UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
FOR MINE SAFETY AND HEALTH

In the Matter of:	) PETITION FOR MODIFICATION
	)
RESOLUTION COPPER MINING	) CASE NO. 2012-MSA-00001
(Resolution Mine,	)
ID No. 0200152)	)

DECISION AND ORDER

This is a petition for modification proceeding under Section 101(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 811(c).[1] The Administrator for Metal and Non-Metal Mine Safety and Health ("the Administrator") appeals the Decision and Order Regarding Petition for Modification of the Department of Labor Administrative Law Judge ("DOL ALJ") Richard M. Clark.[2] The DOL ALJ determined that the standard from which

---

[1] Section 101(c) of the Act 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 results 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.

30 U.S.C. § 811(c).

[2] On October 11, 2012, the DOL ALJ issued a Decision and Order Regarding Petition for Modification. On November 7, 2012, the DOL ALJ issued an amended Decision and Order that is identical to the October 11, 2012 decision, except for its notice of appeal rights language. Citations to the DOL ALJ's decision refer to the November 7, 2012 decision.

Resolution Copper Mining LLC ("Resolution") seeks a modification for its personnel conveyance, 30 C.F.R. § 57.19076, does not apply to the personnel conveyance because the conveyance is not a "bucket" within the meaning of the standard.[3] The DOL ALJ therefore declined to reach the issue of whether Resolution's proposed modification of Section 57.19076 satisfies the standard for modifying the application of a standard set forth in Section 101(c) of the Mine Act, 30 U.S.C. § 811(c). For the reasons set forth herein, I set aside the judge's decision and remand the case to the judge for a determination of whether Resolution's proposed alternative method satisfies the standard for granting petitions for modification set forth in Section 101(c) of the Act or for other actions consistent with his authority under 30 C.F.R. Part 44 and this decision.

1. Factual and Procedural Background

Resolution owns the Resolution Copper Mine, located near Superior Arizona. ALJ Exhibit ("ALJ Ex.") 1 at 1. The mine is in the pre-feasibility phase, which involves

---

[3] 30 C.F.R. § 57.19076 provides:

> When persons are hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station.

sinking the No. 10 Shaft, a 7000-foot deep shaft. ALJ Ex. 1 at 1-2.

On April 12, 2011, Resolution petitioned the Mine Safety and Health Administration ("MSHA") for a modification of Section 57.19076 for the personnel conveyance used in the No. 10 Shaft. Under the proposed modification, the personnel conveyance would be allowed to travel up to 1,200 feet per minute in certain parts of the shaft. The modification would not apply if miners were travelling anywhere but in the conveyance's lower compartment. Dec. at 2; Petitioner's Exhibit ("PX") 5 at 1-2.

Resolution's petition for modification asserts that engineering and safety features in place guarantee no less than the same measure of protection afforded the miners by the standard, and in fact, increase the safety of the miners. PX 5 at 1-2. The petition also asserts that the "personnel conveyance" is not a `bucket,' but rather is an enclosed capsule designed for the transport of personnel." PX 5 at 1.

After investigating the petition, on July 26, 2011, MSHA Inspector Thomas Stefansky issued a report stating that "[g]ranting of the petition was not recommended at this time," PX 13 at 7, due to two potential hazards

introduced by the proposed alternative method: (1) potential excessive emergency stopping deceleration rates that could cause the personnel conveyance to bounce up and down due to the elasticity of the hoist suspension ropes, and (2) increased kinetic energy release if the personnel conveyance collided with an object. On November 4, 2011, the Administrator issued a Proposed Decision and Order ("PDO"), denying the petition on the grounds that the proposed alternative method did not at all times provide a safe work environment for miners and guarantee no less than the same measure of protection afforded miners under Section 57.19076. PX 14. The PDO also stated that "the personnel conveyance . . . is not a 'bucket,' but rather is an enclosed capsule designed for the transport of personnel." PX 14 at 1.

On December 5, 2011, Resolution requested a hearing on the Administrator's PDO before a DOL ALJ.[4] A two-day hearing was held beginning on May 23, 2012. Both parties submitted evidence and argument on whether the personnel conveyance was a "bucket" within the meaning of Section 57.19076 and on whether Resolution's proposed alternative method achieved the result of the standard that would at

[4] By regulation, the Secretary's authority to conduct hearings and to issue initial decisions in petition for modification cases is delegated to DOL ALJs. 30 C.F.R. §§ 44.15, 44.20, 44.22, 44.32.

all times guarantee no less than the same measure of protection afforded the miners by the standard. The Administrator did not argue before the DOL ALJ that determining the applicability of Section 57.19076 to the personnel conveyance was beyond the scope of the DOL ALJ's authority.

