FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20006

April 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THUNDER BASIN COAL COMPANY	: : : : : : :	Docket Nos. WEST 94-148-R WEST 94-303

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

DECISION

BY: Jordan, Chairman; Doyle, Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (1994) ("Mine Act or Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Thunder Basin Coal Company ("Thunder Basin") alleging a violation of section 109(a) of the Act, 30 U.S.C. § 819(a), because Thunder Basin failed to post an order of temporary reinstatement on the mine bulletin board.[1] After receiving cross-motions for summary decision,

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[1] Section 109(a) provides:

> At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this [Act] to be given to an operator shall be delivered to the office of the affected mine,

Administrative Law Judge Arthur J. Amchan issued a Summary Decision in favor of Thunder Basin and vacated the subject citation. 16 FMSHRC 1142 (May 1994) (ALJ). For the reasons that follow, we affirm, in result, the judge's determination that section 109(a) of the Act was not violated.

I.

Factual and Procedural Background

On November 2, 1993, Judge Amchan issued an order of temporary reinstatement requiring Thunder Basin to temporarily reinstate three discharged miners at its Black Thunder Mine, located in Campbell County, Wyoming. On November 22, 1993, in response to a complaint written pursuant to section 103(g), 30 U.S.C. § 813(g), MSHA Inspector James Beam conducted an inspection of the mine to determine whether the November 2 temporary reinstatement order had been posted on the mine bulletin board. 16 FMSHRC at 1142-43. When he found that the order had not been posted, the inspector issued a citation alleging a violation of section 109(a) of the Act. *Id.* at 1143. Thunder Basin concedes that the order had not been posted but claims the Act does not require posting of such orders.

The judge determined that no violation occurred. He concluded that the language of section 109(a) is not clear on its face. *Id.* In analyzing the statutory language, the judge determined that the last sentence of section 109(a) must be read in context with the rest of the section: . . . "[h]ad Congress intended that all decisions . . . be posted, it would not have modified the second sentence . . . with the phrase 'required by law or regulation to be posted.'" *Id.* at 1143-44, *quoting* 30 U.S.C. § 819(a). The judge therefore concluded "that what must be posted under the last sentence of section 109(a) are documents, that are required to be posted pursuant to another statutory provision or by a regulation . . . ." *Id.* at 1144. The judge reasoned that the documents referred to in section 109(a) do not include temporary reinstatement orders from the Commission. *Id.*

The judge declined to accord deference to the Secretary's interpretation of section 109(a) that the requirement to post Commission decisions is implicit. *Id.* at 1146. He found no written agency policy or interpretation regarding posting of Commission decisions. *Id.* at 1145. Thus, he concluded, "[a] subjective understanding of what the statute requires, which is not obvious and has never been communicated to the public, is not an agency interpretation entitled to deference under *Chevron*." *Id.* at 1146, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). The judge also determined that, even if section 109(a)

> and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

30 U.S.C. § 819(a).

requires posting of Commission decisions, a temporary reinstatement order, which "is in the nature of an interim order" need not be posted. *Id.*

II.

Disposition

On review, the Secretary maintains that the second and third sentences of section 109(a) have separate and distinct meanings, and that the decisions of the Commission are implicitly included among the documents referred to in the third sentence of section 109(a). S. Br. at 5-6. The Secretary argues that his interpretation of section 109(a) is consistent with the language and purpose of the Act, and should be accorded deference. *Id.* at 4. The Secretary assigns error to the judge's determination that posting was not required because the subject temporary reinstatement order was only an "interim order," asserting that the subject order is a conclusive, substantive, appealable order. *Id.* at 12. Finally, the Secretary states that, unless section 109(a) is interpreted to include decisions issued by the Commission, the word "decision" in the third sentence is rendered meaningless. *Id.* at 5-6 n.1. Thunder Basin argues that the only orders, citations, notices or decisions that are required to be given to an operator under the Act are those issued by the Secretary. T.B. Br. at 7-8, 12.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. If a statue is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp, v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole,* 889 F. 2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart,* 486 U.S. at 291. (citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Coal Employment Project,* 889 F. 2d at 1131.[2]

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[2] If the statute is ambiguous or silent on a point in question, a second inquiry, a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of the statute is a reasonable one. *Coal Employment Project,* 889 F. 2d at 1131.

