

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

September 28, 2010

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. WEVA 2007-448-R  
 : Order No. 7264179; 04/26/2007  
v. :  
 :  
DYNAMIC ENERGY, INC. :

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

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”), Administrative Law Judge Jacqueline R. Bulluck determined that Dynamic Energy, Inc. (“Dynamic”) violated 30 C.F.R. § 77.1607(b).<sup>1</sup> *Dynamic Energy, Inc.*, 31 FMSHRC 670, 684 (June 2009) (ALJ). Dynamic filed a petition for discretionary review challenging the finding of violation, which the Commission granted. For the reasons that follow, we affirm the judge’s decision.

I.

Factual and Procedural Background

Dynamic owns and operates the Coal Mountain No. 1 Surface Mine (“Coal Mountain”) located in Wyoming County, West Virginia. 31 FMSHRC at 672. As part of the operation, Coal Mountain operates a load out facility which receives truck shipments of coal from several mines in the area operated by Dynamic and affiliated companies. The coal trucks travel to the load out stockpile area on a dirt and gravel haul road, which has a steep grade of 17% to 19% with a sharp

---

<sup>1</sup> Section 77.1607(b) states that “Mobile equipment operators shall have full control of the equipment while it is in motion.”

switchback curve near the midpoint. *Id.* at 672 n.4, Tr. 109-11.<sup>2</sup>

On April 25, 2007, Department of Labor’s Mine Safety and Health Administration (“MSHA”) Inspector Bruce Billups was conducting an inspection of Coal Mountain. 31 FMSHRC at 672. He observed a grader sitting close to a coal haulage truck near the bottom of the mine’s main haulage road. *Id.* Billups approached the grader operator and asked him what he was doing. *Id.* The operator told Billups that when haulage trucks lost traction and were unable to ascend to the top of the road, he moved the grader behind the trucks and pushed until the trucks regained enough traction to move on their own. *Id.* (citing Tr. 16). The Inspector informed the grader operator that such pushing was a “bad practice” and that he would discuss the practice with the mine foreman. *Id.* (citing Tr. 16).

Later that day, Inspector Billups met with Foreman Kirby Bragg and informed Bragg that pushing the trucks up the hill with a grader was a violation of section 77.1607(b) and that if he witnessed the practice he would cite the mine. *Id.* at 687. Foreman Bragg and the inspector “openly and honestly disagreed” on the application of the standard. *Id.* at 687-88.

Inspector Billups returned the next day to resume his inspection. *Id.* at 672. As he traveled in his car to the area he intended to inspect, he overheard a haulage truck driver on the mine’s Citizen’s Band (“CB”) radio state that his truck was stuck and needed a push. *Id.* (citing Tr. 20). Billups headed toward the haulage road where he saw the 18-wheel truck. Tr. 20. It had lost traction and could only spin its wheels. *Id.* at 672 (citing Tr. 20). As Billups watched, the grader started to push the truck up the hill. *Id.* (citing Tr. 21). The inspector contacted the foreman to indicate that he was going to issue a withdrawal order. *Id.* (citing Tr. 26, 62-63).

Billups issued Order No. 7264179, which states in relevant part:

The driver of the loaded Kenworth tractor-trailer truck . . . being used at the mine to haul coal over a loose dirt and gravel roadway did not have full control of the truck while it was in motion, in that he had to be pushed upgrade by a 14H Caterpillar motor grader. It is reasonable to think that if this continues the truck driver could be injured . . . . The mine foreman of the operator was warned of this violation in a pre-inspection conference on 04-25-2007. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. R-5; 31 FMSHRC at 673. Although the inspector designated the violation as significant and

---

<sup>2</sup> MSHA mechanical engineer Ron Medina explained that a 17 percent grade means that for every 100 feet of road, there is an increase in elevation of 17 feet, which is considered fairly steep. Tr. 111.

substantial (“S&S”), the Secretary removed the S&S designation before a hearing was held.<sup>3</sup> S. Br. at 2. Dynamic abated the order by agreeing to refrain from assisting coal trucks with the Caterpillar 14H grader. Dynamic began operating smaller ten-wheel trucks on the haulage road which did not require pushing assistance from graders. Tr. 262-63.

