

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021**

July 30, 2009

JIM WALTER RESOURCES, INC.	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2009-500-R
	:	Citation No. 7696888; 05/01/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	No. 7 Mine
MINE SAFETY AND HEALTH	:	Mine ID 01-01401
ADMINISTRATION (MSHA)	:	
Respondent	:	

DECISION

Appearances: David M. Smith, Esq., Warren B. Lightfoot, Jr., Esq., and A. Christine Green, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and Guy Hensley, Esq., Brookwood, Alabama on behalf of the Contestant; Uche Egemonye, Esq., and Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia and Nashville Tennessee, respectively, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon Contestant’s request for expedited hearings to challenge Citation Number 7696888 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the “Act”. The citation alleges that Jim Walter Resources Inc., (JWR) was operating its No. 7 Mine with an unapproved ventilation plan in violation of 30 C.F.R. § 75.370(a)(1).¹ More specifically the citation charges as follows:

Conceptual approval was given on April 3, 2008 for the sealing plan of D, E, F, G, H, and I panels in the northeast gob contingent in part upon compatibility with requirements in the rule-making process for sealing. The rule making process has been completed and it has been determined that the previously approved conceptual plan does not comply with all requirements contained in the Sealing of Abandoned Areas, Final Rule and 30 CFR 75.364. Therefore, the conceptual approval was rescinded. The plan does not adequately address the

¹ The cited standard requires, in essence, that the mine operator develop and follow a ventilation plan approved by the Secretary.

ability to access and examine the seals after construction, not only for sampling procedures, but also for inspection during and after the curing process. Discussions concerning the issues have been conducted and the process is at an impasse. By letter dated April 23, 2009 and received via fax on April 27, 2009 the operator has adopted a ventilation plan containing seal provisions required by 75.371 (ff) that cannot be approved.

On March 28, 2008, JWR submitted a ventilation plan supplement (Plan Supplement) to the Department of Labor's Mine Safety and Health Administration (MSHA) (Govt. Exhs. No. 3 and 5). As noted in the citation, on April 3, 2008, MSHA approved the Plan Supplement conditioned upon compliance with final rules regarding the sealing of abandoned areas (Final Rules), not yet published but then under consideration by the Secretary.² The Final Rules were published on April 18, 2008, and introduced a requirement that mine operators must "maintain and repair seals to protect miners from hazards of sealed areas" (Govt. Exh. No. 9). MSHA thereafter, on December 16, 2008, rescinded its conditional approval of the Plan Supplement (Govt. Exh. No. 3). On April 23, 2009, JWR adopted the rescinded Plan Supplement under procedures set forth in MSHA's Program Policy Manual to accommodate mine operators who wish to contest disputed ventilation plans (Govt. Exh. No. 15). Accordingly, by agreement between MSHA and JWR, MSHA Inspector Harry Wilcox thereupon issued the citation at bar on May 1, 2009. On the same day, JWR abated the citation by adopting its approved ventilation plan. On May 9, 2009, JWR filed the instant notice of contest challenging the citation and the decision to rescind the Plan Supplement.

The Secretary maintains that the basis for her disapproval of the Plan Supplement is that, if implemented, it would violate the mandatory standards at 30 C.F.R. §§ 75.364(b)(4), 75.364 (c)(3) and 75.337(a). As noted, Section 75.337(a) represents the codification of one of the final rules published following the conditional approval of the Plan Supplement.

When the Secretary disputes a ventilation plan proposed by a mine operator, the Secretary has the burden of proving the unsuitability of the plan. See *Secretary v. Peabody Coal Company* 18 FMSHRC 686 (May 1996), aff'd 111 F.3d 963 (D.C. Cir. 1997). The Commission has defined "suitable" as "matching or correspondent", "adopted to a use for purpose", "fit", "appropriate from the view point of... convenience, or fitness: proper, right," "having the necessary qualifications: meeting requirements." *Peabody* 18 FMSHRC at 690 quoting Webster's Third New International Dictionary 2286 (1986). Clearly, if a plan proposed by the mine operator would, if implemented, violate mandatory standards then it would also be unsuitable.

John Urosek has a Bachelor of Science degree in mining engineering from Pennsylvania State University and is a registered professional engineer. He is presently MSHA's chief of mine emergency operations. In that capacity he is responsible for administering MSHA's seal approval

² The Final Rules were being developed following explosions and seal failures at the Sago and Darby mines resulting in multiple fatalities (Govt. Exh. No. 28 p.7).

program. He was also chairman of the committee which developed the Final Rules for the sealing of abandoned areas. Mr. Urosek is eminently qualified as an expert in mining engineering and, in particular, in regard to mine ventilation and mine explosions (Govt. Exhs. No. 20 and 28). Mr. Urosek has also been designated as the sole decision maker authorized to speak for the Secretary of Labor on this matter and therefore he is the designee to be given deference in interpreting the agency's regulations should that be necessary. See *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Akzo Nobel Salt, Inc. et.al. v. Federal Mine Safety and Health Review Commission and Secretary of Labor*, 212 F.3d 1301 (2000); *Michigan Citizens for Indep. Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989); *Homemakers N. Shore, Inc., v. Bowen* 832 F.2d 408, 413 (7th Cir. 1987); *RAG Cumberland Resources v. FMSHRC*, 272 F.3d 590, 598 (D.C. Cir. 2001).

