FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2011-602
DQ FIRE & EXPLOSION CONSULTANTS, INC.	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), an Administrative Law Judge upheld a withdrawal order issued to DQ Fire & Explosion Consultants, Inc. for an alleged violation of 30 C.F.R. § 48.5(a).[1] Unpublished Order Granting the Secretary's Motion for Partial Summary Decision dated Aug. 13, 2012 ("Sum. J. Order"). DQ filed a petition for discretionary review challenging the Judge's final Decision and Order issued on August 30, 2014. However, the Commission granted review only on the question of whether the Secretary provided adequate notice of the Secretary's interpretation of the training regulations at issue.

For the reasons stated below, we reverse the Judge's decision and conclude that DQ was not provided fair notice of the requirements of the training regulations at issue, 30 C.F.R.

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[1] 30 C.F.R. § 48.5(a) provides:

> Each new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties. Such training shall be conducted in conditions which as closely as practicable duplicate actual underground conditions, and approximately 8 hours of training shall be given at the minesite.

I.

Facts and Proceedings Below

The central issue presented in this case is whether a scientific consultant, hired by the operator's attorneys to investigate the causes of an explosion, needed comprehensive new miner training or only hazard training. Comprehensive miner training requires 40 hours of training and covers topics in detail such as emergency evacuation and barricading, the use of self-rescue and respiratory devices, hazard recognition, first aid, mine gases and eight hours of underground training specific to the mine site. 30 C.F.R. § 48.5. Hazard training requires significantly less instruction on topics such as hazard recognition, self-rescue equipment, and emergency evacuation procedures. 30 C.F.R. § 48.11. Miners subject to hazard training must be accompanied at all times underground by an experienced miner. *Id.*

On April 5, 2010, a massive coal dust explosion occurred at the Upper Big Branch ("UBB") Mine resulting in the deaths of 29 miners. Performance Coal Company was the operator of UBB at the time of the explosion. The Department of Labor's Mine Safety and Health Administration ("MSHA") immediately began an extensive investigation into the causes of the explosion.

Performance Coal's attorneys hired Dr. Christopher Schemel ("Schemel") of DQ as a consultant to be part of the investigation team for UBB, and to provide information to Performance Coal about the explosion and how it occurred. During MSHA's part of the investigation, Schemel accompanied personnel from MSHA and West Virginia's Office of Miner's Health Safety and Training. From June 29 to October 6, 2010, he went underground with MSHA on 25 days during MSHA's investigation. Sum. J. Order at 6. His role was to accompany the MSHA team to observe mine conditions, gather data for his own analysis, and take notes. Schemel Dep. at 80-81, 84-85. Prior to going underground, Schemel received hazard training required by 30 C.F.R. § 48.11. Sum. J. Order at 9. Throughout the period from June to October, MSHA was aware that Schemel had only received hazard training. *Id.* at 3.

On October 7, 2010, MSHA issued an order withdrawing Schemel from the mine until he received comprehensive 40-hour training.[3] This withdrawal order corresponded with the onset

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argument is denied.

[3] Order No. 8249950 provides:

> Chris Schemel, a contract employee for the operator, has not received the required 40-hour new miner training prior to performing duties underground at the mine site. Mr. Schemel has no previous mining experience. Mr. Schemel is hereby ordered to withdraw from the mine until he has received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

of Performance Coal's part of the investigation. Schemel received the 40-hour training and then resumed his investigatory and analytical consultant duties.

The Secretary assessed a penalty of $112 for the training violation. DQ contested the order and penalty. Prior to a hearing, the Secretary filed a motion for partial summary judgment, contending that the record and law were uncontroverted that Schemel was a miner under 30 C.F.R. § 48.2(a)(1) who needed comprehensive training under 30 C.F.R. § 48.5. DQ, on the other hand, argued that Schemel was not a "miner" as defined by section 48.2(a)(1), but was instead a "scientific worker" as described in section 48.2(a)(2), and therefore required only hazard training.

