FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CEMEX INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2014-453-M A.C. No. 01-00016-357166 Mine: Demopolis Plant CEMEX Inc.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION & GRANTING SECRETARY'S CROSS MOTION FOR PARTIAL SUMMARY DECISION

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d).

Background

At issue in this proceeding is a single citation issued to the Respondent under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 56.19120, which requires each operator of a surface metal or nonmetal mine to develop and follow a "systematic procedure of inspection, testing, and maintenance of shafts and hoisting equipment" at its mine. This mandatory safety standard was promulgated under the Secretary's personnel hoisting regulations, which apply to "hoists and appurtenances used for hois[t]ing persons." 30 C.F.R. § 56.19000. The Secretary defines a "hoist" as "a power driven windlass or drum used for raising ore, rock, or other material from a mine, and for lowering or raising persons and material." *Id.* § 56.2. Proceeding under the theory that elevators can fall within this regulatory definition, the Secretary cited the Respondent for failing to complete annual inspections of three elevators at its Demopolis Plant in 2013. The citation alleges that the doors to one of the elevators would open on the sixth and eighth floor while the elevator was on the ground floor, exposing miners to a fall hazard.

After a hearing was scheduled and discovery was conducted, the Respondent filed a motion for summary decision arguing that the elevators at the Demopolis Plant do not constitute "hoists" within the meaning of the regulations. The Respondent further asserts that the Secretary did not provide fair notice of his position that the personnel hoisting regulations apply to non-hoists as well.

The Secretary opposes the motion for summary decision and has filed a cross motion for partial summary decision asking me to narrow the scope of the issues at hearing by finding that

the Respondent's elevators do qualify as hoists that are subject to the Secretary's personnel hoisting regulations.

Legal Framework for Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007).

Discussion & Conclusions of Law

The Respondent argues that the cited elevators do not constitute hoists because they are traction (friction driven) elevators, not power driven drums or windlasses.[1] In support of its position that traction elevators are not hoists, the Respondent points to deposition testimony from two MSHA inspectors, including the inspector who issued the citation, showing that neither could confidently identify traction elevators as power driven drums or windlasses.

The Secretary asserts that the Respondent's argument relies on a purely semantic distinction between the terminology employed by the elevator industry and that employed by MSHA, which explains the inspectors' confusion at deposition. Relying on an affidavit from MSHA Senior Electrical Engineer Thomas Barkand, the Secretary argues that "traction elevator" is a term of art in the elevator industry that actually refers to friction drum hoists.

The Secretary's interpretation of his own ambiguous regulations that lacks the force of law is entitled to respect to the extent it has the power to persuade. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see, e.g.*, *Resolution Copper Mining, LLC*, 37 FMSHRC _, Nos. WEST 2013-319-RM et al. (Oct. 28, 2015) (according *Skidmore* deference when Secretary's interpretation of safety standard was consistent with language and purpose of standard and served Mine Act's purpose of promoting safety). I find that the Secretary's interpretation of the personnel hoisting regulations to include traction elevators is reasonable and persuasive, for the reasons discussed below.

First, the Secretary's interpretation is consistent with the Secretary's regulations for surface coal mines under Part 77 and with the Mine Act's safety-promoting purposes. The Respondent correctly notes that Part 77 distinguishes between elevators and hoists. However, Part 77 applies the same examination requirements to both elevators and hoists and does not exempt elevators from examination as the Respondent seeks to do in this case. *See* 30 C.F.R. § 77.1403. Section 77.1400 states that the personnel hoisting regulations for surface coal mines

[1] One of the elevators at the Demopolis Plant is a hydraulic elevator, but it was not cited and therefore is not at issue in this case.

apply to "hoists and elevators, together with their appurtenances, that are *used for hoisting persons*." *Id.* § 77.1400 (emphasis added). The intended use of the equipment for "hoisting persons" is the germane idea that triggers the need for safety examinations to fulfill the Mine Act's safety-promoting purposes. In contrast to the Part 77 regulations, the hoisting regulations in Part 56 speak largely to aerial tramways and train conveyances, which are surface mine oriented. There are fundamental differences between coal and metal/nonmetal mining that could account for the differences in language between Parts 56 and 77. Regardless, I find it significant that elevators are subject to the same examination requirements as hoists under Part 77 and are not exempted from regulation.

The Secretary's interpretation of traction elevators as hoists is reasonable because it is not an extension of the regulatory definition of "a power driven windlass or drum used … for lowering or raising persons" under § 56.2. As noted above, the germane concept underpinning this definition is that of a vehicle which hoists personnel up and down. This concept encompasses elevators. Moreover, the Secretary has presented evidence that traction elevators are, in essence, friction drum hoists because they share the same operating principle and technical design. The Respondent argues that elevators' operating mechanisms differ from hoists in that elevators have governors and undercar safety devices. The safety features and mechanisms which control overspeed may differ, but this does not change the fundamental operating mechanism of a traction elevator and does not mean that such equipment is excluded from safety examinations or MSHA inspections. The fact that the doors on one of the cited elevators opened at higher floors while the elevator was on the ground floor, exposing the open elevator shaft, demonstrates that governors and undercar safety mechanisms do not make elevators intrinsically safe and emphasizes the need for safety examinations to be conducted in accordance with § 56.19120.

Because the Secretary has advanced a reasonable and persuasive interpretation of 30 C.F.R. § 56.19120 that is consistent with the language and purpose of the standard, I accord *Skidmore* deference to the Secretary's interpretation and therefore find that the traction elevators at the Demopolis Plant constitute "hoists" within the meaning of the standard.

The Respondent argues that the Secretary did not provide due notice of his interpretation of § 56.19120 as covering elevators. To determine whether a mine operator has sufficient notice of the meaning of a regulation to be charged with violating it, the Commission applies the reasonably prudent person test. *See LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). Under this test, even if the operator does not have actual knowledge of the Secretary's interpretation of a safety standard, the operator is considered to have constructive knowledge when a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have ascertained the specific prohibition or requirement contained therein and realized that it was applicable under the circumstances. *LaFarge*, 35 FMSHRC at 3501; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990).

In this case, I reject the Respondent's argument that it was not on notice of the Secretary's interpretation of the cited regulation for two reasons. First, it would be unreasonable for a prudent person familiar with the mining industry and the protective purposes of the personnel hoisting regulations to believe that elevators are not subject to those regulations.

Second, the Respondent had hired a contractor to systematically inspect and test the elevators at the Demopolis Plant in the past and submitted to the MSHA inspector correspondence from elevator maintenance companies detailing the updates needed to keep it in compliance with safety regulations. Both actions indicate a conscious level of understanding that the elevators were subject to health and safety regulations.

For the foregoing reasons, the Respondent's motion for summary decision is **DENIED**.

Because no material issues of fact remain on the issue of whether the traction elevators at the Demopolis Plant constitute "hoists" within the meaning of § 56.19120, the Secretary's motion for partial summary decision is **GRANTED** as to that narrow issue.

Priscilla M. Rae
Administrative Law Judge

Distribution:

Timothy J. Turner, Esq., U.S. Department of Labor, Office of the Solicitor, Denver MLBP, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Michael T. Cimino, Esq., Jackson Kelly PLLC, 500 Lee Street East, Suite 1600, P.O. Box 553, Charleston, WV 25322