FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. CENT 2006-128-M
v.	:	CENT 2006-159-M
AUSTIN POWDER COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

These consolidated civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Austin Powder Company ("Austin Powder"), alleging that it violated 30 C.F.R. §§ 56.6132(a)(4) and (a)(5).[1] Administrative Law Judge Richard Manning upheld the citations. 29 FMSHRC 274 (Mar. 2007) (ALJ). The Commission granted Austin Powder's petition for discretionary review challenging the judge's decision. The Commission also granted motions to participate as amicus

[1] Section 56.6132 (Magazine requirements) provides in pertinent part:

> (a) Magazines shall be—
> (1) Structurally sound;
> (2) Noncombustible or the exterior covered with fire-resistant material;
> (3) Bullet resistant;
> (4) Made of nonsparking material on the inside;
> (5) Ventilated to control dampness and excessive heating within the magazine;
> . . . .

30 C.F.R. § 56.6132.

curiae from the National Stone, Sand & Gravel Association ("NSSGA") and the Institute of Makers of Explosives ("IME"). For the reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

McGeorge Contracting Company ("McGeorge") operates the Granite Mountain Quarry No. 2 in Pulaski County, Arkansas. 29 FMSHRC at 274. Austin Powder is an independent contractor at the quarry. *Id.* Austin Powder delivered and stored explosive materials but did not engage in any blasting activities. *Id*.

Austin Powder stored several types of detonators at the quarry, including Electro-Star and Rock Star detonators. *Id.* at 275; Tr. 31-32. Austin Powder utilized metal, welded freight containers, similar to those used to transport cargo, for storing the detonators. Tr. 38, 150-151. The unit at issue in this proceeding, container No. 8, was covered by plywood on the interior sides and floor, but the metal ceiling was not covered, which provided a sparking surface inside the storage area. 29 FMSHRC at 275; Tr. 38-39. The plywood on the sides covered up vents that would have controlled dampness and alleviated excessive heating inside. Tr. 38-40, 46, 150; G. Exs. 9-1 and 10-1.

On December 6, 2005, MSHA Inspector Steve Medlin conducted an inspection at the quarry. 29 FMSHRC at 274. Medlin issued Citation No. 6250692, charging Austin Powder with a violation of 30 C.F.R. § 56.6132(a)(5). *Id.* The citation stated:

> The vents in the cap magazine number: 8 was [sic] covered up. This hazard exposes miners to the possibility of receiving injuries, should the explosives become over-heated. The foreman stated, new wood had been installed in the magazine, and was not aware the vents had been covered.

G. Ex. 5-1. The citation alleged moderate negligence. *Id.*

Medlin also issued Citation No. 6250695, charging Austin Powder with violating 30 C.F.R. § 56.6132(a)(4). 29 FMSHRC at 275. The citation stated:

> The top of magazine number: eight was not covered with non-sparking material. This hazard exposes miners to the possibility of receiving injuries, should the electric blasting caps become [sic] set off. This area is traveled on a daily basis, to get supplies for the days shot.

G. Ex. 6-1. The citation alleged moderate negligence. *Id.* The Secretary proposed penalties of $60 for each citation. 29 FMSHRC at 275.

Austin Powder challenged the proposed penalty assessments and a hearing was held. Thereafter, the judge issued his decision in which he stated that the parties did not dispute the existence of the conditions that MSHA cited. *Id.* Further, the judge noted that the parties agreed that the products stored in the magazine were "detonators," as that term is defined in the regulations.[2] *Id.* Based on the plain language of the regulation, the judge concluded that explosives and detonators must be stored in magazines that are "bullet-resistant, theft resistant, fire-resistant, weather-resistant, and ventilated." *Id.* at 276. The judge stated that, in contrast, "blasting agents" may be stored in a "storage facility,"[3] which corresponds to a Bureau of Alcohol, Tobacco and Firearms ("BATF") Type 4 or 5 facility that does not satisfy MSHA's definition of "magazine." *Id.* at 276-77.

The judge rejected Austin Powder's arguments that MSHA had incorporated into its regulations BATF's "entire enforcement structure," which allows detonators such as those used at the quarry that do not mass detonate,[4] to be kept in a storage facility that is not a "magazine" as defined by MSHA. *Id.* at 277-78. The judge also concluded that the preamble to the final rule governing explosives supported MSHA's position, rather than Austin Powder's, because the regulations do not distinguish between types of detonators, i.e., between mass detonating detonators and non-mass detonating detonators. *Id.* at 278-80. Based on the clear language of the regulations, the judge also concluded that Austin Powder was provided with fair notice of the

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[2] "Detonator" is defined as:

> Any device containing a detonating charge used to initiate an explosive. These devices include electric or nonelectric instantaneous or delay blasting caps and delay connectors. The term "detonator" does not include detonating cord. Detonators may be either "Class A" detonators or "Class C" detonators, as classified by the Department of Transportation in 49 CFR 173.53, and 173.300 . . . .

