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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CEMEX CONSTRUCTION MATERIALS, ATLANTIC, LLC, Respondent.	CIVIL PENALTY PROCEEDING: Docket No. SE 2014-328-M A.C. No. 40-00840-350438 Mine: Knoxville Cement Plant Cemex Inc.

DECISION

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

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

Before: Judge David Barbour

In this civil penalty case arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820, (the "Mine Act"), the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") petitions for the assessment of civil penalties of $1,838 for alleged violations of 30 C.F.R. § 56.18002(a) and 30 C.F.R. § 56.14100(c).[1] The purported violations were cited at the Knoxville Cement Plant (the "Knoxville plant"), a facility owned and operated by Cemex Construction Materials Atlantic, LLC. ("Cemex").[2] The citations were issued by MSHA Inspector David Smith on March 10, 2014. Inspector Smith found that Cemex did not designate a competent person to examine the plant's elevators during each shift and therefore that the company violated section 56.18002(a). He believed the alleged violation was reasonably likely to result in a fatality and that the condition was a significant and substantial contribution to a mine safety hazard (an "S&S" violation). He also found the alleged violation was caused by the company's moderate negligence. In addition, while he was inspecting one of the elevators, Smith found the "in-use" lights on two call site stations did not activate when the elevator was moving. Further, the

[1] Sections 56.18002(a) and 56.14100(c) are mandatory safety standards applicable to the nation's surface metal/non-metal mines. Section 56.18002(a) states that, "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" and that the operator "shall promptly initiate appropriate action to correct [any] such conditions." Section 56.14100(c) requires that when defects on self-propelled mobile equipment "make continued operation [of the equipment] hazardous to persons, the defective items . . . shall be taken out of service . . . or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected."

[2] In addition to the Knoxville plant the company owns several other facilities where cement is produced.

telephone in the elevator's car was missing. Despite these defects, the company kept the elevator in service and thereby, in the inspector's opinion, violated section 56.14100(c). Smith found that the defective lights and missing telephone were not likely to cause injuries, but nonetheless were due to the company's high negligence.

After the citations were issued, the alleged violations were assessed by the Secretary. When the company contested the proposed assessments, the Secretary filed a petition with the Commission seeking an order requiring the company to pay. The company answered the petition challenging the validity of the violations and arguing alternatively that even if it violated one or both of the standards, the assessments proposed by the Secretary were excessive. Upon receiving the answer, the Commission's Chief Judge assigned the case to the court, which ordered the parties to confer to determine if they could resolve their differences. When counsels advised the court they could not agree on a settlement, the court heard the case in Knoxville, Tennessee. At the hearing, counsels presented documentary evidence and the testimony of several witnesses. They subsequently filed helpful briefs.

THE ISSUES

The case presents several issues. One that is central to the alleged violation of section 56.18002(a) is whether the elevators at the Knoxville plant are "working places" and hence come within the standard. Section 56.18002(a) requires the examination of each "working place" and 30 C.F.R. § 56.2 defines "working place" as "any place in or about a mine where work is being performed." The Secretary contends the elevators are working places "because of the simple fact that work takes place on them." Tr. 16. Cemex finds the Secretary's interpretation to be unreasonable and as applied to deprive the company of due process. Tr. 19. Cemex also argues that the Secretary's finding of "high negligence" with regard to the alleged violation of section 56.14100(c) is inappropriate. Resp. Br. 31-33.

STIPULATIONS and AGREEMENTS

The parties stipulate as follows:

1. The [Knoxville plant] is under the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. At the time the citations . . . were issued, products of the . . . mine entered commerce. The operations therefore affected commerce within the scope and meaning of Section 4 of the . . . Mine Act. Tr. 22.

In addition to the stipulations, the Secretary agrees that Cemex's applicable history of previous violations is small. Tr. 24; see Exh. S-1.

THE SECRETARY'S WITNESSES
and
THE BACKGROUND OF THE MARCH 10, 2014, INSPECTION

For three years before the hearing Inspector Smith worked at MSHA's Knoxville, Tennessee office. Tr. 25. During that period he conducted 40 to 50 inspections per year at 20 to 30 mines. Tr. 26. Prior to March 10, 2014, Smith inspected the Knoxville plant several times. Tr. 27. At the plant limestone and clay are processed into cement. The cement is bagged and shipped by rail and truck to Cemex's customers. Tr. 27-28. Typically, MSHA personnel inspect the plant twice a year. Tr. 27.

The March 10 inspection took place against the backdrop of the fatal accident that occurred at another Cemex facility. On February 21, 2014, a Cemex contract employee stepped into an open elevator shaft at a cement plant located near Louisville, Kentucky (the "Louisville plant"). The employee survived the fall but shortly thereafter succumbed to his injuries. MSHA investigated the accident and on February 28, 2014, the agency issued a "Fatalgram" to all mine operators.[3] It states:

> On February 21, 2014, a 34 year old contract laborer with 6 months of experience was killed at a cement operation when attempting to access an elevator in the finish mill. When the victim opened the elevator door on the fourth floor landing, he stepped into the elevator shaft and fell approximately 51 feet to the top of the elevator car located on the ground floor.

Exh. S-6

The fatalgram lists six "best practices" miners are advised to take when working around elevators:

- Immediately report any elevator problems to management.
- Ensure than any problems affecting the safety of an elevator are reported promptly.
- Ensure the elevator door interlocks that prevent the door from being opened unless the elevator car is present are functional.
- Ensure that the 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 landing prior to the doors opening.
- Train all persons to be aware of their surroundings when entering or exiting an elevator car.

[3] A "fatalgram" is an official publication of the agency that describes a fatal accident and suggests "best practices" to avoid similar accidents. It is sent to mine operators, in this case the operators of all metal/non-metal mines.

Exh. S-6.

THE INSPECTION AND SMITH'S FINDINGS

Smith traveled to the plant on March 10 to conduct a "spot inspection," one that focused on the plant's elevators.[4] The purpose of the inspection, which was triggered by the February 21 fatality, was to ensure that the elevators were in safe operating condition. Tr. 28. Smith was accompanied by Doniece Schlick, the Assistant District Manager of MSHA's Southeast District, Metal/Non-Metal Division. Tr. 29, 124. At the plant Smith and Schlick were met by Alan Stephens, who at the time was the plant's safety manager. In addition, from time to time throughout the inspection the party was joined by William McCalla, the pack house supervisor. Tr. 29-30.

Smith stated that MSHA defines a "working place" as, "[Any] area where a miner would perform work." Tr. 34. He further stated that at one point during the inspection, McCalla told him that the company did not designate a person to perform examinations of those areas where miners worked near or on elevators. Tr. 34-35. Smith also testified that a management official told him the plant's elevators were used daily by miners, although Smith did not recall seeing any miners using the elevators on the day he conducted the inspection. Tr. 94-95. Smith cited the company for failing to have a designated competent person examine the elevators. Tr. 30; Exh. S-2. Smith believed that all of the elevators were "working places" because they were "used to transport miners and materials from floor to floor on a daily basis."[5] Tr. 35. In Smith's view, failing to designate a competent person and failing to examine the elevators violated section 56.18002(a).[6] Tr. 34-35.

