FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

June 6, 2007

BUZZI UNICEM USA,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. CENT 2006-242-RM
	:	Citation No. 6204230; 7/26/2006
v.	:	
	:	Docket No. CENT 2006-243-RM
	:	Order No. 6264178; 8/24/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Lone Star Pryor Plant, Mill & Quarry
ADMINISTRATION, (MSHA),	:	Mine Id. 34-01289
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-071-M
Petitioner	:	A.C. No. 34-01289-102655
	:	
v.	:	
	:	Lone Star Pryor Plant, Mill & Quarry
BUZZI UNICEM USA,	:	
Respondent	:	

DECISION

Appearances: C. Gregory Ruffennach, Esq., Washington, DC, for Buzzi Unicem USA; Thomas A. Paige, Esq., and Matthew P. Sallusti, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on two notices of contest filed by Buzzi Unicem USA ("Buzzi") and one petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). Buzzi contested a citation issued under section 104(a) of the Mine Act and an order of withdrawal issued by the Secretary under section 104(b) of the Mine Act. An evidentiary hearing was held in Pryor, Oklahoma. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND WITH FINDINGS OF FACT

Buzzi operates Lone Star Plant, Mill & Quarry ("Plant"), an open-pit limestone quarry and cement plant, in Mayes County, Oklahoma. As relevant here, mined limestone is processed and sent to one of three kilns, which are rotating furnaces used to heat the processed limestone. The kilns are contained in long horizontal cylindrical tubes. The kilns rotate at varying speeds between 65 to 75 revolutions per hour. All three kilns burn coal, gas, and scrap tires for fuel. A two-tiered automatic conveyor system ("tire feeder" or "conveyor system") transfers the tires to the kilns. The tire feeder consists of eight separate conveyor belts and other devices that feed the tires to the kilns in coordination with the rotation of the kilns. This system was designed by an independent contractor, which specializes in the installation of tire feeding systems. The system was installed at the plant in 2003 and was expanded in 2004. All moving parts are protected by guards, and pull cords are located along the walkway of each conveyor that will de-energize it. MSHA conducted a compliance assistance visit ("CAV") after the system was installed and another CAV after the system was expanded.

Tractor trailers deliver the tires to the plant. The trailers are tipped to dump out the tires. The tires move along a walking floor to a singulator, which operates like a coin sorter. This singulator places the tires, single file, on the first of eight conveyor belts, which are numbered from start to finish. The conveyors vary in length between 7 and 74 feet. All of the tires move along the first three conveyors. Near the end of Conveyor No. 3, the tires are directed to one of the three kilns. Tires going to Kilns 1 or 2 are ejected onto Conveyor No. 4. Next, they travel on Conveyor No. 5 to an upper deck. At this level there are four additional conveyors that feed the No. 1 and 2 kilns via the No. 2 turntable. The tires that remained on the No. 3 conveyor go onto the No. 1 turntable that supplies tires to the No. 3 kiln. There are slots in the rotating kilns and the belts are coordinated so that a tire drops into the slot of each kiln about once a minute.

The burning of scrap tires was enabled by the adoption of automation technology, which permits the movement of the conveyors to be synchronized with the rotating kilns. The conveyor system is operated automatically using computer technology called the programmable logic controller ("PLC"). There are slots in the rotating kilns through which tires are dropped about once per minute. Buzzi tries to run the plant two shifts per day, 24 hours a day. If the system has been shut down, the conveyor operator starts the system from the control room using the computer's mouse. The PLC automatically activates an audible alarm. The conveyors start in sequence and begin delivering tires to the kilns. Video cameras are positioned throughout the conveyor system with monitors in the control room. When the conveyor system is operating, individual belts independently cycle on and off as directed by the PLC. Electric eyes are positioned throughout the conveyor system that can sense the position of tires in the process. The PLC automatically starts and stops individual belts based on the information it receives from these electric eyes. During normal production, the three belts at the beginning of the system cycle on and off about eight times per minute while the belts on the upper deck at the end of the line cycle on and off less frequently. The longest cycle is approximately 30 seconds. The belts

start and stop individually as needed to feed tires to the kilns. No audible alarm sounds when these belts start during these cycles.

