

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
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FEB 12 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2010-774
	:	LAKE 2010-902
v.	:	
	:	
SOLAR SOURCES, INC.	:	

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

**DECISION**

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”) and involve two citations issued to Solar Sources, Inc. (“Solar”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”).<sup>1</sup> Both citations allege a violation of 30 C.F.R. § 77.1109(c)(1), which requires “mobile equipment” to be equipped with at least one portable fire extinguisher.<sup>2</sup> In each instance, the inspector found a violation because a wheeled water pump was not equipped with a portable fire extinguisher.

The Administrative Law Judge affirmed both citations, finding that wheeled water pumps constitute “mobile equipment” under the clear meaning of section 77.1109(c)(1) and are thus required to be equipped with portable fire extinguishers. *Solar Sources, Inc.*, 34 FMSHRC 2826, 2834-37 (Oct. 2012) (ALJ). Solar filed a petition for discretionary review of the Judge’s decision, which we granted.

For the reasons that follow, we affirm in result the Judge’s decision regarding both citations. We conclude that the Judge erred in finding that the term “mobile equipment” had a clear meaning under section 77.1109(c)(1) and instead find the term “mobile equipment” to be

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<sup>1</sup> The Judge had consolidated the two dockets at issue in these proceedings with a third docket, Docket No. LAKE 2009-373. However, the operator does not appeal the Judge’s decision in Docket No. LAKE 2009-373. PDR at 1 n.1.

<sup>2</sup> 30 C.F.R. § 77.1109(c)(1) provides: “Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers shall be equipped with at least one portable fire extinguisher.”

ambiguous. However, we conclude that the Secretary's interpretation, that wheeled water pumps constitute "mobile equipment" under the standard, is reasonable and thus must be accorded deference.

## I.

### **Factual and Procedural Background**

On March 23, 2010, Inspector William Faulkner inspected the Solar Sources No. 2 mine, a coal surface mine in Pike County, Indiana. During his inspection, Faulkner observed a wheeled water pump that was not equipped with a fire extinguisher, and subsequently issued Citation No. 8425618 to the mine operator. The citation alleged a violation of 30 C.F.R. § 77.1109(c)(1). 34 FMSHRC at 2828-29. The inspector believed that the water pumps were "mobile equipment" due to the fact that they have wheels. Sec'y Mot. For Summ. Dec., Ex. D, Inspection Notes, at 9 of 15.

On June 7, 2010, Inspector Faulkner inspected another Solar Mine, the Craney mine, a coal surface mine in Daviess County, Indiana. During his inspection, Faulkner observed a wheeled water pump that was not equipped with a fire extinguisher and subsequently issued Citation No. 8425664 to Solar. This citation also alleged a violation of 30 C.F.R. § 77.1109(c)(1). 34 FMSHRC at 2828-30.

Solar contested both citations. Before the Administrative Law Judge, the parties agreed that no material facts regarding either citation were in dispute. The parties agreed that the water pumps were not self-propelled but that their wheels allowed them to be towed. The parties filed cross-motions for summary decision. 34 FMSHRC at 2826-27, 2830.

In his summary decision, the Judge concluded that the language of the regulation was clear and that the water pumps at issue constituted "mobile equipment." 34 FMSHRC at 2835-36. The Judge noted that 30 C.F.R. § 56.2, a regulation that applies to metal and non-metal mines (as opposed to the coal mines at issue), defined "mobile equipment" in part as any wheeled equipment. On this basis, the Judge found that the two water pumps were clearly "mobile equipment" under section 77.1109(c)(1) since their wheels allowed them to be moved from place to place. 34 FMSHRC at 2834-35. Accordingly, the Judge affirmed both citations.

In reaching this result, the Judge rejected Solar's argument that water pumps instead constitute "auxiliary equipment" under 30 C.F.R. § 77.1109(c)(3), and must be considered only under that section.<sup>3</sup> The Judge "declin[ed] [the operator's] invitation to second guess the Secretary's choice of regulations to enforce." 34 FMSHRC at 2836. Instead, the Judge upheld the Secretary's decision to apply section 77.1109(c)(1) rather than section 77.1109(c)(3). *Id.*

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<sup>3</sup> 30 C.F.R. § 77.1109(c)(3) states that "[a]uxiliary equipment such as portable drills, sweepers, and scrapers, when operated more than 600 feet from equipment required to have portable fire extinguishers, shall be equipped with at least one fire extinguisher."

(citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996), citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)).

## II.

### Disposition

On review, Solar argues that section 77.1109(c)(1) is ambiguous because it fails to define “mobile equipment,” and that the Secretary’s interpretation of the regulation is unreasonable. In this regard, the operator claims that water pumps are “auxiliary equipment” subject to section 77.1109(c)(3) rather than “mobile equipment” subject to section 77.1109(c)(1). This contention is based upon the claim that water pumps are not directly involved in the extraction of coal. Rather, they are used to remove water that impedes mining and to fill water trucks which control dust on mine roads. However, as the operator concedes, this argument is undercut by the fact that portable welding units, which would fall under such a definition of “auxiliary,” are specifically listed as “mobile equipment” under section 77.1109(c)(1).

The Secretary argues that the clear meaning of the term “mobile equipment” includes wheeled water pumps as such pumps undoubtedly are mobile. Alternatively, even if the term is ambiguous, the Secretary claims that his interpretation that wheeled water pumps constitute “mobile equipment” is reasonable and thus should be accorded deference.

