FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 26, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. LAKE 2000-111-R
ADMINISTRATION (MSHA)	:	LAKE 2000-112-R
	:	
v.	:	
	:	
THE AMERICAN COAL COMPANY	:	

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

DECISION

BY: Jordan and Beatty, Commissioners

These are contest proceedings arising from two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against American Coal Company ("American"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), and alleging violations of 30 C.F.R. § 75.1909(a)(1).[2] In the

[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 designated to exercise the powers of the Commission.

[2] This regulation requires, among other things, that diesel powered equipment have "an engine approved under subpart E of Part 7 . . ." Reference to that subpart brings us to the requirement actually at issue in this proceeding, 30 C.F.R. § 7.90, which provides:

> Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall also contain the following information:
>
> (a) Ventilation rate.
> (b) Rated power.
> (c) Rated speed.
> (d) High idle.

proceedings below, American and the Secretary of Labor each moved for summary decision. Administrative Law Judge Michael Zielinski found in the Secretary's favor and affirmed the citations. 23 FMSHRC 505 (May 2001) (ALJ). American filed a petition for discretionary review with the Commission challenging the judge's decision.

I.

Factual and Procedural Background

American operates the Galatia Mine, a large underground coal mine, in Harrisburg, Illinois. 23 FMSHRC at 505. In the mine, American uses diesel-powered personnel carriers. *Id.* American Isuzu Motors, Inc. ("Isuzu") manufactured the diesel engines in the carriers. *Id.* at 506. These proceedings concern citations MSHA issued to American because the approval markings on the diesel engines were not supplied by the manufacturer. *Id.* at 507.

On October 25, 1996, MSHA published final rules establishing new safety standards (30 C.F.R. §§ 75.1900-75.1916) and an approval process (30 C.F.R. §§ 7.81-7.108) for diesel engines and equipment in underground coal mines.[3] 61 Fed. Reg. 55412.[4] Under 30 C.F.R. § 75.1909(a)(1), non-permissible diesel-powered equipment must be equipped with an engine approved under 30 C.F.R. Part 7. *Id.* Section 7.90 further requires an approval marking to be placed on all equipment approved by MSHA. *Id.*

Isuzu applied for MSHA approval under these new regulations for diesel engines with model numbers QD 100-301 and C240MA, which were in use at the Galatia Mine. 23 FMSHRC at 506 & n.1. As part of the approval process, Isuzu was required by the regulations to submit engine specifications, design drawings, and test results. *See* 30 C.F.R. §§ 7.83-7.89; S. Resp. to

---

(e) Maximum altitude before deration.
(f) Engine model number.

[3] The new Part 7 approval procedure is divided into two subparts. Subpart E addresses diesel engines used in areas where permissible electric equipment is required (Category A engines) and diesel engines used in areas where non-permissible electric equipment is allowed (Category B engines). 30 C.F.R. § 7.81. Subpart F addresses diesel power packages used in areas where permissible electric equipment is required. 30 C.F.R. § 7.95. *See generally* 61 Fed. Reg. at 55413, 55415. Only Subpart E is involved in this proceeding. In addition to these subparts, Subpart A (30 C.F.R. §§ 7.1-7.9), which specifies general requirements for MSHA approval of equipment in underground mines, is applicable to diesel engines. *See* 30 C.F.R. § 7.81.

[4] The equipment in this proceeding (which is classified under MSHA regulation as "non-permissible") had been used at the Galatia Mine well before the effective date of the new approval process. 23 FMSHRC at 506.

Mot. for Sum. Dec., Att. 4 at 1-2 (Decl. of Gene Biron, Isuzu Mgr. of Application Eng.) ("Biron Decl."). In order for Isuzu to determine whether a particular engine was manufactured in accordance with the design drawings and specifications upon which MSHA's approval was based, it had to compare the serial number on the engine with its records of the design specifications to which the engine was manufactured. 23 FMSHRC at 507. Equipment owners were required to fill out a form that included the serial number of the engine together with other critical characteristics. Biron Decl. at 3. Isuzu would compare the information in this form with the approval requirements for the approved engine. *Id.* at 4. If the engine met the requirements, Isuzu would record the serial number and issue an approval tag. *Id.*