A miner known as the tire attendant is stationed at the conveyor system to monitor it. The tire attendant, who is normally on the ground at the singulator, coordinates with the conveyor operator by radio and he acts as the operator's eyes and ears. One of the jobs of the tire attendant is to remove rejects from the conveyor system. Rejected tires are partial tires, usually sidewalls. These rejects are typically removed on the first three belts. The proper procedure for removing a sidewall is for the tire attendant to de-energize and lock out the belt, remove the guard, and remove the rejected tire. The switch used to de-energize and restart each belt is along the side of each conveyor. Tire attendants typically use a long hooked tool to remove the reject. The entire length of the conveyor is visible from that belt's control switch. The tire attendant is aware that the belts cycle on and off and also knows that a red laser light is emitted by the photoelectric eye right before a belt starts. This red laser light is visible to the tire attendant.

On July 7, 2006, tire attendant Julie Rogers attempted to remove a reject tire from the No. 3 belt. Ms. Rogers did not de-energize the belt before attempting to remove the tire. Instead, she removed the guard from the head pulley and used the metal hook to remove the sidewall. She testified that she saw the red laser light come on but that she tried to get the sidewall with the hook before the belt started. (Tr. 356). The conveyor started before she could retrieve the sidewall and she suffered severe friction burns on her arm when the hook got caught in a pinch point and pulled her arm into it. The company investigated the accident with the participation of Boilermakers Local D414 ("union"). It was determined that the accident was caused by Ms. Rogers' failure to follow proper lockout procedures. Buzzi retrained employees on lock out procedures, extended the pull cord at that location, and fabricated a shorter reject puller.

On July 26, 2006, MSHA Inspector Wesley Hackworth inspected the tire feed conveyor system. Buzzi had filed an accident report with MSHA and the inspector was aware of the injury suffered by Ms. Rogers. Inspector Hackworth issued a citation alleging a violation of 30 C.F.R. § 56.14105 because proper maintenance procedures were not followed. Inspector Hackworth also issued Citation No. 6204230 under section 104(a) of the Mine Act alleging a violation of section 56.14201(b), as follows:

> The operator did not have a warning system installed for the conveyors at the whole tire system. Once the system is initially turned on these conveyors and conveying systems start and stop automatically and no warning is given of their startup. This condition created a hazard of an employee being injured should the conveyors start automatically without a warning being given.

Inspector Hackworth determined that an injury was reasonably likely and that any injury resulting from the violation was likely to be permanently disabling. He determined that the violation was

of a significant and substantial nature ("S&S") and that Buzzi's negligence was moderate. The safety standard provides:

> **Conveyor start-up warnings**
>
> (a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor;
>
> (b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 second after the warning is given, the conveyor shall be started or a second warning shall be given.

Buzzi started working to abate the condition. The Secretary contends that Buzzi resisted complying with the requirements of the citation and that it tried to abate the violative condition by a means that clearly did not meet the requirements of the safety standard. Buzzi sought to install a visual and audible warning system that was not specifically coordinated with the movement of the belts. As a consequence, the Secretary issued a section 104(b) order of withdrawal on August 24, 2006. The Secretary proposes a penalty of $1,376.00 for the citation and order.

Buzzi maintains that changing the system to comply with the Secretary's interpretation of the standard was a very complicated task because the computer codes had to be changed and the entire conveyor system had to be slowed down. It did not dispute that it tried several means of compliance but denies that it was not moving forward to comply with the Secretary's interpretation of the safety standard.

II. SUMMARY OF PARTIES' ARGUMENTS

The Secretary argues that the language of the standard plainly requires a warning whenever a conveyor is about to start regardless of who or what activates the conveyor. The standard's requirements also apply to multiple conveyor systems and to conveyors that stop and start frequently. She contends that the safety standard does not distinguish between automated conveyors, like the tire feeder, and non-automated conveyors, like the other conveyors at Buzzi's plant that do provide an audible or visible warning before starting.

The safety standard does not distinguish between belts that are started by a computer from belts that are started by humans. Because the conveyor operator at the Pryor Plant cannot see the entire belt system from the control room, an alarm sounds when the system is first activated. Once the conveyor operator selects "automatic," however, and the PLC assumes control of the

conveyor system, there is no visual or audible warning before each belt starts moving as that belt cycles on and off. The conveyor operator cannot see these belts from the control room.

