FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280.1244 SPEER BOULEVARD
DENVER, CO 80204

MAY 7 1992

ASARCO, INCORPORATED, Contestant	CONTEST PROCEEDINGS
	Docket No. WEST 92-227-RM
	Citation No. 3602316; 1/14/92
v.	
	Concentrator
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine I.D. 02-00826
	Docket No. WEST 92-228-RM
	Citation No. 3602354; 1/28/92
	Ray Unit
	Mine I.D. 02-00150
	Docket No. NEST 92-244-RM
	Order No. 3908090; 1/29/92
	Troy Unit
	Mine I.D. 02-01467

DECISION

Appearances: G. Lindsay Simmons, Esq., James Zissler, Esq., Jackson & Kelly, Washington, DC, for Contestants; Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Respondent.

Before: Judge Cetti

These expedited Contest Proceedings were filed by Asarco, Incorporated (Asarco), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to challenge three citations issued by the Secretary of Labor alleging two violations of the mandatory safety "stop cord" standard 30 C.F.R. § 56.14109 (Citation No. 3602316 and 3602354) and one violation of 30 C.F.R. § 57.14112(b) (Order 3908090). The two stop cord citations were fully and vigorously litigated by the parties. Both parties filed helpful post-hearing briefs which have been considered along with the evidence and arguments offered at trial.

STIPULATIONS

At the hearing, the parties stipulated as follows:

(1) Asarco, Incorporated is engaged in mining and selling of copper in the United States and its mining operations affect interstate commerce.

(2) Asarco, Incorporated is the owner and operator of a Ray Mine and concentrator, MSHA I.D. No. 02-00826 and 02-00150, and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The presiding administrative law judge has jurisdiction in this matter.

(4) The subject citation was properly served by a duly authorized representative upon agents of Asarco, Incorporated on the date and place stated on the citations.

(5) The citations may be admitted into evidence for the purposes of establishing their issuance and not for the truthfulness or the relevancy of any statements asserted in the citations.

(6) The exhibits to be offered by both parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

(7) Subsection (b) of the cited safety standard 30 C.F.R. 56.14109, concerning alternate guarding by railings, is not relevant to this proceeding.

I

DOCKET NO. WEST 92-244-RM
ORDER NO. 3908090 VACATED

At the hearing, the parties stated on the record that Order No. 3908090 in Docket No. WEST 92-244-RM involving an alleged violation of 30 C.F.R. § 57.14112(b) was vacated. The representation of the parties are accepted. Order No. 3908090 is vacated and Docket No. WEST 92-244-RM is dismissed.

II

DOCKET NOS. WEST 92-227-RM AND WEST 92-228-W
CITATION NOS. 3602316 AND 3602354

On January 14 and 28, 1992, during routine inspections of Asarco's Bay Complex (the Hayden Concentrator and the Mine, respectively), MSHA issued two 104(a) citations for improper location of emergency stop cords along two conveyor belts (the 1-B belt at the Concentrator and the 117 belt at the Mine). These citations (Nos. 3602316 and 36023541, allege violations of a mandatory safety standard (the "stop cord" standard) -- 30 C.F.R. § 56.14109(a) -- which provides as follows:

> Unguarded conveyors next to the travelways shall be equipped with -
>
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor.

The primary issue is whether or not Asarco's emergency stop cords for the 1-B and 117 conveyors positioned between the conveyor's lower return belt and upper belt at a height of 27 to 38 inches above the adjacent walkway floor were located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor.

On conveyor 1-B the lower (return) belt was 18 inches above the floor and the top portion (outer edge) of the upper belt was 64 inches above the floor. The B-l conveyor stop cord running parallel to the conveyor between the top and bottom belts was approximately 27 to 32 inches above the adjacent walkway floor.

On conveyor 117 the lower (return) belt was 24 inches above the floor and the top belt was 60 inches above the floor. The stop cord running parallel to the conveyor between the top and bottom belts was approximately 29 to 38 inches above the adjacent walkway floor.

It is Asarco's position that the stop cord for each conveyor was properly located and readily accessible in event of a fall so that a person falling on or against the conveyor could "readily

deactivate the conveyor drive motor and that, therefore, Asarco was in full compliance with the cited stop cord standard". [1]

Asarco also points out and presented credible evidence that (1) the stop cord along the 1-B conveyor at Hayden Concentrator has been in place for over 30 years; (2) the stop cord along the 117 conveyor at the Ray Mine has been in place for over 20 years; (3) no citations have been issued to Asarco for stop cords at the Ray Complex since Asarco acquired the Ray Complex in 1986, despite 39 MSHA inspections; (4) there have been no injuries or accidents involving conveyors at the Ray Complex since Asarco acquired the property in 1986 and (5) the conflicting abatement methods suggested by the two inspectors presented more hazards than Asarco's original placement of the stop cords.

