FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 3, 2002

TILDEN MINING COMPANY L.C., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE-2001-94-RM
v.	:	Citation No. 7841254;1/31/2001
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA Respondent	:	Docket No. LAKE 2001-95-RM
	:	Citation No. 7841255;1/31/2001
	:	
	:	Docket No. LAKE 2001-96-RM
	:	Citation No. 7841256;1/31/2001
	:	
	:	Docket No. LAKE 2001-97-RM
	:	Citation No. 7841257;1/31/2001
	:	
	:	Docket No. LAKE 2001-98-RM
	:	Citation No. 7841258;1/31/2001
	:	
	:	Docket No. LAKE 2001-99-RM
	:	Citation No. 7842159;1/31/2001
	:	
	:	Docket No. LAKE 2001-100-RM
	:	Citation No. 7842160; 1/31/2001
	:	
	:	Docket No. LAKE 2001-101-RM
	:	Citation No. 7842161; 1/31/2001
	:	
	:	Docket No. LAKE 2001-102-RM
	:	Citation No. 7842162; 1/31/2001
	:	
	:	Docket No. LAKE 2001-103-RM
	:	Citation No. 7841263; 1/31/2001
	:	
	:	Docket No. LAKE 2001-104-RM
	:	Citation No. 7841264; 1/31/2001
	:	
	:	Docket No. LAKE 2001-105-RM
	:	Citation No. 7841265; 1/31/2001
	:	
	:	Docket No. LAKE 2001-106-RM
	:	Citation No. 7841266; 1/31/2001
	:	
	:	Docket No. LAKE 2001-107-RM
	:	Citation No. 7841267; 1/31/2001
	:	Docket No. LAKE 2001-108-RM

: Citation No. 7841268; 1/31/2001
:
: Docket No. LAKE 2001-109-RM
: Citation No. 7841269; 1/31/2001
:
: Docket No. LAKE 2001-110-RM
: Citation No. 7841270; 1/31/2001
:
: Docket No. LAKE 2001-111-RM
: Citation No. 7841271; 1/31/2001
:
: Docket No. LAKE 2001-112-RM
: Citation No. 7841272; 1/31/2001
:
: Docket No. LAKE 2001-113-RM
: Citation No. 7841273; 1/31/2001
:
: Docket No. LAKE 2001-114-RM
: Citation No. 7841274; 1/31/2001
:
: Docket No. LAKE 2001-115-RM
: Citation No. 7841275; 1/31/2001
:
: Docket No. LAKE 2001-116-RM
: Citation No. 7841276; 1/31/2001
:
: Docket No. LAKE 2001-117-RM
: Citation No. 7841277; 1/31/2001
:
: Docket No. LAKE 2001-118-RM
: Citation No. 7841278; 01/31/2001
:
: Docket No. LAKE 2001-119-RM
: Citation No. 7841279; 1/31/2001
:
: Docket No. LAKE 2001-120-RM
: Citation No. 7841280; 1/31/2001
:
: Docket No. LAKE 2001-121-RM
: Citation No. 7841281; 1/31/2001
:
: Docket No. LAKE 2001-122-RM
: Citation No. 7841282; 1/31/2001
:
: Tilden Mine
: Mine ID 20-00422

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant;
Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Secretary.

Before: Judge Weisberger

Statement of the Case

These consolidated cases are before me based on Notices of Contest filed by Tilden Mining Company, L.C., (Tilden), challenging the issuance by the Secretary of Labor of various citations alleging violations of 30 C.F.R. § 14107(a). Pursuant the notice, the cases were heard in Marquette Michigan on June 12 and 13, 2001. Subsequent to the hearing, the parties each filed Proposed Findings of Fact and a Brief. The parties also filed replies to their adversary's initial filings.

Findings of Fact and Discussion

I. Background

1. Tilden mines and processes ore bearing iron into iron ore pellets.

2. These cases involve guarding conditions at the tail pulley on 14 No. 22 conveyors, the head pulleys on four of the No. 26 conveyors, the take-up and wrap-over pulleys on 13 of the No. 26 conveyors, and the tail pulley on the 26-A conveyor, all located in the balling area of the Pellet Plant at Tilden. Balling attendant, maintenance workers, and lube technicians work in this area.