After the DOL ALJ issued his decision, the Secretary, on November 28, 2012, cited Resolution for a violation of Section 57.19076, for the personnel conveyance travelling in excess of 500 feet per minute. Resolution contested the citation and the accompanying proposed penalty and the matter was heard before the Federal Mine Safety and Health Review Commission ("FMSHRC") ALJ. Resolution and the Secretary of Labor stipulated that the DOL ALJ hearing record could also be used as the hearing record in the FMSHRC case. See Resolution Copper Mining LLC, FMSHRC Docket Nos. West 2013-0319-RM, West 2013-299-M (April 19, 2013) at 2.

On April 19, 2013, the FMSHRC ALJ issued a decision holding that the personnel conveyance was not a 'bucket' within the meaning of the standard and vacated the citation. Id. at 7-9. On May 10, 2013, the Secretary of Labor petitioned the FMSHRC for discretionary review of the

FMSHRC ALJ's decision. On May 17, 2013, the FMSHRC granted the petition for discretionary review.

2. The DOL ALJ's Decision

Since the DOL ALJ concluded that the personnel conveyance is not a "bucket" within the meaning of Section 57.19076 and that the 500 feet per minute speed limit set forth in the standard therefore does not apply to the personnel conveyance, Dec. at 21-22, he declined to reach the issue of whether Resolution's proposed modification satisfied the standard for granting petitions for modification set forth in 30 U.S.C. § 811(c) and 30 C.F.R. § 44.4(a). Dec. at 11, 22. On November 13, 2012, the Administrator filed a notice of appeal of the DOL ALJ's decision to the Assistant Secretary for Mine Safety and Health ("Assistant Secretary").

3. The Administrator's Appeal

The only objection raised in the Administrator's Statement of Objections to the DOL ALJ's decision is that the DOL ALJ exceeded his authority under Section 101(c) of the Mine Act by determining that Section 57.19076 does not apply to the personnel conveyance. The Administrator asserts that the scope of modification proceedings under Section 101(c) is limited to "modifying the application" of a mandatory standard to a particular mine and that by

deciding the applicability of the standard, the judge usurped FMSHRC's authority to adjudicate citations under 30 U.S.C. § 815(d). Statement of Objections of the Administrator for Metal and Non-Metal Mine Safety and Health ("Obj") at 4-5.

The Administrator acknowledges he did not argue before the DOL ALJ that the DOL ALJ was without the authority to decide whether the standard applied in the first place. Obj. at 4 n.3.

4. Resolution's Response

Resolution asserts that the issue of whether the personnel conveyance is a "bucket" within the meaning of the standard" was central to the Administrator's [PDO] and a central issue at trial." Resolution's Response to the Administrator's Statement of Objections ("Response") at 7. Noting that under 30 C.F.R. § 44.22(a), judges in modification proceedings have "all powers necessary or appropriate to conduct a fair, full, and impartial hearing," and that 30 C.F.R. § 44.32(a)(1) authorizes judges in modification proceedings to make "findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact, law, or discretion presented on the record," Resolution asserts that the DOL ALJ had the authority to consider the issue. Response at 6-7 (emphasis

by Resolution) (citing and quoting 30 C.F.R. §§ 44.22(a) and 44.32(a)).

Resolution also asserts that the Secretary is responsible for promulgating standards and his interpretive authority is routinely exercised pre-enforcement and without review by the FMSHRC. It argues that 30 C.F.R. § 44.22(a)(9)'s authorization to DOL ALJs in petition for modification proceedings to "make decisions in accordance with the Act" authorized the DOL ALJ to interpret the standard. Response at 6.

In addition, Resolution claims that Section 101 of the Mine Act authorizes the Secretary to promulgate standards and to grant modifications to such standards, and that 30 C.F.R. Part 44 delegates that authority to DOL ALJs.

Finally, Resolution asserts that because the Administrator did not raise this issue before the DOL ALJ, the Administrator failed to preserve the issue on appeal. In doing so, it points to provisions of the Mine Act (e.g., Section 113 (d) (A) (iii)), which indicate that matters not raised below may not be considered on review, in the absence of good cause or extraordinary circumstances. Response at 10.

DISCUSSION

1. Whether I May Consider the Administrator's Objection that the DOL ALJ Did Not Have the Authority to Determine the Applicability of the Standard When the Objection Was Not Raised Before the DOL ALJ

The Administrator did not argue before the DOL ALJ that the DOL ALJ was without authority to decide the applicability of Section 57.19076 to the "personnel conveyance." See Obj. at 4 n.3. Accordingly, the threshold question in this appeal is whether I may consider the issue even though it was not raised below.

