

U.S. Department of Labor

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Issue Date: 06 November 2008

Case No.: 2008-MSA-00003

In the Matter of:

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

v.

**MINE SAFETY & HEALTH ADMINISTRATION
(MSHA)**
Party Opposing Petition

Appearances: RANDY ROTHERMEL, pro se
Petitioner

LYNN BOWMAN DUNBAR, Esq.
For the Mine Safety and
Health Administration,
U.S. Dept. of Labor

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER

Jurisdictional Basis

This matter involves a request for modification of mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 811 et seq. Title 30 C.F.R., Part 75 sets forth mandatory standards for underground coal mines, as promulgated by the U.S. Department of Labor’s Mine Safety and Health Administration (MSHA) in accordance with the Act’s procedures under 30 U.S.C. § 811(a).

Background and Procedural History

The RS&W Drift Mine (“RS&W”) is an anthracite coal mine located in Schuylkill County, Pennsylvania, operated by the RS&W Coal Company, Inc. Randy Rothermel is the operator of RS&W. On August 30, 2006, Mr. Rothermel submitted a petition to MSHA for modification of various provisions of 30 C.F.R. § 75-1714-(4)(a)(b)(c)(d) and (e), relating to self-contained self-rescuers (SCSRs), that were then in effect. These provisions stated the following:

- (a) *In addition to the requirements in §§ 75.1714, 75.1714-1, 75.1714-2, and 75.1714-3,¹ the mine operator shall provide for each person who is underground at least one additional SCSR device, which provides protection for a period of one hour or longer, to cover all persons in the mine*
- (b) *If a mantrip or mobile equipment is used to enter or exit the mine, additional SCSR devices, each of which provides protection for a period of one hour or longer, shall be available for all persons who use such transportation from portal to portal.*
- (c) *When the SCSR devices otherwise required by paragraph (a) of § 75.1714 are not adequate to provide enough oxygen for all persons to safely evacuate the mine under mine emergency conditions, the mine operator shall provide additional SCSR devices in the primary and alternate escapeways. Under these circumstances, the mine operator shall submit an outby SCSR storage plan to the appropriate District Manager for approval. The mine operator shall include in the outby SCSR storage plan that is required by this paragraph, the location, quantity and type of additional SCSR devices, each of which provides protection for a period of one hour or longer, that are stored in the primary and alternate escapeways. The outby SCSR storage plan shall also show how the storage location(s) in the primary and alternate escapeways was determined. The District Manager may require the mine operator to demonstrate that the location, quantity, and type of the additional SCSRs provide protection to all persons to safely evacuate the mine. The outby SCSR storage plan shall be kept current by the mine operator and made available for inspection by an authorized representative of the Secretary and by the miners' representative.*
- (d) *All SCSR devices required under this section shall be stored in locations that are conspicuous and that are readily accessible by each person in the mine. In addition, all SCSR devices required under this section shall be stored according to the manufacturers' instructions.*
- (e) *A sign made of reflective material with the words "SELF-RESCUERS" shall be conspicuously posted at each storage location and direction signs made of a reflective material shall be posted leading to each storage location.*

The petition for modification stated the following:

It is requested that Sections 75.1714-4(a)(b)(c)(d) & (e) be modified for this anthracite coal mine not to require an additional self-rescue device, nor shall additional SCSR's be required on mantrips or mobile equipment, nor shall additional SCSR's be required in alternate and primary escapeways, therefore storage locations and signs would be unnecessary.

In his petition, the petitioner proposed the following alternative:

At this mine each miner will correctly wear an SCSR for one hour. Actually wearing the SCSR will give the full affect (sic) of proper usage. Training with the one SCSR will be a safer act then (sic) having multiple SCSR's without proper training, leaving the miners to not know how they are properly used. This mine's SCSR training is a safer and reliable way of knowing that each individual miner is ready to use, and knows how to use, the SCSR correctly in the event that an actual emergency should occur. Hand held multi gas detectors are located at each working face. SCSR is stored on locomotive for locomotive operator.

¹ These provisions require the mine operator to have one SCSR, adequate to provide one hour of protection, for each person underground; and require the SCSR to be worn or carried in most circumstances. The one-SCSR one-hour requirement was implemented in 1995. Respiratory Protective Devices, 60 Fed. Reg. 30,398 at 30,401 (June 8, 1995).