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[4] There are five elevators in the cement plant. Tr. 35. Four were in service when Smith arrived at the plant. One, a freight elevator used to move finished product, had been taken out of service because of a problem with the way the elevator's doors opened. Tr. 36. To correct the defect, Cemex ordered new parts through its elevator contractor, Otis Elevator Company ("Otis"). *Id.*, Tr. 37. Smith stated that the company found the defects because it examined the elevator and its doors after it received the February 28 fatalgram with its listing of the "best practices" to prevent the recurrence of a Louisville plant-like accident. Exh. S-6; Tr. 36-37.

[5] MSHA's Program Policy Manual (the "PPM") states as follows:

> The phrase "working place" is defined in . . . [section] 56[.2] as 'any place in or about a mine where work is being performed.' As used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling processes.

Resp. Exh. 17 at 1; Tr. 64.

Smith agreed that there is no mention in the PPM that qualifying as a "working place" is related to the frequency with which a miner visits an area or that a "working place" is a location where a miner is exposed to a hazard. Tr. 64-65.

[6] Smith stated that as he understands the standard, an elevator has to be examined if it will be used on a shift. Tr. 86.-87. According to Smith,

> once the miner places himself or herself onto the elevator

Smith also testified that one of the elevators, the elevator at the preheater tower, moves up and down the tower's nine floors. Workers use the elevator to observe the flow of material being processed ("to make sure the material [is] moving through the process . . . fluidly" (Tr. 38)) and to correct the flow of the material if necessary. *Id.* To do this task workers need access to all nine floors of the tower. *Id.* Although access can be by stairway as well as by the elevator, Smith believed that some materials and tools workers require for the job are too heavy to carry up (and down) the stairs. Tr. 39.

Another of the plant's elevators is located in the area of the kiln. Smith testified that during the kiln's periodic shut down, workers use the elevator to transport insulating bricks from one floor to another. The bricks are loaded on and off the elevator. Tr. 40. According to Smith, there is "someone on each floor to move material in and move material out, [and to] ride the elevator with . . . [the material] if need be." *Id.* In Smith's opinion, moving material in and out of the elevator is "work." Id. Further, Smith stated that workers are at times required to repair or correct defects in the operation of some equipment on the upper floor of the kiln (the "burn floor"). Tr. 40-41.

According to Smith, only those parts of elevators to which miners have access must be examined. Tr. 76. Thus, the shafts of the elevators are exempt, but the interlocks (the safety latches) of elevator doors are subject to examination in order to make sure the elevator doors open as they should. Tr. 42, 76. The goal is to prevent the doors from opening "when the car is not in place" and thus to preclude a fall accident. *Id*; Tr. 91-92. Smith agreed, however, that before March 10, 2014, he never cited an operator for failing to examine safety latches on an elevator door. Tr. 76. He also agreed that when he checked the interlocks on March 10, they functioned properly. Tr. 93-94.

Smith found that Cemex's failure to designate a competent person to examine the plant's elevators was reasonably likely to result in a serious injury. Tr. 43; Exh. S-2. He knew about the Louisville accident, but he was not familiar with the circumstances that led to the accident, nor did he know of any other occasion where a violation of section 56.18002(a) caused such an accident. Tr. 92-93. Nonetheless, he emphasized that he was told by employees at the Knoxville Plant that they used the elevators daily and on all three shifts. Tr. 43-44. Frequent use increased the likelihood of an accident. Further, the likely result of an accident was a fatality. ("[I]ndustry history . . . indicate[s] that [the] condition [if] left unabated would cause a fatal accident or injury." Tr. 43.) Smith feared that due to a malfunction of an interlock an elevator's door would open even though the car was not at the landing and an employee would fall down the shaft.[7] Tr. 91-93. The hazard existed despite the fact that when he checked the interlocks on the working elevators, all of the interlocks functioned properly. Tr. 94.

> car to perform their duties, whether to transport from one floor to the other floor or that they're bringing tools or their expertise as a person to a different level to perform their duties, they are working [and the elevator has to be examined].

Tr. 88.

[7] However, Smith also agreed that all of the elevators' landing doors have windows, and if a person is going to use the elevator and wants to see if the car is at the landing, he or she can simply look through the window. Tr. 107.

Smith further found that the company was moderately negligent in allowing the violation. Exh. S-2. He recognized that the company and/or its contractor, Otis Elevator Co.("Otis"), examined the elevators on occasion and tagged them out if they felt such action was needed. The company's intermittent attention to the elevators somewhat mitigated its negligence, but did not overcome the fact that there was no competent person designated by Cemex to perform the required examinations and no policy to ensure the examinations were performed. Tr. 46. Smith was asked if he was familiar with an MSHA document titled, "Metal and Non-metal General Inspection Procedures Handbook." Exh. R 22. Smith stated he was and explained the handbook governs the procedures under which he and other inspectors conduct inspections. Tr. 71. The handbook instructs inspectors in part that, "Documentation such as records of workplace examinations . . . shall be reviewed during the course of the inspection so any questions concerning those records can be resolved at that time." Exh. R-22 at 46. Smith testified that he routinely reviews such records. Tr. 73. Although he reviewed the records at the plant when he conducted inspections in December 2013 and in January 2014, neither time did he ask to see workplace examination records for the elevators. Tr. 74-75. Prior to March 10 he never asked anyone at Cemex about the company's elevator inspection records. Tr. 75. His citation was a first for the company. *Id.*

The citation was terminated when Cemex trained and then designated competent persons to perform the examinations. Tr. 46-47. As part of the training Cemex created an eight point list of things to check inside and outside all elevator cars and specified "serious issues" that would require the shift supervisor to discontinue use of an elevator and block access to it. Tr. 47; Exh. S-10. The list helped assure MSHA that that the company was checking for hazards as required. Tr. 47. The company also provided MSHA with copies of its training records for each shift. The records listed the persons on the shift who were trained to conduct the elevator work area examinations. Tr. 48; Exh. S-10 at 2-4.

Smith also cited the company for a violation of section 56.14100(c) for failing to correct two hazards relating to the burn floor elevator. Smith found that the "in-use" lights for the elevator (one at the first floor call station and one at the second floor call station) did not activate when the elevator was in motion. Tr. 55, Exh. S-3. He also found that the telephone inside the elevator car was missing.[8] *Id.* Smith explained that an "in-use" light lets a worker know when an elevator car is in motion and when the car stops. *Id.* Smith speculated that if the light is not working, a worker may think the car is at his or her floor ready for use when in fact it is elsewhere. When the worker tries to open the elevator door to access the car, the interlock safety system, if it is working properly, will prevent the door from opening, and tugging on the door can cause the worker to sprain or strain his or her back resulting in lost workdays or restricted duties. Tr. 55, 56, 58. However, the elevator door has a window, and Smith agreed a worker can look through the window to determine if the car is at the landing before he or she attempts to open the door. Tr. 58.