It is the Secretary's contention, as outlined in her post-hearing brief, that (1) the stop cords for conveyors 1-B and 117 were not located so an employee who fell on or against the conveyor could easily and quickly stop the conveyor and (2) abatement problems and the absence of prior citations for stop cords even where the stop cords had been in place for many years are not relevant to a determination of whether the violations occurred.

DISCUSSION

The Secretary's latter (second) contention is accepted. On review and evaluation of the record, however, I find the Secretary's first contention must be rejected. The preponderance of the evidence presented did not establish that the stop cord for either the 1-B or the 117 belt conveyor was so located that a person falling on or against the conveyor could not readily deactiviate the conveyor drive motor.

Asarco may well be subject to citations for having too much slack in one or two spots in its B-l or 117 stop cords but that's

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[1] Without conceding the validity of either citation, Asarco abated the particular conditions cited by raising the stop cords along the 1-B and 117 conveyors. Asarco was informed that if it did not raise the stop cords along thousands of additional feet of numerous different conveyor belts throughout the Ray Complex, it would receive Section 104(d) citations or orders. (Tr. 246).

not what these two citations are about. The record clearly shows the citations were for having the entire length of each stop cord installed at a level which the inspectors believed, (because of their misinterpretation of the stop.cord safety standard) to be too low. The pleadings and the evidence presented at the hearing show that the citations were issued by inspectors Hunt and Swanson (the only witness as presented by the Secretary) as a result of their misinterpretation and impermissible expansion of the requirements of the safety standard.

It is fundamental and undisputed that the "plain meaning" of the standards should be examined to determine what action is required to comply with its requirements. The regulation, 30 C.F.R. § 56.14109 as relevant here, provides that "unguarded conveyors next to the travelways shall be equipped with -- emergency stop devices (e.g. stop cords) which are "located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor."

It is clear from the record, including the testimony of the two inspectors who issued the citations that the citations in question were issued because both inspectors misinterpreted the cited standard. Both inspectors testified that the cited standard requires that the safety cord be so placed that a person falling on or against a conveyor "automatically trip" the stop cord by "falling through" the cord. Both inspectors testified that placing the cord where a person can reach and grab the cord to deactivate the 'drive motor does not, in their opinion, satisfy the standard.

Dr. James Glaze, Asarco expert witness, is a certified safety professional and has been a safety engineering consultant for over 20 years. (Tr. 130-131; Asarco Exhibit 17). He is familiar with conveyor systems. His prior experiences with conveyors includes studying conveyor systems and recommending how to guard them. (Tr. 141-147). He has investigated conveyor accidents and "near misses." (Tr. 202-203).

Dr. Glaze conducted ergonomic studies, analyzed relativity positions and performed safety analyses of the original location of the stop cords including simulation of falls to determine whether the stop cords along the 1-B and 117 conveyors at the Ray Complex were located so that a person falling on or against the conveyor could readily deactivate the motor. (Tr. 155, 159, 165-166).

Dr. Glaze's expert opinion is that the stop cords along the 1-B and 117 conveyors were ideally located and fully complied with the requirements of the standard. (Tr. 164-165, 173-174).

The "stop cord" standard (30 C.F.R. § 56.14109(a) is a performance-oriented machinery and equipment standard. The intent of the standard is to reduce the likelihood of accidents and injuries related to unguarded conveyors adjacent to travelways. (Tr. 24-25, 138). This standard does not require that an operator locate its stop cords so that it guarantees that a person who falls on or against a conveyor will first fall on or through the stop cord. Nevertheless, in this case, the MSHA inspectors who issued the stop cord citations to Asarco erroneously believe that the stop cord standard does require that a falling person "automatically trip" the cord. It appears from the record, this misunderstanding was the basis for their citations. (Tr. 226, 228, 241-244, 247). In addition, both inspectors incorrectly believe that placing a stop cord in a location where a person can reach and grab the cord in the event of a fall does not satisfy the standard. (Tr. 227, 243).

