FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 16, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2002-46
EASTERN ASSOCIATED COAL CORP.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Jordan, Suboleski, and Young, Commissioners

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). Administrative Law Judge T. Todd Hodgdon affirmed Citation No. 7195722 charging Eastern Associated Coal Corporation ("Eastern") with a violation of 30 C.F.R. § 48.11(a)(3).[1] 25 FMSHRC 30, 41-44 (Jan. 2003) (ALJ). We granted in part

[1] 30 C.F.R. § 48.11 provides in pertinent part:

> (a) Operators shall provide to those miners, as defined in § 48.2(a)(2) (Definition of miner) of this subpart A, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:
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> (1) Hazard recognition and avoidance;
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> (2) Emergency and evacuation procedures;
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> (3) Health and safety standards, safety rules, and safe working procedures;

Eastern's petition for discretionary review challenging the judge's decision affirming Citation No. 7195722. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Eastern operates the Harris No. 1 Mine, an underground coal mine in Boone County, West Virginia. 25 FMSHRC at 30. The mine produces 3.9 million tons of coal per year. *Id.* In October 2001, Eastern planned to use the No. 4 entry in the mine's 4 East section to set up the face conveyor and shield for a longwall mining machine. *Id.* at 31. Due to a roof fall in the entry one crosscut outby, the entry had been narrowed to 18 feet. *Id.* Eastern needed an entry of at least 24 feet to set up the longwall equipment. Tr. 364-65. Longer roof bolts had been installed in the roof. 25 FMSHRC at 31. However, before widening the entry, Eastern decided to have polyurethane grout injected into the roof as additional support, because the roof was determined to be layered and cracked.[2] *Id.*

The roof grouting provisions in Eastern's roof control plan addressed various topics related to this task, including training, personal protection, roof control, fire protection, and spills associated with grout work. G. Ex. 6 at 29-33. It identified two roof control requirements, the installation of temporary supports and sag devices, which Eastern was required to follow when grouting was performed at the Harris Mine. *Id.* at 30.

Because Eastern does not do any grout work (Tr. 248, 317, 319), it hired ESS/Micon ("Micon"), a specialist with 18 years of experience doing such work, to perform the grout work at its mine. 25 FMSHRC at 31; Jt. Ex. 1 at 2 Stip. 12; Tr. 95; G. Ex. 16 at 3-4. Eastern provided hazard training to Micon employees Joe Deoskey and Tyler Pawich before their performance of the task. Tr. 314-15. Eastern showed the Micon employees a videotape to familiarize them with

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> (4) Use of self-rescue and respiratory devices . . . and
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> (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

30 C.F.R. § 48.2(a)(2) provides in relevant part "*Miner* means, for purposes of § 48.11 . . . , any person working in an underground mine, including any . . . short-term maintenance or service worker contracted by the operator . . . ."

[2] The grouting process involves drilling holes in the roof and injecting polyurethane grouting material under pressure. The grout seeps into the cracks in the roof and holds it together like glue. Jt. Ex. 1 at 3 Stip. 14; G. Ex. 15 at 9; G. Ex. 16 at 3, 9-10, 37, 69-70.

the mine's condition, and provided training on escapeways, self-contained self-rescuers (SCSRs), check in/check out and lock out/tag out procedures, mine communications, general hazards, and the general layout of the mine. Tr. 297-98, 300; R. Ex. 1. Eastern did not train the contract employees on its roof control plan, specifically the portion pertaining to roof grouting. 25 FMSHRC at 43.

On October 17, 2001, at approximately 5:10 a.m. on the midnight shift, Deoskey and Pawich were "gluing" (i.e., grouting) the roof when two pieces of the roof fell and struck Pawich. *Id.* at 31. The first, smaller piece hit Pawich in the head, stunning him and knocking him to the ground. *Id.* The second, larger piece landed on his right knee, crushing it and pinning him down. *Id.* Pawich received emergency treatment and was transported from the mine. *Id.* He received a permanently disabling injury to his knee. Tr. 83.