30 C.F.R. § 56.6000.

[3] Section 56.2 of MSHA's regulations defines "storage facility" as, "[T]he entire class of structures used to store explosive materials. A 'storage facility' used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility." 30 C.F.R. § 56.2.

[4] Regulations issued by the Department of Transportation define "mass explosion" as "one which affects almost the entire load instantaneously." 49 C.F.R. § 173.50(b)(1). A minor explosion is one where the "effects are largely confined to the package and no projection of fragments of appreciable size or range is to be expected." *Id.* at § 173.50(b)(4).

requirements for detonator storage. *Id.* at 280-81. Finally, the judge found that Austin Powder's negligence was "low," and, based on his analysis of the penalty criteria, he assessed a penalty of $40 for each of the citations. *Id.* at 282.

II.

Disposition

Austin Powder's main argument on review is that MSHA has improperly applied the "magazine" requirements for explosives in section 56.6132 to non-mass detonating detonators. A.P. Br. at 11. Austin Powder continues that the judge erred when, based on the language of the regulation, he concluded that the regulation does not distinguish between types of detonators. *Id.* at 11-12. Austin Powder argues that the judge further erred when he ignored MSHA's intent expressed in the preamble to the publication of the final rule in the Federal Register. *Id.* at 13-18. Austin Powder also argues that the Secretary cannot deviate from BATF regulations on storage of explosives without engaging in additional rulemaking. A.P. Reply Br. at 4-6. Austin Powder contends that the citations are a reversal of MSHA's position that was published in the preamble to the rule, and that due process requires notice to operators before the regulation can be enforced in such a manner. A.P. Br. at 18-22; A.P. Reply Br. at 2. Finally, Austin Powder argues that, even if the regulatory requirements are ambiguous, the Commission should not defer to the Secretary's interpretation of the regulations because her interpretation has been newly articulated in an enforcement proceeding. A.P. Br. at 22-24.

The IME, whose members include manufacturers of commercial explosives and entities that transport and store such materials at customer sites, filed a brief in support of Austin Powder. IME argues that the judge essentially imposed the requirements for BATF Type 1 and Type 2 magazines to Type 4 storage facilities, which are used to store non-mass detonating detonators. IME Br. at 2. IME claims that, if the judge's decision is allowed to stand, it would require replacing over 500 Type 4 storage facilities with Type 1 and Type 2 magazines at a cost of over $90,000 per magazine. *Id.* at 2-3. IME argues that the judge ignored language in the preamble to the final rule; that the decision is contrary to industry practice and MSHA's enforcement for over 14 years; and that Austin Powder lacked fair notice of MSHA's intent to alter the rule. *Id.* at 3-6. Finally, IME contends that MSHA is effecting a major change in regulatory practice without adhering to due process. *Id.* at 8-9.

The NSSGA argues that the economic impact of the judge's decision will be "substantial" because it will require retrofitting or replacing many Type 4 storage facilities with no corresponding safety benefit. Mot. at 3.[5] The NSSGA further contends that the preamble of the 1993 final rule expressly permits non-mass detonating detonators to be stored in Type 4 storage

[5] The NSSGA did not file a brief with the Commission, despite being given the opportunity to do so. Therefore, the summary above is from arguments made in its motion to participate as an amicus curiae.

facilities. *Id.* The NSSGA concludes by arguing that MSHA is changing a longstanding enforcement position without fair notice to operators. *Id.* at 3-4.

In response, the Secretary argues that the plain meaning of the regulations compels the conclusion that all detonators must be stored in magazines that are constructed in compliance with section 56.6132(a). S. Br. at 6-12. The Secretary further argues that Austin Powder's contention that the regulation is ambiguous is unsupported by the language of the regulation. *Id.* at 12-13. Moreover, the Secretary contends that the regulatory history of the explosives standards, when read as a whole, supports the plain language reading of the regulation. *Id.* at 14-22. The Secretary urges the Commission to reject the argument that MSHA had not cited operators for violating the standard because of lack of proof. *Id.* at 22-24. Finally, the Secretary contends that Austin Powder had adequate notice of the standard because of its plain language, that the regulatory preamble could not lead to a different interpretation, and that Austin Powder had actual notice of the standard's requirements from prior litigation and a prior citation. *Id.* at 25-29.

