

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2009-241
	:	WEST 2009-580
v.	:	WEST 2009-820
	:	WEST 2009-1322
TWENTYMILE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve three citations issued to Twentymile Coal Company by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Two citations allege violations of the safety standard in 30 C.F.R. § 75.516-2(c), which requires that additional insulation shall be provided at points where a communication circuit passes over or under a power conductor. The third citation alleges a violation of the safety standard in 30 C.F.R. § 75.1107-16(b), which incorporates the requirements of six specific National Fire Protection Association Codes.

An Administrative Law Judge affirmed the two citations issued for alleged violations of section 75.516-2(c) and held that the standard directs mine operators to manually apply additional insulation to the exterior of communication circuits where they pass over or under any power conductor. 33 FMSHRC 1885, 1945 (Aug. 2011) (ALJ). The Judge, however, vacated the citation that alleged a violation of section 75.1107-16(b). The Judge concluded that the cited provisions of the National Fire Code did not constitute mandatory requirements. *Id.* at 1939. The Secretary of Labor and Twentymile both filed petitions for review of the Judge’s decision, and we granted both petitions.

For the reasons that follow, we reverse the Judge with respect to the alleged violations of section 75.516-2(c). We conclude that an operator may provide additional insulation through the installation of a compliant communication cable. With respect to the alleged violation of section 75.1107-16(b), we conclude that the Secretary failed to establish a violation of a cited provision.

Therefore, we affirm in result the Judge's decision to vacate the citation that alleged a violation of section 75.1107-16(b).

I.

Citation Nos. 8456301 and 8456311

A. Factual and Procedural Background

On February 19, 2009, MSHA Inspector Phillip Ray Gibson visited Twentymile's Foidel Creek Mine, a large underground coal mine in Colorado. During his inspection, Gibson observed that communication cables for the mine phone passed below an energized power conductor in the conveyor belt entry. 33 FMSHRC at 1940. The communication cables consisted of copper conductors that were covered in a layer of insulation, surrounded by foil shielding, and wrapped in a PVC jacket. 33 FMSHRC at 1941-43; Tr. 421, 446-47. The inspector observed that the exterior of the cables lacked an additional wrap of insulation where they passed across two power cables. 33 FMSHRC at 1940. Gibson issued Citation No. 8456301 for an alleged violation of the safety standard in 30 C.F.R. § 75.516-2(c). Gov. Ex. 26. The standard states, in pertinent part, that "[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor." 30 C.F.R. § 75.516-2(c).

On February 26, 2009, Gibson returned to the mine and observed that Twentymile had failed to manually wrap "additional insulation" on either the phone communication cable or the energized power cable at the point where they passed in a crosscut. 33 FMSHRC at 1940. Gibson issued Citation No. 8456311 for an alleged violation of the standard in section 75.516-2(c). Gov. Ex. 29. The citation was abated after Twentymile wrapped electrical tape around the communication cable at the required points. 33 FMSHRC at 1943.

Twentymile contested both citations before an Administrative Law Judge. The Judge concluded that the language of the regulation was clear and that mine operators are required to manually install "additional insulation" at the points where communication circuits pass a power conductor. *Id.* at 1945. The Judge credited the testimony of Twentymile's electrical department manager, who testified that the cables contained sufficient insulation to prevent the transfer of energy to the communication circuits. *Id.* at 1943-45; Tr. 446-48. Nevertheless, the Judge concluded that, because Twentymile did not manually wrap additional insulation around the exterior of the cables at the required locations, it had violated the safety standard. *Id.* at 1945. Accordingly, he affirmed the citations.

On review, Twentymile argues that the Judge erred in his interpretation of the safety standard. It maintains that the required "additional insulation" was "provided" when it installed a cable manufactured with sufficient insulation to meet the objective and requirement of the standard. The Secretary contends that the safety standard plainly requires the mine operator to

install insulation “in addition to whatever insulation is provided (or not provided) by the manufacturer.” S. Br. at 28.

B. Disposition

1. The standard is silent or ambiguous with regard to how compliance is to be achieved.

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. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations 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).