Two MSHA inspectors, David Sturgill and T. L. Workman, began conducting an investigation of the accident around 10:00 a.m. on October 17. 25 FMSHRC at 31. After viewing the accident scene and interviewing the witnesses, the inspectors issued five citations, which Eastern contested. *Id.*

The judge affirmed Citation No. 7195722, at issue in this appeal. *Id.* at 44. He rejected the Secretary's designation of the citation as significant and substantial under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), a ruling the Secretary did not appeal. *Id.* The judge also affirmed another citation, vacated the remaining three citations, and assessed a total penalty of $874, the amount proposed by the Secretary for the two citations he affirmed. *Id.* at 44-45.

With regard to Citation No. 7195722, the judge noted that the evidence was undisputed that Eastern did not provide training on the portion of its roof control plan covering roof grouting to Micon employees Deoskey and Pawich before they performed the grout work. *Id.* at 43. The judge found that section 48.11(a)(3) required the operator to provide hazard training to independent contractors working at the mine infrequently or for short periods of time. *Id.* He also concluded that it was reasonable to expect that Eastern, during hazard training of the Micon employees, would cover the aspects of its roof control plan which specifically address the type of work that the Micon employees performed at the mine. *Id.* The judge rejected Eastern's argument that the standard was impermissibly vague. *Id.* at n.10. He also rejected Eastern's argument that training on its roof control plan's grouting procedures would be covered under task training pursuant to 30 C.F.R. § 48.7, and provided by Micon to its employees. *Id.* at 43.

Eastern filed a motion requesting oral argument. The Secretary filed a motion to strike a portion of Eastern's reply brief pertaining to its argument that the Commission should reconsider its position on deference to the Secretary's interpretation of a regulation. Mot. at 1-2. Eastern filed a response opposing the Secretary's motion. E. Opp'n at 1. The Commission denied the Secretary's motion to strike and heard oral argument on November 9, 2004. Unpublished Orders dated Oct. 20, 2004.

II.

Disposition

Eastern argues that the judge erred in his finding that it violated 30 C.F.R. § 48.11 by not providing training to Micon's employees on the polyurethane grouting provisions of its roof control plan, and maintains that it provided adequate hazard training to Micon's employees. PDR at 5-6; E. Br. at 6, 8. Eastern contends that the judge misconstrued section 48.11 by failing to take into account the overall regulatory scheme for training, which supports its position that its roof control plan was not required to be covered in hazard training under section 48.11, but rather would have been included within task training provided by Micon to its employees. PDR at 6-13; E. Br. at 11-17. Eastern asserts that the judge erred by concluding that the roof control plan's roof grouting provisions should have been part of hazard training, especially because its employees are not competent to provide such training since Eastern does not perform grout work. PDR at 8-9; E. Br. at 17-19. Eastern also contends that the regulation is impermissibly vague and therefore, fails to provide adequate notice. PDR at 13-15; E. Br. at 20-22.

The Secretary responds that the judge correctly held that Eastern violated section 48.11(a)(3) by failing to provide its independent contractors training on its roof control plan's grouting provisions during hazard training. S. Br. at 8. The Secretary contends that section 48.11 is ambiguous and that deference should be given to her reasonable interpretation of the standard. *Id.* at 8-10. She asserts that the judge correctly found that training in safe grouting procedures set forth in the roof control plan was to be covered in hazard training, and she argues that the approved and adopted roof control plan carries the same legal authority as a mandatory safety standard, which clearly falls under the terms of section 48.11(a)(3). *Id.* at 10-13. The Secretary maintains that the preamble to section 48.11 requires mine-specific conditions applicable to the miner's task be included in hazard training, that the roof control plan was mine-specific, and that Eastern was responsible for conveying such information to all employees working at its mine, including independent contractors. *Id.* at 14-23. The Secretary contends that Eastern failed to demonstrate that the regulation is impermissibly vague, and asserts that a reasonably prudent mine operator would understand that the regulation required Eastern to train Micon's employees on the portion of its roof control plan pertaining to the type of work that Micon was hired to perform. *Id.* at 26-29.

