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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2014-299-M A.C. No. 01-00016-349326
v.	
CEMEX SOUTHEAST, LLC, Respondent	Mine: Demopolis Plant CEMEX Inc.

DECISION AND ORDER

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Michael T. Cimino, Esq. & Adam J. Schwendeman, Esq., Jackson Kelly PLLC, Charleston, West Virginia, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). The matter arises out of three citations and one order issued by the Secretary of Labor ("the Secretary") to mine operator CEMEX Southeast, LLC ("Cemex") in February and March 2014. The citations and order allege that safety violations relating to elevators occurred at the Demopolis Plant CEMEX Inc. ("the Demopolis Plant" or "the mine"), a cement processing plant operated by Cemex in Demopolis, Alabama that is subject to the Secretary's health and safety regulations at 30 C.F.R. Part 56. The parties settled three of the violations prior to hearing. I approved the settlement by Order dated June 16, 2016. The parties litigated the remaining citation, Citation Number 8641317.

Citation Number 8641317 was issued under section 104(a) of the Mine Act and alleges that Cemex violated the mandatory health and safety standard at 30 C.F.R. § 56.18002(a).[1] The

[1] The cited standard states: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a).

Secretary filed a petition seeking assessment of a $3,996.00 penalty for the alleged violation. Cemex contested the violation and the citation's gravity and negligence designations and contended that it was not afforded fair notice of the Secretary's interpretation of § 56.18002(a). Accordingly, I held a hearing to determine whether the Secretary properly charged Cemex with a violation of the cited standard, and, if so, whether the Secretary's gravity and negligence designations were appropriate and what penalty should be assessed against Cemex.

The hearing was held in Birmingham, Alabama on April 25, 2016. During the hearing, the parties presented testimony and documentary evidence.[2] After the Secretary presented his case, Cemex moved for judgment as a matter of law, arguing that the Secretary had failed to prove a violation. Tr. 115-19. I denied that motion. Tr. 119-20. The Respondent elected to rest without calling any witnesses. Tr. 120-21. The parties subsequently filed post-hearing briefs.

For the reasons set forth below, I now vacate Citation Number 8641317 on the grounds that the Secretary has failed to establish a violation of § 56.18002(a) and that Cemex did not receive fair notice of the Secretary's interpretation of § 56.18002(a) before the citation was issued. Based on the entire record, including my observation of the demeanor of the witness, and after considering the post-hearing briefs, I make the following findings:

II. STIPULATIONS OF FACT AND LAW

At hearing, the parties agreed to the following stipulations (see Ex. S2 and Tr. 15):

1. Cemex was at all times relevant to this proceeding engaged in mining activities at the Demopolis Plant where the citations in this matter were issued.

2. Cemex's mining operations affect interstate commerce.

3. Cemex is subject to the jurisdiction of the Mine Act.

4. Cemex is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the contested citations in this proceeding were issued.

5. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.

6. On the dates the citations in this docket were issued, the issuing MSHA inspectors were acting as duly authorized representatives of the Secretary, were assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the subject MSHA citations.

[2] Exhibits S1 through S11 and Exhibits R1 through R27 were received into evidence at the hearing. Tr. 10-14, 70, 122. The abbreviation "Tr." refers to the hearing transcript. The MSHA representative who issued the disputed citation was the sole witness to testify.

7. The citations at issue in this proceeding were properly served upon Cemex as required by the Mine Act.

8. The citations at issue in this proceeding may be admitted into evidence.

9. The certified copy of the MSHA Assessed Violation History (marked as Exhibit S1) reflects the history of the citation issuances at the mine prior to the date of the last citation.

10. Cemex demonstrated good faith in abating the violations.

11. The penalties proposed by the Secretary in this case will not affect the ability of Cemex to stay in business.

III. FINDINGS OF FACT

The sole citation remaining at issue in this proceeding was written by MSHA Safety Specialist Michael Evans[3] on March 5, 2014 during a spot inspection of the elevators at the Demopolis Plant that was spurred by a recent fatality involving an elevator at a different cement plant in Louisville, Kentucky. Tr. 38-40. The citation alleges that Cemex violated the mandatory safety standard at 30 C.F.R. § 56.18002(a) by failing to designate a competent person to examine the elevators at the Demopolis Plant during each shift. Ex. S6; Ex. R3.

Maintenance of the Demopolis Plant Elevators

The mine has elevators at four locations: the preheater tower, the mill room, the pack house (or silo), and the office. Tr. 49-52.[4] At the time of the spot inspection, the elevators were maintained by contractor ThyssenKrupp Elevator Corporation ("TKE") pursuant to a service agreement. Tr. 41-42; *see* Ex. R17 (showing regular payments from Cemex to TKE for "our existing maintenance agreement" during the year leading up to the inspection). This arrangement was consistent with industry practice and with Alabama law prohibiting anyone but licensed elevator mechanics from performing maintenance work on elevators. Tr. 81-82; *see* Ex. R16 (containing copy of Ala. Code § 25-13-4).

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[3] Evans began his career in the mining industry as an underground coal miner. He worked for 31 years as an inside laborer, electrician, and eventually a maintenance supervisor. He was hired by MSHA in 2008, and became an inspector for the agency in 2009, after undergoing training in Beckley, West Virginia. In 2012, he became a Safety Specialist, which did not require any specialized training. His job duties include accident investigation, reporting, and follow up; handling mine rescue competitions; and reviewing records such as impoundment plans, mine maps, ventilation plans, and escape and evacuation plans. Tr. 32-38.

[4] Evans, the sole witness, was unsure whether "silo" was a reference to the mill room or the pack house. Tr. 49, 51. Cemex has indicated that "silo" is another name for the pack house. Resp. Br. 16. This makes sense because both terms refer to buildings used for storage.

The precise terms of the contractual arrangement between Cemex and TKE at the time of the spot inspection are not clear. The contract itself was not offered into evidence. The Secretary produced a copy of a different contract that became effective approximately one month after the inspection, on April 1, 2014, and he relies on this contract to show how elevator maintenance duties were allocated between Cemex and TKE at the time of the inspection. Ex. S10; *see* Sec'y Br. 23-24. Under the April 1, 2014 contract, TKE's obligations include providing repair services, which are billed separately from the regular contract payments, and making six visits to the mine each year to conduct "limited preventative maintenance." Ex. S10. The contract specifies that regular preventative maintenance includes lubrication of the guide rails, "minor adjustments," and the examination, cleaning, and lubrication of the elevators' major mechanical components, namely, the controller, the machine, the motor, and the interlocks, which are the mechanisms that ensure that the hoistway doors on each floor do not open onto the elevator shaft unless the car is present. Ex. S-10; Tr. 82.

It would be improper for me to assume that the contractual arrangement between Cemex and TKE at the time of the inspection was identical to the arrangement described above. However, the evidence suggests that it was similar. Specialist Evans testified that Cemex employees performed minor elevator maintenance tasks such as changing burned-out lightbulbs on elevator lights, but in general, a miner who observed an elevator hazard was expected to lock and tag out the elevator and call TKE to repair it. Tr. 62-63, 69-71; Ex. R27 at 30.[5] Cemex asserts that TKE performed regular quarterly elevator inspections and maintenance. Resp. Br. 24 n.11.[6] Miners mentioned quarterly maintenance to Specialist Evans, but did not produce any records of quarterly examinations. Tr. 65, 67. Instead, Evans was shown a "break-and-fix" record and records of annual inspections performed by TKE in 2011 and 2012. Tr. 64-67; Ex. S7 at 4.[7] Considering this evidence, I conclude that at the time of the spot inspection, the elevators at the Demopolis Plant were being examined by TKE four times each year for preventative maintenance purposes, and were subject to separate annual inspections in 2011 and 2012.

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[5] Invoices submitted by Cemex confirm that TKE was called out to the mine to perform repairs on numerous occasions during the one-year period preceding the spot inspection. Ex. R18.

[6] This assertion is supported by a notation in a March 11, 2014 email sent to Cemex by a TKE representative. The email proposes to increase the number of maintenance visits each year from quarterly to monthly. Ex. R21. As noted above, Cemex and TKE ultimately entered into a contract on April 1, 2014 providing for six maintenance visits per year. Ex. S10.