The primary issue on review is whether the structural requirements for magazines in section 56.6132 apply to the metal container used at the Granite Mountain Quarry to store Electro-Star and Rock Star detonators. Resolution of these issues requires a close reading of the definitions and standards in Subpart E of Part 56, which addresses the use of explosive materials at metal and nonmetal mines, and a review of the regulatory history. In addition, because MSHA's rules also refer to regulations of the Department of Transportation and the BATF, consideration must also be given to any impact of those regulations on the Secretary's regulatory scheme.

A. Language of the Regulation

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 *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984))). The Commission has held that the meaning of a broadly-worded regulation may be determined from its plain language. *Nolichuckey Sand Co., Inc.*, 22 FMSHRC 1057, 1060 (Sept. 2000).

Section 56.6130(a) states that "[d]etonators and explosives shall be stored in magazines." 30 C.F.R. § 56.6130(a). As the judge correctly concluded, "[t]his standard could not be written more clearly." 29 FMSHRC at 281. Moreover, on its face, with the exception of detonator cord, the regulatory definition of "detonator" encompasses *all* types of detonators, including the detonators at issue in this proceeding. The Secretary defines "explosive materials" as "explosives, blasting agents, and *detonators*." 30 C.F.R. § 56.2 (emphasis added).[6] In section 56.6100, the Secretary defines "detonator" as "[a]ny device containing a detonating charge used to initiate an explosive." 30 C.F.R. § 56.6100. The only exclusion from the broad definition is "detonating cord." *Id.*[7] The definition further specifies that detonators may be *either* Class A or Class C, as determined by the Department of Transportation ("DOT"). *Id.* DOT, in turn, has included in the first category, Class A, explosives with a mass explosion hazard and in the second category, Class C, explosives with a minor explosion hazard. 49 C.F.R. §§ 173.50(b)(1), 173.50(b)(4), 173.53.[8] These divisions appear to be generally consistent with the Secretary's references to two categories of detonators: mass-detonating (or sympathetic detonators) and non-mass detonating detonators. *See* n.4, *supra*. Thus, relying on DOT regulations, the Secretary has broadly defined "detonators" to include all types of detonators without regard to their explosive capacity.

In subpart E, addressing the use of explosives, the Secretary defines "magazine" as "[a] bullet-resistant, theft-resistant, fire-resistant, weather-resistant, ventilated facility for the storage of *explosives and detonators* (BATF Type 1 or Type 2 facility)." 30 C.F.R. § 56.6100 (emphasis added).[9] Section 56.6132, the regulation at issue in this proceeding, describes with even greater

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[6] The definitions at § 56.2 apply to all of Part 56 – Safety and Health Standards – Surface Metal and Nonmetal Mines. 30 C.F.R. § 56.2. In addition, the subparts of Part 56 also contain definitions applicable to the respective subpart and, if inconsistent with the general definitions, "the definition in the subpart will apply in that subpart." *Id.*

[7] There is also a definition of "detonator" at 30 C.F.R. § 56.2, but in this instance the definition in Subpart E (Explosives) at § 56.6100 applies. *See* n.6, *supra*.

[8] As the judge noted, 29 FMSHRC at 276 & n.1, DOT regulations provide that Class A explosives are now classified as "Division 1.1," and Class C explosives are classified as "Division 1.4." 49 C.F.R. § 173.53. The specification sheets for the Electro-Star and Rock Star detonators state that they are Division 1.4 explosives. 29 FMSHRC at 276; A.P. Exs. 6 and 7. (The judge inadvertently referred to "Class C" explosives as "Class B" explosives in explaining that Class C detonators are now classified as Division 1.4 explosives. 29 FMSHRC at 275-76. *See* 49 C.F.R. § 173.53.)

[9] There is a broader, less precise definition of "magazine" in the general definitions of Part 56, 30 C.F.R. § 56.2, that is superceded by the definition at 30 C.F.R. § 56.6100. *See* n.6, *supra*. The preamble to the final rule publication indicated that the definition in section 56.2 was to be deleted and replaced by the new definition in Subpart E (section 56.6100). 58 Fed. Reg.

specificity the construction requirements for magazines, including the use of "nonsparking material on the inside" and being "ventilated to control dampness and excessive heating within the magazine." *Id.* at § 56.6132(a)(4), (a)(5). Part 56 broadly defines a "storage facility" as "the entire class of structures used to store explosive materials." 30 C.F.R. § 56.2.

