FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

July 25, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. KENT 2000-79
LODESTAR ENERGY, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners[1]

DECISION

BY: Verheggen, Chairman; Beatty, Commissioner

This is a contest proceeding in which Lodestar Energy, Inc. ("Lodestar") challenges a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") 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 T. Todd Hodgdon correctly determined that Lodestar violated 30 C.F.R. § 75.364(b)(1) when it failed to conduct a weekly inspection of a longwall entry at its Baker Mine. 23 FMSHRC 229, 232 (Feb. 2001) (ALJ). For the reasons that follow, we affirm in part and remand in part.

I.

Factual and Procedural Background

Lodestar owns and operates the Baker Mine, an underground coal mine in Webster County, Kentucky. 23 FMSHRC at 230. Lodestar primarily uses a longwall mining unit to extract coal. *Id.* Longwall mining extracts coal from blocks called "panels" that typically

[1] Commissioner Riley participated in the consideration of this matter, but his term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission.

measured 10,000 feet long by 1000 feet wide in the Baker Mine. *Id.* Mining began with the development of entries around a panel using continuous miners, including a set of three entries that ran the length of each side of the panel, three intake entries on the right and three tailgate entries on the left. *Id.* As longwall mining progressed, continuous miners developed the intake entries for the next adjacent panel. *Id.* When the longwall had extracted the first panel, its intake entries became the tailgate entries of the next panel. *Id.*

Of the three intake entries involved in this proceeding, the No. 3 entry, which was closest to the panel, served as a belt line entry and an alternate escapeway. *Id.* The No. 2 entry served as the primary escapeway. *Id.* Together, the No. 1 and 2 entries carried intake air to the face where it mixed with air coming across the face and eventually exited the mine. *Id.* The No. 1 entry was a source of intake air for worked-out areas inby crosscut 74. Tr. 24-25.

On October 26, 1999, MSHA ventilation specialist Robert Sims assisted in a quarterly triple A inspection at the mine. 23 FMSHRC at 230. At that time, Lodestar was mining a longwall panel designated "K" in the 11th East Gates section of the mine. *Id.* Intake air entered the No. 1 and No. 2 entries from a common source at crosscut 10. *Id.* At that point, a portable metal stopping, called a "Kennedy Stopping," partially blocked the No. 1 entry. *Id.* A portion of the airflow continued down the No. 1 entry, but the larger portion of air was directed into the No. 2 entry. *Id.* From crosscut 10 to crosscut 73, a distance of about 6615 feet, the No. 1 and 2 entries were separated by coal pillars and permanent stoppings. *Id.* Inspector Sims determined that the No. 2 entry had been examined for hazardous conditions at least every seven days. *Id.* However, Lodestar had not conducted weekly inspections of the No. 1 entry. *Id.* The potential hazards that a physical examination could disclose included methane accumulations and potential and actual roof falls. *Id.* at 231-32.

Sims issued a citation that charged Lodestar with violating 30 C.F.R. § 75.364(b)(1). *Id.* at 230. The citation stated:

> The # 1 entry (intake) of the 11th East Gates was not being examined from crosscut 10 to crosscut 73 at the Baker Mine. At least every 7 days, an examination for hazardous conditions shall be made in at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

Jt. Ex. 4. Section 75.364(b)(1) provides:

> (b) *Hazardous conditions*. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:
>
> > (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b)(1). The ventilation regulations define "air course" as follows:

> *Air course.* An entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage.

30 C.F.R. § 75.301. Although MSHA had performed prior quarterly inspections, it had not cited Lodestar for failing to examine the No. 1 entry. 23 FMSHRC at 230; Tr. at 88-90.