[7] An annual inspection had not been performed in 2013 due to a billing issue, even though TKE had submitted a quote for it. Ex. S7 at 4, 7. Exhibits R20 and S11 contain quotes sent from TKE to Cemex for big-ticket items, including two quotes submitted in September 2013 and January 2014 for a "safety inspection" consisting of "no load safety tests." If purchased, the safety inspection would have cost Cemex more than a years' worth of regular contract fees. *Compare* Exs. R20 & S11 *with* Ex. R17. It seems likely that this is the "annual inspection" to which Evans was referring when he mentioned the billing dispute in his field notes. Such safety inspections are therefore separate from any regular, periodic maintenance examinations contemplated under the contract.

The Louisville Fatality

The March 5, 2014 spot inspection of the Demopolis Plant elevators was spurred by a fatal accident that had occurred less than two weeks earlier at a different cement plant operated by Cemex in Louisville, Kentucky. Tr. 39, 99. A miner attempting to use an elevator at the Louisville facility on February 21, 2014, had opened the hoistway doors on the fourth floor of the building, stepped into the elevator shaft without noticing that the elevator car was actually on the ground floor, and fell several stories onto the top of the car, sustaining fatal injuries. Tr. 39-40; Ex. S8; Ex. S9; Ex. R9.

On February 28, 2014, MSHA issued a Fatalgram describing the accident and listing the following best practices:

- Immediately report any elevator problems to management.
- Ensure that any problems affecting the safety of an elevator are repaired promptly.
- Ensure that elevator door interlocks, that prevent the door from being opened unless the elevator car is present, are functional.
- Ensure that elevator doors will not open unless an elevator car is at the floor landing.
- Install audible signals that sound when the elevator car is at the landing prior to the doors opening.
- Train all persons to be aware of their surroundings when entering or exiting an elevator car.

Ex. S8; Ex. R9. MSHA also dispatched inspectors, including Evans, to conduct spot inspections of elevators at other cement plants, with special instructions to check the doors at all the landings to ensure that they would not open unless the car was present. Tr. 21-22, 59-60, 92. MSHA's post-fatality enforcement activity relating to elevators has spurred litigation resulting in at least three Commission Administrative Law Judge opinions so far. *Ash Grove Cement Co.*, 38 FMSHRC __, Nos. WEST 2014-963 et al. (Aug. 4, 2016) (ALJ Barbour); *Cemex Constr. Materials, Atl., LLC*, 38 FMSHRC 827 (Apr. 2016) (ALJ Barbour); *Cemex Inc.*, 37 FMSHRC 2886 (Dec. 2015) (ALJ Rae) (order on summary decision motions).

Meanwhile, in the wake of the fatality, Demopolis Plant Manager Gary Pinault had been told by a regional manager to "make sure we are having all of our elevators inspected by a professional third party ASAP ... to be assured that they are safe and the doors cannot be opened unless the elevator is present." Ex. R22 (email dated February 26, 2014). Demopolis' four elevators were duly examined by TKE on February 28, 2014. Tr. 90-91, 104; Ex. S7 at 1-2; Ex. R19. The mill room elevator had been shut down ten days earlier for repairs to the motor, and it remained locked and tagged out after the examination. Tr. 52; Ex. S7 at 4. The preheater elevator was also locked and tagged out during the examination because the hoistway doors could be opened on two different floors when the elevator car was not present, indicating defective door interlocks. Tr. 50-51; Ex. S7 at 1-2; Ex. R19.

The Inspection

MSHA Specialist Evans arrived at the Demopolis Plant to initiate the spot inspection on March 5, 2014. He first visited the mine office, where he learned that only two of the elevators were operational. Tr. 40, 49; Ex. S7 at 1. He set off to inspect all of the elevators, joined by Safety and Health Manager Ann Saelens and a miners' representative, whose name Evans could not recall at the hearing. Tr. 40-41, 46-47.

The first location visited by the inspection party was the preheater tower, which is an eight-story building where material is heated. Tr. 50; Ex. S7 at 1-3. The elevator at this location has a manually operated hoistway door, with a window at each landing. Tr. 84-87. The elevator was danger-taped off and the power to it was shut down, which prevented Evans from inspecting elements such as the lights, the door buttons, and the bell buttons. Ex. S7 at 1-3. However, Evans was able to test the hoistway doors at each landing and confirm that they could be opened on two of the floors when the car was not there, which, as noted above, was the reason the elevator had been locked and tagged out following examination by TKE on February 28. Tr. 50-51; Ex. S7 at 2-3.[9] Because the elevator was shut down and no one was using it, Evans did not issue a citation for the defective doors. Tr. 103. At hearing, he did not claim to observe anyone working near the elevator. Tr. 74-75. In fact, he testified that he did not recall seeing anyone at the preheater tower at all. Tr. 75. However, his field notes state that he saw an employee doing cleanup work "on 1½ level" of the building. Ex. S7 at 2.

The inspection party next traveled to the mill room, a three-story building that has an elevator with automatic doors. Tr. 86-87; Ex. S7 at 3-4. As mentioned above, the elevator had been locked and tagged out since February 18 for repairs to the motor. Tr. 52; Ex. S7 at 4. According to Evans, the miners' representative told him that the mill elevator "had problems with its lights," but because the power was off, Evans could not check this himself. Tr. 62. Evans did not further describe his visit to the mill room, except to say that he recalled seeing people working in the building, although he was unsure exactly what they were doing and could not say what sort of work was generally performed at the mill. Tr. 52-55; Ex. S7 at 3-4.

The inspection party next visited the pack house, a five-story building with an elevator that, like the preheater elevator, has a manually operated door at each landing. Tr. 51-52, 84-87; Ex. S7 at 4. The pack house elevator was operational, and Evans testified that he saw a miner or miners using it. Tr. 51-52, 56, 75. He did not mention what work these miners were performing, and he was unsure of the pack house's general function, although he believed that the building may be involved in the shipping process. Tr. 51-52, 75. Evans checked the pack house elevator's hoistway doors on all floors and found no problems. Tr. 105; Ex. S7 at 4. However, he issued one non-significant and substantial (non-S&S) citation for a defective retiring cam

[9] Although Evans testified that the defective doors were located on the fourth and eighth floors, his field notes from the day of the inspection indicate that they were actually located on the sixth and eighth floors. Ex. S7 at 2-3.

release roller on the third floor, and another non-S&S citation for nonfunctional in-use lights at the call stations on four different floors. Tr. 56, 100-03; Ex. S7 at 4, 7; Ex. R5; Ex. R7.[10]

At some point during the inspection, Evans also checked the elevator at the mine office, which serves three floors and has automatic doors. Tr. 85, 87; Ex. S7 at 5. Evans testified that there were no problems with the hoistway doors, but he did not further describe his observations. Tr. 105; Ex. S7 at 5.

Aside from checking all the elevators himself, Evans also discussed them with several miners. He asked for records showing whether the elevators were included in the workplace examinations that the mine allegedly was required to conduct each shift pursuant to 30 C.F.R. § 56.18002. Tr. 41, 46. Saelens informed Evans that Cemex did not include elevators in its workplace examinations, that miners performed such examinations only in areas where they were working, and that TKE handled all work relating to the elevators. Tr. 41-42, 66; Ex. S7 at 2. As mentioned above, Evans was shown a "break and fix" record, (that is, a record of repair work performed by TKE at the mine), and records of annual inspections that TKE had performed in 2011 and 2012, but no records of regular maintenance examinations. Tr. 64-67; Ex. S7 at 4, 7.

Evans was told that TKE was called to the mine fairly often to perform repairs. Tr. 64. Evans learned from the miners' representative and Plant Manager Pinault that the elevators had been installed in the 1970s and were now "old and in bad shape," and the mine had "spent thousands of dollars trying to keep them running." Tr. 55, 87-88; Ex. S7 at 5. The miners' representative expressed concern about the elevators and said that the elevators had broken down and caused an entrapment or entrapments in the past. Tr. 55, 88; Ex. S7 at 6; Ex. R4; *see* Ex. R1.[11]

The Citation & MSHA Specialist Evans' Supportive Testimony

Based on his observations and the information he had gathered from the March 5, 2014 spot inspection, Evans issued Citation Number 8641317 that afternoon. Ex. S6; Ex. R3; Tr. 42-44. The narrative portion of the citation states, in pertinent part:

> The mine operator failed to designate a competent person to examine the elevators for hazards each shift at this operation. Defects affecting the

[10] Exhibit R5 is the citation issued for the cam roller (Citation No. 8641319) and Exhibit R7 is the citation issued for the in-use lights (Citation No. 8641320). These two citations were initially included in this case (*see* Ex. S4), but settled prior to hearing.

