FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

July 31, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. VA-99-11-R
ISLAND CREEK COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that Island Creek Coal Company ("Island Creek") did not violate 30 C.F.R. § 75.1725(c)[2] when a miner performed maintenance work on a conveyor belt while standing on another conveyor belt which was not blocked against motion. 20 FMSHRC 1395, 1399 (Dec. 1998) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination. For the reasons that follow, the judge's decision stands as if affirmed.

I.

Factual and Procedural Background

On September 20, 1998, Ronnie Maggard, a maintenance foreman at Island Creek's VP 8 underground coal mine, told Charles Miller, a rock dust motorman, to add oil to a speed reducer

[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

[2] Section 75.1725 states in pertinent part: "(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 75.1725(c).

which was part of the drive mechanism of the 5-A conveyor belt. 20 FMSHRC at 1395-96. He did not instruct Miller to make sure the belt was locked and tagged out,[3] even though it was company policy to have belts locked and tagged out during maintenance or repair work. Tr. 53, 76, 155. Miller asked Thomas Ray, an electrician, to assist in the task. 20 FMSHRC at 1396. The 5-A belt was located above the 5-B belt and dumped material onto it. *Id.*; Jt. Ex. 1. Ray stood on the 5-B belt, which had been deenergized, in order to pump oil into the speed reducer which was attached to the 5-A belt and located 4 to 5 feet above the 5-B belt. *Id.* Neither belt was locked and tagged out. *Id.* The 5-B belt was unexpectedly energized, traveling 400 feet, and carrying Ray with it before it was stopped. *Id.* Ray injured his hand and as a result was still unable to return to work as of the date of the hearing, November 12, 1998. *Id.* at 1395-96.

Following an investigation of the accident, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of section 75.1725(c). The order alleged that the violation was significant and substantial ("S&S")[4] and involved a high level of negligence by the operator. Gov't Ex. 1. The operator contested the order and the matter proceeded to hearing before Judge Weisberger.

The judge found that Island Creek did not violate section 75.1725(c). 20 FMSHRC at 1397-99. He concluded that, based on the plain meaning of the standard, it did not apply to the 5-B conveyor belt on which the miner stood because no maintenance or repairs were being performed on that belt. *Id.* at 1397. The judge also rejected the Secretary's claim that, because maintenance work was performed on the belts while they were not locked and tagged out, Island Creek violated the standard. *Id.* at 1398-99. The judge concluded that the standard requires machinery undergoing maintenance or repairs to be blocked against motion but does not require it to be locked and tagged out. *Id.*

II.

Disposition

The Secretary argues that the judge erred in finding that Island Creek did not violate section 75.1725(c) when the miner stood on the 5-B conveyor belt and performed maintenance to the 5-A conveyor belt. S. PDR at 8-10. She contends that the judge incorrectly determined that

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[3] Under regulations covering electrical equipment, the term "locked and tagged out" as used in 30 C.F.R. §§ 56.12016, 56.12017, 75.511, and 77.501 means that the power is turned off by switching the breaker and a lock and tag is placed on the cathead of the equipment so the power cannot be turned on. Tr. 49-50, 73-74; S. Post-Hearing Br. at 4 n.1.

[4] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

the term "on" in the standard does not refer to machinery on which a miner stands while performing repairs or maintenance to other machinery. *Id.* at 8-10. The Secretary also argues that, because the 5-A and 5-B belts formed an integrated unit, the judge erred in finding that the standard did not apply to the 5-B belt when the miner performed maintenance on the 5-A belt. *Id.* at 11-12. Further, she contends that the judge erred in failing to accept the Secretary's interpretation that belts undergoing maintenance or repairs must be deenergized and locked and tagged out, at least when they are not otherwise blocked against motion. *Id.* at 13-16.

Noting that the original order alleged that it violated the standard because the 5-B belt was "not blocked against motion" (IC Br. at 2; Gov't Ex. 1), and that the Secretary did not move to modify the order to assert the "lock and tag out" argument, Island Creek argues that the issue of whether it violated section 75.1725(c) when it failed to lock and tag out the belts is not properly before the Commission. IC Br. at 2. On the merits, Island Creek argues that the plain meaning of section 75.1725(c), as well as case law and MSHA policy, support the judge's finding that the standard does not require machinery to be locked and tagged out during maintenance or repairs. *Id.* at 5-10. It contends that the judge correctly found that the standard does not apply to machinery on which a miner stands to perform maintenance or repairs on other machinery. *Id.* at 11-13. Further, Island Creek argues that the judge correctly determined that the 5-A and 5-B belts were discrete and separate units. *Id.* at 14.

Commissioners Riley and Verheggen on different grounds would affirm the judge's decision that Island Creek did not violate section 75.1725(c). Chairman Jordan and Commissioner Marks would reverse the judge's decision. Under *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501, 1505 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

III.