We conclude that the Judge erred in holding that the language of the safety standard had a clear meaning. 33 FMSHRC at 1945. Section 75.516-2(c) requires that a mine operator provide insulation on a cable *in addition* to the insulation requirements specified in section 75.516-2(b) at certain points.¹ However, the safety standard does not clearly prescribe how the additional insulation is to be provided. The language does not dictate a specific method, be it manually wrapping additional insulation on the exterior of the cable or the installation of cable that contains a greater amount of insulation than is required by section 75.516-2(b).

The Secretary contends that the plain meaning of the phrase “shall be provided” in section 75.516-2(c) is that the mine operator, and not a manufacturer, must provide the additional insulation. S. Br. at 27-28; Oral Arg. Tr. 29-30, 34-36. The Judge agreed that the language of the standard was “quite clear.” 33 FMSHRC at 1945. However, the phrase “shall be provided” is used elsewhere in the regulations in the context of equipment installed by a manufacturer at the factory. Those standards do not plainly require a mine operator to manually install the prescribed features. *See* 30 C.F.R. § 56.14131(a) (“Seat belts *shall be provided* and worn in haulage trucks.”); *see also* 30 C.F.R. § 77.1605(d) (“Mobile equipment *shall be provided* with audible warning devices. Lights *shall be provided* on both ends”) (emphasis added). The use of the phrase “shall be provided” elsewhere in the regulations demonstrates that it does not have a plain meaning which excludes installation by a manufacturer.

¹ Section 75.516-2(b), which incorporates section 75.517-1 by reference, requires insulation with a dielectric strength that is at least equal to the voltage of the circuit. *See* 30 C.F.R. §§ 75.516-2(b) and 75.517-1. The Secretary does not contend that the insulation on any of the cited cables was less than the appropriate dielectric strength or that the amount of insulation was otherwise insufficient. Oral Arg. Tr. at 47.

Finally, we find no guidance as to the meaning of the phrase “shall be provided” in the standard’s regulatory history. *See* 37 Fed. Reg. 11777 (June 14, 1972); 38 Fed. Reg. 4975 (Feb. 23, 1973). It suggests only that the Bureau of Mines originally proposed the rule to ensure proper insulation and prevent unintentional energization of communication circuits. *See* 37 Fed. Reg. at 11777-11778 (“unintentional energization of communication wires and cables can occur if they are too close to power conductors . . . proper insulation of such wires and cables will result in less hazard and greater reliability”).

Similarly, we reject the Secretary’s argument that the phrase “additional insulation” can only mean extra insulation on the cable at the points where communication circuits pass over or under a power conductor. S. Br. at 29. The phrase “additional insulation” can also be understood as relative to the insulation which must exist on all communication cables which, pursuant to sections 75.516-2(b) and 75.517-1, must have “a dielectric strength at least equal to the voltage of the circuit.” 30 C.F.R. § 75.517-1. Thus, the regulation can reasonably be read to require insulation with a dielectric strength *greater* than the voltage of the circuit, at points where communication circuits pass over or under a power conductor.

Accordingly, we conclude that section 75.516-2(c) is silent or ambiguous as to how the additional insulation shall be provided by the operator.²

2. The Secretary’s proffered interpretation is not reasonable.

Where a mandatory standard is ambiguous, courts and the Commission defer to the Secretary’s reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation . . . is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Commission’s review similarly involves an examination of whether the Secretary’s interpretation is reasonable. *See Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992); *Rochester & Pittsburgh Coal Corp.*, 12 FMSHRC 189, 193 (Feb. 1990); *Missouri Rock, Inc.*, 11 FMSHRC 136, 139 (Feb. 1989).