The petition was assigned number M-2006-032-C. As required under 30 C.F.R. § 44.13, an investigation as to the merits of the petition was conducted by MSHA personnel. Leonard P. Sargent, Coal Mine Safety and Health Inspector, conducted the investigation, and submitted a written report dated July 3, 2007, to the MSHA District Manager, which recommended that the petition be denied. On December 28, 2007, the MSHA Acting Deputy Administrator for Coal Mine Safety and Health issued a Proposed Decision and Order (“PD&O”) denying the petition.

On January 18, 2008, the petitioner timely requested a hearing on this matter, as permitted under 30 C.F.R. § 44.14. The matter was forwarded to the Office of Administrative Law Judges and designated as docket number 2008-MSA-00003. In accordance with 30 C.F.R. § 44, subpart C, I held a hearing on this petition on May 21, 2008, in Pottsville, Pennsylvania.² The party opposing the petition (hereafter MSHA) submitted post-hearing arguments.³

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. I have considered all of the evidence of record, including items not specifically referred to or discussed herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Stipulations

At the hearing, the parties stipulated to the following:

- 1) The operations of RS&W Coal Company at the RS&W Drift Mine are subject to the jurisdiction of the Act;
- 2) The petition is subject to the jurisdiction of the U.S. Department of Labor and its designated administrative law judge.

T. at 23.

Documentary Evidence

MSHA submitted the following items of evidence pertaining to this petition, which I admitted.⁴ T. at 98-99.

² Prior to the hearing, MSHA filed a Motion for Summary Decision, based on petitioner’s asserted failure to respond to discovery requests or my “Order Directing Answer to Motion to Compel.” At the hearing, MSHA renewed its motion. I denied MSHA’s Motion, but permitted MSHA wide latitude in questioning witnesses. I also informed MSHA I would permit supplementation of evidence, if necessary, in the event MSHA was surprised by witness testimony based on the petitioner’s incomplete responses to discovery requests. T. at 4-13.

³ The petitioner did not submit any post-hearing materials.

⁴ The petitioner objected to exhibits MSHA-1, MSHA-4, MSHA-5, MSHA-6, MSHA-7, and MSHA-8. T. at 11-20. I overruled the petitioner’s objections. T. at 20.

- MSHA-1: MSHA Investigation Report, dated July 3, 2007.
- MSHA-2: Excerpt of MSHA emergency temporary standard, 71 Fed. Reg. 12,522-71 (Mar. 9, 2006).
- MSHA-3: Excerpt of MSHA final rule, 71 Fed. Reg. 71,430-55 (Dec. 8, 2006).
- MSHA-4: Excerpt of MSHA report of investigation, Dec. 11, 1985 underground coal mine explosion.
- MSHA-5: Excerpt of MSHA report of investigation, Dec. 12, 1985 multiple fatalities explosives accident.
- MSHA-6: Excerpt of MSHA report of investigation, July 16, 1998 fatal explosives accident.
- MSHA-7: Excerpt of MSHA report of investigation, Oct. 23, 2006 fatal methane explosion.
- MSHA-8: Printouts from MSHA's data retrieval system showing that incidents described in Exhibits MSHA-4 through MSHA-7 occurred at anthracite mines.
- MSHA-9: Excerpts of MSHA copies of RS&W part 48 and part 75 training plans, dated Apr. 24, 2001, as amended May 2, 2007.⁵
- MSHA-10: MSHA copy of RS&W's revised mine emergency evacuation and firefighting plan, dated June 12, 2006.
- MSHA-11: Excerpts of MSHA copy of RS&W's emergency response plan, dated June 1, 2007, as amended Aug. 2, 2007.⁶

The petitioner submitted the following item of evidence, which I admitted.⁷ T. at 142-43.

- RS&W 1: Photograph of SCSR (item photographed next to ruler to show size).

⁵ After the hearing, by letter dated June 9, 2008, MSHA submitted a complete copy of RS&W's plans. The petitioner did not object to this submission. Therefore, I will permit MSHA to substitute the complete copy for the excerpt it submitted earlier.

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⁷ At the hearing, I also authorized the petitioner to submit a photograph of a multi-use detector, and to respond to the post-hearing affidavit MSHA submitted. T. at 143-44. However, petitioner did not file any submissions.

