FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

August 31, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 92-216-R
v.	:	WEST 92-421
ENERGY WEST MINING COMPANY	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Jordan, Chairman; Doyle and Holen, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Energy West Mining Company ("Energy West") alleging a violation of 30 C.F.R. ' 75.316 (1991).[1] Upon cross motions for summary decision, former Administrative Law Judge Michael

[1] Section 75.316, which restated 30 U.S.C. ' 863(o), provided as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

On November 16, 1992, 30 C.F.R. ' 75.316 was superseded by 30 C.F.R. ' 75.370, which

A. Lasher, Jr. determined that Energy West violated the standard and he assessed a civil penalty of $20. 15 FMSHRC 1185 (June 1993) (ALJ). For the reasons set forth below, we vacate the judge's decision and remand for further proceedings.

I.

Factual and Procedural Background

At 4:10 a.m. on December 26, 1991, MSHA Inspector Robert Baker issued a citation[2] to

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imposes similar requirements.

[2] The citation states:

The approved ventilation, methane, and dus

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T h e c r e w h a d b e e n

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Energy West at its Deer Creek Mine in Emery County, Utah. The citation alleged that Energy West violated the approved ventilation system and methane and dust control plan it had adopted pursuant to 30 C.F.R. ' 75.316 and section 303(o) of the Act, 30 U.S.C. ' 863(o). 15 FMSHRC at 1187. The citation stated that the 6th Right longwall section was required to be ventilated by 30,000 cubic feet of air per minute ("cfm"). *Id*. The inspector measured the air quantity to be 22,680 cfm, which is not disputed by Energy West. *Id.* at 1188.

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Energy West contested the citation and, on August 17, 1992, filed a motion for summary decision pursuant to former Commission Procedural Rule 64, 29 C.F.R. ' 2700.64.[3] In support of its motion, Energy West asserted that the requirement for 30,000 cfm set forth on the individual water spray schematic for mechanized mining unit ("MMU") No. 051-0 was the sole basis for the Secretary's citation. Energy West also asserted that the provision applies only during periods of coal production, not during idle periods, and that the citation was issued "during an idle shift when no coal production was occurring." E. Mot. at 3-5, citing S. Resp. to Interrog. at 3-4. The operator contended that, because the provision is set forth only on the individual MMU water spray schematic, the 30,000 cfm requirement is linked to the need for water spraying and argued that, because spraying is required only during active mining, the 30,000 cfm requirement is likewise limited to production shifts. Energy West referred to other parts of its ventilation plan and to its fan stoppage plan to support its position that the ventilation plan distinguishes between periods of active mining and idle periods.[4] *Id*. at 3-4, 7-8. The motion was supported by an affidavit from Dave Lauriski, Energy West's Director of Health, Safety and Training, who developed the ventilation plan.

The Secretary filed a cross motion for summary decision, asserting that the pertinent plan provision is unambiguous and that the 30,000 cfm requirement applies at all times whether or not coal is being mined. S. Mot. at 3. The Secretary disagreed that the provision was intended to apply only during periods of coal production or that Energy West had consistently interpreted the provision in the manner it now advocates. *Id*. at 1-2. He further disputed that the shift was idle

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[3] Subsequent changes to Rule 64 do not affect the instant case. See 29 C.F.R. ' 2700.67 (1993).

[4] Energy West relied on the following provisions of its ventilation plan:

VII. VENTILATION OF IDLE AREAS. "1. Appropriate measures will be taken in idle areas to insure the air quality standards required under parts 75.301-2 and 75.301-5."

XVII. LONGWALL SET-UP AND EXTRACTION VENTILATION. "6. Minimum air quantities for set-up and extraction faces are: . . . IDLE PERIODS - At idle periods during the set-up and extraction process a minimum of 3,000 cfm of air will be maintained across the set-up and extraction faces."

