

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

October 30, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 96-235
v.	:	WEST 96-338
	:	
	:	
WHITE OAK MINING &	:	
CONSTRUCTION COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Marks, Riley, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@). At issue is the decision by Administrative Law Judge T. Todd Hodgdon that White Oak Mining & Construction Company, Inc. (AWhite Oak@), did not violate 30 C.F.R. ' 48.7(a) when it gave employee Keith Smith task training as a miner operator of a continuous mining machine.¹ 19 FMSHRC 1414, 1433-34 (Aug. 1997)

¹ Section 48.7 states, in pertinent part:

(a) Miners assigned to new work tasks as mobile equipment operators . . . shall not perform new work tasks in [this] categor[y] until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(1) *Health and safety aspects and safe operating procedures for work tasks, equipment, and machinery.* The training shall include

(ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination.

instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and

(2)(i) *Supervised practice during non-production.* The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; on [sic]

(ii) *Supervised operation during production.* The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

. . . .

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

30 C.F.R. § 48.7(a) and (b) (emphases in original).

I.

Factual and Procedural Background

White Oak owns and operates the White Oak No. 2 Mine, an underground coal mine in Carbon County, Utah. *Id.* at 1414; Tr. 140-41. The mine employs the room and pillar method of mining using remote-control continuous mining machines to perform 40-foot, extended-cut mining. 19 FMSHRC at 1415; Tr. 524, 558. From 1972 to 1992, the mine was operated by Valley Camp using similar mining methods. 19 FMSHRC at 1414-15.

In 1975, Smith started working at the mine, which was then operated by Valley Camp. Tr. 46. In approximately 1976 and 1977, Smith received task training on continuous miners, first as a miner helper and then as a miner operator. Tr. 69, 72-73. From 1976 to 1983, he worked underground as a miner helper or miner operator. Tr. 72. From 1983 to 1987, Smith worked mainly on the surface in non-continuous miner duties, although he sometimes worked underground with continuous mining machines. Tr. 73-74. From 1987, he worked off and on as a miner operator but starting in 1990, he worked steadily as a miner helper and miner operator. Tr. 76. During Smith's time with Valley Camp, he task trained over ten miner operators and about the same number of miner helpers. Tr. 76-77.

On November 2, 1992, Valley Camp closed the mine. Tr. 78. White Oak purchased and reopened it in October 1993. Tr. 46, 78. Smith was recalled to the mine as a miner helper because of his experience with the mine equipment. Tr. 78-79, 532. In October 1993, he attended an eight-hour refresher course at a college before being allowed to work underground for White Oak. Tr. 79. Upon arriving at the mine, he was given mine-specific training involving a tour of the mine, the section, and the face, and task training as a miner helper. Tr. 79-80. From October 1993 until January 1994, he worked as a miner helper, assisting Shane Hansen, a miner operator and the mine's safety director. Tr. 78, 81-82, 209, 496-97.

On January 18, 1994, Smith was task trained as a miner operator by Hansen. Tr. 61, 508-10. During Smith's task training, Hansen covered four of the six required subjects in the company's training plan. Tr. 89-93, 512. The two subjects he did not cover were changing miner bits and servicing continuous miners. Tr. 91-93. Smith's task training also did not cover all of the course materials required by the training plan, such as applicable MSHA standards. Gov't Ex. P-8 at 2; Tr. 95, 97, 509. During non-production, Smith was allowed a few minutes to play with the controls and get used to everything and then [Hansen and he] trammed to the face and began production. Tr. 510-11. After Smith began cutting coal, Hansen stayed with him for most of the remaining shift and helped him on the miner. Tr. 503, 511.

On March 7, 1995, Blue Samples, a 20-year old inexperienced miner, started work at the mine. 19 FMSHRC at 1420; Tr. 227. One week after his arrival, Smith task trained Samples as a miner helper. Tr. 49-55. On March 24, while Samples was working as a mine helper with a

continuous miner operated by Smith, Samples was hit and killed by the tail boom of the machine. 19 FMSHRC at 1420; Tr. 47.

As a result of the fatal accident investigation by inspectors with the Department of Labor's Mine Safety and Health Administration (MSHA), White Oak was issued an order alleging that the task training of Smith as a miner operator amounted to a significant and substantial (S&S) violation of section 48.7(a)² that resulted from White Oak's unwarrantable failure to comply with the standard. 19 FMSHRC at 1421-22. The company was also issued an order alleging that Samples was not properly task trained as a miner helper under section 48.7(c). *Id.* at 1420-21. White Oak challenged the orders, and the matter proceeded to hearing before Judge Hodgdon.

² The order originally charged a violation of section 48.7(c) but it was amended to an alleged section 48.7(a) violation. 19 FMSHRC at 1421 n.3.

The judge held that the task training of Smith as a miner operator did not amount to a violation of section 48.7(a).³ Reasoning that section 48.7 does not provide sufficient notice of the required conduct, the judge applied the "reasonably prudent person" test to determine whether Smith's task training was adequate under the standard. *Id.* at 1423-24, 1433-34. The judge noted that, although Smith's training lasted only between 15 and 30 minutes, and . . . did not cover everything contained in the company's training plan, Smith had extensive experience with continuous miners. *Id.* at 1433. Accordingly, he determined that a reasonably prudent person would conclude that Smith had been adequately trained as a continuous miner operator, and he vacated the order. *Id.* at 1434.