We must also read these regulations in context.[10] *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) ("[R]egulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions."). The Secretary refers in the definition of "magazine" to "BATF Type 1 or Type 2 facility." 30 C.F.R. § 56.6100. BATF regulations, in turn, describe "types of magazines" at 27 C.F.R. § 555.203 and specify that Type 1 magazines are permanent magazines for the storage of high explosives, while Type 2 magazines are mobile and portable indoor and outdoor magazines for the storage of high explosives. *Id.* at (a) and (b). The construction requirements for Type 1 and Type 2 magazines are consistent with the MSHA requirements for magazines, including requirements for non-sparking material in the interior and for ventilation. *See generally* 27 C.F.R. §§ 555.207, 555.208.

The judge concluded that a reading of the plain language of the Secretary's regulations in the context in which they appear leads to the conclusion that all detonators and explosives must be stored in magazines that are bullet-resistant, fire-resistant, weather-resistant, and ventilated. 29 FMSHRC at 276. The judge's reasoning and conclusion are correct.

Contrary to Austin Powder's position in this proceeding, nothing in MSHA's regulations exempts non-mass detonating detonators (Class 1.4 explosives) from the magazine storage requirement. In addition to the reference in the definition of "magazine" at section 56.6100 to a BATF Type 1 or Type 2 facility, the Secretary has further referenced BATF's classification of magazines to specify the requirements for the storage of "blasting agents," the third category of explosive materials that is covered in the Secretary's regulations.[11] Thus, section 56.2 provides that a "'storage facility' used to store blasting agents corresponds to a BATF Type 4 or 5 storage

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69596, 69597 (Dec. 30, 1993). However, as the judge noted, this has not occurred, apparently due to oversight. 29 FMSHRC at 278 n.4.

[10] "In order to discern a standard's plain meaning, the standard must be read in context." *RAG Shoshone Coal Corp.* 26 FMSHRC 75, 80 n.7 (Feb. 2004), citing *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 45 (D.C. Cir. 1990) ("If the first rule of . . . construction is 'Read,' the second rule is 'Read on!'"); *Borgner v. Brooks*, 284 F.3d 1204, 1208 (11th Cir. 2002), *cert. denied sub nom. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (stating that in discerning a statutory provision's plain meaning, court must construe the statute in its entirety).

[11] The Secretary defines "explosive material" to include "explosives, blasting agents, and detonators." 30 C.F.R. § 56.2.

facility."[12] By its terms, the provisions in section 56.2 that allow the use of a BATF Type 4 or 5 storage facility apply *only* to "blasting agents," not to detonators. *See also* 30 C.F.R. § 56.6130(b) ("Packaged blasting agents shall be stored in a magazine or other facility.").

In sum, there is no provision in MSHA's regulations that supports Austin Powder's position that using a Type 4 storage facility to house Class 1.4 non-mass detonating detonators is permissible. However, Austin Powder would have the Commission read the regulatory history associated with the Part 56 regulations and give precedence to language in the preamble that, it argues, overrides the plain language of the regulations. Commission precedent does not support Austin Powder's position that language in the preamble to a regulation can override the plain language of the regulation. *See Morton Int'l*, 18 FMSHRC at 539 ("operators should not be held to examining regulatory history to learn the meaning of a standard that appears to be clear on its face"). *See also Pfizer, Inc. v. Heckler*, 735 F.2d at 1509 (in rejecting reliance on inflation impact statement accompanying issuance of rule that was clear, court noted, "Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.") (quoting *Assoc. of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)). Despite the clear language of the regulation, we now review the regulatory history of the provisions at issue in part because Austin Powder and the amici claim that they lacked sufficient notice of the magazine storage requirements for non-mass detonating detonators.

B. Regulatory History

In evaluating Austin Powder's position and the impact of the regulatory history,[13] prior to the publication of the proposed rule in 1988, the Secretary made clear that the "existing standard . . . states that detonators and explosives other than blasting agents shall be stored in

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[12] BATF regulations provide that Type 4 magazines may be used for storage of "low explosives" and further state, "Detonators that will not mass detonate may also be stored in type 4 magazines . . . ." 27 C.F.R. § 55.203(d). In contrast, MSHA's regulations do not use the term "low explosives," nor do they allow for the storage of non-mass detonating detonators in Type 4 magazines or storage facilities. The *only* exception to the general requirement for storage of explosives in Type 1 or Type 2 magazines is for blasting agents.