Section 109(a), together with the three other sub-sections[3] of section 109, entitled

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[3] Section 109(b) provides:

> The Secretary shall (1) cause a copy of any order, citation, notice, or decision required by this [Act] to be given to an operator to be mailed immediately to a representative of the miners in the affected coal or other mine, and (2) cause a copy thereof to be mailed to the public official or agency of the State charged with administering State laws, if any, relating to health or safety in such mine. Such notice, order, citation, or decision shall be available for public inspection.

30 U.S.C. § 819(b).

Section 109(c) provides:

> In order to insure prompt compliance with any notice, order, citation, or decision issued under this [Act], the authorized representative of the Secretary may deliver such notice, order, citation, or decision to an agent of the operator, and such agent shall immediately take appropriate measures to insure compliance with such notice, order, citation, or decision.

30 U.S.C. § 819(c).

Section 109(d) provides:

> Each operator of a coal or other mine subject to this [Act] shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine. Any revisions in such names or addresses shall be promptly filed with the Secretary. Each operator of a coal or other mine subject to this [Act] shall designate a responsible official at such mine as the principal officer in charge of health and safety at such mine, and such official shall receive a copy of any notice, order, citation, or decision issued under this [Act] affecting such mine. In any case where the mine is subject to the control of any person not directly involved in the daily operations of the coal or other mine, there shall be filed with the Secretary the name and address of such person and the name and address of a principal official of such person who shall have overall responsibility for the conduct of an effective health and safety program at any coal or other mine subject to the control of such person, and such official shall receive a copy of any notice, order, citation, or decision issued affecting any such mine. The mere designation of a health and safety official under

"Posting of Orders and Decisions," sets forth specific requirements as to where, how, and to whom documents are to be conveyed and how they are to be posted at mines. In section 109(a), Congress required operators to post "any order, citation, notice or decision required by this Act to be given to an operator." The question to be answered is whether Congress intended to include documents issued by the Commission when it referred to "order[s] . . . or decision[s] required by this Act to be given to an operator. " No provision in the Mine Act specifically requires Commission decisions or orders to be given to an operator. The orders, citations, notices and decisions issued by the Secretary, however, are subject to this explicit requirement. *See* sections 101(c), 104(a), (b), (d) and (e), 105(d) and 107(d) of the Mine Act, 30 U.S.C. §§ 811(c), 814(a), (b), (d) and (e), 815(d) and 817(d). This distinction in itself would appear to provide a sufficiently compelling indication that the decisions and orders referenced in section 109(a) were intended by Congress to include only those issued by the Secretary, and not the rulings issued by the independent adjudicative body Congress established in section 113 of the Act, 30 U.S.C. § 823.[4]

Any remaining doubt on this issue, however, is removed by reference to the service requirement contained in section 109(b). That provision states: "*The Secretary shall* (1) cause a copy of any order, citation, notice or decision required by this Act to be given to an operator to be mailed immediately to a representative of the miners in the affected coal or other mine, and (2) cause a copy thereof to be mailed to the public official or agency of the State charged with administering State laws, if any, relating to health or safety in such mine." (emphasis added).

The Secretary did not attempt to distinguish the application of section 109(a) from the application of section 109(b). If, as the Secretary urges, the phrase "any order, citation, notice or decision required by this Act to be given to an operator" includes orders and decisions issued by the Commission, not only would the operator be required to post those documents on the bulletin board, as required by the last sentence of section 109(a), but the Secretary would be required, in accordance with section 109(b), to "immediately" mail those same documents to the representative of the miners, and appropriate state officials.[5] That Congress did not intend such result is clear and the statute must be construed to effectuate that intent. The reference to decisions and orders in the last sentence of section 109(a) unambiguously includes only those

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> this subsection shall not be construed as making such official subject to any penalty under this [Act].

30 U.S.C. § 819(d).

[4] Contrary to the Secretary's assertion, decisions under the Mine Act are not limited to those issued by the Commission. In certain instances, the Secretary is required to issue decisions. 30 U.S.C. § 811(c).