Before a penalty was issued, Dynamic filed a notice of contest challenging the order. A hearing was held before Judge Bulluck. The judge found that section 77.1607(b) requires that the operator have “full control of the equipment while it is in motion.” 31 FMSHRC at 684. She relied on the definition of “full” to mean “being at or of the greatest or highest degree” and “control” as having the “power . . . to guide or manage.” *Id.* (citing *Webster’s Third New International Dictionary* (2002) at 919; 496). The judge determined that accordingly “full control” means having “‘complete’ power to guide or manage.” 31 FMSHRC at 684. The judge reasoned that during an assist, the tractor-trailer driver and the grader operator “share control of the truck,” and the truck driver does not possess full control over the truck. *Id.* She concluded that the assist procedure violated section 77.1607(b). *Id.*

The judge determined that this was a moderately serious violation which could lead to an accident that would seriously injure the truck driver but that the chance of injury was remote. 31 FMSHRC at 685. In so doing, the judge credited the testimony of Dynamic’s expert that it was very unlikely that the truck could jackknife and found that the inspector’s concern that a multitude of hazards and injuries could result from the practice was unsubstantiated. *Id.* at 686. The judge also concluded that the violation was a result of moderate negligence and not a result of unwarrantable failure. She modified the Mine Act section 104(d)(2) order to a citation issued pursuant to section 104(a), 30 U.S.C. § 814(a). *Id.* at 688.<sup>4</sup>

## II.

### Dispositon

Dynamic argues that the judge’s finding of violation is not supported by substantial evidence because the evidence showed that the tractor-trailer truck operator was in “full control” of the truck. PDR at 4; D. Br. at 6; D. Reply Br. at 4. It asserts that the judge ignored the clear weight of the testimony and instead relied on unsubstantiated claims of the Secretary’s witnesses. PDR at 6; D. Br. at 9. Dynamic also contends that the judge’s finding of violation contradicts the credibility findings made in the gravity section of the decision. PDR at 6; D. Br. at 9. It further asserts that the judge’s definition of “full control” is erroneous as it is impractical and fails to

---

<sup>3</sup> 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.”

<sup>4</sup> Neither the gravity nor the unwarrantable failure issues are before the Commission because the Secretary did not appeal those rulings. S. Br. at 5, n.5.

harmonize with the objectives of the Mine Act. D. Br. at 13; D. Reply Br. at 1. Dynamic additionally maintains that it lacked notice of MSHA's interpretation of the regulation at issue. D. Br. 17-18.

The Secretary responds that the judge's finding of violation is supported by substantial evidence and should be affirmed. S. Br. at 1. She asserts that the truck driver was not in "full control" of the truck while it was being pushed uphill by the grader. *Id.* at 6. The Secretary argues that the plain meaning of having "full control" over a truck is having complete power to guide or manage the truck. *Id.* at 6. She submits that the truck driver did not have "full control" over the truck's acceleration and deceleration during the assist. *Id.* at 9, 10. The Secretary contends that because there is no ambiguity in the term "full control," Dynamic's argument that it did not have reasonable notice of the Secretary's interpretation is misplaced as the issue of notice does not arise where the language of the standard is plain. *Id.* at 6-7. In any event, she asserts that, if there is any ambiguity in the standard, the Secretary's interpretation is reasonable and entitled to deference. *Id.* at 6 n.6.

A. Plain Meaning of Section 77.1607(b)

The Commission has not previously had occasion to construe section 77.1607(b).<sup>5</sup> Accordingly, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). 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 id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). 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 Ltda. 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

---

<sup>5</sup> A number of administrative law judges have interpreted the standard. *Island Creek Coal Co.*, 3 FMSHRC 1265, 1271-73 (May 1981) (ALJ) (determining that trucks that were slipping and sliding were not in full control and rejecting the argument that an accident or near-miss has to occur before a violation arises); *Highwire, Inc.*, 10 FMSHRC 22, 66 (Jan. 1988) (ALJ) (noting that lacking full control does not mean there must be an accident); *Vandalia Res., Inc.*, 25 FMSHRC 390, 397 (July 2003) (ALJ) (finding a violation when two trucks slipped on ice); *Garrett Const. Co.*, 4 FMSHRC 2202, 2202 (Dec. 1982) (ALJ) (finding no violation because of insufficient evidence that the operators lacked full control of their vehicles or went anywhere other than where the operators wanted them to go, even though a collision occurred). Administrative law judge decisions, although instructive, are not binding precedent on the Commission. 29 C.F.R. § 2700.69(d).

*Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Section 77.1607(b) requires a mobile operator to have “full control [of the equipment] while it is in motion.” “Full” is defined as “being at or of the greatest or highest degree” and the “greatest or highest potential.” *Webster’s Third New International Dictionary* 919 (1993). “Control” is defined as having “the power . . . to guide or manage.” *Id.* at 496. This is the definition upon which the judge based her ruling. 31 FMSHRC at 684. Dynamic relies on the definitions of “full” as “possessing or containing as much or as many as possible or normal,” and “control” as “to have power over.” D. Reply Br. at 2. Based on the terms of the standard, the judge’s construction of requiring the highest degree of control to guide or manage a vehicle appears well supported by the plain language. Hence, we conclude that the judge’s determination that full control means having “complete power to guide or manage” accords with the plain meaning of the standard. 31 FMSHRC at 684.