The Secretary maintains that his interpretation of the standard is consistent with the standard’s purpose because it ensures that the operator will pay attention to insulation on the

² We recognize that in *Western Fuels - Utah, Inc.*, 18 FMSHRC 1912, 1915 (Nov. 1996), the Commission said that “the language of section 75.516-2(c) is clear.” However, this was a case where the operator conceded that it had not provided additional insulation for a communication cable. The operator defended against the citation on the grounds that the first sentence of section 75.516-2(c) limited the subsection as a whole to track entries, a contention which the Commission rejected. The Commission did not address the issue of whether the phrase “shall be provided” in the second sentence of section 75.516-2(c) has a plain meaning which precludes installation of the additional insulation by a manufacturer of the cable.

cables at the required points, safeguarding against unintentional energization. S. Br. at 30-31. The Secretary accepts “a wrap of electrical tape” at the required location to constitute the installation of additional insulation. 33 FMSHRC at 1943; Tr. 434-35. At oral argument, counsel for the Secretary also suggested that it is reasonable to require that the operator install the additional insulation to the exterior of the cable, because it signals to an inspector that the operator has examined the communication cable at the points where it passes the power cable. Oral Arg. Tr. at 27-28, 39, 50.

We conclude that the Secretary’s interpretation is not reasonable and does not advance mine safety. The Secretary would require the manual application of additional insulation to any cable, even a cable that contains abundant amounts of insulation. According to the Secretary, simply wrapping electrical tape around the communication cable or the power cable, regardless of the amount of insulation already existing, would be enough to comply with the standard. Oral Arg. Tr. at 62-63. The Secretary’s interpretation is not supportable because it leads to results that may have the perverse effect of discouraging the purchase and use of communication cables that are manufactured with redundant layers of insulation.

We also find unpersuasive the Secretary’s argument that the additional insulation must be manually installed over the manufacturers’ cables to create a signal for the inspector. We fail to see the benefit of a signal that merely indicates that a communication cable was once examined at some unknown past time. Neither the language of the standard nor its regulatory history suggests that a mine operator is required to flag the areas in question as being compliant. Instead, the regulatory history suggests that the goal of the safety standard is to ensure the proper insulation of wires and cables to prevent unintentional energization. *See* 38 Fed. Reg. at 4975.

We conclude that the Secretary’s interpretation should not be accorded deference as a reasonable interpretation. The safety standard simply requires the presence of “additional insulation” at points where communication circuits pass over or under power conductors. Accordingly, a mine operator may “provide” additional insulation by using a communication cable that contains insulation that is more than sufficient to comply with the requirements of section 75.516-2.³ The Judge’s decision with respect to Citation Nos. 8456301 and 8456311 is reversed, and the citations are vacated.

³ We note that the Secretary takes issue with the Judge’s statement that the requirement of additional insulation in section 75.516-2(c) is “obsolete” due to technological improvements in the insulation of communication circuits and power conductors. 33 FMSHRC at 1945; S. Br. at 29-30. Our determination that the Secretary’s interpretation of section 75.516-2(c) is unreasonable is based on the considerations set forth herein. We are not suggesting in any way that the regulation is obsolete.

II.

Citation No. 7622372

A. Factual and Procedural Background

On December 10, 2008, Inspector James Preece began an inspection of the Foidel Creek Mine. 33 FMSHRC at 1934. Preece observed that sprinkler heads for the fire suppression system along the Three Main North belt were covered in a layer of rock dust. *Id.* at 1934-35; Tr. 379, 381-82, 384-85; Gov. Ex. 21. He issued Citation No. 7622372 for an alleged violation of the safety standard in 30 C.F.R. § 75.1100-3, which provides that “[a]ll firefighting equipment shall be maintained in a usable and operative condition.” Gov. Ex. 21.

Prior to the hearing, the Judge granted the Secretary’s motion to amend the citation to allege a violation of the safety standard in 30 C.F.R. § 75.1107-16(b). 33 FMSHRC at 1935. The standard provides that “[e]ach fire suppression device shall be tested and maintained in accordance with the requirements specified in the appropriate National Fire Code . . . National Fire Code 13A ‘Care and Maintenance of Sprinkler Systems’ (NFPA No. 13A - - 1971).” 30 C.F.R. § 75.1107-16(b) (herein after referred to as “NFPC 13A”). The Secretary alleged that Twentymile violated a provision of NFPC No. 13A, which states that “[s]prinklers should be checked regularly to make sure that they are in good condition, clean, free from corrosion or loading, not painted or whitewashed, and not bent or damaged.”⁴ S. Post-Hearing Br. at 38-39; Gov. Ex. 23.