[11] Exhibit R1 contains a copy of Citation No. 8810886, which was issued on February 11, 2014, after an elevator entrapment occurred at the mine. The citation was initially included in this docket (*see* Ex. S4), but settled prior to hearing. The citation alleges that Cemex violated 30 C.F.R. § 46.7(a) by instructing two miners to rescue the person, who was trapped in the elevator, even though the miners had not received task training for this job. Ex. R1. Because a trained elevator mechanic was not immediately available to free the trapped person, the miners had freed him on their own, relying on instructions relayed by a TKE representative over the phone. Ex. R1; Ex. R2.

> safe operation of the elevator car and the hoistway doors, at each floor, exposed miners to fatal injury when using the elevator and/or working near the hoistway doors on a daily basis. Management is aware of the MSHA regulation requiring work place exams each shift.

Ex. S6; Ex. R3. Evans assessed the violation as reasonably likely to cause a fatal injury affecting one person, significant and substantial (S&S), and the result of Cemex's high negligence. Ex. S6; Ex. R3; Tr. 60-66. As noted above, he issued the citation under the mandatory safety standard at 30 C.F.R. § 56.18002(a), which requires a competent person to examine each working place at least once each shift for conditions which may adversely affect safety or health. Ex. S6; Ex. R3.

Although Evans had inspected the Demopolis Plant before, he had never before asked Cemex for workplace examination records for elevators, had never told Cemex that such records needed to be kept, and had never cited Cemex for failing to designate a competent person to conduct workplace examinations of elevators or for failing to report elevator defects to management. Tr. 87, 98-99, 112-13. In fact, this was the first citation that Evans had ever written involving an elevator. Tr. 59.

Evans conceded that he was not aware of any regulations or MSHA guidance documents, such as Program Policy Letters (PPLs) or the Program Policy Manual (the PPM), which define elevators as part of the "working place" that must be included in workplace exams. Tr. 89, 93-96, 106. He further conceded that MSHA's interpretation of workplace exams with respect to elevators had changed since the Louisville fatality because elevators previously did not need to be included in these exams. Tr. 105-06. Nonetheless, Evans believed that his issuance of the citation was appropriate because "[w]e'd just had an accident that killed a man and if [examining the elevators] could prevent it from happening here at Demopolis, then we needed to get them to do that. That's the only tool that you've got to get them to do what will protect the miners." Tr. 43-44; *see also* Tr. 61 ("[I]f a workplace examiner writes a defect affecting safety anywhere, they usually take care of it pretty quick, and they weren't doing that regarding the elevators."); Tr. 63-64 ("[T]hey should have a regular program that identifies hazards that can kill people and ... may have prevented the [fatality] in Louisville.").

When asked at hearing to define the term "working place" as used in the workplace exam regulation, Evans first provided several examples. "[I]f they were going to change a motor on the fourth floor of the preheater tower, that working place would be the area that they're working at on the fourth floor," he explained. Tr. 47. If miners were working at the bag house, "That would be a working place. It's where people travel to work." Tr. 48. Evans later seemed to embrace a broader definition of the term: "I consider the whole mine a working place. Anywhere that people work or travel is a working place." Tr. 57. On cross-examination, however, he conceded that not every location inside a cement plant is a working place. Tr. 77. For example, he agreed that the regulations do not require travelways in cement plants to be examined each shift. Tr. 107. However, he suggested that a travelway could constitute a "working place" such that it was subject to the workplace exam regulation if a person were injured there. Tr. 110-11. With respect to elevators, Evans e conceded that he believes an elevator becomes a working place only when someone is using it or working close to the hoistway doors, but he opined that Cemex's

elevators were part of the working place when he issued the citation "because people get on the elevator to get to the different levels that they work in" and because miners working on a floor with defective hoistway doors would be exposed to a hazard. Tr. 48-49, 75-76.

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. The Alleged Violation of § 56.18002

The Secretary bears the burden of proving by a preponderance of the evidence that a violation of the cited standard, § 56.18002, occurred. *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

As noted at the outset of this decision, § 56.18002 requires Cemex to "examine each working place at least once each shift for conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002(a). The major requirements of the safety standard are that (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept. *See FMC Wyo. Corp.*, 11 FMSHRC 1622, 1628 (Sept. 1989) (discussing identically worded regulation at § 57.18002). In addition, the standard carries an implicit adequacy requirement: an examination must be adequate in the sense that it must identify those hazardous conditions which would be recognized by a reasonably prudent competent examiner. *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016). The standard is intended "to require regular close examination of the total mining environment to find and eliminate potential hazards," 60 Fed. Reg. 9985, 9987 (Feb. 22, 1995), and was "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine," *Sunbelt Rentals*, 38 FMSHRC at 1627 (quoting *FMC Wyo.*, 11 FMSHRC at 1629).

At issue in this case is whether the standard is broad enough to require examinations of elevators and elevator landing areas. Although Cemex examined its elevators after the Louisville fatality and relied on contractor TKE to perform quarterly maintenance examinations, there is no evidence that Cemex included the elevators and landing areas in its regular workplace examination program under § 56.18002 by instructing a designated competent person to examine them and keeping a record of the examinations, and mine management admitted as much to Specialist Evans. Tr. 41-42, 90-91, 104; Ex. S7 at 1-2; Ex. R19. Accordingly, the Secretary will meet his burden of proving a violation if he prevails on his argument that the term "working place," as used in § 56.18002(a), categorically includes elevators. *See* Sec'y Br. 13-18; Tr. 24-25. He can also prove a violation by establishing that the elevators in question constituted "working places" within the meaning of the regulation. These issues present a question of regulatory interpretation.

1. Legal Principles Governing Regulatory Interpretation

Where the language of a regulatory provision is clear, the provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or enforcement would produce absurd results. *Hecla Ltd.*, 38 FMSHRC __, Nos. WEST 2012-760-

M et al., slip op. at 6 (Aug. 30, 2016); *Austin Powder Co.*, 29 FMSHRC 909, 913 (Nov. 2007); *see Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) ("Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation *only* when the plain meaning of the rule itself is doubtful or ambiguous.").

To the extent that a regulation is silent or ambiguous on a particular point, the Commission follows the doctrine of deference established in *Bowles v. Seminole Rock and Sand Company*, 325 U.S. 410 (1945), and reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g.*, *Hecla*, slip op. at 6; *Tilden Mining Co.*, 36 FMSHRC 1965, 1967 (Aug. 2014), *aff'd*, __ F.3d __, 2016 WL 4254997 (D.C. Cir. Aug. 12, 2016). Under this doctrine, the promulgating agency's interpretation of the regulation is entitled to full deference (referred to as *Auer* deference) unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency's fair and considered judgment on the matter. *Drilling & Blasting Sys., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. __, 132 S. Ct. 2156 (2012)); *see, e.g.*, *id.* at 194-97 (declining to defer to plainly erroneous interpretation); *Hecla*, slip op. at 6-9 (deferring to reasonable interpretation); *Tilden Mining*, 36 FMSHRC at 1967-68 (same); *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012-13 (Aug. 2014) (declining to defer to unreasonable interpretation).