Eastern replies that the provisions of the roof control plan relating to grouting procedures are not specific to its mine and thus, are not appropriate material for hazard training. E. Reply Br. at 1-5. Eastern disputes that the regulation is ambiguous and purports that the Secretary's interpretation is not entitled to deference nor is her interpretation reasonable because it defeats the safety purpose of the regulation. *Id.* at 7-9. It further contends that the Commission should not defer to the Secretary because the bifurcated scheme of the Mine Act created the Commission as an independent body with specific jurisdiction and policy-making authority. *Id.* at 9-13.

A. Interpretation of 30 C.F.R. § 48.11

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) (citation 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 48.11 requires an operator to provide hazard training to miners defined under 30 C.F.R. § 48.2(a)(2), which includes any "short-term maintenance or service worker contracted by the operator." The regulation further requires that such training provide instruction on "health and safety standards, *safety rules*, and *safe working procedures*" related to a miner's duties before such miner commences work. 30 C.F.R. § 48.11(a)(3) (emphasis added). It is undisputed that Micon's employees fall under the definition of miner in section 48.2(a)(2), and that Eastern was required to provide hazard training to Micon's employees prior to their performing roof grouting at the Harris Mine. *See* 25 FMSHRC at 43. However, the parties dispute whether hazard training of Micon's employees should have included Eastern's roof control plan's grout provisions.

Because section 48.11 does not explicitly address whether hazard training must include provisions of a mine's roof control plan, we conclude that the language of section 48.11 is ambiguous as to its application to the facts of this case. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 693 (July 2002) (concluding that the regulation was ambiguous where its plain language did not address fact situation at issue). We must determine whether the Secretary's interpretation is reasonable. *Cannelton Indus., Inc.*, 26 FMSHRC 146, 159 (Mar. 2004) (Comm'r Jordan, dissenting) ("If a regulatory standard is either silent or ambiguous on a particular issue, the Commission will defer to the Secretary's reasonable interpretation of the regulation.") (citing *Rock of Ages Corp.*, 20 FMSHRC 106, 111, 117 (Feb. 1998), *aff'd in part and rev'd in part* 170 F.3d 148 (2d Cir. 1999)).

In analyzing the reasonableness of the Secretary's interpretation, we begin with the language of the regulation. Section 48.11 specifies that an operator provide hazard training on safe working procedures and health and safety standards that are "applicable to the duties of such miners." Thus, the language of the regulation indicates that an operator is required to tailor its hazard training to the work of the miner being trained. Where a miner is engaged in limited work in an area that presents fewer hazards, that miner would receive less comprehensive hazard training.

The Secretary's intent with regard to the language of the regulation is further evidenced by the preamble that accompanied the publication of the final training rules in the Federal Register. 43 Fed. Reg. 47,454 (1978). The Secretary addressed the particular problems posed by the training needs of contract miners and service maintenance workers. *Id.* at 47,454-55. The Secretary stated, in explaining her approach to training these miners:

> Such workers, if not given any training, could expose not only themselves but other miners to unnecessary risks. These workers should, therefore, have periodic instruction concerning the hazards they may encounter from time to time at the extraction or production site. Accordingly, MSHA has added sections . . . which would require the operator to acquaint such individuals with the specific hazards they may confront at the mine.[3]

Id. at 47,455. The Secretary further addressed the unique problem of "specialized contract" miners who "come onto mine property for short duration to perform their tasks and then move to other sites." *Id.* The Secretary noted, "They are skilled at their particular tasks and need only be acquainted with the specific hazards they may encounter at the mine site." *Id.* Thus, it is apparent that the Secretary intended that hazard training for these miners be altered, when necessary, to fit the nature and location of their tasks.

MSHA's published guidance regarding this regulatory scheme is consistent with this approach to hazard training. In MSHA's Program Policy Manual, the Secretary explains that hazard training is specific to the duties of the miner and involves training on hazards that a miner may encounter in performing his or her job at a particular mine. III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 48, at 14b and 25 (1990) ("*PPM*"). Regarding hazard training requirements for independent contractors pursuant to sections 48.2(a)(2) and 48.11, the Secretary explained that:

> Independent contractor exposure to hazards varies from situation to situation. Hazard training must be tailored to fit the training needs

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[3] The scope of the hazard training for this category of miners varies depending on the nature and location of their duties. Indeed, as the Secretary noted, in some instances a "checklist" of hazards would suffice. 43 Fed. Reg. at 47,455.