Lodestar contested the Secretary's proposed penalty assessment, and a hearing was held. Before the judge, Lodestar argued that the No. 1 and 2 entries constituted a set of entries and that, by inspecting the No. 2 entry, it was complying with the regulation. 23 FMSHRC at 231. The judge noted that the feature that distinguishes one entry (or set of entries) from another was that the only mixing of air currents was by leakage, not by design. *Id.* The judge found that the two entries were separated by stoppings and solid blocks of coal for over a mile and there was no mixing of air except by leakage. *Id.* The judge rejected Lodestar's argument that, because common air entered the two entries at crosscut 10 and became common air again at crosscut 73, the entries were part of the same air course. *Id.* While the judge acknowledged the MSHA inspector's testimony that only two blocked crosscuts would not create a separate air course, he concluded that the operator had created separate air courses when it blocked 63 crosscuts. *Id.* Finally, the judge noted the inspector's testimony concerning the hazards that could occur in the No. 1 entry that an examination might detect, including methane accumulation and potential and actual roof falls. *Id.* at 231-32. The judge concluded that Lodestar violated the regulation by not examining the No. 1 entry. *Id.* at 232. In light of MSHA's failure to cite Lodestar for failing to examine the No. 1 entry during prior and subsequent inspections, the judge considered Lodestar's negligence as low, and he assessed a civil penalty of $45. *Id.*

II.

Disposition

Lodestar argues that the judge's conclusion that the No.1 and 2 entries are separate air courses is legally erroneous. L. Br. at 5-6. Lodestar relies on the Commission's decision in *Mettiki Coal Corp.*, 10 FMSHRC 1125 (Sept. 1988), in which two entries that were separated for a distance of 2000 feet were found to be a single air course. Lodestar asserts that in this proceeding the distance between crosscuts is no more a factor under the regulatory definition than it was in *Mettiki*. L. Br. at 6-7. Lodestar further argues that section 75.301 is too vague because it does not specifically state the distance by which entries must be separated. *Id.* at 7. Lodestar maintains that the airflow between the No. 1 and 2 entries was not limited to leakage and, therefore, they were not separate air courses within the plain language of the regulation. *Id.* Finally, Lodestar asserts that it was not previously cited over the last 17 quarterly inspections, demonstrating that a reasonably prudent person familiar with the mining industry and the

protective purposes of the standard would not have recognized the Secretary's proposed interpretation of section 75.301. L. Reply Br. at 1-2.

The Secretary argues that substantial evidence supports the judge's finding that the No. 1 entry is a separate air course within the meaning of section 75.301. S. Br. at 6. In support, the Secretary states that it is undisputed that the No. 1 and 2 entries were separated by permanent ventilation controls and solid coal for a distance of 1.25 miles, and one would have to conduct a separate examination to detect hazardous conditions that could occur in each. *Id.* at 7. The Secretary distinguishes the *Mettiki* decision on the grounds that, after the decision, she promulgated a detailed definition of "air course" on which she relied in this proceeding. *Id.* at 7-8. The Secretary continues that the preamble to the final rule specifically stated that two air courses were not considered to be the same if separated for more than 600 feet. *Id.* at 8. Finally, the Secretary counters Lodestar's notice argument, asserting that a reasonably prudent person familiar with the mining industry would recognize that the No. 1 and 2 entries were "separated" within the meaning of section 75.301. *Id.* at 8-11 & n.6.

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 her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General 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. *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).

Section 75.364(b)(1) provides: "At least every 7 days, an examination for hazardous conditions shall be made . . . [i]n at least one entry of each intake air course, in its entirety . . . ." 30 C.F.R. § 75.364(b)(1). Section 75.301 further defines "air course" as "[a]n entry or a set of entries separated from other entries by stoppings, . . . or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." 30 C.F.R. § 75.301. The No. 1 and 2 entries at issue here have a common source of air below crosscut 10, are separated by

stoppings between crosscuts 10 and 73, and mix into a single air course again above crosscut 73 before exiting the mine. The plain language of the regulations does not address the fact situation here — whether entries with a common entry and exit can be separate air courses. Accordingly, the regulation is ambiguous, and we must ascertain whether the Secretary's interpretation is reasonable.