Dynamic argues that the judge’s holding requiring absolute control is not practical in the real world environment. D. Br. at 13-16. It maintains instead that the standard applies only to vehicles that are out of control or unable to go where the drivers intended. *Id.* It asserts that the truck went where the driver intended and thus was not out of control. *Id.* at 16.

However, Dynamic’s reading that the standard only applies to vehicles dangerously out of control does not comport with the text of the standard. As the Inspector testified, a violation of the standard does not require vehicles to be out of control because “the standard says you [need] full control.” Tr. 97-98.

Accordingly, we affirm the judge’s plain language application of section 77.1607(b). Because the language is plain, it is unnecessary to evaluate the question of whether the standard provides fair notice of its requirements. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997). In *Bluestone*, the Commission held that where it had determined that the language of a standard is clear and unambiguous, that standard provides operators with fair and adequate notice.<sup>6</sup>

#### B. Whether Substantial Evidence Supports the Judge’s Determination of Violation

The next question is whether substantial evidence supports the judge’s determination that tractor-trailer truck drivers and grader operators lack full control over their vehicles during an assist. When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C.

§ 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305

---

<sup>6</sup> In any event, Dynamic had received actual notice that MSHA considered its pushing practice to violate section 77.1607(b). 31 FMSHRC at 672.

U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Under the substantial evidence standard, the “possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Sec’y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (refusing to disturb decision supported by substantial evidence); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (providing that Commission is bound to affirm ALJ factual determinations supported by substantial evidence). Additionally, substantial evidence has been found to be more than a scintilla, but less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolidated Edison*, 305 U.S. at 229 (substantial evidence standard met when the record was not “wholly barren of evidence” to sustain the judge’s finding).

The judge found that when an assist is in progress, the tractor-trailer driver does not have complete power to manage the truck. 31 FMSHRC at 684. She determined that during an assist the tractor-trailer driver and the grader operator share control of the truck, in that both can supply power that causes it to accelerate to the point where its driver can resume full management of the vehicle’s acceleration. *Id.* The judge also held that the facts established that “the tractor-trailer driver and the grader operator share control of the truck’s deceleration.” *Id.*

These findings are supported by the record. The record revealed that when the tractor-trailer reached a particular point on the hill it lacked control over its acceleration. *See* Tr. 20 (Inspector Billups heard over the CB radio that a truck was stuck on the hill and truck driver could not make it on his own and needed a push). *See also* Tr. 32-33 (inspector testified that the tractor-trailer trucks spin out when going uphill and at a certain point, all the wheels’ front and rear axles begin to spin, lose traction, and cannot go further). Similarly, the inspector, with 25 years of experience in the mining industry, testified that the truck driver does not have full control of the truck because he “cedes some of the power to the grader operator.” Tr. 29-30. MSHA’s expert, mechanical engineer Ron Medina, also testified: “What I concluded about the practice was that the driver of the truck does not have full control of the truck because he is giving some of the control of the truck to the grader so it affects his braking, propulsion and his ability to slow the truck down.” Tr. 136, *see also* Tr. 113-14. He also “reached the conclusion that during the practice of pushing the fully loaded coal truck up the hill using a grader, that the haul truck driver does not have full control of the truck. He cedes some of the control to the grader operator.” Tr. 106-07. Dynamic witness Derrick Steele, who was truck driver, would not answer the question whether the truck has lost ability to maneuver when it is starting to spin. Tr. 189-90. Additionally, Dynamic’s expert stated that in order for the truck to regain directional control, the truck needs a push. Tr. 345.

In reaching her holding, the judge explicitly made two credibility determinations. She credited the testimony of truck driver Steele that during an assist, regaining full control of the

truck's ability to accelerate requires the truck driver to keep his foot on the throttle and the grader operator to keep pushing from behind. 31 FMSHRC at 684 n. 21 (citing Tr. 207-11). She further credited the "common sense opinion of the Secretary's expert, Medina, that when the truck driver takes his foot off of the throttle, the force from the grader continues to push the truck forward and consequently, it will 'take a longer time for the [tractor-trailer driver] to slow down or stop.'" *Id.* at n. 22 (citing Tr. 112).

Dynamic takes issue with the judge's conclusions based on these credibility determinations. However, credibility determinations reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly. *See Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995) (holding that judge did not abuse discretion in crediting inspector with many years of experience whose testimony was common sense); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992) (providing that "the Commission has often stated 'a judge's credibility resolutions cannot be overturned lightly.'" (citation omitted).