Separate Opinions of Commissioners

Commissioner Riley, in favor of affirming the decision of the administrative law judge:

For the following reasons, I conclude that the judge properly determined that Island Creek did not violate 30 C.F.R. § 75.1725(c) when maintenance was performed on the conveyor belts while they were not locked and tagged out.

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 Secretary*

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 General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Secretary 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).

I conclude that the language of section 75.1725(c) is not clear when applied to the facts of this case. In such situations as here involving an ambiguous standard, the Secretary has on numerous occasions asserted that the Commission and its judges must examine her interpretation of the standard and give deference to that interpretation if it is reasonable. S. PDR at 6-8; *see, e.g.*, *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1143 (Oct. 1998) (Secretary arguing deference due to her reasonable interpretation of standard); *Harlan Cumberland Coal Co.*, 19 FMSHRC 1521, 1523 (Sept. 1997) (same). Island Creek was cited for failing to block against motion the 5-B belt on which the miner stood while performing maintenance to the 5-A belt. Gov't Ex. 1. Section 75.1725(c) requires machinery to be "blocked against motion" when maintenance is performed "on" it. It is not clear whether the term "on" in the standard only refers to machinery "to which" maintenance is performed (i.e., the 5-A belt) or also includes machinery "upon which" a miner stands (i.e., the 5-B belt) while performing maintenance to other machinery. Because the standard is not clear in this case, the Commission and its judges must defer to the Secretary's interpretation of the standard, provided her interpretation is reasonable. *See Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192-93 (Mar. 1998) (holding that where "the standard is ambiguous rather than plain," the Commission "must consider whether the Secretary's interpretation . . . is reasonable.").

I conclude that the Secretary's interpretation of the standard is unreasonable, inconsistent, and wrong. She erroneously argued to the judge that "blocked against motion" in the standard means "locked and tagged out" when applied to conveyor belts and that the operator violated the standard because it failed to lock and tag out the 5-A and 5-B belts. S. Post-Hearing Br. at 4-5. The Secretary's interpretation is not consistent with the language of the regulation. She defines the term "locking and tagging out" as "a procedure by which a lock and tag are put on the cathead of a belt at the power source [to ensure] that after the power is turned off on a belt, no one else can turn the power back on." S. PDR at 13. However, this "locked and tagged out" requirement is not mentioned in section 75.1725(c) and there is no indication from the regulatory history of the standard (*see* 37 Fed. Reg. 11777 (1972) (proposed rule); 38 Fed. Reg. 4974 (1973) (final rule)) that "blocked against motion" means "locked and tagged out."

The Secretary's interpretation of section 75.1725(c) is contrary to the Mine Act's goal of protecting the safety of miners. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) ("A safety standard 'must be interpreted so as to harmonize with and further . . . the objectives of' the Mine Act.") (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). Under the Secretary's interpretation, even if machinery is deenergized and locked and tagged out, an employee performing maintenance or repairs to the machinery may still be in danger from the unexpected movement of the machinery due to the release of stored mechanical, hydraulic, pneumatic, or other form of energy. *See* 29 C.F.R. § 1910.147 (Occupational Safety and Health Administration regulations for the control of hazardous energy during servicing and maintenance of machinery). Thus, the Secretary's interpretation of the standard does not adequately protect the safety of miners during maintenance or repair work. However, such protection can be better achieved if, as stated in section 75.1725(c), the machinery is deenergized and "blocked against motion" to prevent the unexpected movement of the machinery.[1]

The Secretary's interpretation of the standard is also unreasonable because she erroneously attempts to apply an electrical procedure, the "locked and tagged out" requirement, to mechanical non-electrical work. "Lock and tag out" procedures are specifically required in several MSHA regulations (*see* 30 C.F.R. §§ 56.12016, 56.12017, 57.12016, 57.12017, 75.511, 77.501), but these involve work on electrical equipment where there is a danger of electrical discharge. "Blocked against motion" procedures are also used in several MSHA regulations (*see* 30 C.F.R. §§ 56.14105, 57.14105, 75.1725(c), 77.404(c)) but these involve mechanical maintenance or repair work. In the instant case, the miner performed mechanical work when he added oil to the speed reducer on the 5-A belt. 20 FMSHRC at 1396. The Secretary does not argue and there is no record evidence to indicate that the miner was exposed to the danger of electrical discharge when he added oil to the speed reducer. Furthermore, the preamble to the 30 C.F.R. Part 75 final rules, which cover mandatory safety standards for electrical and mechanical equipment, states that section 75.1725 covers "mechanical equipment" rather than electrical equipment. 38 Fed. Reg. at 4975.

