FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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OCT 28 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2013-319-RM WEST 2013-299-M
RESOLUTION COPPER MINING, LLC	:	

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"). The citation at issue alleges that Resolution Copper Mining, LLC, violated 30 C.F.R. § 57.19076[1] by operating its personnel conveyance system in excess of the maximum speed limitation of 500 feet per minute (fpm). At issue is whether the Administrative Law Judge correctly ruled that the personnel conveyance in question was not governed by the requirements of section 57.19076. For the reasons that follow, we conclude that the Judge erred in rejecting the Secretary of Labor's interpretation of the standard and vacating the citation. Accordingly, we reverse the Judge's decision and remand the case for further proceedings..

I.

Factual and Procedural Background

A. Factual Background

Resolution Copper Mining, LLC ("Resolution") operates the Resolution Mine, an underground copper mine in Arizona. On November 28, 2012, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 8596049 to Resolution. The citation alleged that the operator violated section 57.19076 by

[1] Section 57.19076 requires that "[w]hen persons are hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station." 30 C.F.R. § 57.19076.

hoisting miners in a conveyance vessel at the No. 10 shaft at speeds of up to 1200 fpm, which exceeds the maximum allowable speed of 500 fpm when hoisting persons in a bucket. The outcome determinative issue was whether the vessel used by Resolution constituted a "bucket" within the meaning of section 57.19076. The citation also designated the violation as being "significant and substantial" ("S&S").[2]

Resolution, without objection, sought an expedited proceeding before a Commission Administrative Law Judge. The parties agreed that the record would be based upon an evidentiary record already developed in a separate, prior proceeding before Department of Labor Administrative Law Judge Richard M. Clark, described in detail below. On April 19, 2013, the Commission Judge issued a decision vacating the citation. 35 FMSHRC 1072 (Apr. 2013) (ALJ). On May 17, 2013, the Commission granted the Secretary's petition for discretionary review.

B. Petition for Modification

The proceeding before Judge Clark arose from a petition for modification of the application of section 57.19076 filed by Resolution pursuant to section 101(c) of the Mine Act.[3] 30 U.S.C. § 811(c). The petition was filed on April 12, 2011, twenty months before the issuance of the citation in dispute here. On November 4, 2011, MSHA's Administrator for Metal and Non-Metal Mine Safety and Health ("The Administrator") issued a Proposed Decision and Order denying Resolution's petition for modification.[4] P. Ex. 14. The operator subsequently requested

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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."

[3] Under section 101(c), 30 U.S.C. § 811(c), petitions for modification of mandatory standards are handled by the Department of Labor, as opposed to the Commission. The language of section 101(c) provides in relevant part:

> Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

[4] Petitions for modification under the Mine Act are governed by the Secretary's regulations in 30 C.F.R. Part 44. Proposed decisions to grant or deny petitions for modification are made by the Administrator. 30 C.F.R. § 44.13. Within 30 days of the Administrator's proposed decision, either party may request a hearing before a Department of Labor Administrative Law Judge for an initial decision. 30 C.F.R. § 44.14. Within 30 days of the ALJ's initial decision, either party may file an appeal to the Assistant Secretary for Mine Safety

a hearing before the Department of Labor's Office of Administrative Law Judges, and the case was assigned to Judge Clark. Based on the record developed before him, Judge Clark found that the personnel conveyance system used in the No. 10 shaft did not constitute a "bucket" for purposes of section 57.19076. DOL ALJ Dec. I at 22 (Oct. 2012). Judge Clark did not reach the question of whether Resolution's petition satisfied the requirements for petitions for modification, as set forth in section 101(c).

On May 31, 2013, the Assistant Secretary for Mine Safety and Health set aside Judge Clark's initial decision on the basis that disputes regarding the interpretation and applicability of standards must be resolved before the Commission. DOL Asst. Sec'y Dec. I at 12-17 (May 2013). The Assistant Secretary remanded the case to Judge Clark to determine whether Resolution's proposed alternative satisfied the standard for petitions for modification.