Urosek explained in his direct examination that JWR had requested a change to the mine ventilation plan for its No. 7 Mine to allow the use of seals to separate the active longwall panel from the adjacent mined-out longwall panels (Govt. Exh. No. 28).³ As the active longwall begins to mine, these seals, he explained, would not be accessible and could not be examined for hazardous conditions, could not be accessed to test for methane, and could not be maintained or repaired. Urosek explained that MSHA could not approve these changes because, if made, they would violate the mandatory standards at 30 C.F.R. § 75.364(b)(4), 30 C.F.R. § 75.364(c)(3), 30 C.F.R. § 75.337(a) and 30 C.F.R. § 75.336(a)(1)(II).⁴

30 C.F.R. § 75.364(b)(4) provides as follows:

Hazardous conditions. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator: ...(4) at each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

§ 75.364(c)(3) provides as follows:

Measurements and tests. At least every 7 days a certified person shall-... (3) test for methane in the return entry nearest each set of seals immediately after the air passes the seals.

30 C.F.R. § 75.337(a) provides that “[t]he mine operator shall maintain and repair seals to protect miners from hazards of sealed areas.”

The Secretary maintains that the language of the referenced standards is plain and unambiguous and should be enforced as written. I have no difficulty in agreeing with the Secretary

³ In order to better expedite these proceedings Mr. Urosek's direct testimony, as well as that of other experts in this case, was presented in written form before trial (Govt. Exh. No. 28).

⁴ The Secretary, upon subsequent receipt of additional information from JWR, acknowledged at hearings that the latter standard would not be violated by implementation of the Plan Supplement.

and find that indeed the plain language of Sections 75.337(a), 75.364(b)(4), and 75.364(c)(3) must be enforced as written and requires that JWR regularly examine, maintain and repair the proposed seals as well as perform the required methane tests. JWR acknowledges that, as the active longwall in its No. 7 Mine begins to mine, the proposed seals will not be accessible. It will therefore not be able to examine the seals for hazardous conditions, gain access to test for methane, maintain the seals, and, if structural defects are discovered, replace the seals. In sum, under its Plan Supplement, JWR would not be able to comply with the seal standards. The Plan Supplement, therefore, is not “suitable” under Section 75.370(a)(1). Consequently, the conditional approval of the Plan Supplement was properly rescinded by the MSHA district manager.

It is a cardinal rule of construction that if a regulation’s meaning is plain, the regulation cannot be construed to mean something different from that plain meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). When the language of a provision is plain, the plain language is the meaning of the provision and the sole function of the courts is to enforce the language as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.Na.*, 530 U.S. 1, 6 (2002). The Commission has also held that, where, as here, “the meaning of a standard is clear based on its plain language, it follows that the standard provides the operator with adequate notice of its requirements.” *Jim Walter Resources*, 28 FMSHRC 579, 595 (August 2006); *LaFarge Constr. Materials, et.al.* 20 FMSHRC 1140, 1144 (October 1998).

Moreover, no language in the standards at issue sets forth or even suggests any exception to the requirements that seals be examined for hazardous conditions, that seals be maintained and repaired, and that the return entry nearest each set of seals be tested for methane. As a result, the standards cannot be read as containing such an exception. See *Thunder Basin Coal Co v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995). If the Secretary intended to exempt the seals that JWR proposed in its Plan Supplement from the requirements of Sections 75.337(a), 75.364(b)(4) and 75.364(c)(3), these sections could have so provided. See *Russello v. United States*, 464 U.S. 16, 23 (1983).

Contestant, while professing to also argue that the plain language of the standards should prevail, in actuality has devoted the great bulk of its case in attempting, through extrinsic evidence, to create ambiguities where none exist.⁵ By then citing this extrinsic evidence, Contestant claims that it is not receiving fair notice of what is required by the standards at issue. This argument is, of course, the equivalent of a classic “strawman” argument and can not withstand close scrutiny. In any event, while I am certainly sympathetic with Contestant’s understandable prior confusion engendered by the Secretary’s prior inconsistent enforcement of Section 75.364, I cannot find that Contestant has now failed to have received fair notice of what is required by the standards at issue. Since this proceeding involves only a challenge to the disapproval of a ventilation plan pursuant to procedures set forth in MSHA’s Program Policy Manual, it is not in the same posture as a typical enforcement proceeding under the Act. Unlike enforcement proceedings where punitive penalty sanctions are imposed and where the question of whether fair notice has been provided regarding the