The electrical nature of the "locked and tagged out" requirement is supported by case law. In *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1190, 1192-93 (9th Cir. 1982), the court held that the Secretary should have applied a "blocked against hazardous motion" standard (30 C.F.R. § 55.14-29 (1979) (now 30 C.F.R. § 56.14105)) to mechanical work involving the removal of wedged rocks from a drop chute at a metal mine instead of applying a "lock out" requirement (30 C.F.R. § 55.12-16 (1979) (now 30 C.F.R. § 56.12016)) intended for work on electrically-powered equipment. Similarly, the Commission in *Mettiki Coal Corp.*, 13 FMSHRC 760, 766 (May 1991), stated in dictum that the Secretary should have applied a "blocked against

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[1] I concur with Commissioner Verheggen (slip op. at 10 n.5) that it is troubling that my colleagues voting in favor of reversing the judge (slip op. at 15) place great significance on the operator's internal policies requiring lock and tag out procedures when they conclude that section 75.1725(c) requires the conveyor belts to be locked and tagged out. This is particularly troubling because the operator's policies are clearly at odds with the plain meaning of the standard at issue.

motion" standard (30 C.F.R. § 77.404(c)) to the mechanical repair of a speed reducer on a conveyor belt at a surface coal mine instead of applying a "locked and tagged out" standard (30 C.F.R. § 77.501) intended for electrical work on electric distribution circuits and equipment. Indeed, the Secretary's refusal to acknowledge applicable case law making this distinction between mechanical equipment that must be "blocked against motion" and electrical equipment that must be "locked and tagged out," led to the first Equal Access to Justice Act (5 U.S.C. § 504) award by the Commission. *Ray, employed by Leo Journagan Construction Co.*, 20 FMSHRC 1014 (Sept. 1998).

Like the Queen of Hearts in Lewis Carroll's *Alice In Wonderland*, who could change the law on a whim and then arbitrarily decide whose head would roll for unforeseeable and thus unavoidable offenses, the Secretary stands before the Commission demanding that we endorse the unsupportable proposition that in section 75.1725(c), which covers the maintenance or repair of mechanical equipment, "blocked against motion" really means "locked and tagged out," as used in sections 56.12016, 56.12017, 57.12016, 57.12017, 75.511, and 77.501, which apply to electrical equipment. Because the Secretary's underlying assumption that section 75.1725(c) requires machinery to be "locked and tagged out" is unreasonable, it is not necessary to analyze the reasonableness of her interpretation that the standard applies to the 5-B belt upon which the miner stood when performing maintenance to the 5-A belt. Such an analysis would have included interpretative questions such as whether, for the purposes of section 75.1725(c), the two conveyor belts were sufficiently integrated structurally and functionally to form a single piece of equipment (a "belt system"), or, if they were not a single piece of equipment, whether the term "on" in the standard means "located upon" the machinery as well as "performing maintenance or repairs to" the machinery.

Having found the meaning of section 75.1725(c) to be ambiguous and having rejected the Secretary's interpretation of the standard as being clearly unreasonable, I turn next to what I refer to as the "order argument," raised by Chairman Jordan and Commissioner Marks (slip op. at 13-14), that the judge's finding of no violation should be reversed because the original order stated that the operator violated the standard because the belt was not "blocked against motion"[2] (Gov't

[2] Although the term "blocked against motion" in the order (Gov't Ex. 1) is the same as the term used in the standard, the Secretary's assertions about the meaning of the term have confused the issue. The Secretary did not call the inspector to testify as to his reasons for issuing the order. The only indication in the record of MSHA's definition of the term "blocked against motion" as used in the order was provided by the Secretary who claimed it means "locked and tagged out." S. Post-Hearing Br. at 4-5. Thus, it is not clear whether, when the inspector issued the order, he meant the term to mean any method to prevent the motion of the belt or only the "locked and tagged out" procedure asserted by the Secretary. Given the Secretary's unreasonable interpretation of the term "blocked against motion" which the judge correctly rejected (20 FMSHRC at 1398) and given the confusion surrounding the meaning of the term in the order, I disagree with Chairman Jordan and Commissioner Marks (slip op. at 13-14, 18) that the use of the term "blocked against motion" in the order is a sufficient basis for reversing the judge's decision.

Ex. 1) and the record evidence shows that the belt was not blocked against motion. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides that, except for good cause shown, an issue cannot be considered on review unless it was raised before the judge. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319 (Aug. 1992). Despite having every opportunity to do so, the order argument was never raised before the judge because the Secretary always maintained that the operator violated section 75.1725(c) by failing to lock and tag out the belts. S. Post-Hearing Br. at 4-5. Section 113(d)(2)(A)(iii) of the Mine Act also provides that "review shall be limited to the questions raised by the petition." *Asarco, Inc.*, 14 FMSHRC 1323, 1326 (Aug. 1992). The Secretary never raised the order argument in her petition. Thus, I conclude that the order argument is not before the Commission because it was not explicitly raised before the judge or on petition to the Commission. Nor do I think it was implicitly raised because the Secretary explicitly defined "blocked against motion" to mean "locked and tagged out." S. Post-Hearing Br. at 4-5; *see Beech Fork*, 14 FMSHRC at 1319-21 (finding issue not on review because it was not explicitly or implicitly raised before judge).