[13] The issuance of the final regulations in 1993 addressing explosives at metal and non-metal mines was preceded by several Federal Register publications. On November 10, 1988, the Secretary proposed changes to the safety standards for explosives at metal and nonmetal mines. 53 Fed. Reg. 45487. On January 18, 1991, the Secretary published a final rule. 56 Fed. Reg. 2070. On April 10, 1991, the Secretary stayed the effective date for several provisions of the final rule and reopened the rulemaking record to allow further comment. 56 Fed. Reg. 14470. On October 16, 1992, the Secretary issued a new proposed rule. 57 Fed. Reg. 47524. Finally, on December 30, 1993, the Secretary issued a final rule, fully reflecting the safety standards now in effect. 58 Fed. Reg. 69596.

magazines." 53 Fed. Reg. at 45491. *See* 30 C.F.R. § 56.6001 (1988).[14] In 1988, the Secretary did not propose any change to the magazine storage requirement for detonators. In the January 31, 1991 final rule publication, the Secretary modified the definition of "detonator" to include language that "detonators may be either 'Class A' or 'Class C.'" 56 Fed. Reg. at 2072. In the explanatory material accompanying the final rule, the Secretary emphasized that "*detonators* and explosives *must* be stored in a magazine and . . . blasting agents may be stored in a magazine or other facility." *Id.* at 2075 (emphasis added).

Thereafter, the Secretary issued a Program Policy Letter (PPL No. P91-IV-1) to provide interpretations of, inter alia, "magazine" and "storage facility" in 30 C.F.R. Parts 56 and 57, which became effective on November 1, 1991.[15] The PPL addressed in particular whether the new standards prohibited the use of "Type 4 storage facilities." In stating that the new standards did not prohibit their use, the PPL stated:

> In the final rule, "storage facility" . . . refers to the entire class of structures used to store explosive materials. "Magazine" refers to a type of storage facility for highly volatile explosive materials. *56/57.6130 requires that detonators and explosives, not explosive materials, be stored in magazines because they are highly volatile and subject to sympathetic detonation*. Blasting agents were specifically excluded from this provision because they are less volatile and thus can be stored in structures other than magazines.

Id. at 1-2 (emphasis added). Thus, section 56.6130(a), then in effect, continued to provide that "[d]etonators and explosives shall be stored in magazines." 30 C.F.R. § 56.6130(a) (1992).

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[14] Austin Powder was previously cited under the old pre-1993 standard for storing detonators in magazines that did not comply with the requirements in the regulations. *Austin Powder Co.*, 14 FMSHRC 620, 627 (Apr. 1992) (ALJ). In the same proceeding, Austin Powder also contested a citation in which MSHA cited it for failing to properly ventilate a magazine in which explosives were stored. *Id.* at 628. The judge affirmed the citations in both instances. *Id.* at 629.

[15] As noted above, the Secretary stayed implementation of parts of the final rule, primarily for reasons unrelated to the instant case, because MSHA wanted comments on the safety aspects of requiring ventilation of facilities or magazines used for storing blasting agents. 56 Fed. Reg. at 14470-71. Various other stays were issued thereafter, although most of the provisions of the final rule that had been published were allowed to go into effect. *See* 57 Fed. Reg. 47524. *See generally* 30 C.F.R. Subpart E (1992).

On October 16, 1992, the Secretary proposed to issue new definitions of "magazine" and "storage facility" to clarify usage of the terms in MSHA regulations. "The result is to make clear that MSHA's use of the term 'magazine' corresponds to BATF's use of Type 1 and Type 2 storage facilities." 57 Fed. Reg. at 47526. MSHA further proposed to define "storage facility" as "the entire class of structures used to store explosive materials" and, when used specifically to store blasting agents, it referred to a BATF Type 4 or 5 structure. *Id.* In further explaining the differences between magazines and storage facilities, the Secretary stated that "'magazine' refers to a type of storage facility for highly sensitive explosive materials such as explosives and detonators which are subject to sympathetic detonation." *Id.* The Secretary concluded by stating that "because *blasting agents* are not as highly sensitive as detonators and explosives," they did not have to be stored in magazines or facilities that met the construction and housekeeping criteria of magazines. *Id.* (emphasis added). Nowhere in the Federal Register publication of the proposed rule did the Secretary state that he was proposing to change the existing standard, 30 C.F.R. § 56.6130(a) (1992), which required that all detonators, including non-mass detonating detonators, be stored in magazines.

In the 1993 final rule publication, consistent with the 1992 proposed rule, the Secretary added a definition of "magazine" to section 56.6000 "for the storage of explosives and detonators (BATF Type 1 or Type 2 facility)." 58 Fed. Reg. at 69598. The Secretary responded to several commenters that MSHA had previously used the terms "magazine" and "storage facility" synonymously. *Id.* In distinguishing between a magazine and storage facility, the Secretary clearly stated that "paragraph (a) of §§ 56/57.6130 requires that detonators and explosives, not blasting agents, be stored in magazines; while . . . blasting agents may be stored either 'in a magazine or other facility.'" *Id.* While the Secretary further explained that the reason for differing treatment of blasting agents was because explosives and detonators were "highly sensitive explosive materials . . . subject to sympathetic detonation," *id.* at 69599,[16] there is no statement in the preamble that the Secretary sought to revise the well-established magazine storage requirement for explosives or detonators, including ones that are not mass-detonating.