The Judge concluded that the Secretary failed to allege a violation of a mandatory safety standard. 33 FMSHRC at 1939. The Judge stated that section 75.1107-16(b) incorporates only the “requirements” of NFPC No. 13A. *Id.* He noted that the relevant provisions use the term “should” in their directive language, which normally indicates the non-mandatory nature of a

⁴ In his post-hearing brief, the Secretary alleged that Twentymile had also violated a provision of NFPC No. 13A which provides: “[i]t is of prime importance to keep sprinklers in good condition. If they are subject to loading with dust or foreign material, the authority having jurisdiction should be consulted.” S. Post-Hearing Br. at 39-40; Gov. Ex. 23. The Secretary alleged in the brief that Twentymile failed to consult with MSHA. S. Post-Hearing Br. at 39-40. However, Citation No. 7622372 did not allege a failure to consult with MSHA about the condition of the sprinklers. Gov. Ex. 21. Moreover, when asked about the basis for the citation, Inspector Preece testified about the requirement to maintain sprinklers in good condition, but did not mention a failure to consult with MSHA. Tr. 380-81, 395-96. In his brief to the Commission, the Secretary says in a one-sentence footnote that he also relies on the NFPC No. 13A provision requiring consultation with “the authority having jurisdiction.” S. Br. at 19 n.11. No further explanation is provided. The Commission concludes that the Secretary’s claim that Twentymile failed to consult with MSHA about the sprinkler was not supported by a sufficient allegation in the citation or by evidence at the hearing, and was essentially waived on appeal.

regulation. *Id.* at 1938-39 (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1931-32 (Oct. 1989)). Therefore, the Judge concluded that the cited provisions are not among the “requirements” that mine operators must comply with pursuant to section 75.1107-16(b). *Id.* at 1939. In a footnote, the Judge stated that “[e]ven if the subject National Fire Code provisions could be considered as mandatory safety standards, I find that the Secretary failed to establish a violation.” *Id.* at 1939 n.5. The Judge credited the testimony of Edwin Brady, the maintenance manager who had worked at the mine for more than 20 years, over that of Inspector Preece. *Id.* at 1936-37, 1939 n.5.

On review, the Secretary maintains that it is irrelevant whether the cited provisions use advisory language because the cited provisions were made mandatory through incorporation by section 75.1107-16(b). The Secretary further alleges that the testimony of Inspector Preece was sufficient to establish a violation. Twentymile argues that the plain language of section 75.1107-16(b) incorporates only those provisions in the National Fire Code that are written with mandatory language, and that the Judge properly credited the testimony of Mr. Brady over that of Inspector Preece.

B. Disposition

We conclude that under the specific circumstances of this case, we need not reach the issue of whether 30 C.F.R. § 75.1107-16(b) makes the cited provisions of NFPC No. 13A mandatory. Even if we were to find the NFPC No. 13A provisions mandatory, the Secretary has not proven those provisions would be violated in this case.

Because this case involves an alleged violation due to the presence of rock dust on sprinklers heads, we must consider the case in the context of the use of rock dust in underground coal mining.⁵ It is undisputed that there was a coating of rock dust on the sprinkler. The inspector testified that he observed the sprinklers covered with rock dust and this is supported by Government Exhibit 22, photos of a sprinkler with rock dust all over its surface. However, and very importantly, it is also beyond dispute that rock dust is essential to safety in an underground coal mine.