The judge correctly analyzed the instant case according to the "locked and tagged out" interpretation of the standard argued before him by the Secretary and correctly found it to be erroneous. Although my analysis differs from that of the judge, I affirm his decision in result that the operator did not violate section 75.1725(c) when maintenance was performed on the conveyor belts while they were not locked and tagged out.

By failing to block the machinery against motion, Island Creek's actions were obviously unsafe and my decision in no way condones its actions. It is unfortunate that the Secretary has complicated what might have been a simple case. By again confusing blocking mechanical equipment against motion with locking and tagging out electrical equipment, she continues to muddle the law at the expense of miner safety.

James C. Riley, Commissioner

Commissioner Verheggen, in favor of affirming the decision of the administrative law judge:

In its July 1982 decision in *Phelps Dodge Corp. v. FMSHRC*, the Ninth Circuit highlighted the Secretary's misguided approach to ensuring the safety of miners performing mechanical repairs. 681 F.2d 1189 (9th Cir. 1982). In that case, the Secretary applied to *mechanical* repairs a standard designed to ensure the safety of miners performing *electrical* repairs. *Id*. at 1191-93. Calling the Secretary's enforcement action "an abuse of discretion" (*id*. at 1193), the court observed that the cited standard was "directed to abatement of the danger of electric shock" and did not "address the hazards arising from the accidental movement of electrical equipment while mechanical work is being done thereon" (*id*. at 1192).

Now, almost 18 years later, the instant case, *Island Creek Coal Co.*, underscores the truth of the old adage that the more things change, the more they stay the same. Here, a miner, Thomas Ray, was performing *mechanical* work on a belt drive mechanism. 20 FMSHRC 1395, 1395-96 (Dec. 1998) (ALJ). Ray was assisting another miner, Charles Miller, with adding oil to a speed reducer. *Id*. at 1396. When the belt on which Ray was standing was accidentally activated, it carried Ray 400 feet, resulting in serious injury to him. *Id*. Miller and Ray's work entailed no risk whatsoever of electric shock.

MSHA cited Island Creek under the correct standard, 30 C.F.R. § 75.1725(c), which in my opinion clearly required that the machinery on which Miller and Ray were working be "blocked against motion." Yet inexplicably, the Secretary based her enforcement action against Island Creek on the fact that Miller and Ray had not locked and tagged out the belt on which they were working. At the hearing and in her post-hearing brief, the Secretary argued that, with regard to conveyor belts, the term "blocked against motion" in section 75.1725(c) means "locked and tagged out," and that Island Creek violated the standard because it did not lock and tag out the belts. S. Post-Hearing Br. at 4-5; Tr. 24-26. Island Creek also addressed this contention in its post-hearing brief and the judge fully considered it in his decision. IC Post-Hearing Br. at 16-18; 20 FMSHRC at 1397-98.[1] In other words, the basis for the Secretary's enforcement action is that the belt was not locked and tagged out, which the Secretary described as an "electrical plug [being] pulled from a power source and a lock [being] put on the plug itself, thus preventing it from being plugged back in." S. Post-Hearing Br. at 4 n.1. She also defined the term to mean "a procedure by which a lock and tag are put on the cathead of a belt at the power source [to ensure] that after the power is turned off on a belt, no one else can turn the power back on." S. PDR at 13.

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[1] I disagree with Island Creek's contention that, because MSHA's order did not state that Island Creek failed to lock and tag out the belts, and because the Secretary did not move to modify the order to assert her "lock and tag out" argument, that argument is not properly before the Commission. The parties litigated the lock out/tag out issue at trial, and it is well established that "Rule 15(b) of the Federal Rules of Civil Procedure . . . permits [trial and appellate] adjudication of issues actually litigated by the parties irrespective of pleading deficiencies." *See Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997).