Energy West relied on the following provision of its fan stoppage plan:

C. RESUMPTION OF WORK. 3. BACK-UP FAN OPERATION. "b. Idle work may be done as long as the work area has been examined in accordance with 30 C.F.R. 75.303 . . . ."

E. Mot. Attachments B and C.

and contended that the reason coal was not being produced at the time was because the MMU was being repaired. *Id*. at 3.

Relying on 30 C.F.R. '' 75.301 and 75.301-3(c),[5] the Secretary argued that the longwall face must be constructed "as a pillar line." S. Mot. at 3. The Secretary asserted that, although the minimum quantity of air required under the standard at a pillar line is 9,000 cfm, the Secretary may require a greater quantity and, in this case, had required 30,000 cfm. *Id*. at 3. The Secretary supported his motion for summary decision with an affidavit from MSHA Supervisory Mining Engineer William P. Reitze, who, as a member of the MSHA Denver Ventilation Group, reviews and evaluates coal mine ventilation plans. Affidavit at 1-2. Reitze averred that the 30,000 cfm requirement for the longwall face during idle periods ensures that methane and other harmful gases are cleared from the bleeder system as well as from the face. *Id*. at 2-3. In its response to the Secretary's cross motion for summary decision, Energy West disputed the Secretary's assertions.

The judge granted summary decision in favor of the Secretary. He concluded that the plan provision clearly required 30,000 cfm of air at all times and, thus, that a violation had been established. The Commission granted Energy West's petition for discretionary review, which challenged the judge's decision on both procedural and substantive grounds.

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[5] **Section 75.301 provided in pertinent part: "the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute . . . . The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners." 30 C.F.R. ' 75.301 (1991).**

Section 75.301-3(c) stated that "[w]hen longwall mining is practiced the volume of air shall be measured in the intake entry or entries at the intake end of the longwall face and the longwall shall be constructed as a pillar line." 30 C.F.R. ' 75.301-3(c) (1991).

II.

Disposition

Energy West contends on review that the 30,000 cfm requirement applies only during active coal production, not when the section is idle. PDR at 8-10. Energy West also argues that the Secretary should be required to demonstrate that it was on notice of the Secretary's interpretation. *Id* at 14. It maintains that the finding of violation should be reversed. Reply Br. at 6. Alternatively, if the Commission determines that a genuine issue of material fact exists, the operator seeks remand. PDR at 15. The Secretary asserts that the judge correctly found the disputed provision to be unambiguous and to apply at all times. S. Br. at 8-15.

Summary decision may be granted only where: (1) the entire record, including pleadings, affidavits, and answers to interrogatories, establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. ' 2700.67(b). *See generally Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (November 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). We conclude that the disputed plan provision is ambiguous and that the judge's determination to the contrary was erroneous. We also conclude that the record before the judge contained disputed facts material to determining the requirements of Energy West's ventilation plan. For these reasons, summary decision was inappropriately entered. *See Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994).

The plan contains a separate schematic entitled "water spray diagram" for each MMU longwall section in the mine. 15 FMSHRC at 1188. It is undisputed that the 30,000 cfm requirement is set forth in one place only, as one of four "controls and practices" on the water spray diagram. *See* S. Br. at 14; 15 FMSHRC at 1186. One possible inference from the placement of the requirement is that it is linked to the provision of water sprays and that, like water sprays, the requirement applies only while the longwall is in operation. Furthermore, as Energy West argues, air quantity requirements in the plan vary, depending on whether mining is occurring or the section is idle. PDR at 9-10; Reply Br. at 4-6. We therefore conclude that the disputed plan provision is unclear. Accordingly, a determination must be made as to whether the Secretary's interpretation of the provision is reasonable and we remand to that effect.[6]

In the event the judge determines that the Secretary=s interpretation of the provision is reasonable, he should also address the operator's notice argument and determine whether the operator had notice that the provision was to apply at all times. "The Commission's task is . . . to determine whether the Secretary's interpretation of [a] regulation is reasonable and whether the operator was given fair notice of its requirements." *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992). Commission precedent expressly recognizes notice as an appropriate inquiry as to ventilation and roof control plan provisions. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 908

[6] **An agency's reasonable interpretation of its regulations is entitled to deference. *Secretary of Labor v. Western Fuels-Utah*, 900 F.2d 318, 321 (D.C. Cir. 1990).**

(May 1987); *Mettiki Coal Corp.*, 13 FMSHRC 3, 7 (January 1991).