On November 6, 2014, Judge Clark subsequently found that the standard was satisfied on the basis that the operator's proposed alternative guaranteed no less than the same measure of protection afforded by section 57.19076. As a result, Judge Clark granted the petition for modification. DOL ALJ Dec. II (Nov. 2014).

MSHA subsequently appealed Judge Clark's decision to the Assistant Secretary. On June 5, 2015, the Assistant Secretary granted the petition for modification in part with conditions and additional safety enhancements and remanded the case for additional findings of fact and further proceedings consistent with his decision. DOL Asst. Sec'y Dec. II (June 2015).

C. The Commission Judge's Decision

The Commission Judge in the instant case found that the hearing record developed before Judge Clark was comprehensive and granted the operator's unopposed motion for an expedited proceeding. 35 FMSHRC at 1073-74. Based upon the record, the Commission Judge found that the personnel conveyance used at the No. 10 shaft did not constitute a "bucket" for purposes of section 57.19076. Accordingly, he vacated the citation.

The Judge stated that the term "bucket" is not defined in section 57.19076. He further rejected the Secretary's interpretation that the term "bucket" applies to the personnel conveyance at issue in the No. 10 shaft. The Judge acknowledged that an agency's interpretation of an ambiguous regulatory provision is entitled to "controlling deference unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 1077. However, the Judge refused to defer to the Secretary's interpretation on the grounds that it was unpersuasive and inconsistent with the Secretary's own prior interpretation. *Id.* at 1078-79. In doing so, he cited *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and stated that "[a]n agency's interpretation that does not carry the force of law may still be worthy of receiving another form of persuasive deference or 'respect.'" *Id.* at 1077. He further stated that the "persuasiveness and consistency of the Secretary's interpretation must be evaluated to determine how much deference should be accorded, if any." *Id.* at 1078.

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and Health. 30 C.F.R. § 44.33. Decisions made by the Assistant Secretary are subject to judicial review in the U.S. Courts of Appeals.

In rejecting the Secretary's interpretation, the Judge discounted the opinion of the Secretary's expert witness, Thomas Barkand, who testified that Resolution's "personnel conveyance" met the definition of a "bucket" primarily because it was suspended from a crosshead. Tr. 250. The Judge found that Barkand failed to explain "how the suspension of the bucket relate[d] to what is considered a bucket in the safety standard." 35 FMSHRC at 1078-79. The Judge reasoned that "[i]f the Secretary wanted any personnel conveyance suspended from a wire rope without the use of a fixed guide to be subject to the 500 fpm speed limit, he could have easily said so in the safety standard." *Id.*

In addition, the Judge relied heavily on the definition of "bucket" contained in the *Dictionary of Mining, Mineral, and Related Terms* (*DMMRT*) in rejecting the Secretary's interpretation. The *DMMRT* definition states that a "bucket" is "[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening." P. Ex. 4. According to the Judge, Resolution's conveyance failed to meet that definition because it had a closed top, a door, and thinner walls; was taller; was not used to hoist broken rock or water; and was "specifically designed to only hoist miners" and their personal equipment. 35 FMSHRC at 1078. The Judge rejected the Secretary's argument that the definition of "bucket" in the *DMMRT* should not be relied upon, and stated that the *DMMRT* "is a recognized authority to determine [the] technical usage [of mining terms]" and that the technical usage is relevant to determining the term's meaning. *Id.*

Finally, the Judge found the Secretary's interpretation of section 57.19076 to be inconsistent. Quoting from the proposed decision by the Administrator in the separate petition for modification proceeding denying the petition, the Judge concluded that MSHA itself acknowledged that the "personnel conveyance" was not a bucket. 35 FMSHRC at 1079.

II.