If there is reason to suspect that an agency's interpretation does not reflect its fair and considered judgment, the interpretation is not entitled to full *Auer* deference, but is still entitled to a measure of deference or respect proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Christopher v. SmithKline Beecham*, 132 S. Ct. at 2168-69 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).[12]

In evaluating the merits of a proposed regulatory interpretation, the Commission has considered factors such as whether the interpretation is consistent with the language and ordinary usage of the cited standard, whether it harmonizes with the purpose and structure of the regulations, and whether it furthers the policy goals of the Mine Act, particularly the Act's

[12] Thus, *SmithKline Beecham* can be viewed as extending *Skidmore* deference from the statutory interpretation context to the regulatory interpretation context. The difference is that in the statutory interpretation context, *Skidmore* deference is triggered by the conditions set forth in *Mead*, while in the regulatory interpretation context, it is triggered by a finding under *SmithKline Beecham* that the agency's proffered interpretation may not represent its fair and considered judgment. *Compare Mead*, 533 U.S. at 226-27, 234-35 (providing for full *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," and *Skidmore* deference in all other contexts), *with SmithKline Beecham*, 132 S. Ct. at 2166-69. If the agency's regulatory interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, courts presumably need not accord it any deference at all under either *Auer* or *Skidmore*. *See, e.g.*, *Drilling & Blasting Sys.*, 38 FMSHRC at 194-97; *Twentymile*, 36 FMSHRC at 2012-13.

safety-promoting purposes. See, for example, *Hecla*, slip op. at 6-9 (analyzing the language of the regulation, the regulation's specific purpose, and the general policy goals of the Mine Act, particularly the goal of promoting safety); *Nally & Hamilton Enters.*, 38 FMSHRC 1644, 1648-51 (July 2016) (adopting an interpretation that was consistent with the language of the regulation, as determined by reliance on dictionary definitions and prior case law; that harmonized with the regulatory scheme; and that furthered the goals of the Mine Act); *Twentymile*, 36 FMSHRC at 2012-13 (rejecting an interpretation that was not suggested by the language of the standard or its regulatory history and that did not advance mine safety); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681-82, 1685-86 (Dec. 2010) (analyzing one ambiguous term with reference to the broader regulatory context, including analogous regulations, and adhering to another ambiguous term's customary technical usage, as demonstrated by a mining dictionary and the testimony of knowledgeable witnesses); *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193-94 (Mar. 1998) (analyzing regulatory language with reference to ordinary dictionary meanings, the Mine Act's safety-promoting goals, the PPM, the Secretary's past application of the regulation, and the regulatory structure); *Island Creek Coal Co.*, 20 FMSHRC 14, 19-24 (Jan. 1998) (evaluating the ordinary meaning of the regulatory language; "contextual indications," including the meaning of similar language in other regulations; and the Mine Act's purposes).

2. The Parties' Positions

The Secretary argues that it is reasonable to interpret the term "working place" to include elevators and elevator landings because the definition of "working place" found in § 56.2 includes the expansive word "any"; because § 56.18002 is a broad standard intended to require close examination of the total mining environment; and because miners use elevators to perform "work," as defined in the Merriam Webster Online Dictionary, bringing them within the plain meaning of "working place." Sec'y Br. 13-17.[13] Noting that Administrative Law Judge David Barbour recently interpreted § 56.18002 to cover elevators when they are being used to perform work, the Secretary suggests that I should adopt and broaden this holding to apply to elevators "as a unit" without temporal limitations – that is, he suggests that elevators should categorically be included in workplace exams. *Id.* at 17-18 & n.11 (citing *Cemex Constr. Materials, Atl., LLC*, 38 FMSHRC 827 (Apr. 2016) (ALJ)). The Secretary contends that in this case, § 56.18002 was violated because MSHA Specialist Evans observed employees using the pack house elevator, and was told that employees use the mine's elevators on a daily basis, yet Cemex had not designated a competent person to examine them. *Id.* at 18. The Secretary further asserts that even if elevators constitute travelways rather than "working places," they are still subject to workplace exams. *Id.* at 18-20.

Cemex argues that the elevators at the Demopolis Plant do not fall within the definition of a "working place." Resp. Br. 5-19. Cemex first contends that the Secretary's purported interpretation of "working place" is actually a substantive rule change imposing a new obligation to examine not only areas where miners work, but also where they travel, which is contrary to the plain meaning of the standard. *Id.* at 6-7 & n.4. To the extent that this is a new substantive

[13] The Secretary further takes the position that an elevator shaft is a "working place" for any contract workers who are servicing the elevator's internal workings, obligating the contractor to conduct workplace exams of the shaft. Sec'y Br. 15 n.9. I need not address this contention, as neither the contractor nor Cemex were cited for failing to examine elevator shafts.

rule, Cemex argues that the Secretary was required to engage in notice-and-comment rulemaking. *Id.* at 25-28. To the extent that this is a new interpretation of an ambiguous standard, Cemex argues that the interpretation is unreasonable and not entitled to deference because it is inconsistent with the language and structure of the regulations and would produce absurd results. *Id.* at 7-14. Cemex further asserts that, even if an elevator could be construed as a working place, the Secretary has failed to meet his burden of establishing that work was being performed at the time of the inspection, or would be performed in the foreseeable future, on or near the cited elevators. *Id.* at 14-19.

3. Interpretation of § 56.18002

a. Whether the Language of the Regulation Is Clear

The regulatory language at issue in this case is not clear. Section 56.18002 requires examination of "each working place" each shift, but does not define "working place." A separate regulation defines a "working place" in a metal or nonmetal mine as "any place in or about [the] mine where work is being performed." 30 C.F.R. § 56.2. However, the regulations are silent and therefore unclear as to whether and under what circumstances the Secretary considers elevators and elevator landings to be part of the working place such that they fall within the scope of § 56.18002.

I reject the Secretary's assertion that "[t]here is simply no ambiguity to the standard when measuring it with the definition of work." Sec'y Br. 14. The Secretary's own witness admitted that the Secretary has changed his interpretation of the standard to cover elevators and elevator landings, whereas previously they were not required to be examined as part of the "working place." Tr. 105-06. I further reject Cemex's assertion that the "regulatory language *plainly* requires examinations where miners are conducting work, not travel." Resp. Br. 7 (emphasis added). The parties have advanced competing definitions of both "work" and "working place," showing that the meaning of this language is not plain. Because the regulatory language is subject to more than one interpretation, I find it to be ambiguous. *See Alcoa Alumina & Chems., LLC*, 23 FMSHRC 911, 915 (Sept. 2001) (rejecting competing plain language interpretations and finding regulatory language to be ambiguous due to its silence on the issue in question); *Island Creek*, 20 FMSHRC at 19 (finding a regulatory term to be ambiguous because it was open to alternative interpretations).

b. Whether *Auer* Deference Is Warranted

To the extent that § 56.18002 is ambiguous, the Secretary's interpretation is entitled to *Auer* deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or there is reason to suspect it does not reflect his agency's fair and considered judgment. The Supreme Court has cautioned that a regulatory interpretation may not reflect an agency's fair and considered judgment if it conflicts with a prior interpretation or if it appears to be nothing more than a "convenient litigating position" or a "'*post hoc* rationalizatio[n]' advanced ... to defend past agency action against attack." *SmithKline Beecham*, 132 S. Ct. at 2166-67 (citing *Auer*, 519 U.S. at 462; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)); *see also Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S.

50, 63-64 (2011) (noting that "novelty alone is not a reason to refuse deference," but suggesting that it would be improper to accord deference to a new interpretation set forth for the first time by agency counsel to rationalize an agency action that is under judicial review). *But see Sunbelt Rentals, supra*, 38 FMSHRC at 1622-23, and *Sunbelt Rentals, Inc.*, Nos. VA 2013-275-M et al. (June 30, 2015) (unpublished Order), where the Commission permitted the Secretary's appellate counsel to advance a new regulatory interpretation for the first time during oral argument and subsequent supplemental briefing, despite the ALJ's dismissal on summary judgment grounds based on regulatory interpretation and fair notice grounds.

For example, in *SmithKline Beecham*, the Court found that the agency's proffered interpretation did not represent its fair and considered judgment when the agency had first announced the interpretation during an enforcement proceeding following a lengthy period of inaction. 132 S. Ct. at 2167-68. By comparison, in a subsequent case, the Court found that an agency's interpretation reflected its fair and considered judgment where the agency had offered the interpretation in an amicus brief and had been consistent in its views over time, as opposed to changing its views in response to litigation. *Decker v. Northwest Envtl. Defense Ctr.*, 568 U.S. __, 133 S. Ct. 1326, 1337-38 (2013).

In this case, I find reason to suspect that the Secretary's proffered interpretation does not reflect MSHA's fair and considered judgment on the matter at issue, for several reasons. First, the Secretary's desired interpretation is unclear in some respects. Judge Barbour recently issued a thoughtful opinion in *Cemex Construction Materials, Atlantic*, that addressed (1) when a workplace exam must be performed;[14] (2) where it must be performed;[15] and (3) what specific components of an elevator must be examined when the elevator is part of a working place. 38 FMSHRC at 839-40. By contrast, the Secretary has not clearly addressed all of these points, and because his desired interpretation is not embodied in the citation, the regulations, or any agency guidance documents, I am left to discern its scope and bounds on my own, relying on the testimony and arguments presented in this case.[16] I am hesitant to find that a new interpretive

[14] Judge Barbour held that an exam must be performed on or during a shift when work is being performed, is assigned to be performed, or is reasonably expected to be performed. *Cemex Constr.*, 38 FMSHRC at 839.

