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SOL (MSHA) V. EMERY MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No: WEST 82-48 A.O. No: 42-00121-03103
v.	
EMERY MINING CORPORATION, RESPONDENT	Docket No: WEST 82-80 A.O. No: 42-00121-03106 H Deer Creek Mine

AND

EMERY MINING CORPORATION, APPLICANT	Contest of Order
v.	Docket No: WEST 81-400-R Order No: 1022357 9/9/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Deer Creek Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner
Evert W. Winder, Manager, Health and Safety, Emery Mining Corporation, Huntington, Utah and
Todd D. Peterson, Esquire, Attorney for Respondent

Before: Judge Moore

The above three docket numbers were consolidated for hearing and were tried together on May 18, 1982 in Price, Utah.

At the outset counsel for the government announced a settlement of the two violations involved in Docket No: WEST 82-80. The government announced that it had insufficient evidence to support one of the two alleged violations and that with respect to the other alleged violation it would amend its imminent danger order to a normal citation and settle the matter for $1,000 rather than the $2,500 that had originally been assessed. I approved the settlement.

With respect to the other violations, most of the facts were stipulated. My decision herein will rest on an interpretation of 30 C.F.R. 48.8(a) which states:

> "each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section".

It is the Company's position that "8 hours of annual refresher training means 8 hours of refresher training in each calendar year." It is the government's position that the annual refresher training is required every twelve months without regard to the calendar year. The miners in question in this case, all received 8 hours of refresher training in each calendar year, but the refresher training in 1981 was given more than twelve months after the refresher training that was given in 1980. 30 C.F.R. 48.3(a) requires each operator to have an MSHA approved plan "containing programs for training new miners, training newly employed experienced miners, training miners for new tasks, annual refresher training, and hazard training for miners as follows: "The training plan submitted by respondent to MSHA provides that annual refresher training will be given by December 31 in each calender year. The plan was approved by MSHA. (See Respondent's exhibit No. 1).

The citations in the instant cases were issued in reliance on government exhibit 1, which is a policy memorandum issued by MSHA on June 1, 1981. The policy memorandum is couched in terms that would lead one to believe that it was a relaxation of a former more strict interpretation of the refresher training standard. It says "in order to provide practical flexibility and to reduce record keeping for Part 48, this office has determined that miners may complete their annual refresher training any time during the last calendar month of their annual training cycle. For example, a miner beginning work on June 5, 1981, may complete his annual refresher training any time before June 1982." In the next paragraph the memorandum states that this policy permits records and training schedules to be maintained on a monthly basis instead of tracking individual calendar days." The implication is that prior to this memorandum a miner who began work on June 5 of one year, would have to have his refresher training completed by June 5 of the following year. No memoranda to that effect has been produced or referred to by the parties. If the standard is interpreted in accordance with government exhibit 1, almost 13 months could elapse between refresher training periods. Under the mine operator's plan, however, almost two years could elapse between training periods. If, for example, a miner was hired and trained early in one year, and not given his refresher training until December of the following year, the interval could be close to two years. Section 115(a)(3) of the Act says "all miners shall receive no less than 8 hours of refresher training no less frequently than once each twelve months. . . " This could mean training in one 12 month period and training in the next 12 months period or it could mean that no longer than 12 months shall separate training sessions.

I think that the Congress may well have intended that refresher training be given at least once every twelve months. I think it clear, however, that in preparing the regulation in question here, the Secretary did not intend that refresher training be given every twelve months. The

regulations demonstrate that when the Secretary intends to say twelve months, he does so explicitly. See for example 30 C.F.R. 48.2(b), 30 C.F.R. 48.7(a), 30 C.F.R. 48.11(b) and similar provisions regarding surface mines and surface areas of underground mines. 30 C.F.R. 48.11(b) refers to hazard training and states "miners shall receive the instruction required by this section at least once every twelve months." If 30 C.F.R. 48.8(a) means the same thing, why were not the same words used? I think MSHA meant to require training in every calendar year, and it seems clear that the format it supplied for the preparation of a training plan contemplated training in each calendar year. Item 6 on the training plan is "predicted time when regularly scheduled refresher training be given" and the Respondent mine has in its plan "by December 31 annually." If every miner had to be trained within twelve months of being hired or of his last refresher training there would be no way to respond to the question without giving a date for each miner. Also in Respondent's favor is the normal use of the word "annual". Annual banquets and annual meetings are not necessarily within twelve months of each other.

The fact that Congress may have intended that refresher training be conducted within twelve months of the previous training is not controlling as to the meaning of the regulation promulgated by the Secretary. In Service vs. Dulles 354 U.S. 353 (1957) Congress had given the Secretary of State absolute discretion to discharge anyone who he suspected of being disloyal to the United States. A regulation had been published providing for a hearing for anybody suspected of being disloyal. In this case a hearing was held. It turned out that the results of the hearing were deemed improper, but it was argued by the government that since Congress gave the Secretary absolute discretion the results of the hearing were not important. The Supreme Court held that even though Congress gave the Secretary absolute discretion, if regulations were promulgated providing for a procedure to be followed, then the Secretary no longer had absolute discretion but must follow the procedure. Similar results were reached in Accardi vs. Shaughnessey, 347 U.S. 260 (1954) and Vitarelli vs. Seaton, 359 U.S. 535 (1959). See also Pacific Molasses Company vs. Federal Trade Commission, 356 (Fed 2d. 386, 389, (5th Cir. 1966). Taken together, I consider these cases stand for the proposition that regardless of the intent of Congress, if any agency publishes a regulation that is not so harsh as the one authorized by Congress, the public is bound only by the agency regulation. Therefore, I hold that even though Congress may have intended that refresher training be conducted every twelve months, the regulation published by MSHA is controlling, and only requires refresher training during every calendar year.

The Citations are vacated and the case is DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge