CORRECTED VERSION

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 24, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 2000-102-R through LAKE 2000-105-R
FREEMAN UNITED COAL MINING COMPANY	:	

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

DECISION

BY: Jordan and Beatty, Commissioners

These are consolidated contest proceedings arising from citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Freeman United Coal Mining Company ("Freeman") pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). The citations alleged violations of 30 C.F.R. § 75.1909(a)(1).[2] Freeman and the Secretary of Labor each moved for summary decision,

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[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:

and Administrative Law Judge Gary Melick found in Freeman's favor, vacating the citations. 22 FMSHRC 1345 (Nov. 2000) (ALJ). We granted the Secretary's petition for discretionary review challenging the judge's decision.

I.

Factual and Procedural Background[3]

Freeman uses diesel-powered personnel carriers at its underground coal mine. 22 FMSHRC at 1346. These proceedings concern citations MSHA issued to Freeman because the approval markings on the diesel engines were not supplied by the manufacturer.

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.[4] 61 Fed. Reg. 55412. Two years later, in a memorandum dated October 8, 1998, American Isuzu Motors, Inc. ("Isuzu") notified operators of underground coal mines who owned non-permissible diesel engines, previously certified for use in noncoal mines, of the need to obtain approval of the engines under the regulations in Part 7. S. Resp. to Mot. for Sum. Dec., Attach. B. Each of Freeman's diesel engines at issue here had been

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(a) Ventilation rate.
(b) Rated power.
(c) Rated speed.
(d) High idle.
(e) Maximum altitude before deration.
(f) Engine model number.

[3] There were no stipulations in this proceeding, and the judge gave only a very brief recitation of the facts in the case. Accordingly, we have relied on other undisputed facts alleged by Freeman and the Secretary.

[4] 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 coal mines, is applicable to diesel engines. *See* 30 C.F.R. § 7.81.

approved under 30 C.F.R. Part 32,[5] and approval plates were attached to the engines. F. Mot. for Sum. Dec., Affidavit of Thomas Austin, Freeman Director of Safety ("Austin Aff.") at 2. The Isuzu memorandum stated that customers who owned Isuzu engines with "obsolete Part 32 certifications" had an opportunity to "upgrade" the engines in order to qualify for Part 7 approvals. S. Resp. to Mot. for Sum. Dec., Attach. B. In addition to requesting information about each engine, such as model and serial number, the memorandum noted that as part of the re-certification procedure, the fuel injection pump might require re-calibration and the engine's fuel injection timing might have to be reset. *Id.* Isuzu supplied a form on which an operator could supply the engine-specific information that Isuzu needed in order to issue the "MSHA mine approval label." S. Resp. to Mot. for Sum. Dec., Attach. C.

Isuzu sought to charge Freeman $450 per tag for each engine, which would have cost Freeman a total of about $27,000 for its fleet of carriers. F. Mot. for Sum. Dec., Austin Aff. at 2. To avoid the expense of purchasing individual tags from Isuzu and to make a tag that was more durable than the one Isuzu offered, Freeman began fabricating its own approval tags during October and November 1999. F. Resp. Br. at 4-5.

In December 1999, counsel for Freeman asked MSHA whether Freeman could produce and install plates that contained information relating to approval of diesel engines under Part 7 by duplicating the information from a tag supplied by Isuzu for a similar engine. *See* S. Resp. to Mot. for Sum. Dec., Attach. A. In a letter dated December 13, 1999, MSHA Administrator for Coal Mine Safety and Health, Robert Elam, responded to Freeman's inquiry. *Id.* Elam explained that the Part 7 requirements applied to the approval holder, which in most cases is the manufacturer of the product and that the approval is issued based on MSHA's acceptance of testing, specifications and drawings submitted by the holder. *Id.* He noted that the approval marking tells the user that the engine meets the technical requirements, and that "[o]nly the approval holder can do this." *Id.* Elam further explained that this system of marking established a mechanism by which products could be traced in the event that defects were discovered. *Id.* Finally, Elam stated that MSHA was addressing the legibility and permanence of the approval tags issued by Isuzu and would require reissuance of tags that met those requirements. *Id.*

On April 1, 2000, MSHA issued Procedure Instruction Letter (PIL) No. 100-V-2 to address mine operator complaints about inadequate diesel engine approval markings that were being supplied by various engine manufacturers. F. Mot. for Sum. Dec., Attach. 3. The PIL stated: "The approval marking is supplied by the engine manufacturer." *Id.* 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. *Id.* MSHA would then

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[5] Prior to the publication of the rules in 1996, Part 32 addressed the approval of mobile diesel-powered equipment in noncoal mines. 30 C.F.R. Part 32 (1996). *See* 61 Fed. Reg. at 55415-16. With the issuance of the new Parts 7 and 75 rules, Part 32 was revoked. *Id.* at 55416.

