U.S. Department of Labor

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Issue Date: 13 May 2008

Case No.: 2008-MSA-00002

In the Matter of

R. S. & W. COAL COMPANY, INC.
Petitioner

v.

MINE SAFETY & HEALTH ADMINISTRATION (MSHA)
Party Opposing Petition

ORDER REMANDING MATTER TO MSHA

This matter involves the Petitioner's request for modification of a mandatory safety standard promulgated under the Federal Mine Safety and Health Act of 1977 ("the Act"). In accordance with 30 U.S.C. § 811(c), mine operators may apply for modification of mandatory standards. The procedures set forth in 30 C.F.R. Part 44 govern such requests for modification.[1]

Background

Title 30 C.F.R., Part 75 sets forth mandatory standards for underground coal mines, promulgated in accordance with the Act's procedures. Section 75.1714-2(b) sets forth a general requirement that self-contained self-rescue (SCSR) devices shall be worn on, or carried by, all persons underground. Section 75.1714-2(c) permits SCSR devices to "be placed in a readily accessible location no greater than 25 feet from such person[s]," where the wearing or carrying of the device is hazardous. By letter dated May 1, 2006, the Petitioner requested modification of the requirements of § 75.1714-2(c), to permit storage of SCSRs within 200 feet of the working face of the mine, rather than within 25 feet of a miner, as the regulation mandates.

Pursuant to 30 C.F.R. § 44.13, the petition for modification was investigated. On February 13, 2007, the investigating official submitted a report to the District Manager. By Proposed Order dated November 26, 2007, the Acting Chief, Safety Division for Coal Mine Safety and Health of the Mine Safety and Health Administration (MSHA) dismissed the petition, based on its determination that the Petitioner "had not yet applied to the District Manager for approval of an alternative storage plan." The Proposed Order cited § 75.1714-2(e), which states: "A mine operator may apply to the District Manager under § 75.1502 for permission to place the

[1] The petitioner has several petitions for modification pending. This Order involves only the petition in the case cited in the caption.

SCSR more than 25 feet away." According to the Proposed Order, "the mine operator must exhaust the administrative provisions for storage plans before seeking to modify the standard."

On December 26, 2007, the Petitioner appealed, and requested a hearing. Thereafter, this matter was assigned to me. On March 10 and 11, 2008, a hearing in this matter was held at Hazleton, Pennsylvania. Counsel for the MSHA (the Party Opposing Petition), asserted that I should enter findings on behalf of MSHA based upon the Petitioner's failure to exhaust his administrative remedies, and stated that MSHA was not prepared for a hearing on the merits of the petition. See Hearing Transcript at 6-10. I informed the parties I would consider this assertion and issue a ruling on the matter. I also informed the parties that, in the event I did not find on behalf of MSHA, I would entertain testimony on the merits of the petition at a later date. Hearing Transcript at 6.

Discussion

In the case before me, the Petitioner did not submit a request to the District Manager, but rather has submitted a petition for modification directly to MSHA. MSHA's denial of the petition for modification is not based on the merits of the Petitioner's request, but rather on the Petitioner's failure to first apply to the District Manager.

Significant oversight responsibility for coal mine operations is vested in District Managers. For example, responsibility for approval of mine emergency evacuation and firefighting programs is placed directly on the District Managers. See, e.g., 68 Fed. Reg. 53,037 (Sept. 9, 2003) (Final Rule implementing 30 C.F.R. § 75.1502). The District Manager is also responsible for approving a program of instruction on emergency evacuation and firefighting for each mine. 30 C.F.R. § 75.1502(a). In 2006, the governing regulation was amended to specifically include requirements that mine operators instruct all miners on, among other things, the "location, quantity, types, and use of stored SCSRs," as well as practical training in donning and transferring SCSRs. 71 Fed. Reg. 12,252 (March 9, 2006)(Emergency Temporary Standard/Proposed Rule); 71 Fed. Reg. 71,430 (Dec. 8, 2006)(Final Rule); codified at 30 C.F.R. § 75.1502(c)(6) and (8)(2007).

Both the mandatory safety standard to which the Petitioner requested modification (regarding placement of SCSRs within 25 feet of miners) and the regulatory procedure (to apply to the District Manager for permission to place SCSRs more than 25 feet away) have been in effect for at least 20 years. See 30 C.F.R. § 75.1714-2(c)(1987). For that entire time period, the language of the regulation has stated that a mine operator "may" apply to the District Manager, and the regulation has listed factors for the District Manager to consider in deciding whether to permit the operator to place the SCSRs more than 25 feet from a miner.

Notwithstanding the language of 30 C.F.R. § 75.1714-2(e), which states that a mine operator "may" apply to the District Manager, MSHA's apparent practice is to require that all requests for modification of the relevant requirement be directed to the District Managers. It is not clear when this practice began, or whether public notice of this procedural requirement was ever published in the Federal Register. For example, in 2004, when a technical amendment to § 75.1714-2 was published in the Federal Register, the notice included the following comment:

"The mine operator must apply to the District Manager of the Coal Mine Safety and Health district in which the mine is located for permission to place the SCSR more than 25 feet away." 69 Fed. Reg. 8107 (Feb. 23, 2004). However, as set forth above, the text of the regulation itself continued to state that mine operators "may" apply to the District Manager.