Adequate rock dusting is necessary to prevent the propagation of a mine explosion – the deadliest danger in an underground coal mine. In enacting the Coal Act and subsequently the Mine Act, Congress was explicit about the requirement of rock dusting. Thus, section 304(c) of

⁵ At one point in his cross-examination, Inspector Preece mentioned that coal dust as well as rock dust was present on the sprinkler heads. Tr. 392. However, this contradicted all of his references to the substance of the sprinkler heads in his direct examination. Tr. 379, 381-82, 385. It also contradicted the citation Preece issued, which only refers to rock dust. Gov. Ex. 21. The Secretary adduced no evidence as to the amount of coal dust. Hence, the Secretary’s evidence fails to prove a violation of section 75.1107-16(b) based on the existence of material other than rock dust on the sprinkler heads at the mine.

the Mine Act provides: “All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within forty feet of all working faces, . . . unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners.” 30 U.S.C. § 864(c).

Moreover, Congress was explicit about where rock dust must be applied and the amount of rock dust necessary. Thus, section 304(d) of the Act provides:

(d) Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.

30 U.S.C. § 864(d). Testimony at trial in this case established that rock dust is necessary in belt entries. Tr. 410.

The relevant provision of NFPC No. 13A at issue here states: “Sprinklers should be checked regularly to make sure that they are in good condition, clean, free from corrosion or loading, not painted or whitewashed, and not bent or damaged.” Gov. Ex. 23; Tr. 380-81. Although “clean” is not the term that comes to mind upon viewing the photos, the Secretary has failed to demonstrate through the evidence presented in this case that provisions of NFPC No. 13A have been violated by the presence of the depicted rock dust. As the Judge found, MSHA Inspector Preece’s knowledge of Twentymile’s sprinkler system, how it activates and whether the presence of rock dust would delay the activation was vague and not very convincing, and Inspector Preece appeared to misunderstand how the mine’s sprinkler system operated. 33 FMSHRC at 1939 n.5.

We find no evidence in the record of a regulatory connection between rock dust, which was likely not considered in drafting NFPC No. 13A, and the performance of sprinklers in a mine. No such connection is apparent on the face of the cited provisions,⁶ and the record raises a question as to the feasibility of implementing the Secretary’s interpretation in an underground

⁶ Compare MSHA’s Program Policy Manual (referring to a different regulation (30 C.F.R. § 75.1107-4) where it states: “[t]o be effective, all heat detecting sensors, including sprinklers, must be kept free of oil, grease, rock dust, and other materials that may have an insulating effect.” V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 75, at 115 (2003).

mine.⁷ It would not be necessary that the Secretary prove a particular sprinkler was not functional for it to be deemed to be not “clean” if rock dust were within the scope of materials comprehended by NFPC No. 13A. However, to find that rock dust is a material covered by NFPC No. 13A, it is incumbent upon the Secretary to first show a sufficient regulatory connection between the performance of a fire protection suppression system and rock dust on the system.

In his post-hearing brief, the Secretary relied only on the definition of “clean” and even then argued only that “clean” is defined as “free from dirt or pollution.” The Secretary then went on to state that “pollution” means something that “contaminates (an environment) especially with man-made waste.” S. Post-Hearing Br. at 39. We do not agree that rock dust can reasonably be considered “man-made waste.” Indeed, rock dust is a substance that MSHA requires be applied liberally in underground mines. 30 C.F.R. §§ 75.402 and 75.403. Nor is rock dust “dirt” as the word is used in Volume V of MSHA’s Program Policy Manual. Gov. Ex. 24; Tr. 385-86.

Therefore, the Secretary did not provide adequate evidence to establish that the circumstances of this case would fall within the scope of NFPC No. 13A. For the reasons stated above, we affirm the Judge in result.

⁷ The operator’s witness testified that to remove the rock dust from the sprinklers, the sprinkler heads would need to be washed off with a high pressure hose, and that given the delicate nature of the sprinklers, washing with such a hose could potentially damage the heads. Tr. 411.


III.


Conclusion


For the foregoing reasons, the Judge's decision with respect to Citation Nos. 8456301 and 8456311, which alleged violations of the standard governing additional insulation on communication cables, 30 C.F.R. § 75.516-2(c), is reversed, and those citations are vacated.


We also conclude that the Secretary failed to prove a violation of 30 C.F.R. § 75.1107-16(b). Accordingly, the Judge's decision to vacate Citation No. 7622372 is affirmed in result.


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