Testimonial Evidence

John Rothermel

John Rothermel testified under oath in support of the petition for modification. He stated he has his “mining papers” and a “blasting certificate” and is an electrician for the RS&W mine. He also stated he is on Pennsylvania’s mine rescue team, and has been a miner for three years. Mr. Rothermel stated he has received training on SCSRs, which consists of donning a training model. He agreed that using the training model does not provide the same sensation as using an actual SCSR. He stated that training with SCSRs would provide miners with actual experience on what breathing with the device is like. T. at 26-29.

The witness stated that mine operations at RS&W involve drilling and blasting into rock, and stated no methane has been liberated while driving through rock. He stated that mine operations are currently about 3000 feet from the outside of the mine, and that the mine has no sealed off areas, because “we choose to ventilate.” He stated that the average miner would take 20 to 25 minutes to walk from the mine portal to the working face, and that it takes him 10 to 15 minutes or less. T. at 29-35.

On cross-examination, Mr. Rothermel stated the escapeway is a slant, 800 feet to the surface. In response to my question, Mr. Rothermel agreed that the miners generally work within 100 feet of each other, except for the motorman. He also clarified that the passageways are made of solid rock that has been blasted out. T. at 35-40.

Randy Rothermel

Randy Rothermel testified under oath in support of the petition for modification. He stated that there is a multi-gas detector on every working face in his mine. He stated the model he uses is very sensitive, and produces an audible and visible alarm when there is methane or carbon monoxide present or the oxygen level is low. He stated an SCSR costs \$700 and a multi-gas detector costs about \$1400. He stated he was concerned that SCSRs could be damaged if required to be with the miners at all times, but if the SCSRs were stored in the mine in one place, they would be “pristine.” T. at 41-45.

In response to my questions, Mr. Rothermel clarified that his petition requested to have each of the miners at his mine train with an actual SCSR on one occasion before engaging in mining operations. He confirmed that such training would deplete the SCSRs, making them ineffective. He clarified that the request for modification proposed that, instead of the requirement that each miner have two SCSRs available underground, each miner would have one SCSR, and the mine would rely on the multi-gas detectors for additional information about potentially dangerous conditions. He stated the mine currently has three multi-gas detectors in use daily. Mr. Rothermel stated that the multi-gas detectors are portable and are carried on a belt. He stated he has tested the detectors, and none has ever gone off during mining operations. He stated he has had the current model of detector for about five years, and that his mine has had gas detectors for about 20 years. T. at 45-50.

Leonard P. Sargent

Leonard P. Sargent testified under oath in opposition to the petition for modification. He stated he is a coal mine inspector, demolition specialist, ventilation specialist, and roof control specialist with MSHA, and he has been a mine inspector for 21 years. Mr. Sargent testified he is familiar with the RS&W mine. Mr. Sargent stated that Section 75.1714-4 of the regulation requires each miner to have two SCSRs underground. He also stated that MSHA does not require RS&W to have additional SCSRs stored in escapeways because miners would be able to escape the mine within 30 minutes, based on the current location of mining operations. T. at 55-59.

Mr. Sargent discussed the report of an accident that occurred in 1985 (Exhibit MSHA-4). That investigation established that a miner was asphyxiated after a methane explosion, and Mr. Sargent stated that it is possible the miner would have survived had he been wearing an SCSR. He also testified about reports of other accidents (MSHA-5; MSHA-6, MSHA-7) in which miners were killed in methane explosions. Mr. Sargent also discussed reports of non-fatal accidents involving methane explosions (MSHA-8). T. at 60-80.

Mr. Sargent testified about MSHA's emergency temporary standard (MSHA-2) and agreed that MSHA determined that miners needed additional tools and training to better protect themselves in an emergency, and that additional SCSRs were among the tools MSHA identified. Mr. Sargent also stated that it is important that miners be trained in how to transfer from using one SCSR to a second one. Mr. Sargent noted that MSHA's Final Rule (MSHA-3) implemented additional requirements for SCSR training, and mandated training in donning and transfer of SCSRs for all miners. Mr. Sargent noted that RS&W's revised emergency evacuation and fire fighting plan indicated that the mine could experience various emergency situations, including water inundation, gas, fire, and explosions (MSHA-9, 10). He agreed that it might be prudent or necessary for miners to don and transfer SCSRs in order to escape the mine. T. at 82-93.