American was dissatisfied with the quality and cost of Isuzu's approval tags, and American officials had extensive discussions with MSHA concerning Isuzu's approval tags and American's development of its own approval marking. 23 FMSHRC at 506. On April 1, 2000, MSHA issued Procedure Instruction Letter I00-V-2 ("PIL"), to address mine operator complaints about inadequate diesel engine approval markings that were being supplied by various engine manufacturers. *Id.*; PIL at 1. The PIL stated: "The approval marking is supplied by the engine manufacturer." PIL at 1. In the case of an approval marking that had become detached or illegible, the PIL instructed mine operators to verify that the diesel engine is approved, obtain a replacement approval marking from the engine manufacturer (that could be kept on file in the mine office if the approval marking were of the same design as the prior marking), and notify MSHA of the problem. MSHA would then require the manufacturer to develop an improved approval marking that is legible and permanent as required by section 7.90. *Id.*

American did not obtain Part 7 approval markings from Isuzu. 23 FMSHRC at 507. Instead, American's maintenance department purchased a labeling machine to fabricate tags that it attached to its diesel engines. *Id.* American was able to ascertain from public records maintained by MSHA that Isuzu-manufactured engines with the same model number as those in this proceeding had been approved by MSHA. *Id.*; *see* S. Mot. for Sum. Dec., Att. A. However, American did not have access to the documentation that was the basis for MSHA approval of the engines. 23 FMSHRC at 506, 508. Nor did American have access to Isuzu's records that reflected which engines with a specified serial number of a particular model were manufactured according to the design drawings and specifications that were submitted to MSHA. *Id.* at 508. Consequently, American could not determine whether its engines had, in fact, been approved. *Id.*

In June 2000, MSHA issued two citations charging that two Isuzu diesel engines, one used in a mantrip and another in a personnel carrier, were not being maintained in accordance with the regulations because a legible and permanent approval marking required by section 7.90 was installed but had not been supplied by the engine manufacturer. *Id.* at 507. American contested the citations, and both American and the Secretary moved for summary decision. *Id.* at 505.

The judge granted the Secretary's motion for summary decision and dismissed the notices of contest. *Id.* at 512. The judge noted that section 7.90 was silent regarding the source of the

approval marking and that this silence created ambiguity regarding permissible sources for the approval marking. *Id.* at 509-11. He held that the Secretary's interpretation was reasonable and more consistent with the safety purposes of the Act than the operator's interpretation because an operator cannot determine if a particular engine is covered by an MSHA approval. *Id.* at 511. The judge found that only the manufacturer can ascertain whether an engine was manufactured according to the design drawings and specifications upon which MSHA approval was based. *Id.* He further noted that, even though American could determine that the engine model that it owned was approved, it could not determine whether its particular engines had been manufactured according to the design and specifications upon which the approval was obtained. *Id.* Therefore, the judge concluded that an MSHA inspector attempting to determine whether a mine met applicable ventilation requirement for dissipating emissions could not rely on approval markings supplied by American. *Id.* The judge rejected American's position that it did not have notice of the Secretary's interpretation, noting that the Secretary's position was consistent with the long-standing approval scheme for mining equipment, that MSHA representatives had discussed this requirement with American, and that American was specifically put on notice by the PIL. *Id.* at 512.

II.

Disposition

The only issue in this case, as in the companion case, *Freeman United Coal Mining Co.*, 24 FMSHRC ___, No. LAKE 2000-102-R (June 24, 2002), is whether the approval marking required by 30 C.F.R. § 7.90 must be supplied by the engine manufacturer. Thus, disposition of this case turns on the meaning of section 7.90.

Commissioners Jordan and Beatty, writing separately, vote to affirm the judge. The separate opinions of the Commissioners follow.[5]

[5] Chairman Verheggen, in an opinion dissenting from the result reached by his colleagues, votes to reverse the judge.

Commissioner Jordan, affirming:

This case arose when American Coal Company ("American") was cited for failing to comply with the requirement of 30 C.F.R. § 7.90 that "[e]ach approved diesel engine shall be identified by a legible and permanent approval marking . . . ."[1] Although every one of the diesel engines observed by the MSHA inspector bore a tag containing the information required by section 7.90, MSHA did not consider the tags to be approval markers as required by 30 C.F.R. § 7.90 because they had been produced by American instead of the engines' manufacturer, American Isuzu Motors, Inc. ("Isuzu").