It hardly bears stating that section 75.1725(c) does not require equipment to be locked and tagged out.[2] The term is not mentioned in section 75.1725(c), nor is it defined in any MSHA regulation or by the Mine Act. Instead, the standard requires that when machinery undergoes maintenance or repair, it must be (1) de-energized and (2) "blocked against motion." The term "blocked against motion" is not defined in the MSHA regulations or the Mine Act. Under ordinary usage,[3] the term "to block" means "to render . . . unsuitable for passage or progress by obstruction," and the term "motion" means "passing from one place . . . to another." *Webster's Third New Int'l Dictionary* (1986) at 235, 1475. Therefore, the term "blocked against motion" means obstructing passage from one place to another. There is no indication from the plain meaning of section 75.1725(c) that, when applied to conveyor belts, "blocked against motion" may only be satisfied by locking and tagging out. The Secretary also did not present any evidence at trial to show that the only way to block a belt against motion is to lock it and tag it out.[4]

I also find compelling the clause of section 75.1725(c) that allows blocks against motion to be removed "where machinery motion is necessary to make adjustments." I fail to see how any such adjustments could feasibly be made if the machinery were locked and tagged out. Nor has the Secretary explained this contradiction to her position. More importantly, I find that the Secretary's enforcement strategy in this case could well pose significant hazards to the safety of miners in other situations. It is a matter of common sense that some machinery, no matter how carefully locked and tagged out, could, if not blocked against motion, move under the simple force of gravity (if not other forces, such as stored mechanical energy), and so injure a miner. I am thus in complete agreement with the concern expressed by Commissioner Riley that "[t]he

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[2] 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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

[3] In the absence of an express regulatory definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

[4] Lock and tag out procedures are required by some MSHA regulations (*see, e.g.*, 30 C.F.R. §§ 56.12016, 56.12017, 57.12016, 57.12017, 75.511, 77.501), but these deal specifically with electrical equipment rather than mechanical equipment such as conveyor belts. MSHA regulations require "blocked against motion" procedures when performing mechanical repairs or maintenance to equipment (*see, e.g.*, 30 C.F.R. §§ 56.14105, 57.14105, 75.1725(c), 77.404(c)).

Secretary's interpretation of section 75.1725(c) is contrary to the Mine Act's goal of protecting the safety of miners." Slip op. at 5. Locking and tagging out is no substitute for blocking against motion when mechanical repairs are performed.[5]

All these points lead me to the conclusion that, just as in *Phelps Dodge*, the Secretary has attempted to fit a square peg into a round hole, even though a round peg was ready at hand. I find this inexplicable because it is an attempt to graft an *electrical work safeguard* onto a standard which applies to *mechanical* work, a lock and tag requirement that simply does not appear in the plain language of section 75.1725(c). This case is an example of the Secretary attempting to "prosecute citizens for violating a regulation that does not exist." *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1341 (D.C. Cir. 2000).

The Secretary's confusion of electrical and mechanical standards is also at odds with Commission precedent. In *Mettiki Coal Corp.*, the Secretary cited the operator of a surface coal mine for an improperly functioning lock out device for a belt on which miners were making mechanical repairs to a speed reducer. 13 FMSHRC 760, 762 (May 1991). Although the operator was not required to have the lock out device engaged when an MSHA inspector discovered that it was not working (*id*. at 765-66), the Commission nevertheless recognized that when mechanical repairs are performed

> . . . [a] lock out of the equipment or circuit is not required. Thus, when mechanical repairs are being made to mechanical equipment and there is no danger of contacting exposed energized electrical parts, MSHA requires only that the power be turned off and the machinery be blocked against motion.

Id. at 766.

The Commission addressed similar confusion over mechanical and electrical work in *Ray, employed by Leo Journagan Construction Co.*, 20 FMSHRC 1014, 1016 (Sept. 1998), where in an underlying proceeding, an individual was cited for failing to lock and tag out a crusher under mechanical repair. In *Ray*, a four-member majority stated that "[t]here is an urgent

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[5] I find troubling the suggestion made by my colleagues voting in favor of reversing the judge that we ought to accept locking and tagging out belts on which repairs are being performed because of the "universal acceptance of a lock and tag out policy by everyone affiliated with Island Creek who appeared at the hearing." Slip op. at 15. I fail to see how any such policy, however enthusiastically or universally endorsed by an operator, can be used as guidance in a case such as this when the policy is at odds with the plain language of the standard at issue. Indeed, I find this suggestion of my colleagues particularly puzzling in light of the fact that they do not hesitate to find a violation of the standard's plainly stated requirement that machinery must be blocked against motion. They leave hanging the question of how their holding squares with Island Creek's policy.

need for the Secretary to clarify what precautions are necessary when employees unclog a crusher," including the applicability and feasibility of lockout procedures in situations where mechanical repairs necessitate "jogging" a machine to see if repairs have been successful. *Id*. at 1026.