Removing the telephone from the car created the danger that a worker or workers trapped in the car are unable to call for help. Tr. 43, *see also* Tr. 44. Smith noted, however, that he saw management employees and "a few miners" who carried radios underground and many miners

[8] The telephone is similar to a home wall telephone. Tr. 101

who carried cellular telephones. Both types of devices can be used to communicate with those outside the car. Tr. 45-46, *see also* Tr. 57.

Smith considered the alleged violation of section 56.18002(a) to be directly connected to the alleged violation of section 56.14100(c). Smith stated, "Management did not have an examination program in place concerning elevator defects." Tr. 55-56. Smith implied that had the company complied with section 56.18002(a) it would have observed and corrected the burn floor elevator's defects or would have taken the elevator out of service. Tr. 56.

Smith found that the alleged violation was caused by the company's high negligence. Tr. 58-59; Exh. S-3. Cemex did not require a workplace examination of the burn floor elevator, an examination that most likely would have resulted in the defects being reported and corrected or in the elevator being tagged out of service. Tr. 58-59. However, he agreed that if the "in use" lights had been defective and the telephone had been missing on February 26, the conditions would most likely have been fixed by the Otis employee who examined the plant's elevators on that date. Tr. 104. Moreover, he acknowledged that on March 4 Leroy Lockett, an MSHA supervisor, inspected the plant and that Lockett issued no citations concerning the elevators. Tr. 98-99. If the defects existed on March 4 Lockett most likely would have found them and had them corrected. Tr. 104-105. Therefore, Smith thought that the defects probably came into being between March 4 and March 10. Tr. 105. Nonetheless, Smith stated he and other MSHA personnel were told by both supervisors and rank and file miners that the elevators were "used daily per shift" and thus that management officials should have been aware of the defects. Tr. 113; *see also* Tr. 102, 105. To correct the alleged conditions, Cemex called Otis who sent employees to the plant to fix the defective lights and to reinstall the telephone. Tr. 59.

DONIECE SCHLICK'S OBSERVATIONS

Doniece Schlick has been employed by MSHA for 24 years, and she has served as an MSHA assistant district manager for four years. As an assistant district manager she has been involved in enforcement of the Act and metal non-metal safety regulations promulgated pursuant to the Act. Tr. 124. Prior to becoming an assistant district manager she worked as an inspector at the agency's Macon, Georgia office where she had experience inspecting cement plants. Tr. 125. Ms. Schlick holds a B.S. degree in mining engineering from the University of Alabama. Tr. 126. As an assistant district manager one of her duties is to observe how MSHA's inspectors conduct inspections and how operators relate to inspectors. Pursuant to this duty she accompanied Smith to the Knoxville plant on March 10. Tr. 126-27.

Schlick was clear that the Louisville accident heightened MSHA's emphasis on the need to inspect elevators. She was asked by her counsel why MSHA "was . . . so intent on inspecting [the plant's] elevators?" Tr. 127. She responded: "After a fatality, it is our duty to make sure that not just at Cemex, but [that] all cement plants in the southeast are following the best practices to . . . keep another accident from happening like that in the industry." *Id.* Her counsel then asked, "So a fatality can change the way that MSHA does its job?," and she responded, "Well, I would expect that a fatality . . . or . . . serious accident would be a wake-up call for us to look at things differently." Tr. 128.

Schlick testified regarding her understanding of the accident at the Louisville plant:

> A . . . worker was looking for a bucket . . . and someone told him they were on the fourth floor. He rode the elevator up to the fourth floor. He got the bucket. He [tried to go] back on the elevator. When he opened . . . the doors to the elevator and stepped on the elevator, the vehicle was not at that floor. It was [at] a lower floor.

Tr. 129; *see also* Tr. 130.

Schlick understood that prior to the accident the victim was "manually moving" rocks. Tr. 130. In her opinion when he stopped and started looking for a bucket, he was still "in the process of doing his work and trying to perform it better." *Id.* He was, she stated, "looking for additional tools to help to perform that task." *Id.* She believed the victim was working because "[h]e was going from one floor to another to obtain tools to perform the task that he was doing better, safer, more efficiently." Tr. 131. She added the Louisville plant is similar to the Knoxville plant. *Id.*

When asked what she regarded as an effective workplace examination of an elevator, Schlick stated that at "a minimum" the elevator's safety features should be checked. Such features include the inside light, the inside communication system, and the "in-use" lights. Tr. 132. In addition, the elevator's doors should be checked.[9] Tr. 132-133. In Schlick's opinion, a workplace examination should follow the best practices concerning elevators, practices that are set forth in the February 28, 2014, fatalgram. Tr. 134; Exh. S-6.

Although Schlick visited the Louisville plant several times during MSHA's 19 day investigation of the accident, she did not lead the investigation team, and the investigation was ongoing when Smith and Schlick were at the Knoxville plant. Tr. 134-135. Schlick agreed that she and Smith were not the first MSHA personnel to inspect the Knoxville plant's elevators following the accident. Lockett inspected the plant and the elevators on March 4, six days before she and Smith arrived. Tr. 138.

Schlick stated that before the accident, "some inspectors were asking for workplace examination [records] of elevators " (Tr. 139), but she confirmed that before March 10 Cemex never received a citation for failing to designate a competent person to examine the elevators at its Knoxville plant. Tr. 139, 140. Schlick also stated that she was aware that a few days after the accident, Cemex asked Otis to come to the Knoxville plant and check all of the doors on all of the elevators. Tr. 140-141. She stated that she and Smith looked at the Otis service records. She recalled Lockett telling her that he too looked at the Otis records and that he checked all of the elevators' doors. Despite the fact that Otis's personnel inspected the elevators on occasion,

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[9] According to Schlick, a majority of elevator doors are operated manually. Tr. 133. Schlick testified that it is important during the examination to try to open the doors when the cars are not at the landings to make sure the doors' interlocks work properly. Tr. 144-145. Schlick did not dispute that all of the landing doors at the plant have windows and that workers are supposed to look through the windows to determine if the car is present, but Schlick observed that the victim at the Louisville plant was not tall enough to see through the window. Tr. 142.

Schlick believed a daily shift inspection conducted by a person designated by the operator was important because, "[m]ining is a dynamic and rugged environment that requires more inspections of elevators" than those provided by a contractor like Otis.[10] Tr. 143.

THE COMPANY'S WITNESSES

ALAN STEPHENS AND CEMEX'S PRACTICES REGARDING ELEVATORS

Alan Stephens is the maintenance manager at the plant. Tr. 150. Prior to assuming the position of maintenance manager, he worked as the safety manager. Tr. 151. Stephens began his career with Cemex at the Louisville plant before transferring to the Knoxville plant. *Id.* At the time of the hearing, Stephens had worked in the cement industry for 34 years. *Id.* On March 10 Stephens traveled with the inspection party. Tr. 152.