3. Concentrate containing 65% iron, a fluxing agent, and a binder is fed into balling drums by each of the No. 22 conveyors — Nos. 22-1 through 22-14. There is one such conveyor for each balling drum. The drums form the concentrate into "green balls" or "unfired" pellets for further processing.

4. These balls exit the drums and proceed through a "scalper" or sizing mechanism onto one of the No. 26 conveyor belts — Nos. 26-1 through 26-14. There is one such conveyor for each balling drum.

5. These belts deposit the balls onto either the Nos. 26-A, 26-B, 26-C or 26-D conveyor belts.

6. The Nos. 26-1 through 26-14 conveyor belts, and the No. 26-A conveyor belt are at

an intermediate level in the plant below the level where the No. 22 conveyors and the balling drums are located.

7. The washdown level of the Pellet Plant is located below the intermediate level where the No. 26 conveyors are located. There is a bin area on a level above the main balling drum floor.

8. There are two areas of balling lines. One is called "Tilden 1" and the other is called "Tilden 2". Tilden 1 contains balling line Nos. 1 thru 7 and Tilden 2 contains balling line Nos. 8 thru 14. These lines are located on opposite sides of the same level of the plant. The area immediately between them is open to the washdown floor.

9. These balling mill lines, with their associated conveyors, were installed in the 1970s.

10. The guarding on the various pulleys that was in place at the time of the inspections at issue had been inspected by MSHA on numerous occasions. The guarding on the No. 22 tail pulleys was raised to its current height in 1980 as a result of an MSHA inspection and had been approved by MSHA inspectors at the time. Based on the uncontradicted and unimpeached testimony of Bradley Nelson, Tilden's plant repairman, I find that approximately seven years ago these guards were reduced in height to lighten them to make them easier to move.

11. The conveyors and the guarding at issue were routinely inspected twice a year by MSHA inspectors, and no citations for the No. 22 conveyor tail pulleys, the No. 26 head pulleys, the No. 26 take-up and wrap-over pulleys, and the No. 26-A tail pulley had been issued since 1980.

12. During his September, 2000 inspection, MSHA inspector Steve Field gave a verbal advisory to Douglas Brazeau, an agent of Tilden, that guards along the No. 22 line of conveyor belts were inadequate.

13. However, Field did not give specific advice as to each numbered conveyor. However, he advised Brazeau to extend the guards on any conveyor on the No. 22 line of conveyors that was "... similar to... the No. 22 conveyor we looked at.". (Tr. Vol. I, 29)

14. Brazeau asked Field how long Tilden had to get the extension of the guard done, and Field told him, if they were not extended they would be cited in a follow-up inspection.

15. Brazeau did not start to change these guards because he had not completed the job of modifying other guards cited before Field returned to further inspect the plant.

16. It take one or two days to make a set of guards for a tail pulley.

17. In December, 2000, MSHA inspector Dan Hongisto reminded Jim Paquette, another agent of Tilden, regarding Field's earlier advisory, in September 2000, pertaining to improving some guarding that he had found to be inadequate. Hongisto told Paquette that he expected that Field would issue citations if these conditions were not corrected. However, Hongisto did not identify the specific conveyors at issue.

18. In late December, 2000, Paquette told Leonard Parker, Tilden's manager of safety and environment about the conversation he had with Hongisto regarding the latter's concerns about guarding at the Tilden Mine.

19. Parker and Paquette then made a general inspection of the Tilden pellet plant balling area, the area of the subject citations, of the adequacy of the guards to prevent accidental or inadvertent contact, and determined that the existing guards were adequate.

20. In late January 2001, Field inspected the Pellet Plant.

21. On February 2, 2001, Field issued the 29 citations which are at issue in these proceedings and which involve alleged violations of 30 C.F.R. Section 56.14107(a). He based his determination on his belief that Section 56.14107(a) required guarding that would prevent all contact with the moving parts of the cited No. 22, and No. 26 conveyor belts in the general area of the cited belts.

22. The areas that were cited along the No. 22 conveyor line in January, 2000, were the same as those that had been identified by Field in his September, 2000 advisory to Brazeau.