The Secretary maintains that neither the text of the standard nor the preamble support Buzzi's argument that the tire feeder is exempt from the standard's requirements because the belts are automatic and operate without human input. The "protective purposes of the standard are tailor made to fit [Buzzi's] Tire Feeder precisely because it is automated: while a human being can distinguish between a tire and a human limb (like an arm), the PLC cannot . . . make that distinction." (S. Br. 10).

In addition to the plain language of the standard, the Secretary relies on the preamble to support her position. She points to the fact that the preamble does not specify the minimum amount of time between the warning and the conveyor start-up. The preamble states that "sufficient time must be allowed, however, for the affected persons to leave the hazardous area." (Ex. PX-15 p. 45; 53 *Fed. Reg.* 32496, 32514 (Aug. 25, 1988)). She notes that the Secretary declined to specifically address multi-conveyor systems in the preamble with the result that the rule applies to all belt systems. "Whether a single belt or several belts are involved in a conveyor system, the deciding factor determining whether a visual check or a warning device is required is the ability of the conveyor operator to see the entire length of the conveyor from the starting switch." *Id.*

The Secretary also relies on the decision of Commission Judge Hodgdon in *Tilcon Connecticut, Inc.*, 18 FMSHRC 90 (Jan. 1996). In that case, the operator used a multiple belt conveyor system to transport materials at the site. An alarm sounded when the system was started at the beginning of the shift. When a belt was shut down to remove blockage from a rock chute, however, an alarm did not sound when it was manually restarted by the operator. A miner was seriously injured because he was standing on a belt when it was restarted.

In *Tilcon*, the mine operator argued that its safety policies require the person who starts a belt after a maintenance procedure to shout out that the belt is about to start. It maintained that this procedure met the requirements of the standard. Judge Hodgdon affirmed the violation by holding that a "mechanical warning system is required by the standard." *Id.* at 95. He stated that "[s]ince the regulation does not specifically state that a mechanical warning system is required, this conclusion is reached by evaluating it in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purposes of the standard would have provided in order to meet the protection intended by the standard.' " *Id.* (citation omitted).

The Secretary argues that a reasonably prudent person would have recognized that a warning must be given every time a belt starts in Buzzi's tire feeding system. In this case, the operator provided no warning despite the fact that it provides such warnings at its conventional conveyor systems at the plant. The purpose of the standard is to protect miners from being injured when belts are started without notice. This underlying purpose cannot be ignored when applying the standard to the tire feeding conveyors. The purpose is to alert people of impending

belt movement. The Secretary also argues that, if the standard is deemed to be ambiguous, then her interpretation is entitled to deference because her interpretation fits within the terms of the standard and is compatible with its purpose.

Finally, the Secretary maintains that Buzzi was given fair notice of the requirements of the safety standard. The Secretary argues that the plain and clear meaning of the standard provided notice. She also relies on language in the Secretary's Program Policy Manual.

Buzzi argues MSHA is attempting to enforce the standard in an illogical manner to require that warnings be provided for the automatic cycling of conveyors. It contends that the plain language of the standard only applies to the manual stopping and starting of conveyors and that MSHA's position is totally unreasonable. Section 56.14201 is keyed to whether the length of a conveyor is visible to the conveyor operator. Thus, the standard is designed to apply to the manual operation of conveyors because alarms are required only when the operator cannot see the entire length of the conveyor. Indeed, the Secretary's Program Policy Manual ("PPM") states that the "standard requires that no conveyor is started unless the person starting it is certain that all persons are clear." (B. Br. 15; Ex. PX 7; IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56 at 62 (2003)). The preamble provides that where the "conveyor operator cannot view the entire conveyor length from the starting switch, a system which provides visible or audible warning of the impending conveyor movement is required." (Ex. PX-15, p. 46). Thus, the standard was written to apply to situations where a belt is started by a human. Typically, a human will start a belt or system of belts at the start of the shift and after a belt has been shut down for maintenance. Belts that are stopped and started systematically by a computer are not covered by the safety standard.

Under the standard, there can be up to a 30-second delay between the warning and conveyor motion. Thus, under the regulation, people are given time to get away from the belt and they presumably will not forget that the belt will start during that 30-second period. With respect to the tire feeder, the belts start and stop automatically as quickly as every 8 seconds and at least every 30 seconds. Thus, these belts are constantly stopping and moving again when the conveyor system is running and its employees are not going to forget that fact. Everyone who works at the conveyor system knows that the belts continually stop and start whenever the conveyor system is operating.