The Secretary subsequently filed a petition for discretionary review, challenging the judge's finding that White Oak did not violate section 48.7(a) when it task trained Smith as a miner operator.

II.

Disposition

The Secretary asserts that the judge erred in vacating the citation. She argues that the language of section 48.7(a) is unambiguous and that the judge erred in using the reasonably prudent person test to determine whether Smith was properly task trained as a miner operator. S. Br. at 7, 8-9 n.5. She contends that Smith's task training did not satisfy the requirements of the standard because it did not contain information on the health and safety aspects of operating a continuous miner, and did not include supervised practice under production or non-production conditions. *Id.* at 3, 10. White Oak responds that the judge was correct in his determination that the language of section 48.7(a) is not clear, that it was appropriate to apply the reasonably prudent person test, and that Smith's task training complied with section 48.7(a). WO Br. at 3, 19-22.

Section 48.7(a) sets forth requirements that task training must include "instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks," and must include either "supervised practice . . . where production is not the primary objective" or "direct and immediate supervision [when] production is in progress." 30 C.F.R. ' 48.7(a). While we agree with the Secretary that section 48.7(a) sets forth requirements to be included in task

³ The judge held, however, that White Oak violated section 48.7(c) when it task trained Samples as a miner helper, that the violation was S&S, and that it resulted from the operator's unwarrantable failure. 19 FMSHRC at 1428, 1431-32. White Oak did not file a petition for discretionary review challenging those determinations.

training, those requirements are broadly worded. It is not clear from the regulation which health and safety aspects and safe operating procedures must be covered in training or the extent or duration required for supervised practice or direct and immediate supervision.

In construing broadly worded regulations, the Commission has recognized that it is appropriate to consider whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1617-18 (Sept. 1987). Accordingly, the judge did not err in his determination to apply the reasonably prudent person test to the language of section 48.7(a).⁴

Nonetheless, we conclude that the judge erred in his application of the test. The judge determined that any inadequacies in Smith's task training were offset by his years of experience with continuous miners. 19 FMSHRC at 1433. The judge stated that "[i]f Smith were a new miner, had never been a miner helper or had never operated a continuous miner before, [his task training] would clearly be inadequate. But that is not the case." *Id.* Although task training should be adapted to reflect experience, the judge erred to the extent that he considered Smith's years of experience as a substitute for the standard's requirements that task training include health and safety information and supervision.

The judge failed to provide sufficient factual findings on evidence relating to whether Smith's task training included the health and safety information and supervised practice or supervised operation during production required by section 48.7(a). Without adequate findings of

⁴ We do not place as much reliance on the operator's training plan as do our dissenting colleagues. See slip op. at 7 n.2. Unlike the regulations for roof control and ventilation plans, which have extensive and detailed content requirements, there are no such requirements for training plans covering section 48.7(a) task training. Compare 30 C.F.R. ' 48.3 with 30 C.F.R. ' ' 75.220, 75.221, 75.370, 75.371. Although White Oak's training plan was approved by MSHA, it is very brief and, as the judge noted, does not appear to cover the health and safety aspects and safe operating procedures required by section 48.7(a). 19 FMSHRC at 1432; Gov't Ex. P-8 at 2. Our colleagues claim that White Oak's training plan was presumably tailored . . . to the specific conditions at its mine. Slip op. at 7 n.2. However, it is noteworthy that White Oak did not tailor its training plan to its mine but simply took Valley Camp's training plan, put White Oak's cover letter on it, and resubmitted it to MSHA. Tr. 524. To further support their claim that White Oak's training plan was entitled to considerable weight because it was mine-specific, our colleagues also cite to *Jim Walter Resources, Inc.*, 9 FMSHRC 903 (May 1987). Slip op. at 7 n.2. However, *Jim Walter Resources* does not involve training plans but instead deals with ventilation plans, which, as discussed above, are far more detailed and comprehensive. Unlike our colleagues, we believe it is appropriate to judge Smith's training against the training requirements of section 48.7(a) using the reasonably prudent person test rather than against an overly terse training plan developed by the operator that may not fully comply with the requirements of section 48.7(a).

fact and the basis for them, the Commission cannot effectively perform its review function. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). Accordingly, we vacate the judge's determination and remand to the judge to determine whether the task training provided to Smith amounted to the type of training that a reasonably prudent person would have provided in order to meet the protection intended by the standard's requirements.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that White Oak did not violate section 48.7(a) and remand for further analysis consistent with this decision. If the judge finds that White Oak violated section 48.7(a), he shall also consider whether the violation was S&S and resulted from the operator's unwarrantable failure, and assess an appropriate civil penalty.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Verheggen, dissenting:

The record in this case reflects that Smith's task training included the necessary health and safety information and supervised practice required by section 48.7(a). Because substantial evidence supports the judge's finding that White Oak Mining complied with the regulation,¹ we would affirm his decision and therefore dissent from our colleagues remand order.