Stephens explained the procedures Cemex has in place for detecting and correcting elevator defects. Stephens stated that pursuant to a contract with Otis, it is primarily Otis's personnel who inspect and test the elevators and perform needed repairs and maintenance. Tr. 155. Stephens stated that Otis's employees come each month to inspect the plant's elevators [[11]], and they come when Cemex requests they fix a particular problem.[12] Tr. 154-155, 190. Stephens maintained he has seen Otis's personnel at the plant, "many times." Tr. 158. Moreover, as the safety manager at the plant he reviews all copies of Otis's maintenance records. Tr. 160. Prior to March 10 the last time Otis personnel were at the plant was February 26 when they inspected the plant's elevators at Cemex's request. Tr. 161-162. Stephens remembered that after the February 21 accident the employees at the Knoxville plant were asked to check all of the doors on the elevators, which they did. Among other things they made sure that the doors remained closed when the cars were not at a landing. Tr. 163.

Stephens testified that he traveled with Lockett on March 4 and that Lockett did not find anything wrong with the elevators. Further, Stephens recalled that Lockett reviewed Otis's maintenance records and did not ask if Cemex designated a person to examine the elevators on each shift pursuant to section 56.18002(a). Tr. 164-165. Indeed, although he always traveled with MSHA's inspectors, before March 10 Stephens never was asked about Cemex's examinations of the plant's elevators. Tr. 165–166. Further, before March 10 Stephens never

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[10] Schlick testified that there are competent people that make workplace examinations at the plant on every shift. "They do the stairs. They do the walkways. They do the tow boards. So we are only asking that they also look at the general safety features of an elevator." Tr. 147.

[11] In practice, the purported monthly inspections of the elevators may not be as regular as Stephens implied. Stephens agreed the service report for the plant's kiln elevator shows Otis examined the elevator in October 2013 but not in November or December 2013. Tr. 188; Exh. S-4.

[12] According to Stephens, employees who travel in the elevators report any defect to "someone in supervision. And then we call Otis, and they come and repair it." Tr. 153. He was asked if employees "observe the areas [of the elevators] for hazards" when they use the elevators, and Stephens replied, "If we were to get on an elevator and there was something wrong just as you got on, yes. I mean . . . we would check and make sure the elevator was safe to ride." *Id.* However, he agreed that no one from Cemex is performing workplace examinations and having the results of the examinations recorded. *Id.* Asked why, he stated that it "was not anything we'd ever been asked to do. We didn't consider [an elevator to be] a workplace." *Id.*

saw MSHA's inspectors check the elevators' doors to see if they would open when the cars were not at the landings. Tr. 166.

On March 10 Stephens did not see anyone working in the area of the kiln elevator. Tr. 167- 168, Exh. R-13 at 1, 2. In fact, on March 10 no work of any kind was performed on or around the kiln elevator. Tr. 174. The kiln elevator was used so infrequently Stephens did not know when it was used last. Tr. 168. Stephens was surprised by the March 10 citation. He stated he did not know MSHA would apply section 56.18002(a) to the plant's elevators. Tr. 175. Stephens identified a photograph of the landing door of the mill room elevator. Resp. Exh. 13 at 3-5; Tr. 168-169. The door has a small window, as do all of the landing doors. Tr. 169. The company has never been cited because a window is too high and prevents a short person from looking to see if the car is at the landing. *Id.*

Stephens could not recall if Lockett checked the burn floor elevator on March 4. Tr. 176. In any event, Stephens stated that six days later, on March 10, he was unaware the "in-use" lights for the burn floor elevator were not working and that the telephone in the car was missing. Tr. 173.

Stephens was adamant that he did not consider an elevator is not a "working place." He testified, "We do not perform work in elevators[,]" (Tr. 177), and he was certain that no work was done on any of the elevators on March 10. Tr. 193.

WESLEY WADDINGTON AND OTIS'S PRESENCE AT THE PLANT

Wesley ("Wes") Waddington is an elevator mechanic who is employed by Otis. He has installed and repaired elevators for 27 years. Prior to working for Otis, he worked for Westinghouse for three years. He has 30 years of experience in the elevator business. Tr. 199-200. Waddington testified that in February and early March 2014 he made inspection and maintenance visits to the Knoxville plant. Tr. 200-201. He visited the plant in February and March at Cemex's request because, "[T]here was some concern . . . [because Cemex] had . . . a fatality at another plant and [Cemex] wanted us to come to make sure everything was up to par with their elevators." Tr. 203. He added, "And we did perform maintenance as well as other tasks that were due at the time on those elevators." *Id.* His duties at the plant included inspecting the elevators and providing maintenance services. He testified that during his visits to the plant he examined all of the components of the elevators' doors. One aspect of his work is to make certain the doors do not open when an elevator's car is not at a landing. *Id.* For a door to open under such circumstances the door's interlock mechanism has to malfunction. Tr. 205. To check the mechanism Otis personnel must climb on top of the elevators' car. In Waddington's opinion, tugging on a door from the landing, a safety check advocated by MSHA, is unsafe, because if the door opens and the car is not at the landing, the person tugging on the door can fall down the shaft. Tr. 206; *see also* Tr. 216. In addition, too much tugging can bend and break the interlock mechanism. Tr. 206-207, 218. In general, Waddington believed workers should not pull on an elevator's doors unless "they see the elevator through the door's window." Tr. 207.

Waddington added that if he saw a burned out light or a similar problem on any of the elevators he would fix what was wrong or he would advise Cemex that the problem needed to be

fixed. Tr. 209. If he found that a telephone inside a car was missing, he "would . . . tag . . . out [the elevator] and notify [Cemex] not to use . . . [the elevator] until it had two way communication." Tr. 210. During his February and March visits to the plant he did not see a missing telephone, and although there were burned out "in-use" lights, he fixed them. Tr. 210-211. In Waddington's opinion, burned out "in-use" lights should not be replaced by the company; rather, they should be replaced by Otis's technicians because they pose a hazard of electrocution to those who are unfamiliar with the electrical system of an elevator. *Id.*

THE CITATIONS

Citation No. 8733024, states:

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

Exh. S-2.

Citation No. 8733025 states:

> The IN USE light[s] provided for the [b]urn [f]loor [e]levator were not burning when the elevator was in motion. The defective lights were located on the 1st and 2nd floor call stations. 'The lights, when working, let the miner know when the car is in motion and [the lights] go out when the car stops. Should a miner attempt to open the door when the car is not at their floor, provided the hoistway door safety interlock is working properly, the door would not open and strain and sprain type injuries would occur. Also[,] the supplied communication phone had been removed and not replaced inside the car. The phone is to be maintained to allow miners to make contact with the operator in the event the car becomes inoperable entrapping the miner[s] inside. Management did not have an examination program in place concerning elevator defects.