> of the particular contractor. Training these contractors receive must be of sufficient content and duration to thoroughly cover the mine-specific conditions, procedures, and safety devices. Training must include hazards incident to the performance of all job assignments by the contractor at the mine.

III *PPM*, Part 48, at 14b. Thus, an operator is required to tailor its hazard training of contract employees according to their work and conditions under which they perform. Here, Micon's employees were performing a task for which Eastern's roof control plan contained certain mine-specific requirements, i.e., the installation of sag meters and supplemental supports. *See* 25 FMSHRC at 31; G. Ex. 6 at 30. The language and intent of the regulation indicate that mine-specific hazards, safety standards and procedures that pertained to the task of grouting would be appropriately addressed in their hazard training.

In the preamble to the publication of the final training rule, the Secretary explained that "[t]hese rules are intended to insure that miners will be effectively trained in matters affecting their health and safety, with the ultimate goal of reducing the frequency and severity of injuries in the Nation's mines." 43 Fed. Reg. at 47,454. Applying the hazard training regulation to require a mine operator to train its contractors' miners on mine-specific safety matters fully effectuates this purpose. Eastern had included in its roof control plan the requirement to follow certain safety procedures for grouting work, in particular, the use of temporary roof supports and sag devices. Micon's task training could not be expected to include mine-specific hazards and conditions, such as those addressed in the roof control plan.[4] Thus, Eastern was required to insure that the Micon employees received adequate hazard training on the safety procedures contained in its roof control plan that pertained to the task that they were to perform. Had Eastern provided to Micon the relevant portions of its roof control plan, the Secretary contends it would have satisfied its hazard training requirement under section 48.11. Oral Arg. Tr. 55-56. In short, the Secretary's interpretation of the hazard training regulation represents a common-sense application of the training regulations under the facts of this case.[5]

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[4] Specialist contractors, such as Micon, who may perform work at dozens of individual mines each year, would be challenged to keep abreast of the continually changing hazards, rules and procedures at each of these mines. Thus, hazard training must, for very practical reasons, be the responsibility of the mine operator.

[5] Commissioners Suboleski and Young believe that MSHA's inclusion in the roof control plan of what is essentially a task training obligation under Part 48, most of which does not concern roof control, appears to have contributed to Eastern's confusion over whether the document applied to contractors or to only Eastern's own employees who required task training. Further, the length and variety of the content in the document obscured the two critical elements that pertained to the hazard training of Micon's employees - the requirement to install safety posts and sag meters. While the operator is properly held accountable for its failure to provide the information to its contractors, Commissioners Suboleski and Young hope that the Secretary

Eastern contends that its employees are not competent to provide such training. However, the operator's primary role in the hazard training of contractors should be to provide mine-specific safety information. While it may or may not, for example, be true that Eastern could not competently train the Micon employees in the installation of a sag meter, Eastern was nonetheless responsible for informing the Micon miners of the mine-specific requirement to install sag meters any time that grouting was being performed.[6]

Based on the foregoing, we conclude that the Secretary's interpretation of section 48.11, requiring Eastern to train the Micon employees on certain provisions of its roof control plan relevant to the tasks the contract employees were to perform, is reasonable.

B. Notice

Eastern argues that section 48.11 is impermissibly vague and fails to provide adequate notice regarding the scope of hazard training. PDR at 13-15; E. Br. at 20-22. The Secretary argues that Eastern has failed to demonstrate that the regulation is impermissibly vague and that a reasonably prudent mine operator would understand that the regulation required Eastern to train Micon's employees on the portion of its roof control plan pertaining to the type of work that Micon was hired to perform. S. Br. at 26-29. However, the record indicates that Eastern had actual notice of its obligation to train the Micon employees regarding its roof control plan.

