text.[4] While interpreting a similar Part 77 regulation (30 C.F.R. § 77.404(a)), the Commission determined that "[t]he regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability upon an operator *regardless of its knowledge of unsafe conditions*. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred." *Peabody Coal*, 1 FMSHRC at 1495 (emphasis added). Therefore, under these facts, what Nally knew at the time the citation was issued is only relevant to determining Nally's degree of negligence and the resultant penalty.

Lack of knowledge is also not a defense to liability in light of the strict liability nature of the regulations. *See Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (holding that Mine Act regulation "imposes strict liability on mine operators . . . regardless of whether the operator has knowledge" of hazard); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998) ("knowledge and culpability, however, are not relevant to the determination of whether there was a violation. As we have observed, the FMSHA imposes 'a

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[4] In contrast, other standards do require an operator's knowledge in order to establish liability. In *Lopke Quarries*, 23 FMSHRC at 714-15, the Commission affirmed the judge's finding of no violation of 30 C.F.R. § 56.14100(b), which requires operators to correct defects in a "timely manner," after concluding that there was no evidence indicating when the device became defective. Critical to its analysis, the Commission concluded that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries*, 23 FMSHRC at 715. *See also* 30 C.F.R. § 56.4102 (requiring removal or control of flammable spill or leak "in a timely manner").

kind of strict liability on employers to ensure worker safety'" (citations omitted)). In any event, restricting an operator's liability to hazards identified in pre-shift examinations runs counter to the Act's safety objectives and would lead to perverse incentives. For instance, overlooking a hazard during a pre-shift examination could insulate an operator from being cited for a violation during the shift. Requiring that operators continuously keep machinery in operational condition encourages more vigilance with instituting and enforcing effective maintenance procedures.

Accordingly, we reverse the judge's determination that there was no violation of section 77.410(c). Because we find the standard's language plain and unambiguous, we do not reach the Secretary's deference argument or Nally's notice argument. *See Exportal Ltd.*, 902 F.2d at 50; *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton*, 26 FMSHRC at 151; *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (holding that when the language of the standard is found to be clear and unambiguous, fair and adequate notice to operators is provided).

III.

Conclusion

For the reasons set forth herein, we reverse the judge's finding that Nally did not violate 30 C.F.R. § 77.410(c) and remand this case to the judge for a determination of whether the violation was S&S and the assessment of a civil penalty.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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