Exh. S-3.

CITATION NO.	DATE	30 C.F.R. §
8733024	3/10/14	56.18002(a)

THE VIOLATION

There are five elevators at the plant, the pack house elevator, the mill room elevator, the preheater tower elevator, the burn-room/kiln elevator, and the TBA-tower elevator. The testimony reveals that Cemex did indeed "[fail] to designate a competent person to examine the elevators [at its plant] for hazards each shift." Exh. S-2. Smith credibly testified that he was told as much by a Cemex supervisor, and Smith's testimony was not rebutted.[13] Tr. 34. Cemex goes to some length to argue that "although the miners at the Knoxville . . . [p]lant did not intend to complete an official working place examination of the elevators . . . their actions nevertheless met the requirements of the standard. The miners . . . were deemed competent and trained by the operator to observe the elevator car for defects or issues involving lights, communication systems, and the general condition of the elevator prior to and during use in order to make sure it was safe to ride." Resp. Br. 27. The company's argument fails to address one of the central contentions of the Secretary, that the company failed to designate a competent person to conduct the working place examinations. The standard contemplates the operator's designation of a specific person and the designated person's accountability for the required examination. As Smith was told, Cemex did not designate a person to examine its elevators and whatever its employees did with regard to the elevators did not overcome Cemex's failure to meet the "designation" requirement of section 56.18002. However, this only establishes a violation if at least one of the elevators at the plant comes within the standard.

Section 56.18002(a) applies if an area is a "working place." As noted previously, when used in Part 56, a "working place" is defined as "any place in or about a mine where work is being performed." The definition is expansive ("any place in or about a mine"). It also is written using the present progressive tense, which means that work has started but has not yet finished. If read strictly, the definition means that a "working place" does not come into existence until work is actually performed at the cited place. Cemex points out that where a regulation is clear and unambiguous, effect must be given to its plain language. Resp. Br. 6 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984; *United States Lines, Inc. v. Baldridge*, 667 F.2d 42, 45 (D.C. Cir. 1982); *Cyprus Emerald Resources Corp.* v. FMSHRC,195 F.3d 42, 45 (D.C. Cir. 1982)). Thus, in the company's view "a 'working' place encompasses only those distinct areas of a mine where miners are engaged in actual work." Resp. Br. 7. Within the context of section 56.18002(a) giving effect to the "plain meaning" of the regulation means that a competent person is required to examine an area once

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[13] *See also* the following exchange between counsel for the Secretary and the inspector:

> Q. So how did you discover that the operator was not conducting workplace exams on the elevator?
>
> A. With discussion of the management stating that they did not.

Tr. 41. (Although counsel used the singular, "elevator," it is clear in the context of the questioning that he meant to use the plural ("elevators").

work is underway. This is a permissible reading of the standard and an examination conducted while miners are working undoubtedly complies with section 56.18002(a). However, it is not the only permissible reading of the standard. If it were, it would leave an unacceptable "safety gap" in that workers could be exposed to potential hazards because although they were assigned to work in an area, the work had not yet started and the examination had not yet been conducted thus exposing the workers to potential hazards before the examination was conducted.

The Secretary also recognizes this "safety gap." In what is essentially an appeal for second step *Chevron* deference, the Secretary asks the court to find the standard applicable "if there is a reasonable expectation of work taking place" or, "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." Sec. Br. 16-17. The court agrees with the Secretary to this extent because the court finds extension of the standard to areas where there is "a reasonable expectation of work" (Sec. Br. 16) to further the purpose of the standard whose goal is not only to protect those who are engaged in present work, but also to offer protection to those who soon will be engaged in work in order to prevent them from encountering working place hazards in the first place. Therefore, as the court understands the standard, it applies to places where work is being performed during a shift, where work is assigned to be performed during a shift, or where work can reasonably be expected to be performed during a shift. Under this reading of the standard an operator may time its examination of a working place in one of three ways. It may have a designated competent person examine an area where work is being performed during a shift while the work is being performed; or, it may have a designated competent person examine an area where work is assigned to be performed during a shift but where the work has not yet started; or, it may have a designated competent person examine an area where it is reasonable to expect work will be performed during the shift. To prove a violation the Secretary must show that a designated competent person did not conduct any such examinations either on the shift during which the inspection was conducted or did not perform any such examinations during a specifically identified prior shift.

Turning to the wording of the citation, the court notes it charges Cemex with failing to examine "the elevators." Exh. S-2. This broad brush wording implies a duty on Cemex's part to examine all of its elevators simply because they are elevators. However, the standard must be applied individually, not to the elevators as a unit. Section 56.18002(a) is directed at the examination of "each working place" not at a generic type of working place, i.e., "the elevators."

Further, an elevator is composed of many parts. According to the Secretary some of the parts, i.e., the elevator's "internal workings," -- are not subject to examination by Cemex. *See* Sec. Br. 14 n.5. Under the Secretary's interpretation of the standard, "MSHA expects the contractor servicing the elevator to conduct necessary workplace exams of the . . . internal mechanics of the elevator . . . [and] the operator to conduct workplace exams on only those areas accessible by miners – the elevator car and the elevator landing." *Id.* Indeed, while the citation seems to limit the charge of a violation to Cemex's failure to have a competent person examine its "elevator car and the hoistway doors, at each floor" for "defects affecting the safe operation" of the elevators (Exh. S-2), the Secretary makes clear on brief that the alleged violation also includes the failure of a designated competent person to examine areas of the landings adjacent to the doors, presumably because work projects requiring the opening and the shutting of the

doors and passage into and out of the cars must necessarily also involve the landings providing access to and egress from the cars. *Id.*

To sum up its interpretation of the standard, it is the court's opinion that to establish a violation of section 56.18002(a) in this particular case, the Secretary must show that on the shift when the inspection took place or on a specifically identified prior shift, a designated competent person did not conduct an examination of areas of a specific elevator where a work-related task involving the elevator's car or landing doors was being performed, was assigned to be performed but not yet started, or where such a task reasonably could be expected to be performed.[14]

THE INDIVIDUAL ELEVATORS

With regard to the pack house elevator, the testimony reveals that at the time of Smith's inspection, the elevator was shut down, locked and tagged out. Tr. 36, 46. No evidence was presented as to how long the elevator was out of service and when it would be returned to service. Cemex cannot have violated the regulation by failing to have a competent person examine the car, doors and landings of an elevator Cemex already had taken out of service. This leaves the question of whether the Secretary proved that on a prior shift the car, doors and landings of the pack house elevator had been used as a working place and Cemex failed to designate a competent person to examine those parts of the elevator during the shift when it was so used. The Secretary did not establish what type of work was done in connection with the pack house elevator and did not point to a shift in the past when the company used the pack house elevator as a workplace but failed to examine its parts as required. In fact, the Secretary's allegations regarding the pack house elevator are vague to a fault. They seem to consist of the assertion that "at some time or another" in the past a violation must have taken place. *See e.g.*, Tr. 46. This is too slender a reed to support a violation, and the court concludes that as far as the pack house elevator is concerned, the Secretary did not prove the company violated section 56.18002(a).