[5] We are reminded of the maxim, "be careful what you wish for." During FY 1995, the Commission's Administrative Law Judges issued 4,837 final dispositions.

decisions and orders "*required* by this *Act* to be given to an operator." (emphasis added). The only provisions of the Act that require decisions and orders to be given to the operator pertain to the decisions and orders issued by the Secretary.[6] The second sentence of section 109(a), which refers to "orders, citations, notices and decisions," does not impose a posting requirement but specifies the *manner* in which posting is to be effectuated (i.e., "There shall be a bulletin board . . . located at a conspicuous place . . . protected against damage by weather . . .). *Id.* (emphasis added). Accordingly, we conclude that section 109(a) is clear on its face and does not require the posting of temporary reinstatement orders on mine bulletin boards.

[6] This is not to say that an operator will never be required to post a Commission temporary reinstatement order. As Thunder Basin points out in its brief, the Secretary can seek to incorporate the posting of the order as part of the relief to be granted under 30 U.S.C. § 815(c). T. B. Br. at 8-9 n.14.

III.

Conclusion

For the foregoing reasons, the judge's summary decision is affirmed in result.[7]

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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James C. Riley, Commissioner

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[7] In light of our conclusion that the statutory provision is clear, we do not reach the question of whether the Secretary's interpretation of section 109(a) of the Act is reasonable.

Commissioner Marks, dissenting:

The majority has concluded that the meaning of section 109(a) of the Act, 30 U.S.C. § 819(a) is clear and that the Secretary's interpretation is wrong. I disagree and therefore dissent.

I agree with the Secretary's view, that section 109(a) is ambiguous. I also agree with the Secretary's view, that the Commission should defer to the Secretary's interpretation if the Commission concludes that his interpretation is reasonable. Accordingly, for the reasons that follow, I conclude that section 109(a) requires the posting of Commission issued temporary reinstatement orders. However, for reasons to be discussed, I believe the Secretary's failure to provide Thunder Basin with sufficient notice of his interpretation requires that the citation be vacated.

<u>Section 109(a) is ambiguous</u>

In determining that no violation occurred, my colleagues conclude that section 109(a) is clear, and that it does not require posting of Commission temporary reinstatement orders. In so doing, they do not address the question of deference to the Secretary.

In parsing the terms of section 109(a), the Secretary contends that the second sentence reference to documents that are specifically "required by law or regulation to be posted," relates to: notices of proposed rulemaking under section 101(e) of the Act, 30 U.S.C. § 811(e); the designation of miners' representatives specified under 30 C.F.R. § 40.4 (1995); or petitions for modification filed pursuant to 30 C.F.R. § 44.9. S. Br. at 5. Whereas, sentence three refers to different documents, ie., the Act "explicitly requires that documents referred to[,] be posted if they are 'required by this Act to be given to the operator.'" *Id.* The Secretary suggest that this third sentence reference includes all citations and orders issued by the Secretary and given to the operator pursuant to 30 U.S.C. §§ 814(a), (b), (d), (e), and 817(a). Significantly, the Secretary also contends that, by implication, the provisions of the Act relating to the issuance of decisions by the Commission are also included, (30 U.S.C. §§ 815(c)(2) and (c)(3), 823(d)(1), 823(d)(2)(B), and (d)(2)(C), and 823(e)). *Id.*

After rejecting the Secretary's interpretation of section 109(a) the judge offered his own interpretation of that section and in doing so effectively provided no independent meaning or purpose to the third sentence. 16 FMSHRC at 1143-44; *see* S. Br. at 3, 6-7. He failed to distinguish the limitation contained in sentence two, requiring the posting of documents . . . *required by law or regulation to be posted*, from the condition set forth in sentence three, requiring the posting of documents . . . *required by this Act to be given to an operator*. In analyzing section 109(a) as a whole, he effectively *combined* the two sentences and determined that the third sentence is limited in the same way as the second sentence. "Thus, I conclude that what must be posted under the last sentence [third] of section 109(a) are documents, that are required to be posted pursuant to another statutory provision or by a regulation." 16 FMSHRC at 1144.