[15] Judge Barbour held that the operator must examine the places where work is being or will be performed, noting that the standard "is directed at the examination of 'each working place' not at a generic type of working place, i.e., 'the elevators.'" *Id.* at 840.

[16] The testimony of the Secretary's sole witness, Specialist Evans, is self-contradictory in some respects and ultimately unclear. For example, Evans testified at one point that he considered the whole mine to be a working place, but later essentially recanted this testimony. Tr. 57, 77. He failed to offer a clear theory as to whether and when § 56.18002 applies to elevators and, more generally, to travelways, defined under § 56.2 as "passage[s], walk[s] or way[s] regularly used and designated for persons to go from one place to another." He first stated that the operator should keep exam records for elevators for every shift when they are in use, or for stairways if they are used instead, but later conceded that travelways are not covered under the workplace exam regulation and that he believes an elevator is a "working place" only if someone is working on the elevator or near the doors. Tr. 67, 75-76, 107.

rule that I must cobble together from a litigation brief and the testimony of one MSHA employee represents the Secretary's fair and considered judgment as a policymaker.

Additionally, the Secretary's new interpretation of § 56.18002 is in conflict with MSHA's past interpretation and enforcement of the standard. MSHA did not previously require elevators to be examined as part of the "working place." Tr. 105-06. There is no record evidence that the Secretary or anyone at MSHA thought to apply the standard in this manner until Evans issued the disputed citation.[17] Thus, it appears that the proffered interpretation was first announced by taking the very enforcement action that triggered this proceeding, and the arguments that the Secretary has mustered in favor of his newly adopted position appear to constitute a *post hoc* rationalization of that past agency action.

In addressing a similar situation in *SmithKline Beecham*, the Supreme Court reached the following conclusion:

> Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby "frustrat[ing] the notice and predictability purposes of rulemaking." It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require the regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here.

The Secretary's brief clarifies that he prefers a broad definition of "work" and "working place." However, the rule he ultimately settles on is so open-ended that it is unclear, and likely will be difficult for operators to apply going forward to determine what areas of a mine need to be examined and when they need to be examined. *See* Sec'y Br. 17 ("Finally, if there is even a reasonable expectation of work taking place, essentially anywhere in the Mine, including the elevator car and landing areas – that is, if there is a reasonable expectation of a miner engaging in an activity where he exerts himself to perform some task, duty, function, or assignment as part of a greater phase or larger task – it does not matter if it is performed daily, weekly, or even infrequently, if he is doing it, intends to do it, or if there is a reasonable expectation he will do it, the operator must designate a competent person to perform a workplace exam.").

[17] I note that although the Secretary's new interpretation has already been addressed in two other cases, *Ash Grove Cement Co.*, 38 FMSHRC __, Nos. WEST 2014-963 et al. (Aug. 4, 2016) (ALJ), and *Cemex Construction Materials, Atlantic, supra*, the citation at issue in the instant case was written before the citations at issue in those cases.

132 S. Ct. at 2168 (citations and footnote omitted).

Consistent with this guidance, I find that full *Auer* deference is unwarranted here. Nonetheless, the Secretary's interpretation of § 56.18002 is entitled to a measure of deference proportional to "all those factors which give it power to persuade." *Id.* at 2168-69. Accordingly, I will evaluate it on its own merits.

c. Analysis of the Secretary's Interpretation

As a preliminary matter, regarding Cemex's argument that the Secretary's interpretation amounts to a substantive rule change requiring notice-and-comment rulemaking under the Administrative Procedure Act (APA), I find that the Secretary is merely advancing a new interpretive rule. The APA does not require notice-and-comment rulemaking for interpretive rules issued to advise the public of an agency's construction of the regulations it administers. *See* 5 U.S.C. § 553(b)(A); *Small Mine Dev.*, 37 FMSHRC 1892, 1899 n.7 (Sept. 2015); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. __, 135 S. Ct. 1199, 1206 (2015). However, this does not mean that the APA condones promulgating interpretive rules by any means possible, such as by springing unexpected enforcement actions upon the regulated community. The Secretary should be aware that he subjects his interpretive positions to heightened scrutiny and risks losing the benefit of *Auer* deference when he attempts to legislate through enforcement, which I believe has occurred in this case.

Turning to the interpretation itself, the Secretary proposes to require inclusion of elevators in workplace examinations conducted under § 56.18002. For the reasons discussed below, I conclude that, although elevators may fall within the scope of § 56.18002 under some circumstances, the Secretary has failed to establish that such circumstances exist in this case. Moreover, to the extent that the Secretary is asking me to define an elevator as a "working place" under all circumstances, I find this interpretation to be unreasonable and unpersuasive because it is not suggested by the language and regulatory history of § 56.18002, does not harmonize with the language and structure of the regulations, and is not necessary to protect miner safety.

The language of § 56.18002 and the regulatory definition of "working place" in § 56.2 are so broad and general that they offer little help in divining whether elevators and elevator landings are meant to be included. I reject the Secretary's textual argument that the word "any" in the regulatory definition of "working place" in § 56.2 is intended to provide absolute coverage. *See* Sec'y Br. 15. The full definition of a working place is "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. The Secretary's argument for absolute coverage ignores the limiting phrase "where work is being performed." I find that the language of § 56.18002 and § 56.2 does not directly conflict with the Secretary's new interpretation, but it is so general that it does nothing to suggest this interpretation, either.

The language of § 56.18002 and the current definition of "working place" have been in the regulations since 1979. *See* Final Rule: Metal and Nonmetal Mine Safety; Advisory Standards Revoked or Revised and Made Mandatory, 44 Fed. Reg. 48490, 48505, 48525 (Aug. 17, 1979). However, a review of the regulatory history and pertinent interpretive documents shows that the Secretary has never provided guidance as to whether elevators or functionally

analogous spaces such as stairways and travelways are intended to be included in workplace exams, even after the Louisville fatality.

The Secretary's Program Policy Manual (PPM) states that the term "working place," as used in § 56.18002, "applies to those locations at a mine site where persons work during a shift in the mining or milling processes." Ex. R10. Like the regulations themselves, this statement is broad, general, and unhelpful. The Secretary has issued several Program Policy Letters (PPLs) pertaining to § 56.18002 over the years, but some of them merely recite the language set forth in the PPM. *See* Ex. R11; Ex. R12. One PPL, issued in July 2015, more than a year after the Louisville fatality, adds that working places include "areas where work is performed on an infrequent basis, such as areas accessed primarily during periods of maintenance or clean-up." Ex. R13. A rulemaking notice recently published by MSHA clarifies that such areas are covered only "if miners will be performing work in these areas during the shift." Proposed Rule and Notice of Public Hearings: Examinations of Working Places in Metal and Nonmetal Mines, 81 Fed. Reg. 36818, 36821 (June 8, 2016). However, neither the PPL nor the rulemaking notice addresses elevators or travelways.

Similarly, a 1995 policy notice published in the Federal Register provides examples of what sort of areas need or need not be examined, but fails to address elevators or travelways:

> The working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work. For an operator to be in compliance, that area would need to be examined ... Standard 56/57.18002 does not apply to access or other roads not directly involved in the mining process, administrative office building[s], parking lots, lunchrooms, toilet facilities, or inactive storage areas. Isolated, abandoned, or idle areas of mines or mills need not be examined, unless persons perform work in these areas during the shift.

Notice: Examination of Working Places, 60 Fed. Reg. 9985, 9988 (Feb. 22, 1995).

I find that the available regulatory history and agency guidance documents do not suggest that § 56.18002 is intended to cover elevators or functionally analogous spaces such as travelways, although they do not foreclose the possibility that the standard could be interpreted in this manner. Because the language and regulatory history of the standard, considered in conjunction with the Secretary's guidance documents, do not suggest that the standard is intended to cover elevators, the inquiry turns to whether it is reasonable to expand the definition of "working place" in this manner.