Dynamic also faults the judge for crediting the testimony of the Secretary's witnesses in the finding of violation but not in the gravity section of the decision. However, it is a general rule that a judge need not credit every aspect of one witness' testimony. *See Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813 (Apr. 1981) (providing that judge may accept some but not all of a witness' testimony). We also are not persuaded to take the extraordinary step of disturbing the judge's credibility resolution based on Dynamic's assertion that the judge's findings in the gravity section of her decision are inconsistent with the finding of violation. D. Br. at 10-11. Dynamic contends that the judge's crediting of its expert that the grader simply did not have enough weight to overcome the truck's weight shows that the truck was in control. 31 FMSHRC at 685 (citing Tr. 318-19). Nonetheless, this finding does not mean that the truck was fully in control during the assist. Moreover, the judge went on to point out that given the disparity in weight, if the tractor-trailer lost its brakes and rolled down the steep hill, it would pose a significant risk not only to the truck driver but to the grader operator as well. *Id.* at 685-86. Similarly, Dynamic's attempt to discount the credibility determinations based on the truck driver Steele's testimony is also unpersuasive. Steele explains that in the assist, the grader pushes the truck until it can navigate on its own. Tr. 207-15. This testimony is consistent with the judge's finding that the truck driver lacks full control during an assist.

Dynamic presented some evidence that could be viewed as fairly detracting from the judge's opinion. For example, Dynamic expert Jose Calonge testified that trucks need assistance because there is not enough traction for the wheels to get going and there is a difference between loss of traction and loss of control. Tr. 310-11. According to Calonge, loss of traction means that the wheels are not biting into the surface whereas loss of control means that you have no control over your vehicle. *Id.* Truck owner Bobby Justice testified that the "the truck is definitely in full control," "you got your brakes, you got your steering . . . all you need is a little assistance." Tr. 175. Similarly, Dynamic presented testimony that the pushing helped the truck stay in control and prevented slipping. Tr. 244-46.

On balance, however, the weight of the evidence clearly supports the judge's conclusion that the truck driver did not have complete power to ascend the haulage road without the assistance of the grader and thus was not in full control. Indeed, the testimony of Dynamic's witnesses indicated that the truck driver could not fully ascend the hill without assistance by the grader. Tr. 310-11, 345. Similarly, the record revealed that due to the pushing from behind by the grader, the truck driver did not have complete control over the time to decelerate or stop the truck. Tr. 112-13. Significantly, we emphasize that the judge's holdings are backed by well reasoned credibility resolutions, which we do not overturn lightly. *Farmer*, 14 FMSHRC at 1540-41.

Finally, Dynamic argues that there is no violation because the pushing is customary in the industry and is a safe and calculated process. D. Br. at 16-17. We are mindful that the record showed that the push was normally performed at low speeds, which decreased the likelihood of injury. Tr. 158-59. Nonetheless, the pushing contravenes the plain terms of the standard requiring full control and therefore is a violation. Additionally, as the judge indicated, an operator may obtain a variance or modification of a mandatory safety standard at its mine upon showing 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 . . . ." 31 FMSHRC at 688 n.26 (citing 30 U.S.C. § 811(c)). Moreover, we note that Dynamic's expert testified that pushing is not the only option to propel the trucks up the hill – the operator also can reduce the grade, pave the road, or use a different set of tires. Tr. 358-59.<sup>7</sup>

In sum, substantial evidence contained in the record supports the conclusion that the truck driver ceded some of his acceleration and deceleration power during the assist and that he therefore was not in full control of his vehicle. Accordingly, we affirm the judge's finding of violation.<sup>8</sup>

---

<sup>7</sup> The judge concluded that because the truck driver's loss of full control over the acceleration and deceleration of the truck establishes the violation, it was unnecessary to further examine the alleged loss of control of the truck's braking and steering capacities to resolve the issue. 31 FMSHRC at 684 n.23. Similarly, the Commission need not address Dynamic's arguments with regard to those other capacities of the truck.

<sup>8</sup> Because this is a contest proceeding, the penalty is not before the Commission. The associated penalty assessment proceeding is Docket No. WEVA 2008-1356 before Judge Bulluck.



III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

---

Mary Lu Jordan, Chairman

---

Michael F. Duffy, Commissioner

---

Michael G. Young, Commissioner

---

Robert F. Cohen, Jr., Commissioner

---

Patrick K. Nakamura, Commissioner

Distribution:

Carol Ann Marunich, Esq.  
Dinsmore & Shohl, LLP  
215 Don Knotts Blvd., Suite 310  
Morgantown, WV 26501

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Francine Serafin, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Edward Waldman, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Administrative Law Judge Jacqueline R. Bulluck  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021