Buzzi points out that it was required to slow down its entire tire feeder system to abate the citation. Because the belts stop and start so frequently, there was not enough time to provide a meaningful delay between the warning and belt movement. Buzzi had to modify its tire feeder system so that there would be at least five seconds between the warning and movement at each belt. MSHA has, in effect, enacted a prohibition against Buzzi's automatic conveyor cycling system as a result of its interpretation of the standard. Because this prohibition was neither intended nor articulated by the drafters of the standard, MSHA's interpretation is unreasonable. The performance of Buzzi's conveyor system was seriously hindered by the abatement required

by MSHA's interpretation of the safety standard because this system is closely coordinated with the rotation of the kilns.

Buzzi also argues that the Secretary's interpretation does not advance safety. It initially used the system's built-in alarm to comply with the standard. When the union president complained about the constant noise, Buzzi installed flashing strobe lights. The subject conveyor system does not occupy a large area. As a consequence, under the Secretary's interpretation of the standard, there are now multiple overlapping warnings given during the automatic cycling of the belts. During normal production, there are as many as 18 separate warnings per minute on just the first three conveyor belts. Employees working in the area soon simply tune out these warnings because they are a constant annoyance.

Next, Buzzi maintains that, assuming the standard applies, the Secretary failed to establish a violation. First, it argues that the applicable "starting switch" referenced in the safety standard is the switch located at each conveyor used to stop and start the belt for maintenance or when a reject is removed. In every instance, the tire attendant can see the entire length of the conveyor from that switch. If Ms. Rogers had shut down the belt in accordance with company policy, she would have manually put it back into operation using the switch at the conveyor and she would have been able to see the entire length of the belt from the switch. There are no "starting switches" in the control room because the PLC automatically starts and stops the belts. The only starting switch in the control room is the switch used to turn the entire system on after it has been shut down.

Buzzi also maintains that its tire feeding system warned persons that the conveyor would be started. Ms. Rogers testified that the photoelectric eye system that was installed with the conveyors provided an effective warning that the conveyor would be starting. She testified that these photoelectric eyes emit a visible red light before the conveyor comes on and that "you can see them everywhere." (Tr. 360-61).

Buzzi also argues that it was not provided with fair notice that the safety standard applied to conveyor systems that stop and start on a frequent basis as part of its normal operation. "MSHA's attempt to extend [the safety standard] to automatic conveyor cycling, which involves neither a 'conveyor operator' nor a 'start-up,' creates an insurmountable fair notice problem for the agency." (B. Br. 24). It maintains that a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not have recognized that the standard applied to the automatic movement of the belts in its tire feeding system.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Summary

I find that the Secretary did not establish a violation of section 56.14201(b). The language of the standard dates back to the regulations promulgated by the U.S. Department of the Interior under the old Federal Metal and Nonmetal Mine Safety Act. (*See* 30 C.F.R. § 56.9-6 (July 1, 1979)). Although the wording was slightly different in the prior standard, the requirements are the same. Thus, the cited safety standard was put into place well before the technology at use in the tire feeding system existed. The tire feeder belts start and stop automatically, without human intervention, on a very frequent basis. The standard was not written with this type of system in mind. The miners who work on and around the conveyor system are well aware that the belts stop and start on a continual basis. Miners do not need to be "warned" that the belts are going to start moving, except when the system is started after it has been shut down. The conveyor system is constantly operating, so that as each belt cycles on and off, it is not being "started" as that term is used in the safety standard. As discussed below, applying section 56.14201(b) to Buzzi's tire conveyor system is misplaced because it creates an absurd result and does not improve the safety of miners.