The Secretary's argument in favor of the expansion relies heavily on a wide-reaching interpretation of the term "work," as used in the definition of "working place" in § 56.2 ("*Working place* means any place in or about a mine where work is being performed."). The Secretary contends that "work and working places is a fluid concept." Tr. 23. Citing the Merriam Webster Online Dictionary, he broadly characterizes work as any exertion of physical

or mental effort undertaken as part of a miner's job, including carrying tools and materials while riding in an elevator. Sec'y Br. 14-16.

By contrast, Cemex characterizes riding in an elevator as travel, not work, and notes that the Secretary distinguishes between these two activities in a number of regulatory provisions. Resp. Br. 11-12. Cemex contends that accepting the Secretary's definition would have the absurd result of requiring the mine operator to examine the whole mine during each shift and would render superfluous the various regulations applying to travelways. *Id.* at 8-14.

After considering both parties' arguments, I find that the Secretary's proposed interpretation of "work" and "working place" sweeps so broadly that it does not harmonize with the structure of the regulations. Contrary to the Secretary's proposed definition of "work," which is so broad that it encompasses travel, *see* Sec'y Br. 14-16 (defining work as an "activity in which one exerts strength or faculties to do or perform something"), the regulations clearly treat work and travel as separate concepts and distinguish between places where people work and places where they travel. The regulations separately define "working place" and "travelway." A travelway is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another," which is functionally distinct from a "place ... where work is being performed," that is, a working place. 30 C.F.R. § 56.2.

This distinction is borne out by the fact that numerous other regulations apply, by their specific terms, both to places where miners work and places where they travel. *See, e.g.*, 30 C.F.R. § 56.3130, § 56.3131 (requiring ground control in "places where persons work or travel"); § 56.3200 (requiring hazardous ground conditions to be taken down before "other work or travel is permitted in the affected area"); § 56.3430 (stating that persons "shall not work or travel" between machinery and the highwall, except that "[t]ravel is permitted when necessary for persons to dismount"); § 56.16015 (prohibiting "work from or travel on the bridge of an overhead crane" unless certain precautions are taken). It would be unnecessary for these regulations to list both activities if the Secretary were correct in arguing that "work" is so broad as to encompass "travel." But the use of both terms indicates that work and travel are distinct activities. To interpret the terms otherwise would violate the rule against surplusage. *See, e.g.*, *Cotter Corp.*, 8 FMSHRC 1135, 1137 (Aug. 1986) (avoiding an interpretation of a regulation that would render a provision mere surplusage).

An elevator serves as a "way ... for persons to go from one place to another," rather than a place where the actual work of mineral extraction or milling takes place. An elevator is therefore, in my view, more properly described as a travelway than a working place under § 56.2.

The Secretary asserts that ALJs have consistently required travelways to be examined during workplace exams, and cites several cases where ALJs have upheld citations for unsafe conditions found in travelways. Sec'y Br. 19 (citing *Northshore Mining Co.*, 37 FMSHRC 372 (Feb. 2015) (ALJ Barbour); *U.S. Silica Co.*, 32 FMSHRC 1699, 1707 (Nov. 2010) (ALJ Miller); *USS, Div. of USX Corp.*, 13 FMSHRC 145, 153 (Jan. 1991) (ALJ Broderick)). However, the cases he cites are inapposite because they pertain to different safety standards – specifically, § 56/57.20003 and § 56/57.11001 – that expressly apply to travelways, unlike § 56.18002. *Compare* 30 C.F.R. § 56.18002 (regulating "working places") *with* § 56.11001 (regulating

"means of access" to working places) *and* § 56.20003 (regulating both working places and "passageways," along with storerooms, service rooms, and floors). There is no support for the Secretary's assertion that travelways have customarily been treated the same as working places in the metal/nonmetal context.

By contrast, in the underground coal mining context, the Secretary has promulgated a detailed pre-shift examination standard that specifically includes "[r]oadways, travelways, and track haulageways where persons are scheduled ... to work or travel during the oncoming shift." 30 C.F.R. § 75.360(b)(1). Moreover, the coal mine safety standards expressly require daily examination of "[h]oisting equipment, including automatic elevators, used to transport persons," and specify what components of the elevators should be examined. *Id.* § 75.1400(d), § 75.1400-3; *see also id.* § 77.1403 (requiring daily examinations of elevators at surface coal mines). The Secretary could have inserted analogous provisions into Part 56 to ensure that travelways are examined at the same frequency as working places and that elevators are included in workplace exams, but he did not. The metal/nonmetal regulations simply are not structured to treat elevators or travelways the same as working places.[18] The Secretary's proposed interpretation of § 56.18002 conflicts with the regulatory structure in Part 56.

Aside from conflicting with the regulations' dichotomy between working places and travelways, the Secretary's definition of "work" is also so broad that, as essentially conceded by the Secretary, it would render the entire mine a "working place" whenever a miner is present and on the clock. *See* Sec'y Br. 17 n.10; Tr. 57, 111, 117. This would contradict the Secretary's assurance in the PPM that the phrase "each working place" refers only to "*those* locations at a mine site where persons work during a shift in the mining or milling processes," not to *every* location at the mine. *See* Ex. R10 (emphasis added). If the entire mine is a "working place," this phrase would cease to be a term of art requiring a special definition. The Secretary would have had no reason to use it in § 56.18002. Instead of saying that the operator must "examine *each working place* at least once each shift," he could have simply stated that the operator must "examine *the mine*" each shift. But this is not what the standard says. I am unwilling to expand the standard to give it such a broad reach without a compelling reason to do so.

The Secretary asserts that Cemex ran its elevators into the ground, picking and choosing what to fix and what not to fix, and asks me to interpret § 56.18002 broadly in order to further the Mine Act's safety-promoting goals. Sec'y Br. 13, 17; *see also Island Creek*, 20 FMSHRC at

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[18] This makes sense in some ways. Mining poses unique hazards. However, these hazards are more likely to be present in places were the actual "work" of mining takes places – that is, where miners engage in mineral extraction and milling tasks – than in places that are simply traveled through by miners, especially at facilities where ventilation and roof control are not a concern. Thus, for example, one of the safety standards in Part 56 requires "areas where work is to be performed" to be examined for loose ground more frequently than "[h]ighwalls and banks adjoining travelways." 30 C.F.R. § 56.3401. The Secretary explained in his rulemaking notice that he was drawing this distinction because he expected ground conditions to change more rapidly in areas where work was being performed than along travelways and haulageways. Final Rule: Safety Standards for Ground Control at Metal and Nonmetal Mines, 51 Fed. Reg. 36192 (Oct. 8, 1986). This seems to represent a policy judgment that active work areas pose greater dangers than travelways, and therefore warrant more frequent examination.

22 (referencing the "well-established maxim that regulations must be interpreted in a manner consonant with the safety-promoting purposes of the Mine Act"). But I find it unnecessary to stretch § 56.18002 in the manner he suggests, because the Secretary can protect miners from hazards related to elevators by issuing citations under a variety of other applicable regulations.

For example, the Secretary already regulates machinery and equipment under Part 56, Subpart M and could issue citations under the broadly applicable provisions in this subpart, such as § 56.14100, which requires miners to inspect self-propelled mobile equipment before placing it in use and to timely correct any defects. 30 C.F.R. § 56.14100. Automatic elevators fall within the scope of § 56.14100 because they are self-propelled mobile equipment. In fact, the Secretary cited this provision in this very case to address the defective cam roller and in-use lights on the pack house elevator. *See* Ex. R5; Ex. R7.

As another example, the Secretary has promulgated regulations governing travelways in Subpart J, including a general provision that mandates: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. Because elevators and elevator landings provide access to working places, they could be cited under this standard if they were not being maintained in safe condition.

As yet another example, the Secretary has promulgated detailed regulations governing hoisting equipment in Subpart R, including a provision requiring operators to follow a "systematic procedure of inspection, testing, and maintenance of shafts and hoisting equipment." 30 C.F.R. § 56.19120. The Secretary has successfully applied this provision to elevators in at least one other case. *See Cemex Inc.*, 37 FMSHRC 2886 (Dec. 2015) (ALJ Rae) (granting partial summary decision on the issue of whether an elevator can be classified as a "hoist" under § 56.19120 such that it is subject to a systematic procedure of inspection, testing, and maintenance). Thus, the Secretary can require operators to adopt inspection, testing, and maintenance procedures for elevators without adopting a new interpretive rule.