American contends that section 7.90's failure to specifically identify the manufacturer as the source of the approval marking entitles American to affix the requisite information to the engine. 23 FMSHRC 505, 508 (May 2001) (ALJ). The Secretary argues that section 7.90 cannot be read in isolation from the regulations governing MSHA's approval process, and, because that process permits only the manufacturer to apply for and secure the approval that allows the diesel engine to be used in a coal mine, only a designation by that manufacturer can suffice as an approval marker under section 7.90. *Id*. at 509. The judge held that the Secretary's interpretation that the approval marking must be issued by the manufacturer was reasonable. *Id*. at 511. Because I agree with the judge's conclusion, I join in affirming his decision denying American's motion for summary judgement and granting the Secretary's motion. I write separately, though, because my view that the citations should be affirmed is based on the plain meaning of the standard.

In order to determine the "plain language" or "plain meaning" of a regulatory requirement, we must consider the ordinary meaning of the terms used. *Western Fuels–Utah, Inc.* 11 FMSHRC 278, 283 (Mar. 1989). The ordinary understanding of the phrase "approval marking" is that it refers to a designation placed on an item, the purpose of which is to provide assurance of that item's conformity with certain requirements or specifications. It stands to reason that only someone who can reliably ascertain the item's conformity with those standards

---

[1] Section 7.90 provides:

> Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall also contain the following information:
>
> (a) Ventilation rate.
> (b) Rated power.
> (c) Rated speed.
> (d) High idle.
> (e) Maximum altitude before deration.
> (f) Engine model number.

is in a position to place a mark on the item signifying its approved status. A marking affixed to an object that does not authoritatively verify that object's compliance with the pertinent standards can hardly be considered an "approval marking" as that term would be commonly understood. Therefore, the plain language of section 7.90 does in fact preclude the use of approval markings supplied by an entity not in a position to authoritatively verify the diesel engine's compliance with the relevant design and performance standards.

The relevant question before us then becomes: "Did the Secretary correctly conclude that only the manufacturer could authoritatively ascertain the diesel engines' approved status?" A review of the standards governing MSHA's approval process requires that this question be answered with an emphatic "yes." I note at the outset that the use of approval markings on mining equipment is not a recent phenomenon. Indeed, as MSHA stated in the preamble to the diesel regulations, "[a]pproval markings to identify equipment appropriate for use in mining have been used for more than 85 years, and are routinely relied upon by users of mining equipment as well as state and federal inspection authorities." 61 Fed. Reg. 55412, 55422 (Oct. 25, 1996).[2]

The approval process that permits a diesel engine to be used in an underground coal mine is set forth in 30 C.F.R. Part 7. Subpart A explains the general procedures that apply in obtaining approval, not only for diesel engines, but for numerous other products that are used in underground mines. The only applicant recognized in the approval process is "[a]n individual or organization that manufactures or controls the assembly of a product . . . ." 30 C.F.R. § 7.2. The regulations go on to state that each application must contain "[t]he documentation specified in the appropriate subpart of this part." 30 C.F.R. § 7.3(c)(2).[3] The requirements for diesel engines are located at subpart E, 30 C.F.R. §§ 7.81-7.92, and reference to that section reveals extensive "performance and exhaust emission requirements." 30 C.F.R. § 7.81. Applicants are required to perform tests on the diesel engines and it takes several pages of regulations (which include diagrams and mathematical formulas) to describe how those tests must be carried out and what kind of testing equipment must be used. *See* 30 C.F.R. §§ 7.86-7.89. As part of the approval process MSHA also requires a "certification by the applicant" that the product conforms with

[2] Approval markings are required for a variety of equipment used in mines including: brattice cloth and ventilation tubing, 30 C.F.R. § 7.29; multiple-shot blasting units, 30 C.F.R. § 7.69; electric motor assemblies, 30 C.F.R. § 7.309; and electric cables, signaling cables, and splices, 30 C.F.R. § 7.409.

[3] It is undisputed that American does not have access to the approval documentation submitted by Isuzu on which the MSHA approval was based. 23 FMSHRC at 508.

design requirements[4] and that the applicant will perform the required quality assurance functions. 30 C.F.R. § 7.3(f).

