FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 14, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. CENT 2000-101-M
ALCOA ALUMINA & CHEMICALS, L.L.C.	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge Jacqueline R. Bulluck correctly determined that Alcoa Alumina & Chemicals, L.L.C. ("Alcoa") violated 30 C.F.R. §§ 48.28(a)[1] and 48.31(b).[2] 22 FMSHRC 1484, 1486-92 (Dec. 2000) (ALJ). For the following reasons, we affirm the judge's decision in result.

I.

Factual and Procedural Background

Located in Point Comfort, Texas, Alcoa's Bayer Alumina Plant ("Point Comfort") produces alumina from bauxite. 22 FMSHRC at 1485. At the plant, the bauxite is ground and

[1] Section 48.28(a), entitled "Annual Refresher Training of Miners," provides in part: "Each miner shall receive a minimum of 8 hours of annual refresher training."

[2] Section 48.31, entitled "Hazard Training," provides in part: "(a) Operators shall provide to . . . miners . . . a training program before such miners commence their work duties. . . . (b) Miners shall receive the instruction required by this section at least once every 12 months."

mixed with sodium hydroxide to form a slurry. *Id*. The slurry is combined with steam under high heat and pressure, producing sodium aluminate. *Id*. The sodium aluminate is then clarified, which removes mud solids from the solution. *Id*.; Tr. 173. The solution next undergoes precipitation, which produces hydrated alumina. Tr. 173. After a drying process called calcination, alumina is produced. 22 FMSHRC at 1485; Tr. 173.

On July 13, 1999, the San Antonio Field Office of the Department of Labor's Mine Safety and Health Administration ("MSHA") received a complaint from a Point Comfort employee that certain supervisors had not received refresher training. 22 FMSHRC at 1485. On that same day, MSHA Inspector Larry Parks responded to the complaint and conducted an inspection of Point Comfort. *Id*. Inspector Parks met with Alcoa safety specialist Richard Ripley and union representative Mike Monroy and discussed the particulars of the complaint. *Id.* He also interviewed several employees and reviewed Alcoa's training records for the previous year. *Id*. Parks discovered that over 80 supervisors had not received annual refresher training and six salaried employees had not received hazard training. *Id*. at 1486.

As a result, the inspector issued Order Nos. 7879697 and 7879698 under Mine Act section 104(g)(1), 30 U.S.C. § 814(g)(1),[3] for violations of sections 48.28(a) and 48.31(b). *Id.* Alcoa contested the orders and a hearing was held. The judge found that Point Comfort's processing of bauxite was a milling operation, subject to the jurisdiction of the Mine Act. *Id.* at 1485. She rejected Alcoa's position that, because the plant was neither a surface mine nor a surface area of an underground mine, but a milling operation, it was not subject to MSHA's Part 48 training regulations. *Id*. at 1487. The judge concluded that 30 C.F.R. § 48.21, the scope provision for both sections 48.28(a) and 48.31(b), was plain and that the term "mine" as used in the provision included any operation that constituted a mine under section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). *Id.* She determined that Alcoa violated section 48.28(a) because supervisory and salaried miners had not received annual refresher training. *Id*. The judge concluded that the violation was significant and substantial ("S&S") as there was a reasonable likelihood that supervisory and salaried miners, not updated periodically on safe plant

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[3] Section 104(g)(1) provides in pertinent part:

> If, upon any inspection or investigation . . . , the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other 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.

procedures, could be seriously injured by machinery or chemicals. *Id*. at 1488. Likewise, the judge determined that Alcoa committed an S&S violation of section 48.31(b) because six salaried employees had not received hazard training. *Id.* at 1491-92.

Alcoa filed a petition for discretionary review, challenging the judge's finding that 30 C.F.R. Part 48 applied to Point Comfort, which the Commission granted.

II.

Disposition

Alcoa argues that the training requirements contained in Part 48 do not pertain to Point Comfort, which is a mill. PDR at 1-2, 5-6. It contends that Part 48 plainly applies to underground or surface mines or surface areas of underground mines and, as MSHA Inspector Parks admitted, Point Comfort does not fall within any of those mining categories. *Id*. at 2-4, 6; A. Br. at 5. The operator also argues that MSHA expressly includes "mills" and "milling operations" in other standards and consequently the omission of mills and milling operations from Part 48 implies that it does not apply to a milling operation like Point Comfort. A. Br. at 7-8; A. Reply Br. at 9-12. Accordingly, Alcoa requests that the Commission vacate the orders and proposed penalty assessments. A. Br. at 9; A. Reply Br. at 12.