require the manufacturer to develop an improved approval marking that is legible and permanent as required by section 7.90. *Id.*

On June 22, 2000, MSHA Inspector Larry Rinehart issued citations alleging that four diesel engines at the mine with tags fabricated by Freeman were not being maintained in accordance with 30 C.F.R. Part 7 because the approval markings required by 30 C.F.R. § 7.90 had not been supplied by the engine manufacturer. F. Mot. for Sum. Dec., Austin Aff. at 2; Citation No. 7584882. Freeman filed notices of contest, and the abatement period was extended while the citations were being litigated. Following its notice of contest, Freeman filed a motion for summary decision with the judge. The Secretary responded and filed her cross-motion for summary decision. Oral argument was held before the judge.

The judge concluded that the plain language of section 7.90 did not preclude the use on the cited diesel engines of approval markings supplied by Freeman, and he vacated the citations. 22 FMSHRC at 1347. He rejected the Secretary's argument that the regulation was ambiguous and that he should therefore defer to her interpretation. *Id.* The judge further noted that although regulations that address health and safety should be interpreted broadly, that rule of construction should not be used to rewrite "a clearly worded regulation whose plain meaning cannot reasonably be disputed." *Id.*

II.

Disposition

The only issue in this case, as in the companion case, *The American Coal Company*, 24 FMSHRC ___, No. LAKE 2000-111-R (June 26, 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 reverse the judge and remand the case for penalty assessment. The separate opinions of the Commissioners follow.[6]

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

Commissioner Jordan, reversing and remanding:

This case arose when Freeman 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 Freeman instead of the engines' manufacturer, American Isuzu Motors, Inc. ("Isuzu").

Freeman contends that section 7.90's failure to specifically identify the manufacturer as the source of the approval marking entitles Freeman to affix the requisite information to the engine. 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. The judge focused exclusively on "the plain language" of section 7.90 and concluded that "there is nothing to preclude the use on the cited diesel engines of approval markings supplied by Freeman United itself." 22 FMSHRC 1345, 1347 (Nov. 2000) (ALJ). Because I disagree with the judge's conclusion regarding the "plain language" of section 7.90, I join in reversing his decision to vacate the challenged citations, and remand for an assessment of an appropriate penalty.

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 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

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[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:
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> (a) Ventilation rate.
> (b) Rated power.
> (c) Rated speed.
> (d) High idle.
> (e) Maximum altitude before deration.
> (f) Engine model number.

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."[2] 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).[3]

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). 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 (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 design requirements 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

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[2] In fact Freeman admits that "only Isuzu [the manufacturer] knew with absolute first-hand certainty whether the engines at issue were approved." F. Resp. Br. at 10 n.7.

[3] 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.

C.F.R. § 7.2. Further support for the proposition that only the manufacturer is entitled to produce the approval marking is found at section 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 then, 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.

The Secretary's determination that Isuzu, not Freeman, 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 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 would reverse the judge's decision and remand for penalty assessment.[4]

Mary Lu Jordan, Commissioner

[4] I agree with Commission Beatty's view, slip op. at 13 & n.9, 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 reverse the judge.

Commissioner Beatty, reversing and remanding:

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] 30 C.F.R. § 7.90. As Freeman notes, the clear wording of section 7.90 contains no requirement that the tag be issued by the manufacturer. F. Resp. Br. at 10. Freeman 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

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[1] The judge in the instant proceeding concluded that the language of the regulation was plain (22 FMSHRC 1345,1347 (Nov. 2001) (ALJ)), while the judge in *American Coal Co.* concluded that the language was ambiguous. 23 FMSHRC 505, 509-11 (May 2001) (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 ambiguity and regulatory silence." Slip op. at 14-15. 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*

interpretation is reasonable. 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."). Part 7 subpart A 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 were issued well prior to the 1996 issuance of the rules governing MSHA approval of diesel engines. Significantly, 30 C.F.R. § 7.6(a), provides: "Each approved product shall have an approval marking." The preamble to the publication of the final rule explained in greater detail the rationale for the rule:

> 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). 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.[3] 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. In short, under the regulations at issue, every essential aspect of ensuring that diesel equipment complies with Part 7 regulations is 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*

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[3] Once the integrity of the approval tag comes into question, then an MSHA inspector cannot quickly and accurately determine by looking at the tag that the engine meets the requirements of Part 7, and the purpose of engine approval tags is largely defeated. In a letter to the Commission, dated May 24, 2001, counsel for Freeman asserts that it knew that its engines had been approved because Isuzu had proffered part 7 approval markings. However, Freeman's knowledge of MSHA approval does not necessarily lead to the conclusion that it had all the information needed for the approval tag under the regulations. *See* 30 C.F.R. § 7.90.