In analyzing the reasonableness of the Secretary's interpretation, we begin with an analysis of the statutory provision that is the basis for the regulation. The Federal Coal Mine Health and Safety Act of 1969 ("Coal Act") contained a predecessor provision at section 303(f), 30 U.S.C. § 863(f) (1976), which required weekly inspections of air courses. The purpose behind the provision was to "require[] a weekly examination of areas not normally examined during the regular preshift and onshift examinations" in order to discover and correct conditions posing a hazard to miners. H.R. Rep. No. 91-563, at 44 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1074 (1975). Section 303(f) of the Coal Act was adopted in the Mine Act without change. That section requires weekly examinations for hazardous conditions in "at least one entry of each intake and return aircourse in its entirety." 30 U.S.C. § 863(f) (1994). The Secretary's regulation requiring weekly examination of air courses tracked the statutory language. *See* 30 C.F.R. § 75.305 (1991).

In 1992, the Secretary issued revised standards governing underground coal mine ventilation. 57 Fed. Reg. 20868 (1992). The substance of the weekly inspection requirement was largely unchanged (although renumbered). *See id.* at 20897-98 ("Paragraph (b)(1) requires at least one entry of each intake air course to be examined weekly."). In the final rules, the Secretary rejected a proposed rule that would have allowed, in certain circumstances, the use of an atmospheric monitoring system ("AMS") in lieu of a weekly physical examination in return air courses, because the AMS would not disclose all hazardous conditions which might be discovered during a physical examination. *Id.* at 20869. Most significantly, the Secretary added to the rules the definition of "air course," which is at issue in this proceeding. *Id.* at 20870.

The Secretary's interpretation that the No. 1 and 2 entries must be separately examined for hazards is "logically consistent with the language of the regulations and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d at 1327. As the judge correctly surmised, Lodestar's assertion that, because the entries have a common entry and exit, they should be treated as one air course, taken to its logical conclusion, could lead to the absurd result that only one entry in an entire mine would need to be examined. 23 FMSHRC at 231. Hence, the Secretary's interpretation also furthers the safety purposes of the Mine Act that the weekly examination requirement was drafted to ensure. In light of the foregoing, we conclude that the Secretary's interpretation is reasonable, and we agree with the judge that, under the

standards at issue, the No. 1 and 2 entries were separate and each had to be examined for hazardous conditions.[2]

We find unpersuasive Lodestar's contention that the Commission's 1988 decision in *Mettiki*, 10 FMSHRC 1125, is controlling. Although the Commission held there that the operator did not violate the weekly inspection requirement then in effect, 30 C.F.R. § 75.305 (1986), when it failed to separately inspect entries that were separated by a block of coal that was 300 feet wide and 2000 feet long, the Commission limited its disposition to the record before it, stating: "We are not defining for all purposes the meaning of 'aircourse' as used in section 75.305." *Id.* In addition, the regulatory landscape changed significantly following *Mettiki*. Since the Commission's decision in 1988, the Secretary revised her regulations in 1992 to include a definition of "air course" which is at issue here. Thus, *Mettiki* is no longer applicable to the case at bar.

Finally, Lodestar contends that the regulation is impermissibly vague and affords too much discretion to inspectors. L. Br. at 7; L. Reply Br. at 1-2. In cases involving ambiguous standards, the issue of whether the regulated party has received fair notice of the Secretary's interpretation of the regulation arises. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). Where the imposition of a civil penalty is at issue, considerations of due process "prevent[] . . . deference [to an agency's interpretation] 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.*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See General Elec. Co. v. EPA*, 53 F.3d at 1333-34.

The appropriate test for notice is "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 (Nov. 1990). Here, Lodestar specifically contends that "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard, would not have recognized the specific prohibition or requirement of the standard," because MSHA did not identify the entries as separate air courses during the previous 17 inspections. L. Reply Br. at 1. In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory

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[2] Chairman Verheggen believes that, for the reasons set forth in his dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999) (Comm'r Verheggen, dissenting), the relevant question here is whether "'we will accord special weight to the Secretary's view of the [Mine] Act and the standards and regulations [she] adopts under them'" (quoting *Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979)). Here, Chairman Verheggen would accord special weight to the Secretary's interpretation of the regulations at issue because of her expertise in the examination of ventilation air courses.