The Secretary responds that the judge correctly determined that Part 48 plainly applies to Point Comfort. S. Br. at 4-8. She asserts that the judge's determination is supported by the Mine Act, the purpose of Part 48, and the preamble to the final rule, which states that milling operations are subject to Part 48's requirements. *Id*. at 8-9, 11. The Secretary contends that, in standards such as Part 48 where MSHA does not specify milling operations for special treatment, milling operations are to be treated the same as other facilities covered under the standard. *Id.* at 10 n.5. In the alternative, the Secretary argues that, if the Commission determines that the applicability of Part 48 is not clear, it should accept the Secretary's reasonable interpretation of Part 48, i.e., that the standard applies to milling operations. *Id.* at 16 n.9.

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). If, however, a standard is ambiguous, courts have deferred 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 of its own regulation 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)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory

function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable). Additionally, "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

Sections 48.28(a) and 48.31(b) are contained in subpart B of the Secretary's Part 48 standards. The scope of subpart B is set forth in section 48.21. That section states in pertinent part:

> The provisions of this subpart B set forth the mandatory requirements for submitting and obtaining approval of programs for *training and retraining miners working at surface mines* and surface areas of underground mines. . . . The requirements for training and retraining miners working in underground mines are set forth in subpart A of this part. This part does not apply to training and retraining of miners at shell dredging, sand, gravel, surface stone, surface clay, colloidal phosphate, and surface limestone mines, which are covered under 30 C.F.R. Part 46.

30 C.F.R. § 48.21 (emphasis added). Additionally, "miner" is defined in pertinent part for purposes of both standards at issue by 30 C.F.R. § 48.22(a)(1) & (a)(2) as a person working in a "surface mine." We must therefore decide whether Point Comfort is a "surface mine" for purposes of the training requirements contained in Part 48, subpart B.

Our first inquiry is whether the text of section 48.21 is plain. Both parties advance plain language interpretations of the standard to support their respective positions. Under the strict literal approach, advocated by the Secretary, a mill is a "mine," as defined in Mine Act section 3(h)(1), and because it is located on the surface of the earth, the mill must be a "surface mine." However, the statutory definition of a mine was not expressly incorporated into the Secretary's Part 48 regulations. *Compare* 30 C.F.R. § 50.2(a) (applying Mine Act definition of mine to Part 50). Additionally, neither section 48.21, nor the definitional provision for Part 48, subpart B, contained in section 48.22, define the terms "surface mine," "surface," or "mine." Without sufficient definition, confusion may result because "surface mining" is a term of art in the mining industry that refers to excavation of a mineral on the surface as opposed to underground. *See* Am. Geological Inst., *Dictionary of Mining, Mineral and Related Terms* 554 (2d ed. 1997) (defining surface mining as the "mining in surface excavations"). Indeed, the inspector alluded to this term of art when he testified on cross-examination that surface mining consisted of the removal of metal or mineral from the surface of the earth and that Point Comfort was not a surface mine. Tr. 40-44. Ambiguity is also possible because, as Alcoa points out, section 48.21 does not expressly include mills or milling operations within its scope, whereas other standards

explicitly apply to them. *See* 30 C.F.R. §§ 50.30-1(g) and 56.20012 (specifying requirements for "mill operations" and "milling," respectively). However, we are not convinced by Alcoa's plain language interpretation, particularly given its failure to address the statutory definition of a mine, which includes milling operations.

Because Part 48, subpart B is silent on whether a milling operation constitutes a surface mine and the term surface mine is open to a number of interpretations, we disagree with the judge and the parties that section 48.21 is plain. We conclude that the scope provision of subpart B is ambiguous on this issue. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1081 (10th Cir. 1998) (providing that regulatory standard was ambiguous when neither of the proffered "plain" language interpretations was clearly required or prohibited by the standard's language).

We turn next to the question whether the Secretary's interpretation of section 48.21 is reasonable. The Secretary's interpretation (that a milling operation is a surface mine under Part 48) is consistent with the preamble to the regulations. The preamble to Part 48 explains the coverage of the rules:

> *These rules are applicable to all facilities which are covered under the Mine Act.* MSHA does not have the authority to exempt or exclude operations otherwise covered by the Act from the training requirements. Thus, *milling,* dredging and clay winning operations are subject to these requirements.