In addressing DQ's argument that Schemel required only hazard training because his work fell under the scientific worker exception, the Judge agreed that some of Schemel's work at the UBB mine consisted of collecting data and analyzing coal dust, and could fall within the realm of scientific work. However, the Judge reasoned that Schemel was not conducting research for scientific purposes alone and "his primary purpose was assisting his employer in litigation." Sum. J. Order at 12. Accordingly, the Judge found that DQ qualified as "an independent contractor" that was providing "services" to the mine, as that term is used in the Mine Act and in the training regulations. *Id.* at 13-14. The Judge further found that the training standards demonstrate "an obvious intent on the part of the Secretary to provide 40-hour training to . . . those whose time underground is sufficient to create an exposure to hazards." *Id.* at 14. She held that Schemel "was frequently exposed to hazards underground," and as such was required to have comprehensive training pursuant to section 48.2(a)(1). *Id.*

The Judge also rejected DQ's argument that the Secretary failed to provide notice of his interpretation of the training regulations, concluding that "a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would understand that a person who is underground for frequent and extended periods of time must be adequately trained." *Id.* at 15.

II.

Disposition

A. Relevant Training Law

Mine Act section 115(a)(1) requires that "[e]ach operator . . . shall have a health and safety training program which . . . . shall provide as a minimum that new miners having no underground mining experience shall receive no less than 40 hours of training." 30 U.S.C. § 825(a)(1). Section 104(g) of the Act provides that if the Secretary finds "a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary . . . shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal . . . mine, and be

prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act."[4] 30 U.S.C. § 814(g).

The Secretary's Part 48 regulations implement Mine Act section 115 and set forth different types of training requirements. As noted above, pertinent to this case are comprehensive new miner training, which is outlined in section 48.5, and hazard training, described in section 48.11. The definitions of "miner" set forth in sections 48.2(a)(1) and (a)(2) determine which training is applicable, as set forth below. Section 48.2(a)(1) provides:

> "Miner" means, for purposes of [comprehensive training], any person working in an underground mine and who is engaged in the extraction and production process, or engaged in shaft or slope construction, or who is regularly exposed to mine hazards, or who is . . . a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular basis. . . . This definition does not include: . . . [a]ny person covered under paragraph (a)(2) of this section.

Section 48.2(a)(2) provides:

> "Miner" means, for purposes of [hazard training], any person working in an underground mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine. This definition excludes persons covered under paragraph (a)(1) [above].

Thus, the definitions of "miner," as they relate to the two different training requirements, are mutually exclusive.

The preamble to Part 48 states that "only those persons most directly and regularly exposed to mining hazards need to undergo comprehensive training." 43 Fed. Reg. 47,454, 47,455 (Oct. 13, 1978). It continues: "other workers at the mine, such as scientific, office, or delivery personnel, either employed or contracted by the operator, or short term maintenance or service personnel contracted by the operator [who] are exposed to . . . hazards on a less regular

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[4] The legislative history of the Mine Act expressed a deep concern over the problem of poorly trained miners and attributed many mining disasters to poor training. S. Rep. No. 95-181, at 49-51 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637-39.

basis . . . . [t]hese workers, therefore, have periodic instruction concerning the hazards they may encounter." 43 Fed. Reg. at 47,455.

In 2003, MSHA issued a Program Policy Manual on Training and Retraining of Miners (Vol. III) ("PPM"), which provided that independent contractors working at a mine are miners for Part 48 training purposes and that the type of training a miner receives is not based on the specific job title but a "determination must be made as to the kind and extent of mining hazard exposure." PPM at 34. The PPM states that "[i]ndividuals engaged in the extraction or production process, or regularly exposed to mine hazards, or contracted by the operator and regularly exposed to mine hazards, must receive comprehensive training." *Id.* It defines "'regularly exposed' [as] either frequent exposure, that is exposure to hazards at the mine on a frequent rather than consecutive day basis (a pattern of recurring exposure), or extended exposure of more than 5 consecutive workdays, or both." *Id.* The PPM goes on to state that independent contractors "must receive comprehensive training if they . . . are regularly exposed to mine hazards." PPM at 35, 36.

B. Whether DQ Had Notice that Schemel Needed Comprehensive Training

Under Commission precedent, if the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary. *Bluestone Coal. Co.*, 19 FMSHRC 1025, 1029 (June 1997) (when regulatory provision is clear and unambiguous, then the regulation provides adequate notice); *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000) (If the regulation is unambiguous, the regulation's clear meaning is controlling and it "follows that the standard provided the operator with adequate notice of its requirements.")

Sections 48.2(a)(1) and (a)(2) do not explain or define who qualifies as a "scientific worker." Similarly, neither the preamble nor any published guidances, including the 2003 PPM, explains the term "scientific worker." Accordingly, we determine that sections 48.2(a)(1) and (a)(2) are ambiguous with respect to who qualifies as a scientific worker under these circumstances.