history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc*., 18 FMSHRC 533, 539 (Apr. 1996); *see also Diamond Roofing Co. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

Because here the judge failed to address whether the standards at issue provided Lodestar with adequate notice, a remand is necessary for further analysis and fact finding. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994). It will be up to the judge to weigh Lodestar's contentions as well as all other record evidence bearing on notice pursuant to Commission precedent.[3] *See, e.g.,* 57 Fed. Reg. at 20870 (relevant preamble discussion); Tr. 52-54, 88-90. He shall also consider whether, based on the record as a whole, a reasonably prudent person, familiar with the mining industry and the protective purpose of section 75.364(b)(1), would have recognized that weekly examinations of the No. 1 entry were necessary to discover and remedy potential dangers to miners. *See Ideal Cement*, 12 FMSHRC at 2416.

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[3] One source of notice is the preamble to the revised regulations, but on remand the judge must determine whether it was sufficiently clear to put the regulated community on notice of the Secretary's interpretation. *See Morton*, 18 FMSHRC at 539 (rejecting confused regulatory history and erroneous preamble as adequate notice). The Secretary cites the preamble for the proposition that MSHA "does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet." S. Br at 8 (citing 57 Fed. Reg. at 20870).

At one point the preamble states that MSHA "does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet." 57 Fed. Reg. at 20870. However, the proposed rules had included in the definition of "air course" additional language that stated in pertinent part, "two adjacent entries . . . with an open crosscut or crosscuts between them shall be considered separate air courses if the distance between open crosscuts is greater than 300 feet in seam heights below 48 inches and 600 feet in seam heights of 48 inches or above." 53 Fed. Reg. 2382, 2413 (1988). In the final rule the language was omitted from the definition, MSHA stating that it "has reconsidered this issue and final rule does not include that part of the definition addressing entries which are common at both ends." 57 Fed. Reg. at 20870.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that the Secretary's interpretation of sections 75.364(b)(1) and 75.301 was reasonable and remand to the judge to determine whether Lodestar had sufficient notice of the Secretary's interpretation.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

I would affirm the judge based on the plain meaning of the regulation. The standard defines "air course" as "[a]n entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." 30 C.F.R. § 75.301. I conclude that both the No. 1 and the No. 2 entries constitute separate air courses under this definition, and are thus subject to the inspection requirement at issue.

Focusing on the No. 1 and No. 2 entries from crosscut 10 to crosscut 73 (a distance of about 6615 feet), 23 FMSHRC 229, 230 (Feb. 2001) (ALJ), it is undisputed that between these two crosscuts the entries were separated by coal pillars and permanent stoppings. *Id.* at 231. For over a mile, therefore, the only mixing of air between the two entries was due to leakage, not design. I recognize that the air ventilating the No. 1 entry is air that has been split off at crosscut 10 from a larger current of air, and that at crosscut 73 this No. 1 split of air once again becomes part of a larger air current. In between these two crosscuts, however, the air flow in the No. 1 entry does not mix with other air currents. Consequently, between those crosscuts, the No. 1 entry constituted a separate air course. The fact that the air current used to ventilate the No. 1 entry was initially split off from, and subsequently joined up with a larger air current, does not preclude application of 30 C.F.R. § 75.301 to this split of air. If that were the case, then arguably, as the judge pointed out, no entry in the mine would be considered a separate air course.

Like my colleagues, I find Lodestar's reliance on *Mettiki Coal Corp.*, 10 FMSHRC 1125 (Sept. 1988), unpersuasive. Slip op. at 6. Although the Commission in *Mettiki* described the regulation as ambiguous, that case preceded the 1992 regulatory revision which supplied a definition of air course. *Id*.

Finally, because I find the language of the regulation plain, I would conclude that the operator had adequate notice of its provisions. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (holding that adequate notice provided by unambiguous regulation).

For the foregoing reasons, I would affirm the judge's decision, and therefore respectfully dissent.

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Mary Lu Jordan, Commissioner

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