Further, in the preamble to the 1993 final rule, the Secretary noted that several commenters objected to the use of the term "storage facility" because it precluded the storage of non-mass detonating detonators, as permitted by BATF regulations. *Id.* Accordingly, those commenters suggested deleting use of the term. In response, the Secretary emphasized that MSHA's final rule "conforms to BATF's construction criteria." *Id.* However, the Secretary noted differences in MSHA's regulations and those of BATF because MSHA utilizes the term "storage facility," which corresponds to BATF Type 4 and 5 facilities. *Id.* In contrast to BATF's more limited use of Type 1 and 2 facilities for storage of "highly sensitive explosives," "MSHA's definition of 'magazine' does not prevent the use of magazines to store the full range of

[16] Although Austin Powder relies on this reference to detonators "which are subject to sympathetic detonation," we agree with the judge's conclusion that this language simply offers an additional explanation as to why detonators and explosives must be stored in magazines meeting rigorous construction criteria. 29 FMSHRC at 279.

explosive materials." *Id.* Significantly, in the following section addressing explosive materials storage facilities (sections 56/57.6130), the Secretary stated that the rule in effect, by virtue of the 1991 final rule publication, "required detonators and explosives other than blasting agents to be stored in magazines." *Id.*[17]

In agreement with the judge, 29 FMSHRC at 280, we conclude that nothing in the regulatory history indicates that the Secretary's rules distinguish between mass-detonating detonators and detonators that are not subject to mass detonation. Rather, the Secretary clearly delineated the storage requirements for explosives and detonators versus blasting agents, with the latter category of explosive materials being subject to the least stringent storage requirements. Moreover, neither the storage requirements for detonators in section 56.6130(a) nor the magazine construction requirements in section 56.6132(a) were under consideration for amendment when the preamble language appeared in the Federal Register publication upon which Austin Powder relies. In short, we cannot agree that the regulatory history leads to the conclusion that Austin Powder was not required to store the Electro-Star and Rock Star detonators in magazines. Even if the preamble were unclear as to the regulations at issue, that language cannot override the clear requirements of the regulations. *See* cases cited p. 8, *supra*.

C. Fair Notice of the Requirements of the Regulation

The heart of Austin Powder's due process argument is that "the company lacked fair notice of the Secretary's intention to depart from the [BATF's] explosive storage standards and definitions . . . that she indicated in the 1993 rulemaking were being adopted." A.P. Reply Br. at 2. However, based on our determination that the language of the standard is plain, we conclude that Austin Powder had adequate notice of the storage requirements for detonators. In this regard, the Commission has held that when "the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements." *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998); *see also Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation). Nor can we conclude that, based on the regulatory history of the explosive standards in Part 56, Austin Powder could reasonably believe that section 56.6130 was being revised to eliminate the requirement that all detonators be stored in magazines that met the criteria in section 56.6132(a).

Further, Austin Powder contends that the enforcement history of the magazine storage requirement for detonators supports its position that the citations at issue represent a change in MSHA's enforcement of section 56.6130 and that it lacked fair notice of MSHA's position. Austin Powder's contention is essentially an estoppel argument that it sought to bolster by trial

[17] The preamble further noted that the intervening stays of the rule only affected the first sentence of section 56/57.6130(b), which addressed the storage requirements for packaged blasting agents. 58 Fed. Reg. at 69599. *See* 30 C.F.R. § 56.6130(b) (1992) (accompanying note).

testimony that it had undergone prior inspections and had not been cited for storing detonators in similar storage facilities. However, the Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct. *See Nolichuckey Sand*, 22 FMSHRC at 1063-64 (citations omitted).[18] Thus, even if the record supported the assertion that MSHA had failed to enforce section 56.6130 as written,[19] the Secretary should not be prevented from proceeding to enforce the regulation as she has in the present case.

D. Other Arguments

In addition to notice, Austin Powder raises other arguments in response to the judge's decision. Austin Powder and the amici challenge MSHA's enforcement of the magazine requirements in section 56.6132 to storage facilities containing detonators because of the costs involved. However, there is a lack of evidence to support any specific cost figure.[20] Moreover, the Commission has generally rejected economic reasons as grounds for failing to comply with regulatory requirements. *See Consolidation Coal Co.,* 22 FMSHRC 328, 333 (Mar. 2000) (operator engaged in aggravated conduct when it subordinated its responsibility to clean up coal accumulation to its desire to complete construction); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997) (stating that aggravated conduct was shown when an operator decided to avoid

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[18] Austin Powder's reliance on the Commission's decision in *Alan Lee Good*, 23 FMSHRC 995, 1005 (Sept. 2001), to support its position that the Commission should consider MSHA's enforcement history to determine whether an operator had fair notice of the requirements of a standard, A.P. Reply Br. at 11, is misplaced. In *Good*, the Commission, in applying the "reasonably prudent person standard" to the Secretary's interpretation of an *ambiguous* regulation, remanded a case for an examination of MSHA's enforcement history in order to determine whether the operator had adequate notice of the regulatory requirements. 23 FMSHRC at 1000, 1004-06, 1010. Here, in contrast, the language of the regulation is plain.