A fair reading of 30 C.F.R. § 75.1714-2(e) indicates that MSHA has delegated to the District Managers the authority to determine whether to permit SCSRs to be placed more than 25 feet from miners. Based on the many responsibilities of District Managers regarding coal mine operations, and in particular the responsibility to oversee emergency evacuation instruction programs for each mine under § 75.1502, the requirement that the District Manager act on all requests for placement of SCSRs more than 25 feet from miners makes sense. District Managers are the officials most likely to understand the unique circumstances involved in the operation of each mine in their districts.

The issue before me, however, is whether the Petitioner's request for modification should be denied outright, because he failed to direct his request to the District Manager. Except for the comment in the 2004 technical amendment, noted above, it does not appear as though MSHA ever informed the public, through notice in the Federal Register, of its required procedure. Therefore, the issue of whether MSHA complied with the standards for rulemaking Congress established in the Act must be examined.

Section 101(c) of the Act, 30 U.S.C. § 811(a), states that promulgation of applicable rules under the Act is generally subject to 5 U.S.C. § 553, the notice-and-comment provision of the Administrative Procedure Act. The Act specifically requires that proposed rules promulgating, modifying, or revoking mandatory health or safety standards be published in the Federal Register, and that the public be provided the opportunity to comment. 30 U.S.C. § 811(a)(2).

By its terms, however, the Administrative Procedure Act does not require the notice-and-comment process for "rules of agency organization, procedure or practice," except where such notice is required by the specific statute involved. 5 U.S.C. § 553(b)(3)(A).[2] The Act does not specifically require the notice-and-comment process for amendments to its procedural rules. Courts have held that procedural rules that do not change substantive standards are not subject to notice-and-comment requirements. See JEM Broadcasting Co. v. FCC, 22 F.3d 320, 326-27 (D.C. Cir. 1994).

I find that the designation of which official, within MSHA, to which a mine operator shall submit a request for modification of a mandatory safety standard under 30 C.F.R. Part 44, is a procedural rule. Consequently, I also find that when MSHA delegated authority to District Managers to act on petitions for modification of the mandatory safety standard regarding placement of SCSRs more than 25 feet from miners, it was not required to comply with the notice-and-comment rulemaking procedure set out in 30 U.S.C. § 811(a).

[2] In addition, public comment is not required for technical amendments, because these are not matters of public interest. See generally Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995).

Based on the foregoing, I find that MSHA's determination that the Petitioner did not direct his request for modification to the proper party, the District Manager, was appropriate. However, rather than denying the Petitioner's request outright, under the specific circumstances of this case, I find MSHA should have forwarded the Petitioner's request for modification to the District Manager for appropriate action.

Forwarding the Petitioner's request to the District Manager would not be inconsistent with the regulation, as the language of 30 C.F.R. § 75.1714-2(e) does not clearly set forth MSHA's required procedure. Indeed, the use of the term "may" in this regulatory provision, with regard to applications to the District Manager, suggests that this procedure is optional.[3] In addition, 30 C.F.R. § 44.10, which sets out the procedures for filing petitions for modification, states only that petitions shall be submitted to MSHA, and does not indicate that petitions requesting modification of the SCSR placement standard should first be directed to the District Managers. Unfortunately, petitioners can be confused by the use of imprecise language and the apparent contradictions between regulatory sections.[4]

Additionally, I note that forwarding the Petitioner's request for modification to the District Manager for action at this time would be consistent with judicial economy, as the investigation required under § 44.13 has already been completed. Consequently, upon receipt of the Petitioner's request for modification and the completed investigation, the District Manager has the information needed to make a determination on the Petitioner's request.

Conclusion

Based on the foregoing, therefore, I REMAND the Petitioner's petition to MSHA, and I DIRECT that MSHA forward the matter to the District Manager for a decision on the Petitioner's request for modification of the standard relating to placement of SCSRs within 25 feet of miners. After a determination has been made, if the Petitioner's request for modification is not granted, I direct this matter be returned to me for additional proceedings under 30 C.F.R. § 44, subpart C.

[3] Notably, part 75 of the regulation sets forth the many obligations of coal mine operators, and uses the term "shall" to describe these mandatory standards. The statement that petitioners "may" direct requests for modification of the SCSR placement requirement to the District Managers, set out § 75.1714-2(e), contrasts sharply with the term "shall" used elsewhere in the regulation.

[4] I urge MSHA to examine the governing regulation and, if appropriate, make the technical corrections necessary to ensure that potential petitioners understand the requirement to submit petitions for modification of the SCSR placement rule (30 C.F.R. § 1714-2(c)) to the District Manager.

SO ORDERED.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Notice of Appeal ("Notice") with the Assistant Secretary of Labor for Mine Safety and Health within thirty (30) days after service of the "Initial Decision" of the Administrative Law Judge. *See* 30 C.F.R. § 44.33(a). The Assistant Secretary's address is: Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, Room 2322 TT#2, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Assistant Secretary.

At the time you file the Notice with the Assistant Secretary, you must serve it on all parties. *See* 30 C.F.R. §§ 44.6 and 44.33(a). If a party is represented by an attorney, then service must be made on the attorney. *See* 30 C.F.R. § 44.6(c).

If no Notice is timely filed, then the administrative law judge's "Initial Decision" becomes the final decision of the Secretary of Labor. *See* 30 C.F.R. § 44.32(a).