Because the plan provision is enforceable as a mandatory standard, the operator is entitled to the due process protection available in the enforcement of regulations. A[T]he due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986).[7] When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). *Accord General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *Secretary of Labor v. Western Fuels-Utah, Inc.* 900 F.2d 318, 326 (D.C. Cir. 1990) (Edwards, J., dissenting). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). The enforcement actions at issue were vacated for lack of notice in *Gates & Fox* (790 F.2d at 156-57), *Phelps Dodge* (681 F.2d at 1193) and *General Electric* (53 F.3d at 1330).[8]

The Commission has not required the Secretary to provide an operator with actual notice

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[7] We find *Sewell Coal Co. v. Federal Mine Safety and Health Review Comm=n*, 686 F.2d 1066 (4th Cir. 1982), cited by our colleague, to be unpersuasive. As noted by Judge Widener in his dissent, neither *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), nor *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), Ainvolved the imposition of a fine without notice.@ 686 F.2d at 1073. In *Bell Aerospace*, the Supreme Court explicitly acknowledged this distinction, stating: A[T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. *Nor are fines or damages involved here. . . .@ Id.* at 295 (emphasis added). Neither *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), nor *Molina v. INS*, 981 F.2d 14 (1st Cir. 1992), also cited by our colleague, dealt with imposition of liability without prior notice; in *Molina* the court expressly notes that no due process claim is involved. 981 F.2d at 19.

[8] Chairman Jordan notes that, in *General Electric*, the court held that an agency=s interpretation may be reasonable and entitled to deference even though the interpretation Awould not be obvious to >the most astute reader=@ and might Adiverge significantly from what a first-time reader of the regulations might conclude was the >best= interpretation of their language.@ 53 F.3d at 1327. The court deferred to the agency=s interpretation because it was Alogically consistent with the language of the regulation[s],@ but found that the interpretation was Aso far from a reasonable person=s understanding of the regulations that they could not have fairly informed GE of the agency=s perspective.@ 53 F.3d at 1330. Although the agency could require future compliance with its interpretation, the lack of fair notice led the court to reverse the enforcement action taken in that particular instance. 53 F.3d at 1328, 1330.

of the Secretary's interpretation prior to enforcement. Rather, the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. *E.g., Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982); *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (October 1989), *aff'd*, 921 F.2d 1285, 1291 (D.C. Cir. 1990). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.@ *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

We note that Energy West has conceded that a violation occurred if active mining had been only temporarily halted for repairs of the MMU. E. Opp'n to S. Mot. at 8. *See Mid-Continent Coal and Coke Co.*, 3 FMSHRC 2502, 2504 (November 1981). Thus, depending on the judge's conclusions regarding the interpretation and application of the ventilation plan provision, the status of the longwall section at the time of citation could bear on whether a violation occurred. In the event the judge determines that the Secretary's interpretation is not reasonable, or if he sustains the operator's argument as to lack of notice, he must determine whether, at the time of citation, the longwall section had been only temporarily idled for repairs as asserted by the Secretary (S. Br. at 11-12), or whether the section was idled for the entire shift, as asserted by Energy West. PDR at 13.[9]

III.

Conclusion

[9] We do not reach Energy West's objection to the judge's adoption of language from the Secretary's cross motion in his decision. However, we note that such incorporation of language is "questionable judicial practice." *Energy West Mining Co.*, 16 FMSHRC at 1419 n.8.