The witness stated that he did not believe that RS&W's compliance with the current standard would result in a diminution of safety. Regarding whether miners would be just as safe under RS&W's proposed alternative, Mr. Sargent stated "it's hard to say that if you use a good self-contained self-rescuer just to show how it can properly [be] worn when it's not needed, that where it will provide more protection than if you actually need it in a real emergency." He also stated that Congress applied the MINER act provisions to all mines, of whatever size. T. at 93-98.

On cross-examination from Randy Rothermel, Mr. Sargent stated that the regulations require the miner's motorman to have two SCSRs, but federal mine inspectors are required to have one SCSR with them when underground. Mr. Sargent conceded that the mines in which fatal accidents occurred all had been cited for violations, and stated that in one of the instances an SCSR might have saved the life of a miner. He stated he believed that the SCSR training models were sufficient, because they provided experience in how to properly don the apparatus. He conceded there was no indication that SCSRs in the Sago incident had been depleted, and stated there may have been a donning issue in the Aracoma Alma Mine incident. Mr. Sargent disagreed with the characterization of the training model of the SCSR as a "toy" and stated that if

a miner is trained properly there is no documented instance of an SCSR failing to work. Mr. Sargent stated he could not deny that using an actual SCSR would not be better than a training model, but also noted that this use would destroy the device's usefulness, and he stated he could not conclude the use of an SCSR as training would be better than having a second SCSR. T. at 101-110.

Mr. Sargent stated he could walk from working face to portal in the RS&W mine in 20 to 25 minutes. He stated the SCSR units are intended to last for one hour, but may not last that long under conditions of heavy exertion. He conceded he did not know of any instance of fire in an anthracite mine, and also conceded that the cases of explosions discussed earlier involved incidents in which the mine operations were not complying with the regulatory requirements. Mr. Sargent commented that when a petition for modification is granted, training plans must be revised and miners notified. Mr. Sargent agreed that the purpose of the MINER Act was not to prevent accidents, but to make accidents more survivable for miners. T. at 111-115.

On cross-examination from John Rothermel, Mr. Sargent stated that methane is usually trapped in the coal and is liberated as the coal is mined. He conceded that RS&W has one working face, while the mines in which the accidents occurred had multiple working faces. He added that explosions can do damage to large areas of a mine, and can completely disrupt or destroy the ventilation in an underground mine. He stated that it is possible that ventilation at RS&W could be disrupted, and commented that every time explosives are used there is a risk to the ventilation system. On additional cross-examination from Randy Rothermel, Mr. Sargent stated he has not found methane in the face of the rock development at the RS&W mine. T. at 116-129.

In response to my questions, Mr. Sargent stated that the miners at RS&W generally ride in to the working face on the locomotive. He also clarified that the regulation intended that miners bring their second SCSRs with them on the locomotive, rather than store them at the work location, so they will have two SCSRs with them at all times. Mr. Sargent clarified that the accidents about which he testified were not the only fatal accidents in the district, but were the only fatal accidents which involved explosions caused by blasting agents or methane ignition. He stated he was not sure of the rationale for the requirement that miners have a second SCSR, but stated that he believed that accidents underground can create confusion, and if miners have a second SCSR they have a better chance of escape. Mr. Sargent stated the SCSRs at the Sago and Aracoma mines were properly operating, but there were mistakes in storing and donning the devices. T. at 130-137.

On redirect examination, Mr. Sargent agreed that RS&W has received citations for noncompliance with mining regulations. On additional cross-examination, Mr. Sargent clarified he did not find methane in the RS&W mine at his inspection. T. at 138-141.

After the conclusion of the hearing, Mr. Sargent submitted an affidavit regarding multi-gas detectors, as I had authorized at the hearing.⁸ In his affidavit, Mr. Sargent noted that

⁸ I authorized MSHA to submit additional evidence based on its assertion that it was unable to properly prepare for the hearing because of the petitioner's failure to comply with discovery

30 C.F.R. § 75.1714-7 requires handheld multigas detectors, and he noted that the petitioner's emergency response plan for the RS&W mine states that a multi-gas detector will be available for each working section. Mr. Sargent stated that the regulations and the petitioner's plans indicate that the detection of mine gases is a concern distinct from providing SCSRs to miners. He stated that the fact that the petitioner uses multi-gas detectors in the mine does not change the opinion that the petitioner's compliance with the regulatory standard will not result in a diminution of safety to miners, and that the petitioner's proposed alternative will provide less than the same measure of protection for miners. MSHA-12.