To achieve the purpose of the standard, where an unguarded conveyor exists next to a travelway, "emergency stop devices" (e.g., stop cords) are required. These stop cords must be "located" so that a person who falls "on or against the conveyor" can "readily" stop the conveyor drive motor. Stop cords can be installed in a number of ways to achieve this objective. The standard does not define, mandate nor restrict the "location" of the stop cord, other than to state that it must be "readily" accessible to the person who is falling. It does not prohit stop cords below, at, or above any particular component of a conveyor. With respect to a belt conveyor, the standard does not dictate placement vis-a-vis the floor, the upper or lower belts, the upper or lower idlers, the pulleys, or the drive motor. The stop cords along the 1-B and 117 conveyors at the Ray Complex were located at or above the height of an average man's hand as he walked the adjacent travelway floor. (Tr. 156-157). In that location, they could be "readily" reached by a person falling on or against the conveyor. Their location met the intent, as well as the letter, of the stop cord standard.

The Secretary's -interpretation of 30 C.F.R. § 56.14109(a) in this case ignores the plain meaning of this standard. Both inspectors erroneously believe that the standard requires a person falling on or against a conveyor to "automatically trip" the cord by "falling through" the cord. The record clearly shows that this misunderstanding was the basis for the issuance of the

citations. (Tr. 226, 228, 239, 241and 244). In addition, both inspectors erroneously believe that placing the cord in such a manner that a falling person can reach and grab the cord to deactivate the drive motor does not satisfy the standard. (Tr. 227, 243). These interpretations not only ignore the plain meaning of the standard, they constitute an impermissible expansion of the plain meaning of the standard and thus constitutes an impermissible avoidance of the rulemaking requirements of Section 101 of the Mine Act.

In relation to the deference to be accorded an agency's interpretation of a mandatory safety standard, the court is required to give effect to the actual words and the plain objective meaning of the regulations and is not bound by the agency's "hidden intentions and idiosyncratic interpretations." In Western Fuels-Utah, Inc., 11 FMSHRC 278, 284 (March 1989), the Commission stated:

> While the Secretary's interpretation of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulations. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945). . . . The Mine Act does not contemplate that the Commission merely "rubber-stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.

It is a basic tenant of administrative law that "a regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required." Secretary v. Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152, (1989) (citing Mathies Coal Company, 5 FMSHRC 300, 303 (1983). An agency's failure to provide adequate and fair notice constitutes a denial of due process and renders any attempted enforcement action invalid. Gates and Fox Company, Inc. v. Occupational Safety and Health Review Commission, 790 F. 2d 154, 156 (D.C. Cir. 1986). The rulemaking provisions of the Mine Act were intended to ensure sound standards and regulations and fair and adequate notice to regulated parties. Regulatory interpretations that extend beyond the clear language of the regulation and change the rights or

duties of the parties constitute unenforceable amendments that are in avoidance of required rulemaking procedures. 5 U.S.C. § 551 et seq. (1988). Garden Creek Pocahontas Company, supra.

If the Secretary truly desires to direct the specific location of stop cords and further wishes to require that a person falling on or against a conveyor first fall "through" the stop cord, then the Secretary must pursue this goal through notice and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but also clearly inform the mine operator what he must do for compliance. In short, the Secretary's interpretation (1) contradicts the "plain meaning" of this performance standard; and (2) violates the rulemaking requirements of the Mine Act.

III

DECLARATORY RELIEF DENIED

In its post-hearing brief, Asarco asks for declaratory relief citing Mid Continent Resources, Inc., Docket No. WEST 87-88, 12 FMSHRC 949 (May 23, 19901, aff'g 10 FMSHRC 881 (July 1, 1988) (ALJ Morris). I have reviewed the facts of this case in the light of the cited commission decision. The Commission in that decision points out that the discretionary nature of administrative declaratory relief is its paramount feature. The Commission also ruled that to grant declaratory relief, the Complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the Complainant is real, not speculative.

In my opinion, an insufficient showing of these factors has been made in this case so as to make this case an appropriate one for declaratory relief. I, therefore, decline to exercise my discretionary authority to grant declaratory relief in this case. I trust my ruling on the issues in this case will bring about the reasonable proper interpretation and enforcement of the safety standard in question without need for further ligation or declaratory relief.

ORDER

On the basis of the foregoing findings and conclusions, **IT IS ORDERED AS FOLLOWS:**

1. Citation No. 3602316, January 14, 1992, citing alleged violation of 30 C.F.R. § 56.14109(a) is VACATED and Docket No. WEST 92-227-RM is DISMISSED.

2. Citation No. 3602354, January 28, 1992, citing an alleged violation of 30 C.F.R. § 56.14109(a) is VACATED and Docket No. WEST 92-228-RM is DISMISSED.

3. Order No. 39028090, January 29, 1992, citing an alleged violation of 30 C.F.R. § 57.14112(b) is VACATED and Docket No. WEST 92-244-m is DISMISSED.

August F. Cetti

August F. Cetti
Administrative Law Judge

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