When a regulation is ambiguous, the courts and this Commission defer to the Secretary's reasonable interpretation of the regulation. *E.g., Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). However, this is not a case of interpretation but rather involves whether the operator received sufficient notice to satisfy due process considerations.[5]

The due process clause "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995)(citation omitted) ("*GE*"). DQ argues that it had insufficient notice of the Secretary's interpretation because Schemel should be classified as a

[5] We do not address the issue of whether the Secretary's interpretation of the training regulations at issue was reasonable in that the Commission did not accept review of that question in granting DQ's petition. 30 U.S.C. § 823(d)(2)(A)(iii).

"scientific worker" under section 48.2(a)(2) (requiring only hazard training) and because MSHA permitted him to go underground many times before asserting the need for comprehensive training.

When a regulation does not provide unambiguous notice of its coverage, the appropriate test for notice of an ambiguous regulation is "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 Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). "In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Lodestar Energy, Inc.*, 24 FMSHRC 689, 695 (July 2002).

A reasonably prudent person would not have recognized the training mandate now advanced by the Secretary in part because section 48.2(a)(2) exempts scientific workers from comprehensive 40-hour training requirements. As the Judge found, some of Schemel's work at the UBB mine consisted of collecting data and analyzing coal dust, and could fall within the realm of scientific work. Sum. J. Order at 12. As discussed above, the text of the regulations does not define who qualifies as a scientific worker. Additionally, neither the preamble nor the PPM specifies who falls under the scientific worker category. In the absence of a definition of "scientific worker" in the regulations or published guidances, it was reasonable for DQ to assume that Schemel qualified as a scientific worker.

Moreover, MSHA's actions created enormous confusion regarding the type of training Schemel needed. Schemel accompanied MSHA underground at UBB on 25 occasions prior to Performance Coal's part of the investigation.[6] On none of these occasions did MSHA indicate that he required comprehensive 40-hour training.

Indeed, MSHA itself did not assert that Schemel needed comprehensive training when he was accompanying MSHA officials. It was not until approximately September 9, 2010, after Schemel had been underground 21 times, when Jerry Vance, a training specialist with MSHA, checked with MSHA Headquarters to inquire whether Schemel needed more than hazard training. Vance Dep. at 28. Although Headquarters responded that Schemel required 40-hour training, MSHA delayed in issuing the withdrawal order until October 7, and MSHA escorted Schemel underground without comprehensive training on four more occasions.[7] Thus, the

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[6] Schemel accompanied MSHA underground at UBB on the following dates between June and October 6, 2010: June 29; July 7, 8, 13, 14, 15, 19, 20, 21, 23, 27, 28, 29; August 4, 12, 13, 18, 20, 23, 25, 30; September 9, 23; October 5 and 6. Sum. J. Order at 6.

[7] MSHA Inspector Charles Maggard, a training supervisor who was part of the UBB investigation team, stated that the delay was caused by a lack of coordination with other MSHA inspectors and the large, busy nature of the UBB investigation. Maggard Dep. at 5-10, 26-27, 36-37.

actions of MSHA itself contributed to DQ's failure to understand the training requirements. If MSHA inspectors and supervisors did not know what the training regulations required, how could DQ? *See GE, supra* at 1333 (when agency itself is "unable to discern clearly . . . [what] was required," the regulation did not provide adequate notice).

In *GE, supra* at 1334, the court held that when regulations and other policy statements are unclear and "where the agency itself struggles to provide a definitive reading of the regulatory requirements," the regulated party cannot be held to be "on notice" of the agency's interpretation. *See also Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940, 944 (9th Cir. 1979) (vacating order and providing that "an employer should not be held to standards, the application of which cannot be agreed upon by those charged with their enforcement."). Here, the ambiguity in the wording of the regulations, coupled with MSHA's confusing actions, resulted in a lack of notice to DQ that Schemel was required to have comprehensive training.

We emphasize that this is a narrow ruling based on a unique set of facts. We conclude that on these facts, dealing with a scientific expert and MSHA's specific enforcement actions, the operator did not have notice of the Secretary's interpretation that miners who are regularly exposed to mining hazards must receive comprehensive training regardless of job title. Accordingly, on due process grounds, we vacate the withdrawal order and the penalty at issue here.

III.

Conclusion

For the foregoing reasons, we vacate Order No. 8249950 and the accompanying penalty.

Patrick K. Nakamura, Acting Chairman

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William I. Althen, Commissioner

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