That it is only the applicant who is authorized to produce approval markings finds further support in the warning that "[a]n applicant shall not advertise or otherwise represent a product as approved until MSHA has issued the applicant an approval." 30 C.F.R. § 7.5(a). An approval is defined as "[a] document issued by MSHA which states that a product has met the requirements of this part and which authorizes an approval marking identifying the product as approved." 30 C.F.R. § 7.2. Further support for the proposition that only the manufacturer is entitled to produce the approval marking is found at 30 C.F.R. § 7.6(c), which provides: "Applicants shall maintain records of the initial sale of each unit having an approval marking." Obviously, this regulation could not be carried out if entities other than the applicant produced approval markings. In addition, MSHA takes steps to protect the integrity of approval markers even after the approval is issued. Approved products are subject to periodic audits and the approval holder must, at MSHA's request, make the product available to the agency at no charge to enable it to carry out those audits. *See* 30 C.F.R. § 7.8(a)-(b). In sum, the document that entitles an approval marker to be placed on a product is issued by MSHA to the applicant and, under the regulations, applicants are limited to the manufacturer. There is no indication that the end-user of the product is authorized to produce an approval marking.[5]

The Secretary's determination that Isuzu, not American, must supply the approval marking required under section. § 7.90 is amply supported by the regulations governing her approval process. Indeed, it is evident that permitting any entity other than the manufacturer to tag equipment as approved would compromise the integrity of the approval process, not only for diesel engines, but for the many other kinds of equipment that require such designation.

Contending that "the meaning of an explicit term is not at issue," slip op. at 15, my dissenting colleague proceeds to render the term "approval marker " meaningless. Under Chairman Verheggen's analysis, the regulation's failure to specify the producer of an approval marker requires the Secretary to accept any label, affixed to an engine by any person, so long as

---

[4] As the judge concluded, "[e]ven though American Coal could determine that engines of that model had been approved, it could not determine whether its engines had been manufactured according to the design and specifications upon which the approval was obtained. Consequently, it could not determine whether its engines had, in fact, been approved . . . ." 23 FMSHRC at 511. American does not dispute this finding in its brief.

[5] As an Isuzu official acknowledged, engines with the same model number are not necessarily identical, because over time changes can be made in the manufacture of a certain model engine, including changes in the parts used, the settings, or the engine configuration. Biron Decl. at 3. Thus, the fact that American could ascertain from MSHA records that MSHA had approved Isuzu engines with the same model number as engines owned by American could not serve as a basis for American to determine that its particular engines had been approved.

the label is legible, permanent and contains the information described in section 7.90. Under this view, the phrase does not denote an engine's conformity with MSHA's safety standards and the approval marker itself would be no more significant than a decorative sticker.

For the foregoing reasons, I vote to affirm the judge's decision.[6]

_____
Mary Lu Jordan, Commissioner

[6] I agree with Commission Beatty's view, slip op. at 13 & n.6, that *Pennsylvania Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), is inapplicable to the disposition of this case, because here a majority of the Commission has voted to affirm the judge.

Commissioner Beatty, affirming:

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).

Section 7.90 provides that "Each approved diesel engine shall be identified by a legible and permanent approval marking."[1] As American notes, the clear wording of section 7.90 contains no requirement that the tag be issued by the manufacturer. A. Br. at 3. American is correct that, on its face, the regulation is silent as to the source of the approval tag. However, neither does the regulation clearly provide that the approval tag can be fabricated by the engine's owner or any other entity. Therefore, the regulation's language is not plain but rather ambiguous on this issue.[2] I turn next to the question of whether the Secretary's interpretation is reasonable.

---

[1] The judge in the instant proceeding concluded that the language of the regulation was ambiguous (23 FMSHRC 505, 509-11 (May 2001) (ALJ)), while the judge in *Freeman United Coal Mining Company* concluded that the language was clear. 22 FMSHRC 1345, 1347 (Nov. 2000) (ALJ). Given these inapposite readings of section 7.90, it is reasonable to conclude that the regulation is ambiguous. *See Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192-193 & n. 7 (Mar. 1998) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.") (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02 at 6 (5th ed. 1992)).

[2] Chairman Verheggen distinguishes "regulatory silence and regulatory ambiguity." Slip op. at 15. However, Commission cases have not drawn such a distinction in regulatory contexts similar to the one at issue. *See Rock of Ages Corp.*, 20 FMSHRC 106, 117 (Feb. 1998), *rev'd in part on other grounds*, 170 F.3d 148, 158-59 (2d Cir. 1999) (regulation is either silent or ambiguous on the issue of what may trigger a post-blast examination for misfires); *Steele Branch*

On this point, it is evident from reading section 7.90 in the context of other related regulatory requirements and the regulatory preamble relating to 30 C.F.R. § 7.6 that the Secretary's position is reasonable. *See also Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260 (Mar. 1988) (separate provisions in the Mine Act must be read together).