Petitions for Modification

Section 101 of the Federal Coal Mine Health and Safety Act of 1969, as amended by Section 201 of the Federal Mine Safety and Health Act of 1977, codified at 30 U.S.C. § 811(a), empowers the Secretary of the Department of Labor to make rules, under the notice-and-comment procedure set out in the Administrative Procedure Act, 5 U.S.C. § 553, for mandatory health and safety standards "for the protection of life and prevention of injuries in coal or other mines." Such rules, when put into effect, are set out at 30 C.F.R. Part 75.

As an exception to the notice and comment rule-making for mandatory coal mine safety standards, the Act also permits the Secretary to issue emergency temporary mandatory health or safety standards, ("ETS") to take effect immediately upon publication in the Federal Register. The Secretary may issue these emergency mandatory standards upon determining that miners are exposed to grave danger, and the emergency standard is necessary to protect miners from such danger. 30 U.S.C. § 811(b). Under the statute, concurrently with the publication of the emergency temporary standard, the Secretary is to commence a notice-and-comment proceeding under 30 U.S.C. § 811(a), with the emergency temporary standard serving as the proposed rule. 30 U.S.C. § 811(b)(3).

In accordance with 30 U.S.C. § 811(c), mine operators may petition for modification of mandatory standards. The statute provides in pertinent part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine

The procedures set forth in 30 C.F.R. Part 44 govern such requests for modification. Section 44.4(a) implements the standard set out at 30 U.S.C. § 811(c) and specifically provides:

A petition for modification of application of a mandatory safety standard may be granted upon a determination that --

requirements, and so was surprised by some aspects of the petitioner's testimony. See T. at 7-8; 51-52; 144. I will denominate his affidavit as Exhibit MSHA-12.

- (1) An alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same protection afforded by the standard, or
- (2) Application of the standard will result in a diminution of safety to the miners.

A party seeking a modification of a mandatory safety standard has the burden of proof to establish that the modification should be granted, by a preponderance of the evidence. 30 C.F.R. § 44.30.

The Petition for Modification

On March 9, 2006, as a result of several recent fatal mine accidents, including the Sago mine disaster, MSHA issued emergency temporary standards. Among other things, these emergency temporary standards included new rules on self-contained self rescuers, and imposed a requirement that a mine operator provide two SCSRs for each person underground. Emergency Mine Evacuation, 71 Fed. Reg. 12,252 (Mar. 9, 2006).

The petitioner's petition for modification, submitted in August 2006, addressed these emergency temporary standards. In brief, the petitioner proposed that his mine be exempted from the requirement that two SCSRs per person be provided. He also proposed that, as a substitute for the second SCSR, he train his miners using (and depleting) an SCSR, and that he provide portable multi-gas detectors for his miners' use during all mine operations.

The MINER Act

On June 15, 2006, before the petitioner submitted his request for modification, and while the ETS was pending, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). P.L. 109-236 (June 15, 2006). The purpose of the MINER Act was "to improve the safety of mines and mining." P.L. 109-236.

Section 2 of the MINER Act amended § 316 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 876(b)(2)(A)) to require that all underground mine coal mine operators develop, and submit for approval, written accident response plans that provide for "in addition to the 2 hours of breathable air per miner required by law under the emergency temporary standard as of the day before the date of enactment ... caches of self-rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes;" and "training for each miner in proper procedures for donning self-rescuers, switching from one unit to another, and ensuring a proper fit." §§ 2 (3)(b)(2)(E)(iii)(II) and (IV).

In enacting the MINER Act, Congress specifically intended to make permanent the requirement that mine operators provide two SCSRs for each person. As the Senate Committee report stated:

The act increases the quantity of self-contained self-rescuers ["SCSRs"] that will be required to be stored underground, and thus, increases the amount of breathable air available to underground personnel both in the event of escape and entrapment. This section requires that miners have 2 hours of breathable air that is readily accessible at their worksite.