[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 construction. *See, e.g., Rock of Ages Corp.*, 20 FMSHRC at 111. Here, the mine operator placed

of Ages Corp., 20 FMSHRC at 117 (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).

Freeman objects to the Secretary's interpretation of the regulation because of the cost of the approval tags and because Isuzu provided tags that were not legible and would not stand up to daily use. F. Resp. Br. at 8. 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, 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. Freeman, 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 Freeman's excessive cost argument.[5]

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an approval marking on the equipment, notwithstanding that it did not know with certainty whether the engines at issue had been approved. F. Resp. Br. at 10 n.7. 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 15-16. 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] Chairman Verheggen equates the costs associated with the approval markings to the fines levied by MSHA in *Drummond*. Slip op. at 15. However, it is apparent that fines for Mine Act violations are provided for in the Act and further specified in the Secretary's regulations. Fees for approval markings provided by Isuzu to Freeman, on the other hand, were a matter of private contract. The Chairman's further suggests, *id.*, that the approval markings, because of problems with the permanency and legibility of the tags, did not further miner safety and health. However, MSHA was addressing those issues with Isuzu and accommodating those operators who were supplied approval markings that would not withstand daily use. Notwithstanding that, the dissent would solve the problem of resiliency of the approval tags by effectively undermining the approval process by allowing an operator with incomplete knowledge of the circumstances surrounding the approval to place an approval marking on an engine. *See id.* I find such a prospect much more inimical to miner health and safety.

Freeman further objects to having to pay for approval tags when it was unnecessary to make any changes to the engines to conform to Part 7 regulations. F. Resp. Br. at 4. However, Freeman's argument ignores the substance of the newly issued approval procedures which went into effect in 1996. Prior to 1996, there was no regulatory approval procedure for diesel engines used in underground coal mining. With the issuance of the new Part 7 regulations, all equipment manufacturers had to apply for MSHA approval based on engine performance and exhaust emission requirements. 30 C.F.R. § 7.81. As previously noted, the application requirements under the new Part 7 standards are extensive. Thus, without regard to whether Freeman is correct that no changes had to be made to any of its diesel engines to bring them into compliance with Part 7, it is apparent that there is a burden and cost to the equipment manufacturer in simply applying for approval under Part 7.

Moreover, the Secretary challenged the validity of Freeman's position that certifications under the old Part 32 regulations were effective under the new Part 7 regulations. Before the judge, Freeman asserted that "Part 32 approved engines are grandfathered." F. Mot. for Sum. Dec. at 5. The Secretary took issue with that statement.[6] S. Resp. to Mot. for Sum. Dec. at 9. Further, contrary to Freeman's assertion before the Commission (F. Resp. Br. at 3), it is not apparent that prior approval of the cited Isuzu engines under Part 32 meant that no changes to the engines were required for approval under the new Part 75. While the regulatory preamble does state that "existing part 32 engine approvals continue to be valid," Part 32 by its terms only applied to approvals for diesel equipment in *noncoal mines*. *See* 30 C.F.R. Part 32 (1996).[7] Finally, before the judge, the Secretary cited to a compliance guide that specified that equipment approved under Part 32 had to be approved under the new Part 7 if it was to be used in underground coal mining. S. Resp. to Mot. for Sum. Dec., Attach. E at 4-5 (Compliance Guide for MSHA's Regulations on Diesel-Powered Equipment Used in Underground Coal Mines, Oct. 1997). In short, Freeman's position that no action was required to bring its equipment into compliance with the new Part 7 appears to be, at best, disputed.[8]

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[6] At oral argument, the judge requested that the parties try and work out stipulations "with respect to whether these engines met the approval requirements." Oral Arg. Tr. 63. However, counsel were unable to do this. Letter to Judge Melick, dated Oct. 20, 2000. Therefore, whether the cited engines were in fact approved under Part 7 appears to be a disputed fact. *See* S. Resp to Mot. for Sum. Dec. at 8.

[7] In the final rule publication of Part 75, Part 32 was revoked because it was "outdated" and "obsolete," and manufacturers seeking Part 32 approvals were required to seek approval through the new Part 7, Subpart E, and Part 75. 61 Fed. Reg. at 55416.