⁵ The Contestant had also earlier claimed that the Secretary failed to negotiate in good faith but specifically withdrew that claim at hearings.

application of a mandatory standard may be a relevant issue, in these proceedings the Secretary is actually providing clear advance notice of how the mandatory standards are now, and will be, applied in the future. Such notice has not only been provided by the plain meaning of the language of Sections 75.364 and 75.337(a) but also by the issuance of the letter of disapproval on December 16, 2008, by the issuance of the citation at bar on May 1, 2009, by these proceedings and reconfirmed by the testimony of the Secretary's designee, Mr. Urosek. Under the circumstances JWR cannot claim in this case that it has not received fair notice before any punitive enforcement action has been taken. See *Akzo Noble Salt, Inc.* at 1304-1305.⁶

While apparently acknowledging that the language of Section 75.364 does indeed prohibit it from using internal seals, JWR nevertheless argues, in effect, that by issuing a memorandum in 1993 (Gov't Exh. No. 25) effectively waiving enforcement of 75.364 at its No. 7 Mine, the Secretary is barred or estopped from changing that policy. As explained by Mr. Urosek, the mining disasters of 2006 prompted the Secretary to more strictly enforce the provisions of section 75.364. A lack of prior enforcement does not, in any event, constitute a defense to a violation and does not estop the government from prosecuting the violation. *Emery Mining Corp. v. Secretary* 744 F.2d 1411, 1416 (10th Cir. 1984); *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546-47 (August 1993); *Nolichuckey Sand Co.*, 22 FMSHRC 1057; 1063-64 (September 2000). As previously noted, moreover, this is not an actual enforcement proceeding and JWR has now been given, prior to any actual enforcement action, clear notice of the Secretary's change in policy to a strict enforcement of Section 75.364. For all the above reasons the Contestant's argument must in any event be rejected.

I also have not disregarded JWR's assertion that Section 337(a) is ambiguous based on language in the preamble to the Secretary's Final Rules published in 2008. However it is well established law that language in a preamble cannot create an ambiguity where none exists in the plain language. See *Pfizer Inc. v. Heckler*, 735 F.2d at 1509 ("Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble") *Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Albermarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000) "The preamble need be consulted only when, unlike here, the regulation's plain language is ambiguous"; *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous").

It is also noted that, in any event, the Secretary's authorized decision maker, Mr. Urosek, testified that what JWR calls an "exception" to the Final Rules appearing in the preamble applies only to "spontaneous combustion" mines and explained at trial why that language only applies to such mines. It is undisputed that the No. 7 Mine is not a "spontaneous combustion" mine. Urosek explained that mines that are susceptible to spontaneous combustion are provided an exception

⁶ As the Secretary noted at hearings, the proper forum for JWR's dispute herein is under a Petition for Modification proceeding pursuant to Section 101(c) of the Act. Under such a proceeding, JWR would have the opportunity to prove that its alternative to compliance with the standards at issue herein would be just as safe as compliance with these standards.

because such mines must comply with other rules that afford miners the same protection from hazards (Gov't Exh. No. 28).

JWR also argues that MSHA intended to depart from its practice of only exempting seals in "spontaneous combustion" mines from the maintenance, examination, and testing requirements. JWR points out that MSHA's 2007 Procedure Instruction Letter (PIL) contained language that exempted seals in spontaneous combustion mines from the maintenance, examination, and testing requirements, whereas the 2008 PIL omits this language. As Mr. Urosek explained, however, the omission of this phrase did not indicate a change in the interpretation of 75.337(a) to recognize the blanket exception to the maintenance and repair of seals which JWR seeks to impose on MSHA. (Gov't Exhs. No. 28 and 15). Further, where a new version of a standard eliminates a provision in a previous version, such elimination does not establish a new intent, especially where, as here, the result is simply silence on the matter. See *US v. Wilson* 290 F.3d 347, 360 (D.C. Cir 2002), cert. denied, 537 U.S. 1028 (2002).

In any event, directives contained in agency materials such as instruction manuals, memoranda, opinion letters, and enforcement guidelines are not entitled to deference where, as here, the interpretation or policy statement cannot be squared with the plain language of mandatory standards. *Christensen et al. v. Harris County, et al.* 529 U.S. 576 (2000); *Brock v. Cathedral Bluffs Shale Oil Co.* 796 F.2d 533, 538-39 (D.C. Cir. 1986); *Secretary v. Utah Power and Light Company*, 11 FMSHRC 1926 (October 1989).

Under all the circumstances, it is clear that JWR's proposed Plan Supplement, if implemented, would be in violation of the standards at 30 C.F.R. §§ 75.364(b), 75.364(c)(3) and 75.337(a) and that the Secretary has therefore met her burden of proving that the Plan Supplement is "unsuitable".

ORDER

Citation No. 7696888 is affirmed and Contest Proceeding Docket No. SE 2009-500-R is hereby dismissed.

Gary Melick
Administrative Law Judge
202-434-9977

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