S. Report 109-365 at 6-7 (2006).

MSHA's Final Rules

On December 8, 2006, while the petitioner's request for modification of the ETS was pending, MSHA issued Final Rules regarding SCSRs. Emergency Mine Evacuation, 71 Fed. Reg. 71,430 at 71,454. (Dec. 8, 2006). As noted in the comments accompanying the Final Rules, "Final § 75.1714-4(a) retains the ETS requirement that mine operators provide all persons with an additional SCSR at their underground work locations. Section 2 of the MINER Act reiterated the ETS requirement." 71 Fed. Reg. at 71, 443 (Dec. 8, 2006).

The Final Rule retained the requirement in the ETS that at least one additional SCSR be available on mantrips or other equipment "for each person who uses such transportation from portal to portal." 30 C.F.R. § 75.1714-4(b). The Final Rules modified the ETS in the following ways germane to the petitioner's request for modification:

- The requirement to have additional SCSRs available in escapeways was clarified to require SCSRs "when each person underground cannot safely evacuate the mine within 30 minutes." codified at 30 C.F.R. § 75.1714-4(c)(1)(2007).
- Mechanisms for determining how far an average miner could walk in 30 minutes under different conditions were provided. 71 Fed. Reg. 71, 454; codified at 30 C.F.R. § 75.1714-4(c)(2)(2007).

The Final Rules also set forth a new requirement that mine operators provide "an MSHA-approved, handheld, multi-gas detector that can measure methane, oxygen and carbon monoxide" to each group of underground miners and to each person who works alone.⁹ 71 Fed. Reg. 71,430 at 71,454; codified at 30 C.F.R. § 75.1714-7.

MSHA's Investigation of the Request for Modification

The MSHA investigation verified that a methane explosion has never occurred at the RS&W mine, but also established that the mine liberates methane.¹⁰ The investigation verified that the current travel time on foot for a miner from working face to portal at the mine is less than 20 minutes, and substantiated the petitioner's assertion that fire is not a significant hazard in anthracite mines, due to the low volatile nature of the coal. Regarding the petitioner's proposal that miners use SCSRs for training purposes and rely on hand-held multigas detectors, the investigation stated: "It could not be determined that the miner's [proposed] SCSR training is a safer and more reliable way of knowing that each individual is ready to use and know (sic) how to use the SCSR correctly in the event that an actual emergency should occur. Three miners in the section do carry multi-gas detectors."

⁹ This provision is new in the Final Rule. There is no requirement to provide handheld multi-gas detectors in the ETS or in the MINER Act.

¹⁰ Mine bottle sample data covering the time period between 2000 and 2006 was appended to the investigation report. MSHA-1.

MSHA's Proposed Decision and Order (PD&O)

As noted above, the PD&O denied the petitioner's petition.¹¹ The PD&O noted that the petitioner's assertion that SCSRs have never been deployed in an anthracite mine cannot be verified, as there is no requirement to report SCSR use. However, according to the PD&O, there have been at least three methane explosions in anthracite mines since 1983 that resulted in fatalities. In addition, mine fires have occurred, and the use of explosives underground has created conditions of fumes, methane and dust that may not easily dissipate. Regarding the petitioner's proposal to use SCSRs for training purposes, the PD&O concluded that "current standards already require annual training using realistic training units that simulate the heat and resistance of actually using an SCSR....MSHA does not agree that additional training is an adequate substitute for additional SCSRs."

Discussion

As permitted under 30 U.S.C. § 811(b), the Secretary promulgated an ETS on SCSRs. However, while the ETS was still pending, and before the Secretary announced the Final Rule, Congress enacted the MINER Act. The requirement that a mine operator provide two SCSRs for each person underground is set forth in Section 2 of the MINER Act. Subsequently, as recognized in the comments accompanying the Final Rule, the new mandatory standard implemented and clarified the Congressionally-mandated standard.

Notably, the modification procedure set forth under 30 U.S.C. § 811(c) addresses only mandatory standards the Secretary has implemented as regulations. It does not provide any mechanism whereby a mine operator may petition for modification of a Congressionally-mandated standard. The fact that the Act provides a procedure for modification of a mandatory regulatory standard but has not provided any procedure for modification of a Congressionally-mandated standard suggests strongly that Congress did not intend for any exceptions to be granted to the standards it imposed. See generally International Union, United Mine Workers of Am. v. MSHA (Utah Power & Light), 823 F.2d 608 (D.C. Cir. 1998).