[8] It is difficult to square Freeman's assertion that no action was required to bring its equipment into compliance with Part 7 (F. Resp. Br. at 3) with its further concession that only Isuzu could know with certainty that the engines were approved (F. Resp. Br. at 10 n.7). The scheme that Freeman and the dissent envision for operators (or anyone else) to attach approval markings, without full knowledge of the facts and circumstances surrounding the approval, poses

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 administrative law judge's finding of a different plain meaning. 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 (3d Cir. 1992) ("*Penelec*"), in this situation, the Chairman clearly misstates applicable Commission law. *See* slip op. at 16 & n.1. *Penelec* only applies when Commissioners are equally split on whether to reverse or affirm the decision of the administrative law judge at issue. In such an instance, the judge's decision stands as if affirmed. *Penelec*, 12 FMSHRC at 1563-65. By any count, in this case two Commissioners have voted to reverse the judge, while only one has voted to affirm. *Penelec* is thus entirely immaterial to the disposition of this case.[9]

For the foregoing reasons, I would reverse the judge's decision and remand for penalty assessment.

Robert H. Beatty, Jr., Commissioner

hazards to miners as obvious as the financial advantages to Freeman in end running the approval scheme in the regulations as applied by the Secretary.

[9] The dissent has clearly confused the split in rationales among the majority to reverse 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.

Chairman Verheggen, dissenting:

Silence in a regulation does not automatically give license to the Secretary to impose by fiat substantive requirements upon a party under the guise of "interpretation." This is precisely what the Secretary did here, and I find that in so doing, she stepped beyond the bounds of her authority. I find that the judge properly reached the conclusion that "there is nothing [in section 7.90] to preclude the use on the cited diesel engines of approval markings supplied by Freeman United itself," 22 FMSHRC 1345, 1347 (Nov. 2000) (ALJ), and I therefore dissent from the contrary result reached by my colleagues.

On one point, the parties and the judge all agreed. When the Secretary told Freeman United that it had to use approval markings supplied by the manufacturer of its diesel vehicles, she based her action on a regulation which clearly on its face requires no such thing. I agree. Section 7.90 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 Secretary, however, did not see this silence as any impediment to her action against Freeman United the result of which is the instant litigation.

In a holding that has stood the test of time, the Ninth Circuit 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). As in the *Phelps Dodge* case, here, section 7.90 "inadequately expresses an intention to reach the activities to which MSHA applied it," *id*., and therefore, the Secretary's enforcement action on review must fail.

The situation here is similar to a regulatory silence we faced in *Contractor's Sand & 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 1342. Instead, Judge Sentelle suggested that "it [was] time for the Secretary to repair to rulemaking, not to bring one more unsupportable citation." *Id*.

There is no question that section 7.90 is silent as to who provides Freeman United approval markings for its diesels. There is a distinction between such regulatory silence and regulatory ambiguity. There could be no serious dispute that the Secretary would be well within her authority to require that under the "legibility" requirement 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 are susceptible to more than one relevant meaning, the regulation is ambiguous

and we would then turn to an analysis of whether the Secretary's interpretation 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). Indeed, Freeman United has pointed out that "Isuzu sought to charge . . . $450 for each of these markings, a cost equivalent to almost 10% the price of a new engine." F. Resp. Br. at 4. The total cost to Freeman United was "$27,000 – plus the [cost] of additional replacement markings." *Id*.

The Secretary's requirement that the manufacturer must supply such markings is "a regulation that does not exist." 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.

I would hasten to add that, in light of the undisputed facts of this case, even if I were to reach whether it was appropriate to "accord special weight" to the Secretary's interpretation of section 7.90 as including a requirement that manufacturers supply the approval markings, *see Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979), my answer would be "no." The approval markings provided by Isuzu to Freeman United were neither "permanent" nor capable of being "securely attached" to the engines at issue (*see* F. Resp. Br. at 4 and 12-13), and thus did not comply with the regulation. The Secretary's enforcement action, and the interpretation on which the action was based, were clearly at odds with the regulatory text and, thus, unreasonable.

Both my colleagues raise a hue and cry over 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. 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 7) 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 my reading of the regulation "more inimical to miner health and safety" because it would allow "an operator with incomplete knowledge of the circumstances surrounding the approval process to place an approval marking on an engine." Slip op. at 11 n.5. 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 its 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 Freeman United state, the company had on the cited equipment "'legible and permanent approval marking[s] as required by [section] 7.90.'" *See* 22 FMSHRC at 1346 (quoting Citation Nos. 7584882, 7584883, 7584884, and 7584885). 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.

I note that although my colleagues reverse the judge here, their reasons for doing so are diametrically at odds. Commissioner Beatty finds section 7.90 ambiguous whereas Commissioner Jordan, finds it plain. The effect of this split decision is that the judge's decision is reversed under no rationale, and the case remanded simply for the assessment of a penalty. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). In other words, there is no *Commission* rationale. The split rationales on which my colleagues base their separate opinions are non-binding and non-authoritative, and are thus dicta.[1] 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).

[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*).

In this case, the Secretary's interpretation literally exalts a flimsy form over the substance of section 7.90. I reject the Secretary's approach, and therefore would affirm the judge.

Theodore F. Verheggen, Chairman

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