I find it unfortunate here that where the Secretary could simply have argued before the judge that the operator violated section 75.1725(c) because it failed to block the belts against motion, she chose instead to erroneously argue that the "blocked against motion" requirement was equivalent to a "lock and tag out" requirement developed for electrical work. This error might have been understandable had it been made by an inspector in the field. Yet it is the Secretary's counsel, at both trial and appellate levels, that has made this error. I am troubled by the Secretary's apparent failure to distinguish *mechanical* standards from *electrical* standards, a point that ought to have been settled 18 years ago with the Ninth Circuit's *Phelps Dodge* decision.[6]

Apparently, the Chairman and Commissioner Marks do not share my concerns regarding the Secretary's confused approach in this case. They state that "the terms of [section 75.1725(c)] must be enforced as they are written." Slip op. at 13. They then proceed to write an opinion in which they would so enforce the standard against Island Creek. Their approach is at odds, however, with the manner in which the Secretary chose to enforce section 75.1725(c) in this case. It is not the role of the Commission to usurp the Secretary's enforcement role under the Mine Act and prosecute a violation — which is essentially what my colleagues suggest we do. To the contrary, Congress established the Commission to, among other things, "develop a uniform and comprehensive *interpretation* of the law . . . [to] provide guidance to the Secretary in enforcing the [Mine Act]." *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm. Before the Senate Comm. on Human Resources*, 95th Cong. 1 (1978) (emphasis added). Congress explicitly charged the Commission "with the responsibility . . . for reviewing the enforcement activities of the Secretary." *Id*. I am not prepared, as my colleagues are, to ignore the problems posed by the Secretary's litigation posture in this case. I find that it is more appropriate to attempt to guide the Secretary to a more reasonable and realistic appreciation of the distinction between mechanical and electrical standards.

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[6] Similarly, in the *Ray* case, the Secretary did not address *Phelps Dodge* — "indeed, in her posthearing brief, [she] chose to ignore the case altogether." 20 FMSHRC at 1025. The Secretary lost her case against Ray, and also was ordered to pay his legal bills. *Id*. at 1029.

Accordingly, I find that the judge's conclusion that Island Creek did not violate section 75.1725(c) is correct, albeit on grounds different from those upon which the judge relied. I would thus affirm his decision.

Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Marks, in favor of reversing the judge:

According to the plain meaning of section 75.1725(c), an operator must take two actions to insure that miners are protected from accidental equipment start-ups when repairs on machinery are performed: (1) turn off the power and (2) ensure that the machinery is blocked against motion.[1] Unless it does both, the operator is in violation of the standard.

In order to pump oil into the drive mechanism of the 5-A conveyor belt, Thomas Ray stood on the 5-B belt, which was located 4 to 5 feet below. 20 FMSHRC 1395, 1396 (Dec. 1998) (ALJ). Coal on the 5-A belt dumped into the 5-B belt. *Id.*; Jt. Ex. 1. There is no dispute that at some point during the repair, the power on the 5-B belt was turned on. 20 FMSHRC at 1396. It is also undisputed that the 5-B conveyor belt was not blocked against motion. *See* IC Br. at 4 ("when the 5-B belt started to move" Ray was carried on the top). The accidental start up of the belt caused Ray to be carried a distance of 400 feet and to sustain injury to his hand. 20 FMSHRC at 1396.

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. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). Both the plain meaning of the regulation and the order at issue clearly state the nature of Island Creek's violation here[2] — failure to block a belt against motion. 30 C.F.R. § 75.1725(c); Gov't Ex. 1 at 1 (belt was not "blocked against motion").

Although the Secretary has argued both below and on review that the regulation required Island Creek to lock and tag out the belt during maintenance work (S. PDR at 13-16), we are not bound by the Secretary's theory in making our determination as to whether Island Creek violated the standard. We cannot let the Secretary's more complicated litigation posture obfuscate the straightforward fact that Island Creek simply did not block the 5-B belt against motion, as

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[1] Section 75.1725(c) states that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 75.1725(c).

[2] Although we agree with Commissioner Riley that part of the regulation is ambiguous (because the words "on machinery" can mean machinery "to which" maintenance is performed, or "upon which" a miner stands to perform it), Riley opinion, slip op. at 4, this does not render the "turn off the power" and "blocked against motion" language ambiguous. Rather, that language should still be interpreted according to its plain meaning. *See American Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 848 (D.C. Cir. 1995) (deference to agency interpretation of term contained in regulation only appropriate where meaning of that term is ambiguous).

required by the regulation.[3] Consequently, it was unnecessary for the judge, and remains unnecessary for this Commission, to rule on the Secretary's contention that the regulation required the operator to lock and tag out the machinery.[4]

The Commission routinely refuses to examine contentions of the parties that are not necessary for the resolution of the case before it. *See, e.g.*, *Arch of Kentucky*, 20 FMSHRC 1321, 1327 n.7 (Dec. 1998); *Extra Energy, Inc.*, 20 FMSHRC 1, 8 n.11 (Jan. 1998); *Fort-Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 n.6 (Sept. 1997). Neither the judge nor our colleagues provide any reason to depart from this bedrock principle of jurisprudence, and we can discern none on our own.