[19] The testimony of Kris Bibey, an Austin Powder safety official, that Austin Powder had numerous other storage facilities for detonators that had been inspected and not cited was conclusory at best. Tr. 109-10. Location manager John McCloy testified that BATF, not MSHA, had previously inspected container No. 8 and had no problem with the way it was constructed. Tr. 148-52.

[20] IME's statement in its brief that "the total cost of compliance" would be in excess of $90,000 per magazine has no record basis. IME Br. at 2. Indeed, there was testimony from an Austin Powder official that the storage facilities were freight containers that had been retrofitted. Tr. 150-51. *See* G. Exs. 9-1 to 9-7. Because of this and other evidence, the monetary estimate in IME's brief appears to be without foundation. *See also* S. Resp. Br. at 24-25 n.9, *citing* G. Ex. 5 at 3 (MSHA inspector stating in citation that it was terminated when "[h]oles were drilled in the plywood that covered the vents in magazine [No.] 8").

compliance with the standard in order to continue production). Austin Powder's and the amici's economic defense stands on no better foundation in this proceeding.

Finally, Austin Powder argues in its reply brief that the BATF regulations preempt MSHA regulations in the area of explosives. A.P. Reply Br. at 10-11. However, Austin Powder's preemption argument is a new theory in the case that was not raised before the judge. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass."). In any event, Austin Powder failed to raise the issue in its petition for discretionary review. "Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and by the Commission *sua sponte*." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table) *citing* 30 U.S.C. §§ 823(d)(2)(A)(iii) and (B); 29 C.F.R. § 2700.70(f) (1993). In these circumstances, we cannot consider the issue on review.[21] However, we note that Austin Powder is not foreclosed from raising the preemption issue in a future case or requesting that MSHA undertake rulemaking to address that issue.

III.

Conclusion

On the basis of the foregoing, we affirm the judge's decision in all respects.

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

[21] The Secretary filed a motion to strike this portion of Austin Powder's brief. Mot. at 3. Commissioner Jordan would grant the Secretary's motion. Commissioner Young would hold that it is not necessary to rule on the motion, because, based on the Commission's procedural rules, the argument is not properly before us and has not been considered in disposing of the instant case.

Chairman Duffy, concurring:

I concur with my colleagues in affirming the judge's decision, however, I do so with great reluctance. At the Commission's decisional meeting I indicated that I would dissent in this case and hold that the judge erred in finding a violation of the standard. Since that time I have concluded that court and Commission precedent, particularly the decisions in *Pfizer, Inc. v. Heckler*, 735 F. 2d 1502, 1509 (D.C. Cir. 1984), and *Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996), argue strongly for the proposition that the clear language of the standard trumps contradictory language in the preamble.[1]

While I agree with my colleagues that the regulations themselves do not distinguish between mass-explosion detonators and non-mass explosion detonators, I disagree that the preamble to the 1993 final rule supports the proposition that class 1.4 explosive materials, i.e., non-mass explosion detonators, must be stored in Bureau of Alcohol, Tobacco and Firearms ("BATF") Type 1 or Type 2 storage facilities. Indeed, as I read the preamble, the opposite is true.

Regulatory agencies are loath to admit error, particularly in the rulemaking process. They are especially reluctant to modify the language of a proposed rule even in light of expert public comment supporting a change. This is understandable; an agency puts a great deal of time and effort into the preparation of a proposed rule and would not issue a rule it believed to be defective. However, it seems clear to me that when MSHA proposed in 1988 to drop the definition of "magazine" in its regulations and began to use the terms "magazine" and "storage facility" interchangeably (53 Fed. Reg. 45487, 45490 (Nov. 10, 1988)), the agency set in motion a wealth of confusion that persists to this day.