For the reasons set forth below, I conclude that in petition for modification cases, the Assistant Secretary has the discretion to consider certain issues that are raised for the first time on appeal to the Assistant Secretary,[5] although this discretion should be exercised sparingly. Because the issue involves an important question of law under the Mine Act and reaching the issue will promote miner safety, and because the issue is purely legal and has been fully briefed by the parties, I am exercising my discretion to consider the issue in this case.

Section 101(c) of the Mine Act authorizes the Secretary to grant petitions for modification. 30 U.S.C. §

[5] The Secretary's authority to review DOL ALJ initial decisions is delegated to the Assistant Secretary. 30 C.F.R. § 44.35.

811(c). Although Section 101(c) requires that operators or representatives of miners be afforded hearings on petitions for modification, nothing in Section 101(c), or any other provision of the Mine Act or in the procedural rules, limits the matters the Secretary may consider during any internal appeal process that he establishes to review petition for modification decisions. See 30 U.S.C. § 811(c); 30 C.F.R. Part 44.[6]

30 C.F.R. Part 44 implements Mine Act Section 101(c). Nothing in Part 44 precludes the Assistant Secretary from considering issues not raised before the DOL ALJ.

When, as here, the statute and the implementing regulations do not provide specific waiver rules, courts will look to appellate waiver rules in deciding whether a reviewing body may consider an issue that was not raised below. See Simms v. Apfel, 530 U.S. 103, 108 (2000). Under appellate waiver rules, reviewing bodies generally will not consider an issue raised for the first time on

---

[6] Resolution's suggestion that a provision limiting the issues that the Assistant Secretary may consider should be read into the statute because other provisions in the Act provide that issues not raised below may not be considered on appeal absent exceptional circumstances or good cause (Response at 6) is unpersuasive. If Congress had intended such a limitation to apply to internal petition for modification appeals it would have said so.

Similarly unpersuasive is Resolution's reliance on Federal Rule of Civil Procedure 12(b). Were the provision otherwise applicable, Rule 12(h) sets forth waiver requirements for failing to properly raise specific defenses, none of which are at issue here.

appeal. E.g., Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 834-35 (3d Cir. 2011). This rule, however, "is one of discretion rather than jurisdiction," Id. at 834-35 (internal quotation marks and citation omitted); Maine General Medical Center v. Shalala, 205 F.3d 493, 500 (1st Cir. 2000)), and appellate bodies have exercised their discretion to consider issues raised for the first time on appeal in cases that present important and recurring questions of law, Doe VII v. Exxon Mobil Corp., 654 F.3d 11, 40 (D.C. Cir. 2011), or implicate "matters of great public moment." Puerto Rico Telephone Company, Inc. v. T-Mobile Puerto Rico LLC, 678 F.3d 49, 58 n.4 (1st Cir. 2012) (internal quotation marks and citations omitted).

In this case, the issue of whether DOL ALJs have the authority to consider the applicability of a standard in petition for modification proceedings raises an important question concerning the scope of petition for modification proceedings.

In exercising my discretion to reach the issue of the DOL ALJ's authority to consider the applicability of the standard, I also note that the issue is purely legal and has been briefed by both parties. See, e.g., Borntrager v. Cent. States Se. & Sw. Areas Pension Fund, 577 F.3d 913,

924 (8th Cir. 2009); Barefoot, 632 F.3d at 835 (same effect).

2. Whether the DOL ALJ Was Authorized To Determine the Applicability of the Standard

I conclude that the plain meaning of Section 101(c) of the Mine Act does not provide the DOL ALJ authority to consider the applicability of the standard. Even if the Act were not plain on this issue, I interpret the Act as not authorizing DOL ALJs in petition for modification proceedings to determine the applicability of the standard from which a modification is sought. Instead, DOL ALJs must assume that the standard from which a modification is sought applies and, in that context, determine whether the petitioner has satisfied the standard for granting petitions for modification set forth in Section 101(c). Disputes regarding the applicability of the standard must be resolved before the FMSHRC.

The Secretary's authority in petition for modification proceedings comes from Section 101(c) of the Act. Section 101(c) provides that "upon petition by the operator the Secretary may modify the application of any mandatory safety standard to a coal or other mine." 30 U.S.C. § 811(c) (emphasis added). Thus, the plain language of the statute authorizes the Secretary in petition for modification

proceedings only to "modify the application of any mandatory safety standard." It does not authorize the Secretary to make a determination concerning the applicability of the standard.

Resolution's argument that because the Secretary has the inherent authority to interpret standards he may do so in petition proceedings is not persuasive. Although the Secretary is authorized to promulgate standards under Section 101(a), interpret standards in Program Policy Letters and the Program Policy Manual on an ongoing basis, and take enforcement actions for violating standards, that is not the same as having the authority to adjudicate the applicability of standards in Section 101(c) proceedings.