MSHA required Eastern to include provisions in the plan covering grouting even though Eastern's miners never performed such work. 25 FMSHRC at 39; Tr. 336-37. The plan explicitly required that the operator provide training in safe grouting procedures. G. Ex. 6 at 29. Section C of the grouting provisions in the plan entitled "Training," states that "[a]ll persons working directly with the polyurethane grouting process . . . shall be properly trained in the *approved plan requirements*, hazards, [and] safety precautions . . . ." *Id.* (emphasis added). By the very terms of its plan, therefore, Eastern was required to train all miners performing grout work in its mine on the plan's requirements, including the use of temporary supports and sag devices.[7] *Id.* at 29-33. Thus, Eastern had actual notice of the requirement that it train Micon miners in safe grouting procedures.

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will more clearly and directly communicate required action to operators, making both compliance and enforcement easier and more certain.

[6] Micon employee Deoskey testified that he did not routinely use either of the safety devices specified in Eastern's roof control plan when performing his grouting work, but did so only on a mine-specific basis, when conditions warranted. G. Ex. 16 at 64-65. In this case, the Secretary has made a determination that mine conditions required specific safety precautions, which were required under the mine's roof control plan. G. Ex. 6 at 30.

[7] For Micon's workers, only the special features that are pertinent to hazard training were required.

Additionally, the roof grouting provisions in Eastern's roof control plan specifically identified two roof control requirements, the use of temporary supports and sag devices, which Eastern was required to follow in roof grouting work at the Harris Mine. G. Ex. 6 at 30. These requirements fit into the category of "safe working procedures" and "safety rules," which are subjects required to be covered under hazard training. Based on the nature of the material in the roof control plan concerning grout work, Eastern had actual notice that, under its roof control plan, it was required to train or see that Micon trained its employees on the plan's requirements related to roof grouting.

Further, under the circumstances of this case, Eastern had constructive knowledge of its obligation to train the Micon employees on its roof control plan pursuant to section 48.11. Section 48.11, as reflected in the preamble in the Federal Register and the PPM, provided Eastern notice of the application of the regulation to the facts in this case. *See* discussion *supra*, slip op. at 6-7. As the Secretary explained in the preamble and the PPM, such training must be tailored to the duties of the miner receiving training and must address the circumstances applicable to the mine in which the work is to be performed.[8] *See* 43 Fed. Reg. at 47,454-55; III *PPM*, Part 48, at 14b. This constructive notice is sufficient to satisfy any due process concerns.

Accordingly, because Eastern had both actual notice and constructive notice of its obligation to see that Micon's employees were trained in the roof control plan, we reject Eastern's contention that the regulation is unconstitutionally vague.

[8] Eastern argues that, because MSHA's district manager forced inclusion of the grouting provision onto all mines in the district, the provision is not specific to the Harris Mine, and is thus not required for hazard training. Eastern could have refused to add this provision and litigated the issue of being forced to include non-mine-specific items in its roof control plan before the Commission. *See, e.g.*, *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 77 (Feb. 2004). However, it did not do so and now must abide by the provision it adopted.

III.

Conclusion

Accordingly, we affirm the judge's decision.

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Chairman Duffy, dissenting:

This is a simple case made unduly complex by the Secretary's enforcement choices. Finding those choices to be unwarranted and, arguably, a case of regulatory overreaching, I respectfully dissent.

The facts themselves are straightforward. Eastern Associated Coal Corporation ("Eastern") encountered hazardous roof conditions in the No. 4 entry of the company's No. 1 Mine. 25 FMSHRC 30, 31 (Jan. 2003) (ALJ). Not possessing the unique expertise to address the problem, Eastern contracted with ESS/Micon ("Micon") to rehabilitate the entry by injecting grout into the unsound roof. *Id*. Prior to proceeding, however, Eastern agreed to an amendment to its roof control plan, proffered by MSHA, which set forth specific guidelines, the compliance with which was necessary to secure MSHA's approval of the grouting activity.[1] *Id*. at 39. The plan was amended, the contract was let, and prior to the commencement of the work by Micon, Eastern's Training Specialist, John Knabb, provided what he considered adequate and appropriate hazard training to Micon's employees.[2] Tr. 312-15.