We do not agree with Commissioner Riley that we are prohibited from addressing the plain meaning of the regulation because the Secretary failed to raise it before the judge. Riley opinion, slip op. at 6-7. The order was admitted into evidence, and clearly charges, using the language of the regulation, that "[t]he 5-B conveyor belt drive was not blocked against motion." *See* Gov't Ex. 1 at 1.[5] To refuse to consider the order as written, as both our colleagues do, runs directly counter to the Mine Act's directive that we issue a decision "affirming, modifying, or vacating the Secretary's . . . order." 30 U.S.C. § 815(d). Consequently, we find Commissioner Verheggen's commentary that we are somehow acting outside our proper role in this case unpersuasive. *See* Verheggen opinion, slip op. at 11.

We also disagree with Commissioner Riley's statement that the Secretary never raised this argument in her petition. Riley opinion, slip op. at 7. In fact, the Secretary's petition was carefully drafted to explicitly include the more global "blocked against motion" argument as part of the "lock and tag out" theory that applied to the specific situation at Island Creek. S. PDR at 14 n.4 ("[I]n the mine in this case, locking and tagging out is the only viable method for blocking against motion. . . . [T]his is not a case where the operator argued that it had blocked the belts against motion in some way other than locking and tagging out."); *see also id.* at 13 ("The Secretary's interpretation of the standard . . . [requires] that belts on which miners are working be deenergized *and* locked out, at least where, as here, the belts are not otherwise blocked against motion"); *id.* at 15 n.5 ("The operator in this case neither locked and tagged the belts against motion, nor tried to block them in some other way.").

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[3] Commissioner Riley is incorrect when he claims that we "conclude that section 75.1725(c) requires the conveyor belts to be locked and tagged out." Riley opinion, slip op. at 5 n.1. Nothing in our opinion can be reasonably read to support such a statement.

[4] Consideration of the Secretary's position is better left to a case in which the operator can reasonably contend that its machinery *was* "blocked against motion," but not locked and tagged out. This is not such a case.

[5] In fact, Island Creek calls attention to this language in its brief, complaining that the Secretary should have modified the order to reflect her "lock and tag" out theory. IC Br. at 2.

In addition, we are frankly puzzled by, and thus briefly comment on, our colleagues' indignation regarding the Secretary's "lock and tag out position," indignation that leads them to vacate the order at issue here. Charges that the Secretary's interpretation "does not adequately protect the safety of miners," Riley opinion, slip op. at 5, or that it impermissibly applies an electrical procedure to mechanical work, *id.*, Verheggen opinion, slip op. at 9-11, are truly perplexing given the consistent assertions by Island Creek's miners, foremen, and counsel, that locking and tagging out the belts was precisely what Island Creek's safety policies required. Miners Ray, Charles Miller, and Tommy Proffit all testified that they had been told to lock and tag out belts. Tr. 40, 55, 59, 74, 102. In fact, Miller and Proffit even stated that they had been told by Island Creek management that this was a legal requirement. Tr. 76, 102. Island Creek foremen Elmer Deel and Ronnie Maggard verified that the company's policy required miners to lock and tag out belts. Tr. 120, 156-57. Notes from Island Creek safety meetings confirm that this was the procedure taught to miners. IC. Ex. 1.[6] At the hearing, Island Creek's counsel also asserted that this mine "require[s] a higher standard of care from their employees . . . [and] as a matter of practice, we do require for mechanical work that the equipment be locked and tagged out." Tr. 31.

In fact, locking and tagging out the belts is the only feasible manner of blocking the belts against motion (the actual regulatory requirement) that is mentioned in the entire record of this case. There was universal acceptance of a lock and tag out policy by everyone affiliated with Island Creek who appeared at the hearing. There is also a complete lack of record evidence both as to why it might be dangerous and how the belts could otherwise be blocked against motion. Accordingly, our colleagues' assertion that a lock and tag out policy does not adequately protect miner safety (Riley opinion, slip op. at 5; Verheggen opinion, slip op. at 9-10), constitutes a finding without record support.

Although Island Creek failed to insure that the 5-B belt was blocked against motion, and therefore failed to comply with the explicit mandate contained in section 75.1725(c), our inquiry cannot end here. Island Creek also contends that it was unreasonable for the Secretary to apply section 75.1725's requirements to the 5-B belt, the one upon which Ray was standing. The operator argues that since the maintenance was performed on the 5-A belt, only that belt came under the purview of the regulation while Ray added oil to the speed reducer. IC Br. at 11. The

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[6] The notes from the safety meeting of December 1, 1997, state that:

> Belts can be very dangerous if correct work habits are not followed and if we do not lock and tag the cathead out at the power source when we are going to work on any belt for any reason. No work shall be started on any belt until it is verbally confirmed that the belt has been properly locked and tagged out.

IC. Ex. 1 at 6.

judge agreed with Island Creek that the standard only applied to the 5-A belt. 20 FMSHRC at 1397.