The Secretary's regulations implementing Section 101(c) are consistent with this interpretation. 30 C.F.R. § 44.11 sets forth requirements for the contents of petitions for modification and provides that petitions for modification must include:

> [a] concise statement of the modification requested, and whether the petitioner proposes to establish an alternate method in lieu of the mandatory safety standard or alleges that application of the standard will result in diminution of safety to the miners affected or requests relief based on both grounds.

In addition, the petition must include "[a] detailed statement of the facts the petitioner would show to establish the grounds upon which it is claimed a

modification is warranted." Nowhere does Section 44.11 indicate that a petitioner can make a request based on a contention concerning the application of a standard.

30 C.F.R. § 44.4, entitled "Standard of evaluation of petitions; effect of petitions granted" (emphasis added), sets forth the standards for evaluating petitions. 30 C.F.R. § 44.4(a) provides that a petition may be granted upon determination that:

> an alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same measure of protection afforded by the standard [or] application of the standard will result in a diminution of safety to the miners.

It does not suggest that the DOL ALJ may evaluate the issue of the applicability of the standard.

Although, as Resolution points out, the Secretary has the authority to promulgate standards under Section 101(a), 30 C.F.R. Part 44 establishes procedures and rules of practice "govern[ing] petitions for modification of mandatory safety standards filed under section 101(c) of the Act." 30 C.F.R. § 44.1(a) (emphasis added). 30 C.F.R. § 44 does not contain language delegating the Secretary's authority to promulgate standards and to interpret standards to DOL ALJs.

This interpretation best protects miner safety and is consistent with the intent of the Mine Act, which reflects Congress' exclusive grant of authority to the FMSHRC to adjudicate enforcement proceedings. See 30 U.S.C. § 815(d). Resolution's assertion that the personnel conveyance is not a 'bucket' within the meaning of the standard allowed them to engage in a pre-enforcement challenge to an anticipated citation.

Based on the "Mine Act's comprehensive enforcement structure combined with the legislative history's clear concern with channeling and streamlining the enforcement process," the Supreme Court in Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207-212 (1994), held that the Mine Act precludes pre-enforcement review in District Court and stated that the Act sets up a detailed structure for reviewing violations demonstrating that Congress intended to preclude pre-enforcement challenges in District Court. 510 U.S. at 208-09. The Court also noted the Mine Act's legislative history contained "persuasive evidence that Congress intended to direct ordinary challenges under the Mine Act to a single review process." Id. at 211. The same considerations that preclude pre-enforcement review in District Court also preclude pre-enforcement review in petition for modification proceedings. Resolution's claim

that the personnel conveyance is not a 'bucket' turns on a question of regulatory interpretation that the FMSHRC routinely resolves. Allowing that question to be resolved in a petition for modification proceeding directly contravenes Congress' intent to direct ordinary enforcement challenges under the Act to the FMSHRC. See Id. at 214. Miner safety and health will be better protected if the question of the applicability of Section 57.19076 to the personnel conveyance is resolved by FMSHRC, with the DOL ALJ in this proceeding resolving the issue of whether Resolution has proved that its proposed alternative method satisfies the standard for granting its petition set forth in Section 101(c). Resolution is currently exercising its right to litigate the application of the standard to the personnel conveyance in the appropriate forum, i.e., the FMSHRC.

More generally, allowing pre-enforcement challenges to be resolved in petition for modification proceedings has the strong potential to increase the number of petition for modification cases filed, delaying final determinations in petition for modification cases.

For these reasons, I hold that I have the discretionary authority to consider the issue of the DOL ALJ's authority to determine the applicability of Section

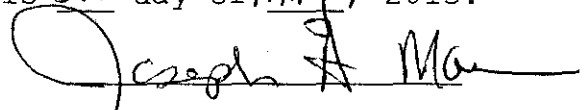
57.19076 to the personnel conveyance, and I am exercising that authority. I also hold that the Mine Act does not provide the DOL ALJ with authority to consider the applicability of the standard to the personnel conveyance.

ORDER

WHEREFORE, for the foregoing reasons, I set aside the decision of the Department of Labor administrative law judge and remand the matter to the Department of Labor administrative law judge for further proceedings consistent with his authority under Part 44 and this decision.

Upon receipt hereof, Resolution is directed to post this Decision and Order in an unobstructed location on the mine's bulletin board and/or in other conspicuous places where notices to miners are ordinarily posted, for a period of not less than 60 consecutive days.

SO ORDERED on this 31st day of MAY, 2013.



JOSEPH A. MAIN
Assistant Secretary
for Mine Safety and Health