Early in the course of the grouting procedure, Tyler Pawich, a Micon employee, was seriously injured by a roof fall, and authorized representatives of the Secretary investigated. As a result of that investigation, MSHA determined that Eastern's roof control plan had been violated on three counts: (1) employees were not trained as to the grouting provisions of the roof control plan in contravention of Section C(1) of the plan; (2) adequate temporary supports were not installed in contravention of Section E(2) of the plan; and (3) sag devices were not installed in contravention of Section E(3) of the plan.

In citing Eastern for violating 30 C.F.R. § 75.220(a)(1), which governs the development and approval of roof control plans, MSHA included only counts (2) and (3). Count (1), the training violation, was instead cited several days later under 30 C.F.R. § 48.5(a), which mandates 40 hours of training for new miners. 25 FMSHRC at 42 n.9.[3] That citation was subsequently

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[1] Eastern considers the mine plan amendment to have been unilaterally imposed upon it without much opportunity for recourse and with little or no thought as to whether it was tailored specifically to the conditions in the No.1 Mine. Indeed, it appears that the guidelines are an off-the-shelf set of generic requirements that MSHA imposes as a matter of course. That issue is not before the Commission, however, inasmuch as Eastern acceded to the agency's demand without lodging a legal challenge at the time the guidelines were adopted.

[2] Mr. Knabb had 24 years experience as a certified training specialist. Tr. 291. If anyone can be considered an expert witness as to the scope and application of the training regulations in this case, it would be Mr. Knabb.

[3] The record establishes that Micon's employees had received all the comprehensive new miner training and refresher training required under the regulations. *See* E. Br. at 7.

modified to allege a violation of 30 C.F.R. § 48.11, which requires hazard training for persons working in an underground mine. 25 FMSHRC at 41-42 & n.9.

There should be no distinction between the training violation and the other two violations; they are all subsumed in Citation No. 3568565, which charges a violation of section 75.220(a)(1). The upshot of the Secretary's enforcement decision to cite the hazard training regulation in addition to the roof control plan standard constitutes, for lack of a better term, "double dipping" with respect to the training violation. In other words, applying the logic used by the Secretary to justify the citation of a violation under section 48.11, should Eastern have been cited for a violation of Section E(2) of the roof control plan as well as for a violation of 30 C.F.R. § 75.210 since both provisions govern the installation of temporary roof support? Likewise, should double citations have been issued for violations of Section E(3) of the roof control plan and 30 C.F.R. § 75.214, since both provisions address requirements for the use of supplemental roof support materials, e.g., sag devices?

The answer, of course, is "no" in each instance. Duplicate citations for the same violative condition are foreclosed under well-established case law holding that the Secretary cannot issue separate citations under two different standards unless those standards "impose separate and distinct duties" upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).[4]

Here, the parties have stipulated that hazard training was provided by Eastern; the dispute is whether it was adequate. However, the Secretary is asserting that section 48.11 was violated only to the extent that Eastern did not train Micon's employees regarding the grouting requirements set forth in the amendment to the roof control plan – precisely the requirement set forth in Section (C)(1) of the plan. Section 48.11 did not impose separate and distinct duties upon Eastern that were not already imposed by Section (C)(1) of the roof control plan. The invocation of section 48.11 by the Secretary was superfluous and contrary to the principles adopted by the Commission in the cases cited above.

Of equal concern are the lengths to which the Secretary has gone in order to characterize the training at issue here as "hazard" training. Mr. Knabb, the expert witness in this case, testified that training employees in the particulars of the grouting guidelines is intrinsically a type of task training, not hazard training. MSHA's witness, inspector Sturgill, in essence, agreed. Tr. 102-03 (defining task training as "the training on a specific job that you're going to be doing" and agreeing with Eastern's counsel that "the roof control plan tells you how to do the job of

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[4] It could be argued that the Commission's decision in *Western Fuels-Utah* also supports the proposition that when two standards – one general and one specific – address the same condition, the specific standard is the more appropriate one to cite. "Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence . . . used to support the violation of the specific standard, we would not have found them duplicative." 19 FMSHRC at 1004 n.12.

injecting grout into the roof safely"). Unfortunately, MSHA's task training regulation applies only to machinery and equipment operators or those engaged in blasting operations, and then only if they are being assigned to those duties for the first time. 30 C.F.R. § 48.7. It would appear that, notwithstanding the existence of a precise, on-point, mandatory standard expressly aimed at the training sought to be provided in this case, i.e., Section (C)(1) of the roof control plan, the Secretary has adopted section 48.11 as a default standard even though it is counterintuitive to hold that instruction on how to go about performing a task is "hazard training."