In sum, I find that the Secretary's new interpretation of § 56.18002 is not necessary to promote elevator safety, because other provisions can be applied to elevators to accomplish the same safety-promoting goals with less violence to the structure of the regulations. Because interpreting the term "working place" in § 56.18002 to categorically include elevators is inconsistent with the structure of the regulations and is not necessary to promote safety, I find that this interpretation is unreasonable and unpersuasive, and I decline to adopt it.

It may be possible for miners to use an elevator in such a way that it becomes a working place, that is, a place where work is being performed, during a particular shift. However, the Secretary has failed to put on any evidence that the elevators at issue in this case were being used as working places at the time of the inspection, were scheduled or expected to be used as working places in the future, or had been used as working places during any particular shift in the past.

The sole evidence put on by the Secretary regarding the use of the elevators was Evans' testimony that he learned from a company representative that the elevators are used on a daily basis, as needed, and that the mine "needed to get [the downed elevators] running again because

they have to carry their tools to the – up those flights of stairs and things, parts and things, you know, just a big inconvenience." Tr. 55-56. Evans admitted that he did not see any work being performed on or near the elevators at the time of the inspection. Tr. 73-75. The preheater and mill room elevators were locked and tagged out and the only miners he saw using an elevator were at the pack house, but he could not say what sort of work they were performing or even explain the general function of the pack house. Tr. 50-52, 74-75. He did not describe any past work or future work that he expected to be performed on or near the elevators. When asked what type of work a miner would use an elevator for, he responded, "I mean, just to get to the different floors where they're working at, you know ... otherwise, they have to use the stairways alongside the building." Tr. 50. In other words, the miners used the elevators for travel. Evans did not explain or provide any examples of how miners would use the elevators to perform work, as opposed to travel. He did not describe what other items would be transported in elevators and for what purpose, and could not even identify what work was generally performed at the mine.

The Secretary did not put on any other evidence to show how the elevators at the Demopolis Plant are used or have ever been used as working places. I find that the Secretary has failed to establish that the elevators were used or were expected to be used as "working places" such that they needed to be included in workplace exams under § 56.18002. Accordingly, he has failed to establish a violation.

However, regardless of whether or not a violation occurred, there is another reason that Citation No. 8641317 cannot be upheld. Cemex did not have fair notice of the Secretary's new interpretation of § 56.18002 before the citation was issued.

B. Fair Notice

1. Legal Principles

Even if an agency's interpretation of a regulation is reasonable, fundamental due process considerations preclude adoption of that interpretation without fair notice. *See Hecla Ltd.*, 38 FMSHRC __, Nos. WEST 2012-760-M et al., slip op. at 9 (Aug. 30, 2016); *Am. Coal Co.*, 38 FMSHRC __, No. LAKE 2009-35, slip op. at 15 (Aug. 30, 2016); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). In Mine Act proceedings, this means that before the Secretary can penalize a mine operator for a violation of a safety standard, the operator must be placed on notice of what conduct the standard forbids or requires such that it has an opportunity to act accordingly. *See Hecla Ltd.*, slip op. at 9 ("To comport with due process, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *Energy West*, 17 FMSHRC at 1318 (same); *Mathies Coal Co.*, 5 FMSHRC 300, 303 (Mar. 1983) ("[E]ven a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard."), *aff'd*, 725 F.2d 126 (D.C. Cir. 1984) (table).

To resolve issues of notice, the Commission applies an objective standard called the "reasonably prudent person" test. *Hecla*, slip op. at 9; *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619,

1627 (July 2016); *Energy West*, 17 FMSHRC at 1318. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Many different factors may be relevant to this inquiry, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history and purpose, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation, and whether the operator would have been aware of the requirement of the standard because of past case precedent. *See Sunbelt Rentals*, 38 FMSHRC at 1627; *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002).

2. The Parties' Positions

The Secretary asserts that Cemex had fair notice that it needed to incorporate elevators and elevator landing areas into its workplace examinations under § 56.18002. Sec'y Br. 22-24. The Secretary first suggests that this is not a new interpretation of § 56.18002. *Id.* at 22-23. To the extent that the interpretation is new, the Secretary argues that three factors should have placed Cemex on notice of the interpretation: the contract between Cemex and TKE; the fatality at the Louisville plant; and § 56.18002 itself. *Id.* at 23-24.

Cemex asserts that the citation should be vacated because the Secretary failed to provide adequate and fair notice of his new interpretation of § 56.18002, in violation of the U.S. Constitution's Due Process Clause. Resp. Br. 19-25. Cemex argues that a reasonably prudent person would not have known of the Secretary's new interpretation before the citation was issued because the Secretary chose "to ambush unknowing operators and legislate its new requirement through enforcement methods" without first alerting mine operators to the change through the Secretary's authorized representatives or through specific published guidance. *Id.* at 22. Cemex also suggests that its employees were acting with reasonable prudence at the time the citation was issued. *Id.* at 24.

3. Analysis

I find that the Secretary has not met the notice requirement. Contrary to the Secretary's argument, his proffered interpretation of § 56.18002 is new. Specialist Evans admitted that interpreting the standard to cover elevators represents a change from the agency's prior position. Tr. 105-06. Evans admitted that before the March 4, 2014 spot inspection, he had never asked Cemex for examination records for elevators or their functional analog, stairwells; he had never told Cemex that such records needed to be kept; and he had never cited Cemex for failing to designate competent persons to examine elevators or stairwells or for failing to report elevator defects to management. Tr. 87-89, 97-100, 112-13. In fact, Evans had never before issued a citation involving an elevator. Tr. 59.

Apparently, MSHA had not previously paid much attention to elevators at cement plants, and it was only after the Louisville fatality that MSHA decided to prioritize elevator safety at these plants. Tr. 21-22, 39. Rather than communicating this decision to cement plant operators and notifying them of what they must do to improve elevator safety at their facilities, such as

incorporate elevators into workplace exams, MSHA dispatched inspectors to issue citations, resulting in Evans' issuance of the instant citation under a novel theory of violation. In Judge Barbour's words, "the agency effectively 'sandbagged' the company." *Cemex Constr. Materials, Atl.*, 38 FMSHRC at 846.

The facts before Judge Barbour in his *Cemex Construction Materials* case were nearly identical to those at issue in this case. On those facts, Judge Barbour concluded that the mine operator was not properly on notice of the Secretary's new interpretation of § 56.18002. 38 FMSHRC at 845-46. He found that the operator reasonably could have read the standard as not applying to elevators due to the Secretary's "total lack of prior enforcement, the broad wording of the definition of 'working place' and the fact that elevators are not specifically mentioned in the regulations for surface and underground metal and non-metal mines." 38 FMSHRC at 846. These factors are equally valid here, and I agree with his analysis.

Judge Barbour also rejected the Secretary's specific arguments that the regulation itself, the Louisville fatality, and the contract between the mine operator and an elevator maintenance company would have placed a reasonably prudent operator on notice of the need to incorporate elevators into its workplace exams under § 56.18002. *Id.* at 846-47 n.19. The Secretary has raised the same three arguments in this case, and they are equally unavailing here.

First, the regulation itself is so broadly worded that it does not place a reasonably prudent operator on notice of the Secretary's purported intent to require inclusion of elevators and elevator landings in workplace examinations. The Secretary contends that the regulation provided Cemex with fair notice of this interpretation because "[u]nder a clear mandate from the standard, an operator must examine *any* workplace." Sec'y Br. 24. However, I have already found the standard to be ambiguous, not clear, in terms of intended coverage. As the Commission has noted, the standard was "drafted in general terms." *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016). Its broad, general terms do not amount to the sort of "clear mandate" that would notify a reasonably prudent operator of the specific meaning the Secretary wishes to attribute to the regulation in this case.[20]

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[20] Usually, in cases where the Commission has found that a regulation itself provides fair notice of the Secretary's interpretation, the standard either expressly mandates or clearly indicates the interpretation. For example, in *Austin Powder Company*, the Commission found that the language of a regulation placed the operator on notice that a detonator must be stored in a magazine because the regulation expressly mandated that "[d]etonators ... shall be stored in magazines." 29 FMSHRC 909, 919-20 (Nov. 2007). As another example, in *Bluestone Coal Corporation*, the Commission held that a regulation requiring equipment operating speeds to be "prudent" provided fair notice that unsafe speeds were prohibited because the meaning of the standard was clear. 19 FMSHRC 1025, 1030-31 (June 1997). Similarly, in *Sunbelt Rentals*, the Commission held that § 56.18002 includes an adequacy requirement for workplace examinations, even though this requirement is not expressly stated, because otherwise the purpose of the standard would be thwarted. 38 FMSHRC at 1627. As discussed at length above, unlike in these example cases, in this case there is no express regulatory mandate or clear indication that elevators must be included in workplace examinations.