With regard to the mill room elevator, Smith testified that it is a "personnel elevator which transports . . . miners from floor to floor." Tr. 37. Smith stated that he found no deficiencies when he inspected the mill room elevator. Tr. 93-94. Smith estimated that in general five or six miners work in the mill on any given shift. Tr. 112. Stephens testified that some elevators are used daily at the plant (Tr. 176), but that on March 10 he saw no one working near the mill room elevator. Tr. 169. Stephens disagreed with Smith's testimony that the mill elevator is used only to transport personnel. He stated that it is also used to convey materials and equipment (Tr. 183) ("[h]ot hand tools . . . tool bucket, stuff like that" *Id.*). The court accepts Stephen's testimony. Tr. 182-183. Stephens was more familiar than Smith with operations at the

[14] While the court believes this is a permissible reading of the standard, it is a circuitous way to reach the undoubtedly salutary goal of requiring the examination of elevators. Rather than "squeeze" the requirement for elevator examination out of section 56.18002(a), the court believes the Secretary is well advised to promulgate a standard specifically directed at the mandatory examination of all elevators, much as he has done with regard to surface coal mines and surface areas of underground coal mines. *See* 30 C.F.R. §77.1430. Cemex argues at some length that notice and comment rulemaking is in fact **required** (Resp. Br. 22-26), but the court disagrees. While rulemaking may well be preferable, the fact is that section 56.18002(a) as presently written may be read to apply to the plant's individual elevators in certain circumstances.

plant and he was a credible witness. Use of the elevator to convey materials and equipment means that when it was so used the items had to be gathered on the landing, the doors had to be opened and the various items had to be loaded into the car and then unloaded. Loading and unloading the materials and equipment made the car, doors and landings for the mill room elevator a working place (i.e., "a place . . . where work is being performed." 30 C.F.R. § 56.2). Therefore, the car, doors and landings were subject to examination by a competent person designated by Cemex on the shift when the inspection took place if work involving the car, doors and landings was being performed, was assigned to be performed or reasonably could have been expected to be performed or if such work took place during a prior identifiable shift.

As the court noted, there is no evidence any of the five elevators were in use during the shift when Smith and Schlick were at the mine on March 10.[15] Nor is there sufficient evidence for the court to conclude it was reasonable for Cemex to expect the mill room elevator would be used to convey materials and equipment or to transport workers carrying work-related materials or equipment before the March 10 shift ended. Further, the evidence of prior use offered by the Secretary is too vague to support finding a violation. At most, the evidence leads to the conclusion that the mill room elevator may have been used to convey work-related materials, equipment, or employees transporting such equipment in the indeterminate past. The Secretary does not offer evidence as to when and on what shift this occurred, and the court concludes that as far as the mill room elevator is concerned, the Secretary did not prove the company violated section 56.18002(a).

With regard to the preheater tower elevator, Smith described it as a "personnel floor to floor" elevator. Tr. 37. The preheater tower has nine floors. Smith estimated that four or five employees work on or near the preheater tower. Tr. 113. According to Smith, workers use the preheater tower elevator to go from floor to floor to provide maintenance and to observe the processing of material. Tr. 38. At the top floor of the tower, workers sometimes use a tape measure to check the depth of material that is being processed. They also use compressed air or water to help the material move through the processing system. Tr. 38-39. Although workers could use stairs to reach the landings, Smith thought the weight of materials and tools the miners often carry made use of the stairs unlikely. Tr. 39. The court agrees and finds it highly unlikely miners would walk up the stairs rather than use the elevator. The court further finds that loading equipment onto and off the elevator car to facilitate the processing of plant material makes the landings, doors, and car of the preheater tower elevator working places within the meaning of section 56.18002(a).[16]

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[15] The court recognizes Smith credibly testified he was told there were elevators at the plant that were used daily and that Stephens' testimony corroborated that of Smith. Tr. 41, 95. But even if the Secretary had offered testimony of actual use this alone would not bring an elevator within the standard. The pertinent question is how and why an elevator is used. Tr. 35, 43, 95. If it is used only to transport plant personnel, the court believes the elevator does not come within the standard. The court fully agrees with Cemex that use of an elevator solely to move personnel from one level to another to get them to a working place does not in and of itself mandate an elevator's examination. *See* Resp. Br. 16. (To hold otherwise would make modes of transportation to, into and out of the plant also subject to examination under the standard.)

[16] The court rejects Cemex's argument that the transportation of miners does not make the mill room elevator a working place. Resp. Br. 16. More than just transporting employees from one place to another is involved. The employees themselves are transporting work-related equipment from the landing, through the door and into the car of the elevator and reversing the process at another landing and this work is part of the process of production at the

The court finds it significant that the purpose of the work conducted at the preheater tower is to maintain the smooth processing of material at the plant. While there is no evidence the preheater tower elevator was in use while Smith was at the mine (Tr. 95, 169), the court infers from the fact the task to be accomplished is production-related and from the fact production was and had been ongoing (the plant was not shut down), that it is reasonable to conclude the preheater tower elevator was used on the most recent production shift to move workers and their equipment to the top of the tower to monitor and expedite the processing of material. The loading and unloading of the necessary equipment and materials by the employees made the elevator's car, doors and landings working places and, in the court's view, brought the preheater tower elevator within the standard on the production shift most recent and prior to the March 10 inspection when it was so used. For these reasons the court concludes the evidence supports finding a violation of section 56.18002(a) regarding the preheater tower elevator.

With regard to the burn room/kiln elevator, Smith testified that it is used to transport both personnel and materials from floor to floor. Tr. 37. Smith remembered seeing plant personnel walking around the burn floor, but he could not recall what they were doing and no one was working in the area of the elevator's first and second floor landings on March 10. Tr. 167-168. In fact, Stephens testified he did not know the last time the elevator was in operation. He stated that based on the company's records the elevator had not been operated two months before March 10 and two months after March 10. Tr. 168. He described the elevator as "hardly ever use[d]." *Id.*

The court finds that record confirms the burn room/kiln elevator was not in use during the shift when Smith conducted the inspection and there is no evidence it was going to be so used if the shift continued after the inspection ended. In the court's view, Stephens' unrebutted testimony that he could not recall when the burn room/kiln elevator was last used, that its use was infrequent, and the lack of any testimony as to when it was last used in the performance of work-related activities means that as far as the burn room elevator is concerned, the Secretary failed to prove the company violated section 56.18002(a).