Disposition

A. The Secretary's Interpretation of Section 57.19076 is Reasonable and Persuasive Because It Is Supported by the Language and Purpose of the Standard and the Overall Regulatory Scheme.

The term "bucket" is not defined in the standard or elsewhere in the Secretary's regulations. Further, as applied to the facts of this case (involving the movement of persons), the term "bucket" is inherently ambiguous. The Secretary maintains that the conveyance used by Resolution is a "bucket" for purposes of section 57.19076 because it is suspended from a crosshead and guided by ropes. The issue is whether interpreting the standard in such a way is a reasonable and persuasive approach.[5]

[5] It appears that in rejecting the Secretary's interpretation of section 57.19076, the Judge applied the standard of review for deference articulated in *Skidmore v. Swift*, and held that the Secretary's interpretation lacked the power to persuade. *See* 35 FMSHRC 1077-78; *Skidmore*, 323 U.S. at 140 (holding that deference to decision of administrator varies, depending on a

We hold that the Secretary's approach is reasonable and persuasive because it is consistent with the language and purpose of the standard and serves the Act's promotion of mine safety. The clear purpose of the speed limitations in section 57.19076 is to reduce the likelihood of death or injury that might result from the impact on persons in a bucket if the bucket strikes something while being raised or lowered. The Secretary maintains that the speed of such a conveyance, i.e., one that is suspended from a crosshead and guided by ropes, must be limited because there will be a lesser degree of control, and this lesser degree of control could cause a strike to occur.

The Secretary's position is supported by the testimony of expert witness Barkand. Barkand testified that the personnel conveyance was a bucket because, like the operator's muck and cement buckets, it was hung from a crosshead by ropes that – as opposed to the mechanism that controls a fixed guidance conveyance, such as an elevator – do not "precisely control[ ] the travel of the conveyance." Tr. 248-51. In other words, it was the method of suspension and control of the conveyance – in particular, the lesser degree of control – that makes the conveyance a "bucket" for purposes of section 57.19076.

The operator's argument that Barkand's testimony fails to support the Secretary's interpretation is unpersuasive. The operator asserts that Barkand failed to relate the rope-guided method of suspension for the personnel conveyance to what is considered a "bucket" in the safety standard. However, Barkand implicitly testified that the method of suspension could result in the "bucket" striking the shaft wall or other obstruction. Specifically, after testifying about how guided rope conveyances have a lesser degree of control, he subsequently testified about how, in the event of a strike, the kinetic energy transfer would injure miners. Tr. 249-54. Thus, Barkand's testimony supports the Secretary's interpretation.

Given the injuries to miners that would occur if the bucket struck an obstruction, it is reasonable for the Secretary to require speed limitations on rope-guided personnel conveyances to prevent such strikes from occurring while the conveyances are traveling up and down mine shafts. Thus, we are persuaded by the Secretary's interpretation of the term "bucket" as applying to personnel conveyances that are not precisely controlled because they are suspended from crossheads and guided by ropes.[6]

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number of factors that give power to persuade, if not control). Because we hold that the Secretary's interpretation is reasonable and persuasive, and therefore entitled to deference under *Skidmore*, it is not necessary for us to determine whether the Judge should have applied a more deferential standard of review following *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

[6] The personnel conveyance at issue is guided and controlled just like any other bucket. Tr. 237-38. It is attached to a cross-head and guided like the other buckets at the mine. *Id.* The personnel conveyance in question also looks like a bucket. Tr. 249-50. The Secretary's Exhibits 1-3 show three different sorts of buckets used at the Resolution mine. R. Exs. 1-3. The primary difference between the personnel conveyance and the muck and cement buckets is the addition of a lid and the fact that there is no side door. But it is guided in the same manner. In contrast, the "Maryanne" – another type of personnel conveyance used at the mine – operates using a fixed-