B. Language of the Safety Standard and MSHA's Interpretive Materials

The safety standard was written at a time when computer-controlled conveyor systems did not exist in the mining industry. As the preamble states, the standard "addresses the concern that persons be clear of conveyors before they are started." (Ex. PX 15 at 45). Multiple-conveyor systems existed at that time and the preamble states that, whether a single belt or multiple belts are involved, the deciding factor in whether a "visual check or a warning device is required is the ability of the conveyor operator to see the entire length of the conveyor from the starting switch." *Id.* Although the standard specifies the maximum amount of time before a belt starts after the warning is given, the preamble states that MSHA did not establish a minimum time but that sufficient time must be allowed "for affected persons to leave the hazardous area." *Id.*

MSHA's PPM allows both manual and automatic alarm systems. (Ex. PX 7). Thus, a conveyor system can be designed so that one switch activates the warning and then automatically starts the conveyor(s) within the 30-second time-frame. In the alternative, a conveyor system can be designed to require the conveyor operator to switch on the warning, wait the requisite time, and then turn another switch to activate the conveyor(s). (Tr. 35, 125). Finally, the PPM provides that an audible "warning must be positive and effective for each conveyor or series of conveyors capable of being shut down or started independently within the system." *Id.* Again, this contemplates someone shutting down or starting a system of conveyors or a single conveyor within the system.

Clearly, if one of the conveyors in the tire feeding system is shut down and then restarted, a warning must be given unless the miner at the switch used to restart the conveyor can see the entire length of the conveyor. In this instance, however, I find that the belts are not "started" every time they start moving as part of their normal operating cycles. Instead, the belts are continuously operating once the system is started up. While it is true that the computer repeatedly stops and then resumes movement of the belts in order to feed tires to the rotating kilns, the system is operating continuously. The Secretary's reliance on *Tilcon* is misplaced. In that instance, a miner shut down a conveyor for maintenance and then, when he restarted the belt, he failed to provide an adequate warning. The miner standing on the belt did not know that someone was going to start the belt. On the other hand, at the time Ms. Rogers was injured, she knew that the belt was going to automatically start right away. The belts at Buzzi's tire feeding system are not "started," as that term is used in the standard, every time they resume movement after stopping for less than 30 seconds during their normal operation. The tire attendants at the plant know that, when the conveyor system is operating, the individual belts constantly stop and move again to feed tires to the kilns. They also know that they are required to stay behind the guards until they de-energize and lock out the belt.

C. Plain Meaning and Deference to the Secretary's Interpretation

When the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Alcoa Alumina & Chemicals,* 23 FMSHRC 911, 913 (Jan. 2001) (citations omitted). If, however, a standard is ambiguous, I must give special weight to the Secretary's reasonable interpretation of the regulation. An "agency's interpretation of its own regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Sec'y of Labor v. Western-Fuels Utah, Inc*., 900 F. 2d 318, 321 (D.C. Cir. 1990) (citations omitted).

I find that the language of the standard is not suited to the cycling of the belts in the tire feeding system at the plant. It is not clear that the standard contemplates that the requirement "to warn persons that the conveyor will be started" applies when belts resume movement after stopping for less than 30 seconds during normal operations. The standard clearly applies when someone makes an intentional decision to start or restart a belt. Indeed, subsection (b) of the standard only applies if the entire length of a conveyor belt is not visible to the person at the starting switch for that belt. In this case, a computer program controls the movement of the belts based on information it receives from the electric eyes located throughout the conveyor system. It is worth noting that the conventional conveyor systems at Buzzi's plant are equipped with devices that warn miners when a belt or belts are starting, if the entire length of the conveyor is not visible from the starting switch. Thus, Buzzi was aware of the requirements of the standard and Buzzi's management did not believe that the standard applied to the tire feeding system.

The Secretary argues that her interpretation is reasonable and that I owe deference to her interpretation. In this case, I find that the Secretary's application of the standard to the tire

feeding conveyor system is inconsistent with the language of the standard and that her interpretation does not serve a "permissible regulatory function." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). Her interpretation is not consistent with the language of the standard because the standard presupposes the intentional act of starting a conveyor. Here, once the conveyor system is started, the belts stop and move automatically on very short intervals. This fact is known by miners who work in and around the tire feeding system, so they are not at all surprised by the frequent cycling of the belts. There has been no showing that providing extra warnings on a virtually continual basis would improve the safety of miners or reduce the risk of an accident.