Procedures governing adjudication of petitions for modification are set out in 30 C.F.R. part 44. These procedures permit an administrative law judge to "make decisions in accordance with the Act." 30 C.F.R. § 44.23(a)(9). Therefore, in adjudicating a petition for modification, I am limited to providing relief, only within the strictures set out by Congress in the Act. As set out above, Congress has authorized a procedure for modification of mandatory standards the Secretary implemented by regulation, but has not legislated a process for modification of Congressionally-mandated standards. I find, therefore, that insofar as the petitioner seeks relief from the requirement that two SCSRs be provided for each miner, I do not have authority to grant the petitioner's request for modification.

¹¹ The MSHA PD&O, issued in December 2007, recognized that the petitioner's petition was based on the ETS; however, the PD&O cited the Final Rules, which became effective in December 2006, as set forth infra.

As set out above, the MINER Act requires that each miner have two SCSRs available for use. The mandatory standard specifically requires a second SCSR to be available for each person who uses a mantrip or other form of transportation into the mine.¹² The petitioner proposed exemption from the requirement that miners using mechanized transportation into the mine have access to a second SCSR during their transport. I find that, because the petitioner's request for modification seeks exemption from the statutory requirement for two SCSRs for each miner, I do not have authority to grant the petition.

I note that the petitioner also requested relief from the ETS requirement that additional SCSRs be provided in escapeways. However, that the current mandatory standard, promulgated in the Final Rule and codified at 30 C.F.R. § 75.1714(c), requires additional SCSRs only when each person underground cannot safely evacuate the mine within 30 minutes. The evidence adduced at the hearing establishes that, based on mining operations at RS&W at present, all miners can exit the mine within the 30 minute timeframe. T. at 59. Under the regulation, therefore, the petitioner is not required to provide additional SCSRs in escapeways, and a petition for modification of this requirement was not necessary.

In his request for modification, the petitioner asserted that training miners with actual SCSRs, as opposed to training models, would have significant value. As noted during the hearing, however, SCSRs are costly, and using SCSRs for training purposes renders them inoperable. T. at 44-45. Therefore, as an alternative to providing two SCSRs, the petitioner's request for modification proposed that he provide one SCSR for miners in the RS&W mine and rely on multi-gas detectors in lieu of a second SCSR. The petitioner asserted that enhanced training (through actual use of an SCSR), coupled with reliance on multi-gas detectors, would provide a level of safety to the miners at RS&W at least equal to the level that two SCSRs per miner would give.

The petitioner is to be commended for his foresightedness and his commitment to miner safety, in using multi-gas detectors in mine operations, even before there was a regulatory requirement to provide such devices. As he testified at the hearing, he has been using multi-gas detectors in his mine for many years. When the Final Rule was adopted in December 2006, a regulatory standard that mine operators provide handheld multi-gas detectors to each group of miners and to each miner who works alone was imposed. 30 C.F.R. § 75.1714-7. As set forth above, I do not have the authority to exempt a mine operator from the Congressional mandate that two SCSRs be provided for each miner. Therefore, even presuming that a multi-gas detector and one SCSR provides more safety than two SCSRs, as the petitioner asserted in his request for modification, I must deny his request.¹³

¹² The ETS set forth an identical requirement. See 30 C.F.R. § 75.1714-4(b)(2006).

¹³ Provided that the petitioner complies with the statutory requirement to provide two SCSRs for each person underground, it is not necessary to request modification of a mandatory standard in order to use SCSRs for such training. Under the MINER Act, all mine operators must submit accident preparedness and response plans for Department approval. P.L. 109-236, Section 2 (adding 30 U.S.C. § 876(b)(2)(E)(iii)(IV)). If the petitioner chooses to implement such training, it should be included in RS&W's training plan and submitted for approval.

Conclusion

As set forth above, insofar as the petitioner's request for modification seeks exemption from the Congressionally-mandated requirement that he provide two SCSRs for each person underground, I do not have the authority to grant the petitioner's request.

ORDER

Therefore, I DENY the petitioner's petition for modification.

In accordance with 30 C.F.R. § 44.4(b), this Order shall not become effective until 30 days after service of this Decision, to permit any party to file a notice of appeal. See 30 C.F.R. § 44.33.

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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).