Contrary to the judge and my colleagues (*see* slip op. at 5-6) , *both parties* seem to agree that the second and third sentences have distinct and separate scopes. S. Br. at 3, 5-7; T.B. Br. at 11-12. However, the principle distinction between their respective positions is that the Secretary construes the third sentence, i.e., documents *required to be given to the operator,* to include, by implication, Commission decisions. Because the Act does not expressly provide that such decisions be given to the operator, Thunder Basin rejects the Secretary's interpretation and urges a strict construction of the terms in section 109(a).

In my opinion, the Secretary's interpretation is reasonable. It gives effect to each sentence in disputed paragraph (a), and is consistent with the overall purpose of section 109 to ensure that miners, as well as operators, are informed about the health and safety conditions of their work environment, and to ensure that the miners' participation in that process is facilitated by informing them of the rights and protections provided to them under the law. *See* S. Br. at 8; T.B. Br. at 12.

When distilled to its essence, Thunder Basin's assertions that the Secretary's interpretation is ambiguous and unreasonable fall into two arguments. First, Thunder Basin asserts that adoption of the Secretary's interpretation that Commission decisions are among the documents "required . . . to be given to an operator," would impose an affirmative duty upon the Commission to "give" and to "deliver" those documents, and that such duty is a usurpation of the Commission's power to fashion "appropriate relief." T.B. Br. at 8-9.

In my opinion, adoption of a construction of section 109(a) consistent with the Secretary's interpretation would in no way diminish or "usurp" the independence of the Commission or its judges. *Id.* at 8. In fact, all decisions and orders presently issued by the Commission and its judges are routinely "given" and "delivered" to the operator either directly, or to its legal representative. *See* 16 FMSHRC at 1144. This is the established practice of the Commission, notwithstanding the absence of express statutory authority, or the existence of a procedural rule requiring such practice.[8] Thus, one could conclude that the statutory authority for such practice is *implicit.*[9] Moreover, a recognition that such documents are to be routinely posted would not affect the content of the document, or in any way limit the Commission's authority under section 113, 30 U.S.C. § 823, to direct "other appropriate relief," including an order that a

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[8] The Commission's procedural rules do, however, contain specific service requirements regarding a judge's issuance of: an order on application for temporary reinstatement (Rule 45(e)); a subpoena (Rule 60(a)); and a summary disposition of proceedings (Rule 66(a)).

[9] Beyond the legal arguments asserted, it is inconceivable to not draw that implication. The Act is replete with narrowly drawn time frames for filing actions and appeals which could not be effected unless the Commission, like any other adjudicatory body in this country, promptly issued and conveyed its determinations to the affected parties.

notice be posted. *See* T.B. Br. at 8-9 n.14. It merely would ensure that whatever the judge or Commission decide, will be posted and made available to the miners.

Secondly, Thunder Basin argues that adoption of such an interpretation requiring the posting of the temporary reinstatement order would not satisfy the two objectives underlying the statutory posting requirements, which it asserts are to "notify miners . . . of proceedings . . . in which they have a right to intervene and participate; and . . . to provide immediate notice . . . of present mining conditions that may pose a risk of danger or harm through exposure." T.B. Br. at 12; *see also* S. Br. at 8. In asserting that the posting of the temporary reinstatement order is "unnecessary and superfluous" to satisfying the statutory objectives noted above, Thunder Basin argues that those objectives are secured "where there is a miners' representative, whose duty it is to provide miners with such notice." T.B. Br. at 13, 15.

Given Thunder Basin's unrelenting resistance to the miner representative rights mandated by the Act, its attempt to draw support for its position by describing the benefit of having a miners' representative is an astonishing display of cynicism. It also is unpersuasive. The argument makes no provision for miners who work in mines where there is no representative. Obviously, any "reasonable" statutory construction must apply to all miners. Furthermore, the posting of a temporary reinstatement order may also serve to alert miners to an existing safety or health risk. As we have observed over the years, the garden variety discharge occurs after a miner has reported the existence of an unsafe/unhealthy condition, or has refused to work in such conditions. Because of the brief statutory time requirements, temporary reinstatement orders ordinarily will be issued fairly close in time to the discharge. Thus, it is possible that at the time temporary reinstatement is ordered, the conditions giving rise to the discharge will have continued to exist and pose a risk to other miners. Moreover, there can be no question that the posting of such an order vividly demonstrates the reach of the law, and reaffirms to the miners the government's commitment to provide representation and relief to those who may have suffered retaliation or discrimination because they have engaged in a protected activity.