For the foregoing reasons, we reverse the judge's determination that the plan provision is unambiguous, vacate his decision, and remand this matter to the Chief Administrative Law Judge for assignment to a judge for an evidentiary hearing.[10]

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Mary Lu Jordan, Chairman

Commissioner Mark Lincoln Marks, concurring in part and dissenting in part

[10] **Judge Lasher has retired.**

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I concur in the result reached by my colleagues. I agree that the disputed plan provision is ambiguous for the reasons set forth by them and that the judge's determination to the contrary was erroneous. I also agree that the record before the judge contained disputed facts material to determining the requirements of Energy West's ventilation plan and; therefore, the judge inappropriately entered summary decision. *See Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). I agree with my colleagues that this case must be remanded to the judge for a determination of whether the Secretary's interpretation of the provision is reasonable and, thus, entitled to weight.[11]

However, I dissent from my colleagues= view that, in addition to a determination that enforcement of a ventilation plan is based on a reasonable interpretation of its requirements, enforcement actions are subject to a *separate* "notice" requirement. In my view, the Secretary can enforce ventilation plans based on reasonable interpretations of their requirements and that such enforcement actions are not also subject to a *separate* "notice" requirement. *Sewell Coal Co. v. Federal Mine Safety and Health Review Comm=n*, 686 F.2d 1066, 1069 (4th Cir. 1982) (A*Sewell*@). In *Sewell*, the Fourth Circuit Court of Appeals held that Sewell=s argument that the Secretary=s interpretation, unknown to it at the time, should not be retroactively applied was foreclosed by a number of Supreme Court decisions. *Id.* at 1069-70, *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Fourth Circuit further held that Aretroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe the rights secured by the due process clause.@ *Sewell*, 686 F.2d at 1070.

[11] The Senate committee report on the Mine Act states that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978).

The Secretary is not prevented from enforcing a reasonable interpretation of an ambiguous plan provision simply because the operator has relied on an alternative interpretation; on the contrary, the Commission must give weight to a reasonable interpretation by the Secretary, even if it is not the only one permitted by the language of the standard. *E.g., Sewell*, 686 F.2d at 1069; *Secretary of Labor v. Western Fuels-Utah*, 900 F.2d 318, 321 (D.C. Cir. 1990). Requiring pre-enforcement "notice" of a reasonable interpretation of a plan provision would allow the operator to escape liability in cases of first impression. Due process does not require the Secretary to enforce a reasonable interpretation of the ventilation plan requirements only prospectively (i.e., only after providing Anotice@). *See SEC v. Chenery Corp.*, 332 U.S. at 202-03; *Sewell*, 686 F.2d at 1069. "[R]etroactive application of new principles in adjudicatory proceedings is the rule, not the exception. And, agencies have broad legal power to choose between adjudication and rulemaking proceedings as vehicles for policymaking." *Molina v. INS*, 981 F.2d 14, 23 (1st Cir. 1992), *citing SEC v. Chenery Corp.*, 332 U.S. 194 (1947).[12]

Further, I also believe that the "reasonably prudent person test" is inapposite in this case. I do not address whether this test is ever an appropriate analytical framework for "evaluat[ing] the fairness of the application of *broad standards* to particular factual settings." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990) (emphasis supplied). However, even assuming that the test is an appropriate analytical framework for broad standards, the Commission here is confronted with a specific ventilation plan provision, not a broad standard.

Marc Lincoln Marks, Commissioner

Joyce A. Doyle, Commissioner

[12] It is true, as pointed out by my colleagues, slip op. at 5 n.7, that in *Molina* the court noted A[t]here is no claim here that the federal definition exceeds the bounds that some other part of the Constitution (say, the >due process= clause) might set.@ *Molina*, 981 F.2d at 19. However, my colleagues neglect to point out that the court went on to note that it found Anothing >fundamentally unfair= about [the federal] definition.@ *Id.*

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Arlene Holen, Commissioner