The Secretary's witnesses stretched the meaning of the standard and MSHA's interpretive material to support MSHA's interpretation of the standard. Fred Gatewood, a staff assistant to the district manager who is on detail as the assistant district manager for the South Central region, testified with respect to the application of the standard to Buzzi's tire feeding conveyors. He referred to the sentence in the PPM which states that the standard "has been uniformly interpreted by MSHA and its predecessor organizations to include both automatic and manual alarm systems" to support MSHA position. When he was questioned whether that sentence referred to automatic alarm systems rather than automatic conveyor systems, he replied that it could refer to both. (Tr. 207). He testified that this sentence in the PPM makes clear that the "standard applies to every conveyor or series of conveyors, whether it's automatic, automated, or manual." (Tr. 207). I find Mr. Gatewood's interpretation of the PPM to be absurd and completely unreasonable. The cited language quite obviously provides that MSHA and its predecessors have always allowed mine operators to use automatic and manually operated *alarm* systems to comply with the safety standard's warning requirement. The PPM does not even obliquely address conveyor systems that stop and move automatically as directed by a computerized operating system.

The Secretary failed to prove that Buzzi's tire feeding system presented a hazard in need of correction. Ms. Rogers testified that she knew that the belt was about to start when she reached over with a tool to pick up a reject tire. She saw the red laser light flash. She admitted that she took a short-cut and tried to race the belt. Her actions are akin to someone driving over a railroad grade crossing when a train is rapidly approaching. The person driving the car is well aware of the oncoming train but he thinks he can beat it. If an audible or visible warning had been given before the belt moved in this instance, Ms. Rogers would not have had any greater knowledge of the impeding movement than she already did. She knew that the belt would move again because of her knowledge of the design of the conveyor system and the fact that the laser light came on.[1] If an individual belt is shut down and locked out before a miner removes the

---

[1] I recognize that the issue in this case is whether Buzzi violated section 56.14201 and not whether the alleged violation contributed to Ms. Roger's accident. Nevertheless, it is clear to me that the warning that the Secretary seeks would not have averted this accident because Ms. Rogers knew that the belt was about to move again. Likewise, other tire handlers would have the same knowledge assuming they were properly trained. The Secretary has not shown how a visible or audible warning

guard for the belt, there is no chance that the miner will be injured by the movement of the belt. (Tr. 82). That is the procedure required by Buzzi and Ms. Rogers had the means to lock out the belt. The switch for the belt was located but a few steps from where she was standing when she attempted to remove the sidewall. If she had shut down the belt to remove the sidewall, the requirements of section 56.14201 would have applied when she restarted the belt.

It is significant that the tire feeding system has been inspected by MSHA on several occasions while it was in operation and no citations have been issued. (Tr. 357). Indeed, the conveyor system was inspected in January 2006. It was also subjected to two CAVs and no suggestions were made that additional warnings were required. (Tr. 89-94). At least part of the tire feeder was operating during the CAV on April 28, 2004. (Tr. 94). Although it was obvious that no visible or audible warnings were given during the automatic cycling of the conveyors, no MSHA inspector suggested that such warnings were required. It also appears that as of the date the citation was issued, there had been no prior enforcement of section 56.14201 in this manner at other cement plants. Buzzi established that other limestone and cement plants use similar conveyor systems to feed tires into kilns without providing audible or visible warnings when belts automatically stop and start. The present case appears to be one of first impression.

D. Abatement of the Cited Condition and the Safety of Miners

Buzzi first attempted to abate the citation by reprogramming the conveyor's alarm system to go off at 30-second intervals. Buzzi also installed signs at each belt that warned miners that the belt could start at any time. Miners complained that they were going home every day with severe headaches because of the constant alarms. The union president intervened on their behalf by sending a letter to the MSHA district manager. In this letter, the union president stated his position that Buzzi had been complying with the requirements of section 56.14201 before the citation was issued. (Ex. PX6, p. 40). He testified that the tire feeding system was completely safe before Inspector Hackworth issued the citation. (Tr. 365). He said that the frequent alarms irritate people working in the area. *Id.* He then states:

> While the Boilermakers wholeheartedly support effective safety and health programs, we feel that the audible alarm going off every 30 seconds offers nothing in the way of safety. In fact, as an irritant, it could become a safety hazard in that our people may begin to ignore warning alarms. Therefore, we recommend the audible alarm be reprogrammed back to its original startup setting.

Id.