Regulated persons – be they human or corporate – who are subject to civil or even criminal sanctions for their transgressions are entitled to know, in advance, precisely what their government expects of them. Thus, the Commission has consistently held that due process requires that the Secretary provide mine operators adequate notice of their compliance responsibilities with regard to mandatory safety and health standards. *E.g., Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The most compelling reason for citing Eastern under section 75.220(a)(1), and, by implication, under Section (C)(1) of the roof control plan, is that it eliminates the issue of whether Eastern had adequate notice of its responsibilities to train Micon's employees under the training regulations or to see that they were trained in the particulars of the grouting requirements incorporated into Eastern's plan.

On the other hand, in order to uphold a citation under section 48.11, one must accept the Secretary's amphilogical premise that 30 C.F.R. § 48.11(a)(3) is simultaneously "ambiguous," S. Br. at 8-9, and "not impermissibly vague," S. Br. at 26. One must also accept the Secretary's expansive and contorted conception of hazard training arrived at by connecting random interpretive dots lurking in various hideaways in the regulatory history and subsequent policy pronouncements. Lastly, one must accept that the Secretary's interpretation as to the scope of section 48.11(a)(3), only now fully revealed on review, should have been readily apparent to Eastern prior to the events giving rise to this proceeding.[5]

Adequate notice of Eastern's training responsibilities for the Micon employees was clearly provided when the Secretary required that Section(C)(1) be incorporated into Eastern's roof control plan. Had the Secretary referenced that section in the citation alleging a violation of 30 C.F.R. § 75.220(a)(1), I would have no hesitation in upholding it.[6] The requisite notice is

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[5] The Secretary's assertion that Eastern should have anticipated that section 48.11 would be applied in the manner argued here would be more convincing if MSHA had cited that section in the first place. MSHA's confusion surrounding the proper training provision to cite in the week following the investigation belies any notion that the application of section 48.11 to the circumstances in this case should have been obvious to a "reasonably prudent person." *See Alabama By-Products*, 4 FMSHRC at 2129.

[6] Eastern essentially argues that it would be illogical to expect an operator who lacks the expertise in a specialty such as roof grouting to train the employees of an independent contractor

lacking, however, with respect to a citation charging a violation of section 48.11(a)(3) under which MSHA has had to employ exegetical jujitsu to make the standard fit the offense.[7]

Accordingly, I would reverse the decision below.

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Michael F. Duffy, Chairman

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in the arcana of that process. After all, it is the operator's lack of practical knowledge and experience that compels contracting out the activity in the first place. That may well be true, but, as the Secretary argues, Eastern's responsibility in this regard could have been met simply by providing Micon and its employees with a copy of the grouting guidelines that the operator agreed to incorporate into its roof control plan. Oral Arg. Tr. 55.

[7] I agree with two of my colleagues who express a hope that "the Secretary will more clearly and directly communicate required action to operators, making both compliance and enforcement easier and more certain." Slip op. at 7-8 n.5. I strongly suspect, however, that if this particular citation is upheld, any incentive to provide that guidance will be lost. Indeed, it seems to me that, in the future, whenever something untoward happens to an employee of an independent contractor, and notwithstanding the employee's having been fully trained by his own employer as to the safety aspects of his job, MSHA will be motivated to assert post hoc that the operator's hazard training must have been deficient in some fashion. I doubt whether that advances the cause of accident prevention, particularly when, as is the case here, there is an explicit requirement to provide training in the task to be performed that the Secretary has ignored.

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