Thus, Thunder Basin's arguments fail to demonstrate that the Secretarial interpretation of section 109(a) is unreasonable, or inconsistent with Congressional intent.

<u>The Secretary's reasonable interpretation is entitled to deference</u>

In declining to accord deference to the Secretary's interpretation of section 109(a), the judge found that there was no written agency policy or interpretation regarding the posting of Commission decisions. Indeed he concluded that "there is no agency 'interpretation' to which deference must be paid." 16 FMSHRC at 1146. Thus, he concluded that a "subjective understanding of what the statute requires, which is not obvious and has never been communicated to the public, is not an agency interpretation entitled to deference under *Chevron*." *Id.* at 1146, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

Notwithstanding the record evidence indicating no prior enforcement of this interpretation, the Secretary contends that in citing Thunder Basin it was permissibly exercising its delegated rulemaking powers as sanctioned by the Supreme Court and therefore its interpretation is entitled to deference. S. Br. at 9-10, *citing Martin v. OSHRC,* 499 U.S. 144, 156-58 (1991) ("As we have indicated, the Secretary's interpretation is not undeserving of deference merely because the Secretary advances it for the first time in an administrative adjudication"). I find that the Secretary is correct in that position, and I therefore conclude that deference should not be withheld. Deference should be accorded to a reasonable Secretarial interpretation, i.e., "a permissible construction of the statute," even one the Commission might not choose.[10] *Chevron,* 467 U.S. at 843. "'When the Secretary and the Commission disagree on the interpretation of ambiguous provisions of the Mine Act, and both present plausible readings of the legislative text, [the] court owes deference to the Secretary's interpretation.'" *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.,* Nos. 95-1130 & 95-1212, slip op. at 7 (4th Cir. April 3, 1996), *quoting Secretary of Labor v. Cannelton Indus., Inc.,* 867 F.2d 1432, 1433 (D.C. Cir. 1989). Thus, my colleagues should have determined that the Secretary's interpretation is reasonable and entitled to deference.

Thunder Basin did not receive adequate notice of the Secretary's interpretation

Notwithstanding the deference that I accord to the Secretary's interpretation of section 109(a), the issue of whether the operator was accorded adequate notice remains. "[T]he decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice, to regulated parties." *Martin,* 499 U.S. at 158. In *Gates & Fox Co. v. OSHRC,* 790 F.2d 154 (D.C. Cir. 1986), the court, citing to no less than five other circuits, indicated its agreement that agency interpretations, to which deference is owed, and for which a penal sanction is at issue, must still pass constitutional due process muster in providing "fair warning of the conduct it prohibits or requires." *Id.* at 156.

Given the absence of any rule, regulation, or written policy articulating the Secretary's interpretation, as well as, the lack of any evidence that prior enforcement of the asserted "unwritten policy" ever occurred, and in consideration of the precise wording of the statutory provision, I conclude that Thunder Basin was not afforded fair notice of the Secretary's interpretation of section 109(a).

Accordingly, I would decide this case as the court recently did in the matter of *General Electric Co. v. EPA*, 53 F.3d. 1324 (D.C. Cir. 1995). There the court determined that the agency's interpretation of its regulations was entitled to deference, even "where the agency's reading of the statute would not be obvious to 'the most astute reader.'" *Id.* at 1327, *quoting*

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[10] "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron,* 467 U.S. at 843 n.11 (citations omitted).

Rollins Envtl. Servs. v. *EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). However, because "the interpretation is so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the regulated] of the agency's perspective," the finding of liability was reversed. *Id.* at 1330.

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Marc Lincoln Marks, Commissioner