After this letter was received, MSHA started advising Buzzi that flashing lights may be a better solution. Buzzi attempted to abate the citation by installing strobe lights that constantly flash at each belt. MSHA would not accept this method to abate the citation because the flashing

---

will improve the safety of miners.

of the lights were not coordinated with the movement of the belts. Buzzi management did not initially believe that the program logic in the PLC could be modified to time the flashing of lights with the movement of the belts. (Tr. 65, 68). The plant manager told MSHA inspectors that Buzzi had tried to modify the system to comply with MSHA's abatement requirement but that it would not work right. Buzzi's electrical supervisor told MSHA Inspector Dana White on August 23, 2006, that he had been working on it but that there was a problem ramping up the voltage because the belts only operate for a few seconds and then they stop for five to six seconds. (Tr. 71; Ex. PX 6 p. 25).

On August 24, 2006, Brian Goepfert, MSHA's Field Office Supervisor, visited the plant. The section 104(b) order was issued at the conclusion of his meeting with mine management. MSHA did not believe that the company was making sufficient progress to abate the cited condition. Buzzi had to modify its conveyor system in order to abate the citation. MSHA determined that the warning had to provide at least a five second delay between the start of the warning and the movement of the belt. In order to achieve this result, Buzzi had to slow down the cycling of the belts, which reduced the efficiency of its tire burning system. Buzzi hired a consultant to change the computer codes in the PLC in order to achieve abatement of the order of withdrawal.

The order was terminated on October 12, 2006, after Buzzi installed lights that flash five seconds before each belt begins to move as it cycles. A five second gap between a visible warning and belt movement is extremely short and its utility is doubtful. After this condition was abated, MSHA started issuing citations to other cement plants with tire feeding systems similar to Buzzi's. Inspector White testified that each of these plants were able to abate the condition within about 30 days. (Tr. 77).

Because the entire conveyor system is in a relatively small area, the warnings are quite frequent and overlap from belt to belt.[2] Not only does this cause miners to simply ignore the warnings, it is also likely to be confusing. I credit Buzzi's evidence that the warning lights are required to flash up to 18 times per minute along the first three belts to comply with MSHA's interpretation of the safety standard. As a consequence, there is a good chance that the abatement required by MSHA actually contributes to a mine safety hazard. The flashing strobe lights had to be bright enough to be seen in the daytime. The record makes clear that at night the tire handlers are frequently temporarily blinded by these lights because they are flashing virtually constantly in the vicinity of the first three conveyors. (Tr. 296, 369). Although the tire handlers spend most of their time on the ground near the singulator, they do walk along the walkways for the first three belts to remove rejects from time to time. If audible alarms had been installed, the noise level likely would have been intolerable to miners in the area. I find that the evidence fails to support the Secretary's position that the warnings she believes are mandated by the safety standard has

---

[2] The first three belts are immediately adjacent to each other and the singulator. (Ex. PX-3 p. 4). Belt No. 1 is about 12 feet long, Belt No. 2 is about 8 feet long, and Belt No. 3 is about 62 feet long. (Ex. PX-6 p. 45).

improved the safety of miners at the plant. Her interpretation of section 56.14201 has created an absurd situation at the plant that does not advance the safety of miners.[3]

E. Fair Notice of the Requirements of the Safety Standard

The Secretary must provide fair notice of the requirements of a broadly written safety standard. *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "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."

Id. (citations omitted). "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The Commission recently addressed this issue in *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) ("*Good Construction*"). Although it was a split decision, the analysis to be used is summarized in the opinion of Commissioners Jordan and Beatty, as follows:

> In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has

---

[3] The Secretary should consider promulgating a new safety standard for conveyor systems that automatically stop and move in short cycles. The advantage of this approach is that the agency will be able to consider the comments of labor and industry.

> published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnote omitted).

I find that the Secretary did not provide fair notice that she would start interpreting section 56. 154201 to apply to the automatic movement of conveyor systems like the one in place at Buzzi's plant. Neither the language of the safety standard nor MSHA's interpretive materials gave notice that conveyor systems that stop and move automatically eight times a minute are required to have visible or audible warnings every time the belt moves. My factual findings set forth above are equally applicable to this issue.