Subpart A of Part 7, which specifies the general procedure for testing and approving products used in underground mining, provides that only the manufacturer can submit an application for MSHA's approval. Thus, 30 C.F.R. § 7.2 defines "applicant" as "[a]n individual or organization that manufactures or controls the assembly of a product and applies to MSHA for approval of that product." The same section defines "approval" as "[a] document issued by MSHA . . . which authorizes an approval marking identifying the product as approved." Further, only applicants receive the equipment approval from MSHA. *See* 30 C.F.R. § 7.5(a) ("An applicant shall not advertise . . . a product as approved until MSHA has issued the applicant an approval."). Subpart A Part 7 regulations further specify post-approval procedures, including record keeping, quality assurance in the manufacturing process, and audits (30 C.F.R. §§ 7.6, 7.7, and 7.8, respectively) that are the responsibility of the applicant or approval holder. In short, these regulations present an integrated approach to the equipment approval process that impose burdens and continuing responsibilities on the manufacturer.

The rules in Subpart A of Part 7, which apply to underground mines generally, were issued prior to the 1996 issuance of the rules governing MSHA approval of diesel engines for use in underground coal mines. Significantly, 30 C.F.R. § 7.6(a) (1996), provides: "Each approved product shall have an approval marking." The preamble to the publication of the final rule explained the procedures for tagging approved products then in force:

> Once MSHA has approved a product, the *manufacturer* is authorized to place an approval marking on the product that identifies it as approved for use in underground mines. Use of the MSHA marking obligates the *manufacturer* to maintain the quality of the product. The MSHA marking indicates to the mining community that the product has been manufactured according to the drawings and specifications upon which the approval was based.

Mining, 15 FMSHRC 597, 601-02 (Apr. 1993) (operator must file an accident report with MSHA within a reasonable time when the regulation is silent as to the period of time required for compliance). *See also Akzo Nobel Salt, Inc.*, 21 FMSHRC 846, 865 (Aug. 1999) (Comm. Verheggen, dissenting) (regulation is silent as to the issue presented and thus "inherently ambiguous"), *rev'd*, 212 F.3d 1301, 1303 (D.C. Cir. 2000). *Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992), cited by my colleague (slip op. at 15), is readily distinguishable from the instant proceeding in that *Drummond* involved the imposition of penalties for Mine Act violations greater than those permitted in the Secretary's regulations through use of an administratively issued "Program Policy Letter."

53 Fed. Reg. 23486 (June 22, 1988) (emphasis added). *See, e.g.,* 30 C.F.R. §§ 19.12, 20.13, and 23.12. The issuance of the new Part 7 did not result in any material change to the approval marking process but established a single provision, section 7.6, that had general application to products that had to be approved for use in underground mines.[3] 53 Fed. Reg. at 23486-87. Thus, the preamble to the final rule regarding approval marking identifies the manufacturer as the entity responsible for attaching the approval tag to the equipment, because only the manufacturer can ensure that a particular engine is manufactured in accordance with the model design specifications submitted to MSHA for approval. The provisions of Subpart A are applicable to the approval and testing of diesel engines for use in underground coal mines. *See* 30 C.F.R. § 7.81.

In addition to the general provisions of Part 7, Subpart E of Part 7 specifically addresses the technical requirements, approval, and testing of diesel engines used in underground coal mines. As part of the application process set forth in Subpart E, the manufacturer must submit a large amount of technical information, including drawings and design specifications. *See* 30 C.F.R. § 7.83. Regulations specifying the technical requirements and testing for diesel engines are detailed and complex. *See* 30 C.F.R. §§ 7.84-7.89. This information is the basis for MSHA approval of the equipment for use in underground mining. 61 Fed. Reg. 55412, 55419 (Oct. 25, 1996). Further, the Secretary noted in the preamble to the final rules regarding approval of diesel equipment in underground coal mines: "Approved diesel engines must be manufactured in accordance with the specifications contained in the approval . . . ." *Id.* Finally, section 7.90(a)-(f) specifies information to be included on the approval marking that the manufacturer is in the best position to provide.