There is very little evidence regarding the TBA tower elevator. Smith described it as a "personnel elevator." Tr. 37. There is no evidence of the elevator's other use or uses, if any. As the court stated, using an elevator solely to transport workers does not, in and of itself, make the elevator a "working place" and bring the elevator's car, doors, and landings within the strictures of section 56.18002(a). The court therefore finds the Secretary did not prove a violation regarding the TBA tower elevator.

For reasons set forth above the court finds that the Secretary established that Cemex violated section 56.18002(a), but only with regard to the preheater tower elevator.

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plant. In the court's view, when the preheater tower elevator is so used, the work of the employees makes the car, doors, and landings a working place subject to the standard.

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. §814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981). To establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 2-4 (Jan. 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The S&S nature and the gravity of a violation are not synonymous. "[T]he focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." Consolidation Coal Co., 18 FMSHRC 1541, 1550 (Sept. 1996).

The court concludes the Secretary established that the violation was of an S&S nature. The first *Mathies* element has been established in that the court finds that Cemex violated the standard when it failed to designate a competent person to examine the preheater tower elevator. To prove the second element, the Secretary needs only to identify a discrete safety hazard associated with the S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n.5 (Dec. 2012). The possibility that a defective locking mechanism on the preheater tower elevator's doors would not be detected and corrected because a section 56.18002 examination was not conducted presented the associated hazard that an unsuspecting worker, mistakenly thinking the elevator car is at the landing, would open the elevator's door and would slip or fall into the empty shaft. This happened at the Louisville plant and by applying the standard to the elevator in question, the Secretary hoped to prevent the hazard's recurrence. With regard to the third element of the *Mathies* formula, the Secretary established that the hazard contributed to by the violation was reasonably likely to result in an injury. The issue must be viewed in the context of continuing operations at the plant. Use of the preheater tower elevator was related to production, which on March 10 had been and was ongoing, and which means the elevator had been and would continue to be regularly used. When regular use is coupled with the fact the locks on an elevator's door can malfunction and the door can be opened without the car being present (*see* Tr. 51), the court finds that as mining continued, it was reasonably likely a malfunctioning elevator door would not be detected and a worker, mistakenly thinking the car was at the landing, would open the door and fall into the shaft. Any resulting injury was reasonably likely to be at least of a reasonably serious nature.

There is no doubt that the violation was serious. The "effect of the hazard" assuming it occurred was at least a serious injury. *Consolidation Coal Co.*, 18 FMSHRC at 1550.

NEGLIGENCE

Smith found that Cemex was moderately negligent. The court disagrees and concludes the company was not negligent. The Secretary's definitions of negligence (30 C.F.R. §100.3(d)) are not binding on the Commission. *See Brody Mining, LLC.*, 37 FMSHRC 1687, 1701-02 (Aug. 2015). The Commission has stated, "In determining whether an operator met its duty of care, we consider what actions would have been taken under the circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining* at 1702 (quoting *Jim Walter Resources*, 36 FMSHRC at 1975). The Commission also has stated that the court should "consider the totality of the circumstances holistically" (37 FMSHRC at 1702) and that in doing so it should take account of "the actions that a reasonably prudent operator would or would not have taken under the circumstances presented." *Id.* at 1703. As set forth more fully in its discussion of due process, the court finds that while application of the standard to one of the elevators at the plant is a permissible way to read section 56.18002(a), given the broad wording of the standard and the Secretary's consistent failure to apply the standard at the plant, Cemex reasonably could have read the standard as inapplicable to its elevators, and the company cannot be held to have failed to meet a standard of care it was reasonable to conclude did not exist.

DUE PROCESS

Cemex would have the court vacate the citation on due process grounds. It contends the Secretary violated its Constitutional rights by failing to provide it with fair notice of his interpretation of the standard. *Id.* 17.

The Commission has held:

> Where an agency imposes a fine based on its interpretation [of a standard], a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). . . . The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "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).

Island Creek Coal Co., 20 FMSHRC 14, 24 (Jan. 1998).

But this does not end the matter because an agency's interpretation may be reasonable and nevertheless fail to provide the notice required in some circumstances to support the imposition of a penalty. *General Electric Co.* v. *EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995).

There is no doubt that the Secretary's application of the standard to the plant's elevators was a "first" at the plant. Tr. 139; *see also* Tr. 140. Before March 10 the company relied on its contractor, Otis, to examine all of its elevators and to correct reported elevator defects on an "as needed" basis. Tr. 96, 141. Stephens testified that when a defect was reported by an employee, the company "would call Otis, and they would come and repair it." Tr. 153. He added, "We relied on Otis[.]" Tr. 154, *See also* Tr. 179. In December 2013 and again in January 2014, Smith reviewed workplace examination records at the plant. Tr. 74. Although at the time a designated person was not conducting workplace examinations of the elevators, Smith did not cite the company for a violation of section 56. 18002(a) and did not ask the company about its policy and practice with regard to elevator workplace examinations. Tr. 74-76, 166. Moreover, on March 4, 2014, Lockett, who was conducting a spot inspection at the plant that included the elevators, did not issue any elevator related citations Tr. 98-99, 164. Nor did Lockett ask Stephens if Cemex had designated an individual to examine the elevators. Tr. 165. Smith's and Lockett's lack of action in December 2013, January 2014 and early March 2014 reflects either the agency's lack of concern with elevator inspection at the plant, its uncertainty as to whether the standard applied, its conviction the standard did not apply to any of the elevators, or its determination that the company's reliance on Otis provided its employees with adequate protection.[17] Not until sometime after the February 21, 2014, accident and Lockett's March 4 inspection did MSHA decided to apply section 56.18002(a) to elevators at metal/non-metal facilities. Once the decision was made, it was announced to Cemex not through a program policy letter or through the February 28, 2014, "fatalgram" (Gov't Exh. S-6), but through the agency's issuance of the subject citation. Gov't Exh. S-2. No prior notice was given to Cemex that MSHA would apply the standard to the plant's elevators. Indeed, if anything, Lockett's "citationless" inspection on March 4 reasonably could have been interpreted by Cemex to signal that the then *status quo* complied with the Act. By issuing the citation without prior notice on March 10, the agency effectively "sandbagged" the company. This does not mean, however, that Cemex necessarily was deprived of fair notice. Another analytical step is required.