#### **A. The standard is ambiguous with regard to the definition of “mobile equipment.”**

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. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

We conclude that the Judge erred in finding that the term “mobile equipment,” as used in the standard, had a clear meaning. Section 77.1109(c)(1) does not define “mobile equipment” or include “water pumps” in the listed examples of “mobile equipment.”<sup>4</sup> Likewise, section 77.1109(c)(3) does not define “auxiliary equipment,” and does not identify “water pumps” in listed examples of auxiliary equipment. Thus, neither standard defines the term “mobile equipment” or directly addresses whether water pumps are “mobile equipment” within the meaning of section 77.1109(c)(1) or “auxiliary equipment” under section 77.1109(c)(3).<sup>5</sup>

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<sup>4</sup> As mentioned above, section 77.1109(c)(1) states that “[m]obile equipment, *including* trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher” (emphasis added). The word “including” indicates that the subsequent list of “mobile equipment” is not exhaustive.

<sup>5</sup> The Commission has previously found ambiguity regarding the scope of a standard under similar circumstances. *See Alcoa Alumina & Chemicals, LLC*, 23 FMSHRC 911, 914-15 (Sept. 2001) (in the context of 30 C.F.R. § 48.21, which applied to “surface mines,” the

The Secretary argues that the term “mobile equipment” plainly encompasses a wheeled water pump because the water pump is capable of being moved from place to place. However, certain equipment categorized as “auxiliary equipment” pursuant to section 77.1109(c)(3), e.g. “scrapers,” are also capable of being moved from place to place. Scrapers are described by the *Dictionary of Mining, Minerals and Related Terms* 485 (2d ed. 1997) (“DMMRT”) as “rubber-tired device[s].”<sup>6</sup> Therefore, the ability to move from one place to another does not plainly distinguish “mobile equipment” from “auxiliary equipment.”

We conclude, after reading section 77.1109(c) in its entirety, that the term “mobile equipment” in section 77.1109(c)(1) does not have a plain meaning. Instead, the term is ambiguous.

**B. The Secretary’s proffered interpretation is 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’s interpretation, that wheeled water pumps constitute “mobile equipment” because they are capable of traversing roadways, is reasonable. Considering wheeled water pumps as “mobile equipment” is consistent with the examples contained in section 77.1109(c)(1), which include other wheeled equipment, such as portable welding units that can be towed along roadways. Such an interpretation of “mobile equipment” is not overly broad, as it does not include all types of equipment that can be picked up and carried.

Furthermore, the reasonableness of the Secretary’s interpretation is demonstrated by the definitions of “mobile equipment” in both the DMMRT and 30 C.F.R. § 56.2. The DMMRT defines “mobile equipment” as “equipment that is self-propelled or that can be towed on its own wheels, tracks, or skids.” DMMRT at 352. Section 56.2 defines “mobile equipment” as “wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved.” 30 C.F.R. § 56.2. While section 56.2 applies to metal and non-metal mines, and the mines at issue are coal mines, we have previously recognized that “[t]here is no logical reason

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Commission found ambiguity as to whether “surface mines” included “mills” because the standard did not define “surface mines” or specifically include “mills” within its scope).

<sup>6</sup> We have previously recognized that the definitions in the DMMRT, while not always dispositive, are a “recognized authority for [technical] usage.” *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1685 (Dec. 2010).

why . . . coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result.” *Wolf Run*, 32 FMSHRC at 1681-82.

We are persuaded by these definitions that it is reasonable to interpret the term “mobile equipment” as any type of wheeled equipment that can traverse roadways.<sup>7</sup> The Secretary’s interpretation, that wheeled water pumps are “mobile equipment” as they are capable of traversing roadways, is clearly consistent with these concepts. Consequently, we uphold the Secretary’s interpretation of the term “mobile equipment” as reasonable in this instance.<sup>8</sup>

Under the Secretary’s interpretation, both water pumps at issue constituted “mobile equipment” under section 77.1109(c)(1). As a result, the operator was required to equip both water pumps with fire extinguishers, and its failure to do so violated the standard.

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<sup>7</sup> The question as to whether auxiliary equipment listed in section 77.1109(c)(3) may also be considered mobile equipment under section 77.1109(c)(1) is not raised by the facts of this case. Consequently, we leave this issue for a future case.

<sup>8</sup> We note that, as section 77.1109(c) is currently written, some types of equipment could fit both the definition of “mobile” within the Secretary’s interpretation and “auxiliary” within a reasonable interpretation of that term. When a regulation does not provide unambiguous notice of its coverage, the Commission’s test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Although the operator did not raise an issue of “fair notice” in this case, it may arise in other cases. For example, scrapers often have wheels, but they are explicitly included in section 77.1109(c)(3) as “auxiliary” equipment. Therefore, without in any way forecasting an outcome, we note that an operator might claim a lack of fair notice if it receives a citation under (c)(1) on a piece of demonstrably auxiliary equipment.

III.

Conclusion

For the foregoing reasons, we find that the Secretary proved violations of 30 C.F.R. § 77.1109(c)(1) with regard to Citation Nos. 8425618 and 8425664. Therefore, we affirm in result the Judge's decision with respect to both citations.



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Patrick K. Nakamura, Acting Chairman



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Robert F. Cohen, Jr., Commissioner



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William I. Althen, Commissioner

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