It is this section of the regulation that we find ambiguous, because the requirement that "repairs or maintenance shall not be performed *on* machinery" does not make clear whether it is restricted to machinery that is being repaired, or also includes machinery on which a miner is standing to perform the repair. If 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 Secretary 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 General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Secretary 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, 966-69 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary interprets section 75.1725(c) to apply both to machinery on which miners stand to perform repair or maintenance work, and to the machinery to which the repair or maintenance work is being performed. S. PDR at 8. The Secretary argues that to repair one piece of equipment, miners must sometimes position themselves on or adjacent to another piece of equipment. *Id.* at 9-10. In light of this fact, she maintains that the fundamental protective objective of section 75.1725(c) can only be realized if it is interpreted to also apply to machinery with which miners come into contact during repair work. *Id*. She urges the Commission to reject a restrictive interpretation of the standard that would protect miners only from the dangers caused by the accidental movement of machines undergoing the repair, but would leave them vulnerable to the equally harmful safety hazards of adjacent machinery. We find this approach eminently reasonable.[7]

In *Walker Stone Co. v. Secretary of Labor*, 156 F.3d. 1076 (10th Cir. 1998), the Tenth Circuit eschewed the narrow approach to the standard urged by Island Creek here. In that case, a

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[7] The Secretary also contends that the regulation applies to both the 5-A and 5-B belts because the definition of the word "on" means both "upon" (or "on top of machinery") and "to" machinery. S. PDR at 8-9. This is a permissible reading of the regulation, and thus is entitled to deference. *See Island Creek Coal Co.*, 20 FMSHRC 14, 18-19, 23 (Jan. 1998). The judge erred by framing the question as asking whether the fact that Ray stood on the 5-B belt constituted maintenance of that belt (20 FMSHRC at 1397) improperly focusing on the word "maintenance" instead of the word "on."

miner removing rocks which had clogged the crusher was killed when the crusher was accidentally restarted. *Id.* at 1079. Walker Stone was cited under a standard almost identical to the one at issue in this case.[8] The operator first maintained that the standard was inapplicable because removing rocks could not constitute repair or maintenance work. Alternatively Walker Stone contended that even if the work was considered repair or maintenance, the standard was still inapplicable "because the work was actually being performed on the rocks rather than on the crusher." *Id.* at 1082. The court rejected that literal approach, endorsing instead the Commission's broad reading of the standard as "consistent with the safety promoting purposes of the Mine Act," and one that avoided "anomalous results." *Id.*

Under the approach urged by Island Creek, miners repairing equipment would be protected from accidental movement by the equipment undergoing repair but would have no protection from the accidental movement of equipment they might find it necessary to stand upon or lean against in order to perform the repair or maintenance work. Their protection under the standards would therefore depend on the location of the equipment needing the repair or maintenance. The less accessible the equipment being repaired, the less protection would be afforded by the standard. We reject an interpretation that would lead to such an absurd result. *See Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998) (to avoid absurd results, explosives training standard must be interpreted to require training in the type of explosives actually used); *aff'd in pertinent part*, 170 F.3d 148 (2d. Cir. 1999); *Consolidation Coal Co.*, 15 FMSHRC at 1557 (judge's construction of an escapeway standard could lead to absurd results).

In this case, the Secretary also maintains that the 5-B belt was an integral part of the 5-A and 5-B belt transfer point, and that the work performed by Ray should be considered a repair of the entire belt transfer machine, which contains 5-B. S. PDR at 11-12. A careful review of the evidence regarding these belts indicates that they formed an almost seamless unit, with the belts mounted contiguously. *See* Joint Ex. 2A-2D, 2G. Furthermore, testimony at trial demonstrated that the miners performing the maintenance work believed that, at least at the transfer point area, the belts formed one unit. Ray testified that he did not check to make sure that the 5-B belt was locked and tagged out before he started his maintenance work on the speed reducer because "[w]e were working there all day. . . . I didn't stop to consider that this was a new order, new job . . . . I just thought it was a continuation of what we were doing." Tr. 40.[9] Miller testified that he did not verify whether the 5-B belt was deenergized "[b]ecause [he] made an assumption that — being that work was already being done at that speed reducer, [he] just made an assumption that it was already locked out." Tr. 73.

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[8] Walker Stone was cited under 30 C.F.R. § 56.14105, the surface mine counterpart to section 75.1725(c), which applies to underground coal mines. 156 F.3d at 1079.

[9] Testimony revealed that the prior work in that area was replacement of a broken roller on the 5-A belt drive. Tr. 36, 96-7, 119.

In construing the identical regulation in *Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (May 1991), the Commission recognized that "[t]he purpose of section 75.1725(c) is to 'prevent, to the greatest extent possible, accidents in the use of [mechanical] equipment.' . . . A safety standard should be construed to effectuate its purpose." (citations omitted). We agree and would reverse the judge's decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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