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[1] My change of opinion will come as something of a surprise to my colleagues since under the dual constraints of the Government in the Sunshine Act, and a reduced roster of Commissioners, we are not allowed to discuss cases unless we do so at an open meeting. Under the Mine Act, the Commission is intended to be composed of five members, with three members constituting a quorum. 30 U.S.C. § 823(a), (c). Under those circumstances any two Commissioners can discuss the merits of a case without invoking the public meeting requirements of the Sunshine Act, 5 U.S.C. § 552b. However, when the Commission is reduced to three members as it is currently, any two Commissioners constitute a quorum. 30 U.S.C. § 823(c). Accordingly, the Sunshine Act constraints take effect, and substantive discussions among any two members must be carried out in a public meeting with advance notice of its time and place. 5 U.S.C. § 552b(b), (e)(1). The Commission has not been at full strength since the expiration of Commissioner Beatty's term in August of 2004, and has been reduced to three members since the expiration of Commissioner Suboleski's term in August of 2006. Needless to say, these circumstances severely restrict, indeed foreclose, the opportunity for the informal give and take necessary to reach consensus among the Commission's members.

From the time that proposed rule was issued in 1988, the regulatory history demonstrates that commenters consistently warned MSHA that its new regulatory approach was inconsistent with longstanding policy adopted by BATF, the vanguard federal agency for the regulation of explosives. As I understand it, the confusion arose because BATF defines "magazines" in terms of what can be stored in them (Types 1 through 5), while MSHA began to define various classes of "storage facilities" in terms of their construction characteristics as specified by BATF criteria.

MSHA framed the issue in the agency's preamble to the final rule issued in 1993:

> A few commenters objected to the use of the term "storage facility." These commenters found the use of the term "storage facility" confusing in that it precluded the storage of non-mass detonating detonators as permitted by 27 CFR part 55, subpart K of the BATF regulations. They suggested deleting the term "storage facility" to be consistent with BATF regulations.

58 Fed. Reg. at 69596, 69599 (Dec. 30, 1993).

What follows in the preamble cannot be read for anything other than an attempt by MSHA to counter the accusation that its standards were inconsistent with those adopted and enforced by BATF:

> BATF Type 1 facilities are permanent magazines used for the storage of high explosives; . . . BATF Type 4 facilities are magazines used for the storage of low explosives, blasting agents and non-mass detonating detonators; . . . . MSHA's final rule does not require BATF Type 4 storage facilities to be bullet-resistant. The only storage facilities that need to be bullet-resistant are magazines (BATF Type 1 and 2 facilities) used for the storage of highly sensitive explosive material such as explosives and detonators which are subject to sympathetic detonation.[2]
>
> . . . .
>
> In summary, MSHA believes that the definition of "storage facility" as clarified by this final rule, provides mine operators and miners with objective criteria, consistent with BATF, relative to storage requirements, for the entire range of explosive materials.

Id.

[2] "Sympathetic detonation" and "mass-detonation" are synonymous.

Thus, if the BATF standards allow non-mass detonation detonators to be stored in the Type 4 magazines, and MSHA's standards are "consistent" with BATF standards, it is easy to understand why Austin Powder and others could have concluded that the detonators referred to in section 56.6130(a) are mass explosion detonators and not non-mass explosion detonators.

Moreover, on the basis of the brief submitted on review by the Institute of Makers of Explosives ("IME"), I strongly suspect that the position articulated by MSHA in this proceeding constitutes an abrupt departure from longstanding policy regarding the storage of non-mass detonating detonators. If anyone can attest to how explosives have been regulated under BATF, MSHA, and Department of Transportation standards, it is IME.[3] Nevertheless, since the standard refers to "detonators" without clarification, I must reluctantly agree that Austin Powder and IME have relied upon the contradictory evidence in the preamble of the rule to their detriment.[4]

Lastly, as to Austin Powder's argument that BATF regulations pre-empt MSHA's regulations as they apply to explosives, I, too, note that the argument was not raised before the judge nor in the operator's petition for review. I would, however, take judicial notice of the fact that MSHA's sister agency, the Occupational Safety and Health Administration, recently declared that it was ceding the field of explosives regulation and enforcement to BATF. *See* 72 Fed. Reg. 18792, 18796 (Apr. 13, 2007). I would encourage MSHA to consider a similar path if for no other reason than to assure that standards are consistent and enforced by the federal agency with preeminent expertise in this area.

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Michael F. Duffy, Chairman

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[3] In its October 16, 1992, notice of proposed rulemaking, MSHA referred to IME as an association "created to provide technically accurate information and recommendations concerning explosive materials and to serve as a source of reliable data about their use." 57 Fed. Reg. 47524, 47525 (1992) (quoting favorably from the self-description of IME).

[4] The phrase "regulatory bait and switch" comes to mind. If this issue had been raised in a court of appeals' review of the rulemaking proceeding, the regulation may have been invalidated because of the inconsistency between its language and the preamble. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1220 (D.C. Cir. 1996).

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