The ambiguity in the standard would not foreclose a finding of fair notice if the Secretary had communicated his interpretation of the provision to Cemex before issuing the citation, such as through specific pre-enforcement warnings to Cemex or guidance published to the regulated community at large. *See, e.g.*, *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that operator was on notice of a particular regulatory requirement when management had been informed of that requirement in seven prior meetings with MSHA), *aff'd*, 136 F.3d 819 (D.C. Cir. 1998); *Tilden Mining Co.*,36 FMSHRC 1965, 1970-71 (Aug. 2014), *aff'd*, __ F.3d __, 2016 WL 4254997 (D.C. Cir. Aug. 12, 2016) (holding that operator had received actual notice of an interpretation when the interpretation in question had been published in the PPM five years before the citation was issued). However, there is no indication that the Secretary gave any prior warnings to Cemex. Cemex had never received a citation under the Secretary's new interpretation of § 56.18002, and as noted above, Evans admitted he had never asked Cemex for examination records for elevators or stairwells and had never suggested such records needed to be kept. Tr. 87-89, 97-100, 112-13. Evans could not point to any MSHA regulations or guidance documents that suggested that workplace exams performed under § 56.18002 must include elevators or even travelways. Tr. 89-96, 106-07. As discussed above, the Secretary has not come forward with any such evidence.[21] I conclude that the regulation itself, even when considered in light of relevant guidance from MSHA, is not sufficient to place a reasonably prudent operator on notice of the specific requirement that the Secretary now seeks to impose.

Second, I also find that the Louisville fatality would not have placed a reasonably prudent operator on notice that elevators should be included in workplace exams under § 56.18002. The fatality should have alerted Cemex that it would be a good idea to make greater efforts to ensure that its elevators were safe for miners to use, and perhaps to check the doors on its elevators, since the accident was caused by a faulty door interlock. Cemex did, in fact, check the doors on all of its elevators after the fatality (Tr. 90-91, 104; Ex. S7 at 1; Ex. R19), and apparently took some steps toward improving elevator safety. *See* Ex. R22; Ex. R23; Ex. R24. However, there is no reason to expect that, simply because a fatality involving an elevator occurred, Cemex would know to take the specific step of incorporating elevators into workplace exams under § 56.18002. Even the Fatalgram issued by MSHA after the fatality does not name this as a best practice. Ex. S8; Ex. R9. Accordingly, I reject the Secretary's argument that the fatality provided Cemex with fair notice of his new interpretation of the standard.

Finally, I also reject the Secretary's argument that the contract between Cemex and TKE provided Cemex with fair notice. The contract the Secretary offered into evidence excludes from TKE's coverage "cosmetic, construction, or ancillary components of the elevator," such as ceiling and door panels, light fixtures, floor coverings, belowground or unexposed components, and communication devices. Ex. S10. The Secretary contends that when this contract or one like it went into effect, Cemex was placed on notice that the listed components were its responsibility rather than TKE's. Sec'y Br. 23-24. However, the contract relied upon by the

[21] To drive home the point, Cemex has introduced into evidence relevant portions of the PPM and the Metal/Nonmetal General Inspection Procedures Handbook, along with a PPL addressing § 56.18002 that was in effect at the time of the inspection, to show that none of these sources mentions the Secretary's new interpretation of the standard. *See* Ex. R10; Ex. R11; Ex. R15. I also note that, as discussed above, the standard's regulatory history does not contain any mention of elevators and does not suggest that travelways must be examined.

Secretary did not go into effect until after the inspection, *see* Ex. S10, and the Secretary has not established that the contract in effect at the pertinent time excluded the same components. More importantly, even if the terms of the contract in effect on the day of the inspection were the same or substantially similar to those that appear in the contract relied upon by the Secretary, (which seems likely), those terms provided notice only that Cemex was liable for maintaining the cosmetic, construction, and ancillary components of the elevators, not that Cemex would be expected to treat elevators and elevator landings as "working places" for purposes of § 56.18002. In fact, rather than alerting Cemex to the need to incorporate elevators into its workplace exam regimen, I find that the contract likely had the opposite effect. Cemex likely believed that it was not responsible for conducting regular maintenance examinations of the elevators because it had delegated its elevator maintenance duties to TKE by entering into an arrangement which was consistent with industry practice and Alabama law, and to which MSHA had never objected. *See Cemex Constr. Materials, Atl.*, 38 FMSHRC at 846-47 n.19 ("The Secretary states that Cemex's contract with Otis put the company on notice that areas not listed in the contract are Cemex's responsibility ... However, a more reasonable conclusion is that the long standing nature of the contract ... and the lack of any indication from MSHA that Cemex's practice of relying on Otis violated any regulatory provision, led the company logically to conclude its practice did not run afoul of the Act and Part 56.").

The Secretary broadly asserts that "MSHA simply expected the elevator car and the surrounding landing area to fall under the exam umbrella especially considering CEMEX inspected the adjacent stairs, walkways, toeboards, etc." Sec'y Br. 22. Aside from the fact that there is no evidence that Cemex ever inspected stairs, walkways, and toeboards, the record is also devoid of any evidence that MSHA ever actually expected elevators to fall under the exam umbrella at any point before Specialist Evans issued the disputed citation. As suggested by Judge Barbour, this claim seems disingenuous under the circumstances:

> Given the documented history of Secretarial non-enforcement at the plant, the Secretary's assertion that "MSHA simply expected the elevator car and the surrounding landing area to fall under the exam umbrella" rings hollow. A far more likely scenario is that MSHA never gave a thought to the inspection of elevators under any standard until after the February 21, 2014, accident [the Louisville fatality] and then decided that section 56.18002(a) could be stretched to fit the need.

Cemex Constr. Materials, 38 FMSHRC at 846 n.17.

I conclude that the Secretary attempted to stretch § 56.18002 to cover elevators after the Louisville fatality, but without providing any sort of signal that would have led a reasonably prudent person familiar with the mining industry and the protective purposes of § 56.18002 to recognize, before the citation at issue in this case was written, that elevators should be incorporated into workplace exams. Accordingly, Cemex was not provided with fair notice of the Secretary's interpretation of § 56.18002, and Citation No. 8641317 must be vacated.

I emphasize that this conclusion does not mean that miners are left unprotected against hazards associated with elevators. The Mine Act gives the Secretary multiple avenues to protect

miner safety while still respecting operators' due process rights. *See Mathies Coal Co.*, 5 FMSHRC 300, 303 (Mar. 1983) (rejecting the Secretary's particular application of a broad standard to elevators, but describing other ways that the Secretary "could have accomplished abatement of the hazardous condition while at the same time avoiding the due process problems posed by seeking a civil penalty for a violation of a standard that did not provide adequate notice"). As discussed above, and as occurred in this very case, the Secretary can cite elevators under existing applicable regulations such as § 56.14001. *See, e.g.*, Ex. R5; Ex. R7. Also, as always, the Secretary is free to promulgate more specific standards or guidance notifying operators of steps they must take to improve elevator safety, such as a PPL specifying under what conditions he considers elevators to be part of the "working place" and identifying the components of the elevator that must be examined under § 56.18002. In this case, even a step as simple as directing an authorized representative to give cement plant operators a warning before issuing citations may have sufficed to avoid notice problems. The Secretary instead chose to issue Citation No. 8641317 to Cemex without fair notice. Because the Secretary could have protected miners through other means that respected due process, there is no need to validate his issuance of the citation under these circumstances.

V. ORDER

For the foregoing reasons, Citation No. 8641317 is **VACATED**. Because no issues remain for adjudication, this docket is **DISMISSED**.

Thomas P. McCarthy
Administrative Law Judge

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