When an agency uses a citation as the initial means for announcing a particular interpretation, the court must "ask whether the regulated party received . . . notice of the agency's interpretation in the most obvious way of all; by reading the [regulation]." *General Electric*, 53 F.3d at 365. The court has concluded that it is permissible to read section 56.18002(a) to require a designated person to examine a particular elevator car, doors and landings on each shift when an operator's employees will be conducting work-related activities (e.g. the transportation of work-related equipment or materials) on, in, or through an elevator's car, door or landing on or during a shift when such work is or will be conducted or when such work reasonably can be expected to be conducted. The court also concludes that 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

[17] 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. Sec. Br. 22. 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 and then decided that section 56.18002(a) could be stretched to fit the need. As Schlick put it, "[A] fatality . . . would be a wake-up call for us to look at things differently." Tr. 128.

metal and non-metal mines[18] means that Cemex reasonably could have read section 56.18002(a) as not applying to its elevators. Therefore, even though the court finds Cemex violated section 56.18002(a) with regard to one of its elevators and that the violation was S&S, the court's findings are a nullity, because in the court's view, Cemex was not provided with constitutionally adequate notice of the Secretary's interpretation of section 56.18002(a), and the citation must be vacated.[19]

CITATION NO.	DATE	30 C.F.R. §
8733025	3/10/14	56.14100(c)

THE VIOLATION

Section 14100(c) requires that when defects make continued operation of self-propelled mobile equipment hazardous to persons, defective equipment shall be "taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected." The Secretary charges that the "in-use" lights on the first and second floor call stations of the burn floor elevator did not activate when the elevator car was in motion or go out when the car stopped. As a result a worker might think the car was at the first or second floor when it was not. The worker might try to open the door of the elevator and because the interlock prevented the door from opening, might strain his or her back. Exh. S-3, Tr. 55-56. In addition, the telephone inside the elevator car was missing. Workers could not communicate over the phone with rescuers if workers became trapped in the elevator. Exh. S-3, Tr. 55-56.

Based on Smith's undisputed testimony, the court finds both conditions existed as alleged in the citation. Tr. 54-55. The court agrees with Smith that each condition posed a hazard to persons. The fact that the "in-use" lights were not working means a worker might think the car was at either the first floor or second floor call station when it was not, might try to open the locked door, and in the process might injure himself or herself. Further, as Smith implied, lack of working "in-use" lights created the possibility, if coupled with a failure of the interlock mechanism, for another Louisville-type accident. Tr. 56. In addition, the lack of a telephone in

[18] In contrast, see the detailed regulation of hoists, equipment that like elevators, is raised and lowered by cables. 30 C.F.R. § 56.19045 - § 56.19083; 30 C.F.R. § 57.19.000 – 57.19135.

[19] The Secretary's arguments to the contrary are not persuasive. 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 subject to inspection by the company. Sec. Br. 23. However, a more reasonable conclusion is that the long standing nature of the contract, which went into effect in 1977, 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 also argues the accident at the Louisville plant should have alerted the company to "[bring] the elevator cars and landing areas under the workplace exam umbrella." *Id.* However, rather than alert the company to the fact it was in violation of a regulation because of its adherence to a contractually based practice, a practice for which it never had been cited, a more logical conclusion for the company to draw was to request its contractor ensure the interlock mechanisms on the plant's elevators doors were properly functioning. This is exactly what Cemex did. Finally, the Secretary states that the "clear mandate" of the standard should have alerted Cemex to its duty to comply. *Id.* But, as noted above, the standard is open to interpretation to say the least. The Secretary failed to apply it prior to the accident and reversed its course after the accident. If the standard provided a clear mandate it is logical to assume the Secretary's actions would have been consistent.

the elevator car clearly deprived workers of a way to call for help should they become trapped in the car. Tr. 57. The court agrees with Smith that the cited defects made operation of the elevator hazardous to persons riding in it or working on the landings near it. Smith testified, and Cemex does not dispute, that the elevator was not taken out of service and the court finds, in the words of the standard, that the elevator was not marked "to prohibit further use until the defects [were] corrected." For these reasons, the court concludes that Cemex violated section 56.14100(c) as charged.

GRAVITY and NEGLIGENCE

The court concurs with Smith's finding that the violation was not serious and that it was unlikely to result in an injury producing more than lost workdays or restricted duty. First, as Smith noted, the doors of the elevator were provided with windows. Tr. 58. Thus, a worker could see if the elevator car was at the landing before he or she tried to open the door. Moreover, Smith checked the interlocks during the course of his inspection and found they functioned properly. *Id.* The court concludes that it was therefore unlikely the non-functioning "in-use" lights would lead to any injury. The court also concludes, given the presence in the mine of other communication devices, namely portable radios and cellular phones (Tr. 57), it was highly unlikely that an injury would result from the fact the car's telephone was missing.

While the court agrees with the inspector regarding the gravity of the violation, it takes issue with the inspector's finding of high negligence. Exh. S-3; Tr. 58-59. The finding is based upon the fact that Cemex had not conducted a workplace examination of the elevator. "A workplace exam being performed daily on the elevator would have addressed the defects when observed." Tr. 59. Rather than high negligence, the court concludes the company's negligence was moderate. While the cited conditions were visually obvious and should have been detected and corrected, as the court has found, it was reasonable for the company to conclude section 56.18002(a) did not apply to its elevators and thus not to designate a competent person to examine their car, doors and landings on a shift when they were or would be used for work-related activities. Further, while section 56.14100(a) requires that when self-propelled mobile equipment is used during a shift, the equipment be examined before it is placed in operation, there is no evidence the cited elevator was used during the shift on which the inspection took place or on a prior identifiable shift. Nor is there certainty as to how long the cited conditions existed. The most likely implication is that they occurred sometime between Lockwood's and Smith's inspections, a not inordinately long period. Tr. 105, The court therefore finds that Cemex's negligence was moderate.

OTHER PENALTY CRITERIA

The burden of establishing that any penalty assessed will affect the company's ability to continue in business is born by Cemex. The company did not offer evidence or make an argument on the issue, and the court finds that the penalties it assesses will not affect Cemex's ability to continue in business. The parties stipulated that Cemex has a small history of previous violations. Tr. 24; *see* Exh. S-1. The parties did not stipulate or present evidence as to the size of the operator, but the court notes that when proposing penalties, the Secretary based the proposals in part on the fact that the plant is of a medium size, but that Cemex's controlling entity is large.

Petition for Assessment of Civil Penalty, Exh. A. The court therefore finds that Cemex is large in size. Finally, when proposing penalties the Secretary gave the company a 10 percent reduction because of its abatement efforts. The court therefore finds that Cemex exhibited good faith in seeking to rapidly abate the violations.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8733024	3/10/14	56.18002(a)	$1,530	$0

The court has found that the Secretary's application of the standard deprived Cemex of fair notice. The citation must be vacated. A penalty cannot be assessed.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8733025	3/10/14	56.14100(c)	$308	$208

The court has found that the violation was not serious and was due to Cemex's moderate negligence. The Secretary proposes a penalty of $308. Given the court's gravity and negligence findings and the civil penalty criteria discussed above, the court finds that a penalty of $208 is appropriate. The court departs from the Secretary's proposed penalty because it finds the negligence of the company to be less than the Secretary alleges.

ORDER

Citation No. 8733024 **IS VACATED**. Citation No. 8733025 **IS MODIFIED** by reducing the Secretary's negligence finding from "high" to "moderate." Within 30 days of the date of this decision, Cemex **SHALL PAY** a civil penalty of $208.[20] Upon payment of the penalty this proceeding **IS DISMISSED**.

David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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[20] Payment shall be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390