The Secretary also relies on other information available to mine operators. Mr. Gatewood testified about an article he wrote in MSHA's South Central District Newsletter. (Tr. 192). This article was also published at MSHA's website. Mr. Gatewood testified that this article provided notice to mine operators that automatic conveyor systems, like the one cited at Buzzi's plant, are required to provide a visual or audible warning every time a belt moved. (Tr. 211-14). Specifically, he stated that the following question provides such notice: "Is the system flexible enough to provide a warning when restarting only a portion of the plant during the shift?" (Tr. 212-13; Ex. PX 10). I find that this question does not provide the notice that Gatewood prescribes to it. Both parties agree that if a belt is shut down during a shift, a warning must be given when it is restarted if the entire belt is not visible from the starting switch. The question Gatewood refers to concerns the situation described in *Tilcon*. If a belt is taken out of production for maintenance, a warning must be given before the belt is restarted. Miners need to be given a warning whenever a belt is started after it has been shut down. The belts in the tire feeding system at Buzzi's plant, on the other hand, repeatedly stop and then resume movement within seconds throughout the shift while the conveyor system is in production. This cycling of the belts at Buzzi's plant bears no resemblance to the situation contemplated in Mr. Gatewood's article or under the facts in *Tilcon*.

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that a visible or audible warning was required every time a belt in the tire feeding system starts moving again during the normal cycling of the conveyors. The text of the safety standard, its placement in the overall enforcement scheme, and its regulatory history do not provide the requisite notice. The Secretary has also not published notices informing the regulated community with "ascertainable certainty" of the interpretation of the standard that she presented in this case. Since this appears to be the first time that MSHA has issued a citation for this type of conveyor system, there has not been

consistent enforcement of section 56.14201 in this manner. Indeed, several MSHA inspectors observed the tire feeder in operation prior to July 2006 without commenting that a warning system was required. In addition, a number of other cement plants in the United States have tire feeding systems similar to Buzzi's. The evidence shows that the operators of these plants have not been required to install visual or audible warnings for their automated conveyor systems that activate whenever a belt starts moving. (Tr. 297, 370, 385-87, Ex. C-19)

F. Conclusions

I find that Citation No. 6204230 should be vacated because the Secretary did not establish that section 56.14201 applies to the automatic cycling of the belts in Buzzi's tire feeding conveyor system. The language of the standard and MSHA's interpretive materials do not support the Secretary's position that the standard applies to the automatic cycling of belts. In addition, I find that the Secretary's interpretation is not reasonable and it leads to absurd results. Having either lights flashing or alarms sounding on a virtually constant basis around the first three belts of the tire feeding system would not increase safety, as the union president makes clear, and may well result in a diminution of safety. It is important to understand that my conclusion in this regard was influenced by the fact that the belts stop and then resume movement on a very frequent basis. The belts that are closest to the duty station of tire attendants independently stop and move again about eight times a minute while the other belts cycle at various rates with the slowest being twice a minute. If a conveyor system has belts that automatically stop and start again every ten minutes, for example, a different analysis may be required.

It is also important to note that the only tire attendant who testified at the hearing stated that she knows when the belt is about to start. She knows that the belt will start by the location of the tires on the belts and, more importantly, she can see the electric eye activate before the belt starts.[4] An additional warning would not serve the same safety function as a warning given before a belt is restarted after being shut down for maintenance as in *Tilcon*.

I also find that, even if the standard applies to the automatic movement of the belts, the citation should be vacated because fair notice was not provided to the mining community that the Secretary would be applying the requirements of section 56.14201 to such movement. The standard and MSHA's interpretive materials do not address the issue. Various MSHA inspectors had observed the tire feeding system at the Pryor Plant without indicating that a warning system was required. In addition, no other limestone quarry or cement plant that used automatic tire feeding systems had ever been warned, prior to July 2006, that they were in violation of the safety standard.

I reject Buzzi's argument that the activation of the electric eye serves as a visible warning, as that term is used in the safety standard. There simply is not enough evidence in the record to support its position on the issue.

Because I have vacated Citation No. 6204230, Order of Withdrawal No. 6264178 issued under section 104(b) of the Act, is also vacated as moot.

IV. ORDER

For the reasons set forth above, Citation No. 6204230 and Order No. 6264178 are hereby **VACATED** and these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

C. Gregory Ruffennach, Esq., 1717 K. Street, NW, Suite 600, Washington, DC 20036 (Certified Mail)

Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202-5036 (Certified Mail)

RWM