The operator argues that, under the regulatory scheme, "guided by ropes" cannot be an essential characteristic of a "bucket" that distinguishes it from some other type of conveyance because the regulations contemplate the use of guide ropes for hoisting personnel in conveyances that are not buckets. For instance, the operator points out that 30 C.F.R. § 57.19019 provides strength requirements for guide ropes when such ropes are "used in shafts for personnel hoisting applications *other than shaft development*" (emphasis added). The operator notes, however, that under 30 C.F.R. § 57.19049, buckets may not be used for hoisting personnel, *except in the case of shaft development and inspection, repair and maintenance activities*. Thus, if a bucket can only be used for shaft development, inspection, repair or maintenance, but guide ropes are permitted to be used for hoisting personnel *outside of those circumstances*, the operator contends that it logically follows that the regulatory scheme contemplates the use of guide ropes for hoisting personnel in conveyances that are not buckets. Thus, according to Resolution, being "guided by ropes" cannot be an essential characteristic of a "bucket" that distinguishes it from some other type of conveyance.

Although this particular point might have some initial appeal, the Secretary has ultimately persuaded us that an essential characteristic of a "bucket" in these circumstances is that it is "guided by ropes." Specifically, the Secretary points out that section 57.19000(b)(4) states that the hoisting standards (Subpart R of Part 57) *do not apply* to "wire ropes used for elevators." The Secretary argues that this regulatory delineation between buckets and elevators is intended to reflect the fact that a collision or strike is more likely to occur in the case of a conveyance that is guided by ropes and attached to a crosshead than in the case of a fixed-guidance conveyance, such as an elevator. By contrast, being "guided by ropes" creates significant safety risks, and therefore *is* an essential characteristic of a "bucket." The Secretary argues that these safety risks support the speed limitations in section 57.19076. We agree, and as a result, conclude that the Secretary's interpretation is reasonable and persuasive.[7]

B. The *DMMRT* Definition of "Bucket" Is Irrelevant to this Case.

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cage guided by a fixed-guide method (similar to an elevator), as opposed to a rope-guided method. Tr. 139-140.

[7] We further note that Resolution's position is inconsistent with numerous statements in the record made by it, along with its consulting engineers, G. L. Tiley & Associates, and its independent contractor, Cementation Canada – all of which refer to the personnel conveyance as a "bucket." For example, Petitioner's Exhibit No. 1, a lengthy PowerPoint presentation, labels the conveyances as "buckets" on the computer screen. P. Ex. 1 (p. 5, Monitor: Shaft Information and Communications) (referring to "No. 1 Bucket" and "No. 2 Bucket"). G. L. Tiley, commissioned to do testing on the conveyance, also refers to the conveyances as "buckets." P. Ex. 7, pages 3-11. In addition, Cementation of Canada, a contractor working with the operator, described it in 2007 as a "bucket" in their own diagrams. R. Ex. 4. Furthermore, Cementation's programmable logic controllers and operating description from 2009 do not refer to conveyances, but rather to "buckets." P. Ex. 17, pages 4, 6, 7. These references certainly undercut Resolution's legal position.

The *DMMRT* definition of "bucket" relied upon by the Judge does not undermine the reasonableness and persuasiveness of the Secretary's interpretation. In this case, the Judge's reliance on the *DMMRT* definition is undermined by the Secretary's safety standards and thus has no relevance to this case.[8] Specifically, the *DMMRT* definition fails to mention any of the characteristics of a "bucket" that are relevant to the safety of personnel being hoisted in it. For example, the *DMMRT* definition fails to recognize that when a "bucket" is hoisting personnel it must be securely attached to a crosshead." 30 C.F.R. § 57.19050(a). Further, although the *DMMRT* defines a bucket as "[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening," the Secretary's standards require a "bucket" that is hoisting personnel to be covered, i.e., to "[h]ave overhead protection," and to have a device that disables the bail. 30 C.F.R. § 57.19050(b), (d); *see also* 30 C.F.R. § 57.19045 ("man cages" and "skips" used for hoisting personnel "shall be covered with a metal bonnet"). Thus, the Secretary's standards effectively negate the very characteristics (open-topped and equipped with a bail) by which the *DMMRT* defines the term "bucket."