It is apparent from reading Subparts A and E of Part 7 and their preambles that the drafters of the regulations clearly intended that the manufacturer of approved equipment be the source of the approval tag. The manufacturer is the source of the information that is the basis for the approval. The manufacturer is also responsible for making the equipment in conformity with the design specifications that are the basis for MSHA approval. Finally, there are post-approval responsibilities including quality control, spot testing, and maintaining records of sales of approved equipment, that only the equipment manufacturer can perform. Under the regulations at issue, every essential aspect of ensuring that diesel equipment complies with Part 7 regulations is borne by the manufacturer. Thus, the placement of a tag on approved equipment is the final step in the approval process that, from a standpoint of logic as well as from a concern of miner safety, must be borne by the manufacturer. Therefore, under settled principles of regulatory construction, deference should be given to the Secretary's reasonable interpretation that the approval marking must be provided by the manufacturer of approved equipment.[4] *See, e.g.*, *Rock*

---

[3] In addition, the new Part 7 allowed product testing by manufacturers, or third party laboratories, instead of MSHA. 53 Fed. Reg. at 23487.

[4] Chairman Verheggen's plain meaning approach in applying the regulation leads to an absurd result and cannot stand under established principles of statutory and regulatory

of Ages Corp., 20 FMSHRC 106, 117 (Feb. 1998) (Commission deferred to Secretary's reasonable interpretation where the pertinent regulation was either "silent or ambiguous"), *aff'd in pertinent part*, 170 F.3d 148 (2d Cir. 1999); *see also Morton Int'l, Inc.*, 18 FMSHRC 533, 537-38 (Apr. 1996) (Secretary's interpretation of regulation not upheld where inconsistent with regulatory history and not in harmony with other regulations).[5]

Notwithstanding the foregoing, American argues that, under its reading of section 7.90, any equipment user can place a tag on approved diesel equipment. American and my dissenting colleague would carve out this function among all others assigned to manufacturers in Part 7. However, this reading would lead to an illogical result, would be inconsistent with other applicable rules in Part 7, and would defeat the policies behind the promulgation of the Part 7 regulations. Indeed, under this reading of section 7.90, the protections of miner health and safety would largely be eviscerated. This is so because, as the judge noted, "[t]he operator cannot determine that a particular engine is covered by an MSHA approval because it has no way of determining whether the engine was manufactured according to the design drawings and specifications upon which the MSHA approval was based." 23 FMSHRC at 511. Only the manufacturer is privy to the information that is the basis for MSHA approval. Without access to the information that is the basis for the approval, an operator would be guessing as to whether his equipment is within the class of equipment approved. Such a reading of section 7.90 would thwart the purpose of providing for equipment approvals and undermine the safety objectives of the Mine Act and should be avoided. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994).

---

construction. *See, e.g., Rock of Ages Corp.*, 20 FMSHRC at 111. Here, the mine operator placed an approval marking on the equipment, notwithstanding that it did not know with certainty whether the engines at issue had been approved. 23 FMSHRC at 508. Nevertheless, my colleague believes that as long all of the required lines are filled in on the approval marker, there is no violation, regardless of whether the person entering the information had access to the records necessary to supply accurate information. Slip op. at 16. Under the approach suggested by the dissent, MSHA inspectors would thus have no confidence in the information contained on the approval markers, and would have to conduct an independent search of records to verify that the operator's equipment was in fact approved. The absurdity of such a scheme speaks for itself.

[5] *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982), cited by the dissent (slip op. at 15) in support of his position, addressed the application of an electrical equipment regulation to hazards resulting from mechanical motion. *Id.* at 1190-92. The court concluded that the primary intent of the regulation was to protect miners from electrical shock, rather than machinery motion. *Id.* at 1192-93. Contrary to the decision in *Phelps Dodge*, it is readily apparent from the regulatory history and context in the instant case that the Secretary intended equipment manufacturers to supply approval tags. In this regard, I find the court's decision in *Freeman United Coal Mining* Co. *v. FMSHRC*, 108 F.3d 358 (D.C. Cir. 1997), more instructive to the issue of regulatory silence. The court noted, "'specific regulations cannot begin to cover all of the infinite variety of . . . conditions which employees must face' . . . ." *Id.* at 362 (citations omitted).

Further, allowing any entity other than the manufacturer to tag engines as approved compromises the integrity of the approval process. As noted above, only the manufacturer can attach an approval marking on an engine because it can do so with the certainty that the engine conforms to the specifications submitted to MSHA. The manufacturer's approval marking is an integral part of the approval process. MSHA must be able to depend on the accuracy and authenticity of the approval tag. S. Resp. to Mot for Sum. Dec., Att. 5 at 2-3 (Decl. of Terry Bentley, Deputy Chief, Coal Mine Safety and Health). The tag includes such critical information as the ventilation rate that must be maintained in the mine to dissipate engine emissions. 30 C.F.R. § 7.90(a). Once the integrity of the approval tag comes into question, an MSHA inspector cannot accurately determine that the engine meets the requirements of Part 7, and the purpose of approval tags is largely defeated.