43 Fed. Reg. 47,454, 47,456 (Oct. 13, 1978) (emphases added). Thus, the preamble explicitly states that milling is subject to Part 48 training requirements.[4] Since the preamble was issued when Part 48 was first promulgated, the Secretary has historically and consistently applied her interpretation. *Id.*[5]

We must also examine whether the Secretary's interpretation of Part 48 is consistent with Mine Act section 115, 30 U.S.C. § 825, the statutory section that Part 48 implements. *See* 43 Fed. Reg. at 47,454 (preamble indicating that Part 48 implements Mine Act section 115); *Emery*, 744 F.2d at 1414 (construing Part 48 in light of Mine Act section 115). Section 115(a) states: "Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary." 30 U.S.C. § 825(a). The section requires that "all miners" are to receive annual refresher training. 30 U.S.C. § 825(a)(3). Miners are defined in section

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[4] The preamble's explicit inclusion of milling contradicts Alcoa's arguments in its PDR and opening brief that the preamble should be read to exclude milling. PDR at 4-6; A. Br at 6-8. In its reply, Alcoa asserts, inconsistently with its prior argument, that the preamble should not in fact be considered. A. Reply Br. at 4-6.

[5] Additionally, the Secretary's construction is not inconsistent with the literal terms of section 48.21.

3(g) of the Act as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Because mills are included in the definition of "mine" under Mine Act section 3(h)(1), the Secretary's interpretation, i.e, that the phrase "surface mines" should be read to include mills, is consistent with the Mine Act.

On the other hand, Alcoa's construction, which excludes mills from Part 48's coverage, would permit operators to deny training to miners at milling operations. This construction directly contravenes the Mine Act's mandate that all miners receive training. 30 U.S.C. § 825(a). We find problematic Alcoa's assertion that, under its interpretation, miners who work in milling operations located as part of surface mines or underground mines would be subject to Part 48 training requirements, but miners who work at stand-alone milling operations, like Point Comfort, would not receive Part 48 training. A. Reply Br. at 3, 11-12. Alcoa's interpretation would result in piecemeal protection for miners at milling operations, a result at odds with the Mine Act and the Congressional intent in enacting the Act.[6]

Because the Secretary's interpretation that a milling operation qualifies as a surface mine under Part 48 is reasonable, logically consistent with the language of the regulation, and serves a permissible regulatory function in furtherance of the Mine Act's safety goals, we defer to it.[7] *Rock of Ages Corp.*, 20 FMSHRC 106, 112 (Feb. 1998), *aff'd in part*, 170 F.3d 148 (2d Cir. 1999); *Cannelton*, 867 F.2d at 1435. Accordingly, we affirm the judge's decision that Part 48, subpart B applies to Point Comfort, and that Alcoa committed S&S violations of sections

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[6] The legislative history reveals that Congress was aware of and concerned about the health and safety hazards for miners in mills. H. Rep. No. 95-312, at 6-9, 11-13 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 362-65, 367-369 (1978) ("*Legis. Hist.*") (bringing mills specifically under the jurisdiction of the Mine Act and discussing the potential hazards of mills including toxic exposure to iron oxide, radon, mercury and manganese). Congress also considered training of miners to be of paramount importance for mine safety. *See Legis. Hist.* at 362 (citing one of the causes for the Sunshine Silver Mine fire, in which 91 miners lost their lives, to be the failure to train miners in self-rescue and survival techniques); *id*. at 637-638 (stating that "the Committee considers the presence of miners in a dangerous mine environment who have not had even the rudimentary training of self-preservation and safety practices inexcusable."). In fact, Congress provided MSHA with one of the most potent tools under the Act — a withdrawal order — for training violations. 30 U.S.C. § 814(g).

[7] Chairman Verheggen states: For the reasons stated in my dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999), *appeal docketed sub nom. RAG Cumberland LP v. FMSHRC*, No. 00-1438 (D.C. Cir. Oct. 10, 2000), I would "accord special weight," rather than defer, to the Secretary's interpretation of the regulations at issue here. *See Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979).

48.28(a) and 48.31(b) by failing to provide the requisite training.[8]

III.

Conclusion

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

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

[8] In cases involving ambiguous standards, the issue of whether the operator had adequate notice of the regulatory requirements at issue may arise. An agency's interpretation may be permissible but nevertheless may fail to provide the notice needed to support imposition of a civil penalty. *Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Alcoa has not raised the issue of notice on this appeal. 30 U.S.C. § 823(d)(2)(A)(iii). Nevertheless, even if it had, the record reveals that at least since 1992, Alcoa had actual notice of the Secretary's interpretation of Part 48, including that the training requirements applied to salaried and supervisory employees. 22 FMSHRC at 1490. Moreover, with regard to its hourly employees, Alcoa has complied with Part 48 for many years. Tr. 92-93, 99, 155; *see also* S. Ex. 6 (Part 48 training plan in force at Alcoa's Point Comfort Plant).

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