Our colleagues in the majority contend that the regulation does not contain information on the health and safety aspects of operating a continuous miner, and consequently, they approve the judge's use of the reasonably prudent person test to evaluate compliance with section 48.7(a). Slip op. at 4-5. However, they fail to adequately acknowledge the existence of the

¹ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C.

' 823(d)(2)(A)(ii)(I). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion. Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

operator's training plan, approved by MSHA,² which provides a blueprint for ascertaining whether appropriate health and safety training occurred. Reference to the training plan is consistent with this particular regulatory scheme, as section 48.7(a) is written in deliberately broad terms, with the details to be provided by each individual operator's training plan. Therefore, we see no need to adopt the objective, but nonetheless still general standard of what training a "reasonably prudent person" would have provided, when we have as a reference the specific elements in White Oak's training plan. Rather, we believe the pertinent inquiry is whether the Secretary has proven that the operator failed to comply with the provisions of the training plan, and conclude that in this case she did not meet this burden.³

² Under section 115 of the Mine Act, 30 U.S.C. § 825, every mine operator is required to have a health and safety training program approved by the Secretary. Our colleagues characterize White Oak's training plan as "overly terse," and, consequently, "do not place . . . much reliance on" it. Slip op. at 5 n.4. We believe, however, that this plan provides the only mine-specific frame of reference to evaluate the training given Smith. The plan was presumably tailored, with MSHA's approval, to the specific conditions at its mine. As the Commission has noted in another context, "[t]he ultimate goal of the [mine plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord." *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Also, although our colleagues assert that the plan "may not fully comply with the requirements of section 48.7(a)" (slip op. at 5 n.4), the propriety of the plan is not before us in this appeal.

³ Our reliance on the operator's own training plan is consistent with the importance we place on an operator's roof control and ventilation plan. See *Jim Walter Resources*, 9 FMSHRC at 907 (once ventilation plan approved, its provisions are enforceable as mandatory safety standards); *U.S. Steel Mining Co.*, 8 FMSHRC 314, 318-20 (Mar. 1986) (affirming judge's finding that operator violated its roof control plan).

White Oak's training plan contains six required elements that a miner operator must learn during the training program. Gov't Ex. P-8 at 2. The evidence in the record reflects that Smith completed four of these six elements. Tr. 89-93, 512; WO Br. at 6-7. Thus the Secretary's only possible claim that White Oak failed to comply with the provisions of the training plan would rest on Smith's lack of training on two remaining elements of the plan: changing of bits and the servicing of the continuous miner. On this particular record, this does not suffice to prove a violation.⁴

Section 48.7(a) is not applicable when a miner has demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. Although it is undisputed that Smith was required to undergo task training, since he had not performed the miner operator job within 12 months, he had performed some aspects of that job within that time period; in fact, he had changed bits and serviced the machine as a miner's helper. Tr. 92-93; 498; W.O. Br. at 16. In other words, there was an overlap in function between the helper and operator's jobs because Smith performed this work during the period immediately preceding his task training. His trainer, Hansen, would have been aware of this because Smith worked as Hansen's helper. Tr. 86, 496-97. Thus, under the language of the regulation, he was not required to be trained on these two elements of the plan.

We find it troubling that MSHA issued this order having made little or no effort to discuss with either Smith or Hansen the substance of the training provided. Tr. 199, 202-03, 260-61. Instead, the Secretary appears to treat White Oak's failure to utilize the manufacturer's service bulletin's guidelines on the safe operation of continuous miners as virtually a per se violation. S. Post-Hearing Br. at 14, 16. However, the training plan approved by MSHA does not require that this manual be used. Even the plan's reference to course materials does not identify the manufacturer's bulletin.⁵

⁴ The Secretary's sweeping assertion that there can be no doubt that the specific requirements of Section 48.7(a) were not satisfied (S. Br. at 10) C offered without a shred of record support C hardly suffices to sustain her claim.

⁵ We agree with the judge, however, that the manufacturer's bulletin would provide an excellent training reference and that MSHA might want to include it in the training plans it reviews and approves in the future. 19 FMSHRC at 1427.

We emphasize that we do not disagree with the application of the reasonably prudent person test to this regulation in the absence of more specific guidance. For instance, because this plan is silent about how long task training should be conducted, we agree with our colleagues in the majority that the reasonably prudent person test could be applied to this part of the regulation. We believe that under this test, the 15 minutes of oral instruction provided here constitutes compliance with section 48.7 (a) in light of Smith's extensive mining background.⁶

In conclusion, substantial evidence in the record supports the judge's determination that no violation occurred, and accordingly, we would affirm.

Mary Lu Jordan, Chairman

Theodore F. Verheggen, Commissioner

⁶ We agree with our colleagues in the majority that it would be inappropriate to substitute a miner's experience for training that fails to meet the requirements of the regulation. Slip op. at 5. Because they are correct, however, that task training should be adapted to reflect experience,⁶ we cannot say that 15 minutes of training was inadequate under this regulation. *Id.*

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