Finally, American objects to the Secretary's interpretation of the regulation because Isuzu provided tags that were flimsy or demanded excessive consideration for them. MSHA too was concerned about the poor quality of the approval markings, and that was addressed in the PIL, which specified how mine operators could preserve the original tags pending receipt of new ones. With regard to the cost of the approval tag, it is worth noting that the responsibilities related to obtaining MSHA approval of diesel equipment are extensive (*see* Biron Decl. at 1-2), and Isuzu undoubtedly incurred costs during the approval process that it passed on to its customers. The record contains no evidence on the extent of those costs. American, on the other hand, which had not borne any of the responsibilities or costs of the approval process, sought to enjoy the benefits of owning MSHA-approved equipment at no cost by fabricating its own approval tags. In short, there is no record support for American's excessive cost argument.

While there is much that appeals to me in Commissioner Jordan's analysis, I simply cannot agree that the term "approval marking" as used in the regulations at issue plainly means a marking that only the manufacturer can provide, especially given the ALJ's finding of a different plain meaning in *Freeman United*. As for the dissent's commentary invoking *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) ("*Penelec*"), in this situation, the Chairman clearly misstates applicable Commission law. *See* slip op. at 17 & n.1. *Penelec* only applies when Commissioners are equally split on whether to reverse or affirm the decision of the ALJ at issue. In such an instance, the ALJ's decision stands as if affirmed. *Penelec*, 12 FMSHRC at 1563-65. By any count, in this case two Commissioners have voted to affirm the judge, while only one has voted to reverse. *Penelec* is thus entirely immaterial to the disposition of this case.[6]

---

[6] The dissent has clearly confused the split in rationales among the majority to affirm the judge with a split in votes on the result of the case. These are two entirely separate issues, with plainly different ramifications. The Secretary does not enforce Commissioner rationales against operators; she enforces her regulations, and her reading of the one at issue here has been upheld by a majority of the Commission. Until such time as it is vacated by a court, that reading stands, the dissent's view of the force of the separate opinions notwithstanding.

For the foregoing reasons, I vote to affirm the judge's decision that American violated sections 75.1990(a)(1) and 7.90 when it fabricated the approval tags for its diesel engines.

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

In this matter, the regulation at issue, 30 C.F.R. § 7.90, does not on its face require the use of approval markings for diesel engine supplied by the engine manufacturer. The judge opined that the "regulation's silence creates ambiguity as to permissible sources for the approval marking" at issue. 23 FMSHRC 505, 511 (May 2001) (ALJ). He then proceeded to defer to the Secretary's "interpretation" of the purported ambiguity. *Id*. at 511-12. The judge made an analytical leap here, but fell far short of bridging the chasm between the regulatory silence and the Secretary's attempt to fill that silence. I disagree with his decision as a matter of law, and thus dissent from my colleagues' separate opinions affirming the judge's decision in result.

The judge's analytical error is in equating silence with ambiguity. This conclusion is directly at odds with a well-established holding of the Ninth Circuit in which that court stated: "'If a violation of a regulation subjects private parties to . . . civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.'" *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (citations omitted). Indeed, section 7.90 simply requires that "[e]ach approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine." 30 C.F.R. § 7.90 (in relevant part). The regulation does not include the phrase "approval marking *provided by the manufacturer*."

The distinction the judge misses in his decision is between regulatory ambiguity and regulatory silence. Clearly, the Secretary would be well within her authority to require that under the "legibility" provision of section 7.90, for example, approval markings be in English and in type of a certain size. Insofar as any of the explicit terms of the regulation would be susceptible to more than one relevant meaning, the regulation would be ambiguous and we would then turn to an analysis of whether the Secretary's interpretation of the ambiguity is reasonable. But here, the meaning of an explicit term is not at issue. Instead, the Secretary is attempting to graft onto section 7.90 a new substantive requirement that imposes new obligations that significantly affect private interests. *See Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992) (setting forth discussion between substantive rules, which require notice-and-comment rulemaking, and procedural rules, which do not).