The *DMMRT* definition does not even recognize that a "bucket" is commonly used to hoist personnel during the sinking of a shaft.[9] The definition mentions lowering supplies and equipment to miners but says nothing about carrying personnel. Indeed, the DMMRT definition simply describes an ordinary "bucket" and has nothing to do with personnel conveyances. As a result, the *DMMRT* definition is clearly incongruous with the standard being interpreted.

Finally, the Judge's finding of fact that the conveyance was taller than the muck and cement buckets is inconsequential, given the requirement of section 57.19050(c) that a "bucket" used to hoist personnel must be tall enough to "transport persons safely in a standing position." Nor may a "bucket" in which personnel are riding contain "muck, supplies, materials, or tools other than small hand tools." 30 C.F.R. § 57.19071. Thus, these facts have no bearing on whether or not the conveyance at issue is a "bucket."

For all these reasons, we conclude that the *DMMRT* definition of "bucket" is irrelevant to this case.

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[8] As noted above, the *DMMRT* definition states that a "bucket" is "[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening." P. Ex. 4. Am. Geological Institute, Dictionary of Mining, Mineral, and Related Terms 71 (2d ed. 1997).

[9] The operator's assertion that this issue is not properly before the Commission because the Secretary did not make this argument before the Judge lacks merit. At issue before the Judge below was the meaning of the term "bucket" in section 57.19076. The reliability of the *DMMRT* definition of "bucket" is central to this issue. Thus, although the points raised on appeal by the Secretary are not identical to those raised below, they are "sufficiently related" to those raised in support of the Secretary's interpretation so that the Commission can consider them. *See, e.g., BHP Copper Inc.*, 21 FMSHRC 758, 762 (July 1999); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994).

C. The Judge Failed to Recognize that the MSHA Administrator's Allegedly Inconsistent Previous Interpretation Was Merely a Description of Resolution's Legal Position.

The Judge additionally erred in finding the Secretary's interpretation undeserving of deference on the ground that it was inconsistent with the language in the Administrator's proposed decision denying the petition for modification. 35 FMSHRC at 1079. The Judge failed to realize that the portion of the Administrator's proposed decision that he quoted was the introduction, in which the Administrator merely described – verbatim – the position stated in the operator's petition for modification. Recitation of that description, in that context, did not mean that the Administrator agreed with Resolution's position.

The operator's petition for modification and the Administrator's proposed decision both stated: "The personnel conveyance that this petition is submitted upon is not a 'bucket,' but rather is an enclosed capsule designed for the transport of personnel." P. Exs. 5, 14. Similarly, the succeeding eight sentences in the Administrator's proposed decision were all taken verbatim from the operator's petition and all appeared in the Administrator's proposed decision *prior to* the section with the heading "Findings of Fact and Conclusions of Law." P. Ex. 14. Under that heading, the Administrator did not repeat the statement relied on by the Judge, but rather addressed the merits of the petition for modification on the assumption that the conveyance was a "bucket" for purposes of section 57.19076. This is consistent with the fact that the Administrator referred to the conveyance as a "personnel bucket" throughout the entire section. P. Ex. 14. Furthermore, the Administrator's denial of the petition for modification in effect directed that the standard be applied to the conveyance without modification, which implies that the Administrator found that the conveyance was a "bucket" for purposes of section 57.19076.

In short, the Judge's conclusion that MSHA had taken inconsistent positions regarding the interpretation of the standard is based on a misreading of the Administrator's proposed decision.

III.

Conclusion

For the reasons stated above, we reverse the Judge's decision and rule that section 57.19076 was violated. We remand the case to the Judge to determine whether to affirm the inspector's S&S designation.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

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