The situation here is similar to a regulatory silence we faced in *Contractor's Sand and Gravel, Inc. v. FMSHRC*, where the Secretary attempted "grafting onto the plain language of a regulation a [requirement] neither stated nor implied in that regulation." 199 F.3d 1335, 1342 (D.C. Cir. 2000). At issue in *Contractor's* was whether the Secretary's attempt at enforcing her grafted rule was substantially justified under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1). Writing for the court, Judge Sentelle left no doubt that the Secretary's approach was ill-advised: "It is not substantially justifiable for an agency to persistently prosecute citizens for violating a regulation that does not exist." 199 F.3d at 1341. Instead, Judge Sentelle suggested that "it [was] time for the Secretary to repair to rulemaking, not to bring one more unsupportable citation." *Id*. at 1342.

As I stated in *Freeman United*:

> The Secretary's requirement that the manufacturer must supply [the] markings [at issue here] is "a regulation that does not exist." [*Contractors*, 199 F.3d at 1342.] And even if the Secretary wanted it to exist, if she believes such a requirement is needed, she must initiate appropriate rulemaking to achieve this goal.

Freeman United Coal Mining Co., 24 FMSHRC ___, slip op at 15, No. LAKE 2000-102-R (June 24, 2002).

As I point out in my opinion in *Freeman*, my colleagues find serious fault with my approach. Commissioner Jordan claims that I would "render the term 'approval marker' meaningless" because I would require "the Secretary to accept any label, affixed to an engine by any person, so long as the label is legible, permanent and contains the information described in Section 7.90." Slip op. at 7-8. My colleague's conclusion that the regulation would thus be meaningless simply does not follow from her argument. Any such label, regardless of its source, would have to comply with the clear requirements of section 7.90, i.e., that the approval marking be legible and permanent and contain the information set forth in the regulation. That Commissioner Jordan would view even a marking that meets these requirements as a "decorative sticker" (slip op. at 8) simply because of who made the sticker reveals an astonishing exaltation of form over substance. So long as an approval marking meets the requirements of section 7.90, it matters not from whence the marking comes under the clear terms of the regulation.

Commissioner Beatty finds that under my reading of the regulation, "the protections of miner health and safety would largely be eviscerated" because mine operators would not be able to "'determine that a particular engine is covered by an MSHA approval.'" Slip op. at 12 (quoting 23 FMSHRC at 511). I have two problems with my colleague's argument. First, to paraphrase the court in *Contractors*, mere invocation of the "expansive theory [of] the commendable goal of promulgating safety" is not sufficient to permit the Secretary "to prosecute activity which violates no existing rule." 199 F.3d at 1342. Instead, it is incumbent upon the Secretary to protect the health and safety of miners by instituting a rulemaking to clarify her regulation, not "bring one more unsupportable citation." *Id.*

Secondly, my colleague is apparently concerned that some operators could produce approval markings that are incorrect. That would indeed be a problem, and would certainly give rise to violations of section 7.90. *But that is not the case here.* As the Secretary's charges against American state, the company had on the cited equipment "'legible and permanent approval marking[s] as required by [section] 7.90.'" 23 FMSHRC at 507. The *sole* basis for the citations at issue was that the approval markings "had not been supplied by the engine manufacturer." *Id*. *Otherwise, the markings fully complied with section 7.90*. This is not a case involving approval markings that failed to meet *any* explicit requirement of section 7.90. I thus find my colleague's concerns misplaced.

Finally, I note that although my colleagues affirm the judge here, their reasons for doing so are diametrically at odds. Commissioner Beatty finds section 7.90 ambiguous and affirms the judge's decision to defer to the Secretary's interpretation of the regulation. Commissioner Jordan, on the other hand, finds section 7.90 plain and affirms the judge in result. The effect of this split in rationales is to allow the judge's decision to stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). However, there is no *Commission* rationale. The rationales on which my colleagues base their separate opinions are non-binding and non-authoritative, and are thus dicta.[1] In other words, the result they reach has no basis – neither plain meaning nor deference – that will bind future Commissioners under the principle of stare decisis. I find this unfortunate in light of the congressional charge to us to "develop a uniform and comprehensive interpretation of the law . . . [and to] provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law." *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res.*, 95th Cong. 1 (1978).

Accordingly, I would reverse the judge and vacate the challenged citations.

Theodore F. Verheggen, Chairman

[1] My colleagues' opinions are dicta in that they are "unnecessary to the [result of the] decision in the case and therefore not precedential." *Black's Law Dictionary* 1100 (7th ed. 1999) (definition of *obiter dictum*).

Distribution

Michael O. McKown, Esq.
The American Coal Company
29325 Chagrin Boulevard, Suite 300
Pepper Pike, OH 44122

Tina Peruzzi, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Administrative Law Judge Michael E. Zielinski
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041