II. The validity of the Citations at Issue

At issue in these consolidated cases is the validity of 29 citations alleging violations by Tilden of 30 C.F.R. Section 56.14107(a) which provides that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and take-up pulleys ... and other similar moving parts that can cause injury". (Emphasis added.) The cited violative conditions relate to the tail pulleys on the No. 22 conveyors, the head pulley on a No. 26 conveyor, the head, take-up and wrap-over pulleys on the No. 26 conveyors, and the tail pulley on the left side of the 26-A conveyor belt. In essence, the weight of the evidence establishes, with regard to all cited conditions, that, either due to the existence of guards in place, including mesh guards, rails, and other structures, or the location of the moving machine parts in relation to miners accessing the area, contact with the moving machine parts was unlikely. Indeed, it was stipulated to by the parties, prior to the hearing, that all the citations allege that the likelihood of injury is "unlikely". (Jt. Ex.. 1, par. 9).

A. The Secretary's Position

It is the Secretary's position, as set forth in her Post-Trial Brief, that regarding all the cited conditions, although contact with moving parts may have been "unlikely", they were not in compliance with Section 14107(a), supra, because the conditions were such that a person could have made contact with the moving machine parts. In support of its position, the Secretary argues that, (1) its enforcement action is consistent with the language of the standard and the protective purposes of the Act; (2) that legislative history demonstrates congressional intention to prevent, not merely to minimize violative conditions; (3) that the Secretary's interpretation best promotes the protection of Tilden's miners, as excluding the cited guards would thwart the protective purposes of the Act; (4) that, accordingly, the Secretary's interpretation deserves deference; and (5) that the Mine Act provides for liability without fault[1].

For the reasons that follow, I do not find much merit in the Secretary's arguments and find that it has not been established that the cited conditions were in violation of Section 14107(a) supra.[2]

1. The Preamble to Section 56.14107(a), supra, and MSHA's Program Policy Manual

In support of its position that, in essence, the Section 56.14107(a), supra, requirement for guarding is not limited to situations of protection against inadvertent or accidental contact, but encompasses conditions where contact can be made, the Secretary strongly relies on the preamble to the Federal Register ("preamble") which contains a discussion and summary of the final promulgated version of Section 56.14107(a) (56 Fed. Reg. 32509, Aug. 25, 1988). The preamble notes that some commenters suggested that "... the standard also permit an exception for situations where the exposed moving parts are 'located out of reach' " (id.). The next sentence of the preamble states as follows: "[h]owever, this phrase would create uncertainty as to the standard's application." In not accepting the exception urged by the commenters, the preamble states as follows: "[u]nder the final rule, the standard applies where the moving machine parts can be contacted and cause injury." (Id.)

The preamble further notes that some commenters believed "... that guards should provide protection against inadvertent, careless, or accidental contact, but not against deliberate or

---

[1]The Secretary also argues that because estoppel does not operate in enforcement proceedings, this doctrine can not be applied to defeat the validity of the citations at issue. Inasmuch as I did not take estoppel into account in reaching a decision in these cases, it is not necessary to further discuss this argument.

[2]In light of this conclusion it is not necessary to make a decision regarding the Secretary's argument that the inspector appropriately deemed Tilden's negligence to be high regarding the cited conditions at the No. 22 belts.

purposeful actions. ...[and that] guards which totally enclose moving parts [are] counterproductive to other safety considerations ... ." (Id.) After noting this opinion, the preamble sets forth the following language:

> [i]n reviewing the statistics in which persons working in mines have lost hands, arms, legs, and their lives to moving machine parts, MSHA notes that in most of those instances the persons were performing deliberate or purposeful work-related actions with the machinery. The installation of a guard to enclose the moving machine parts would have prevented most of those injuries." (Id.) (Emphasis added.)

Thus, it would appear that it was recognized in the preamble that guarding is required not to prevent all contact but would be limited to preventing either deliberate work-related actions or purposeful work-related actions. In the instant proceeding no evidence has been adduced as to any scenario wherein contact with moving parts could result from situations where a miner is engaged in the performance of either deliberate or purposeful work-related actions. While contact can physically be made with the moving parts at issue, there is no evidence relating such contact with the performance of either deliberate actions or purposeful work-related actions.

I am cognizant of the second sentence of the preamble regarding the objective of Section 56.14107(a) supra, as follows: "The Standard clarifies that the objective is to prevent contact with these [moving] machine parts." (Id.) However, it is clear that the expressed objective was not to prevent all contact as this word was omitted from this sentence. Further, the scope of contact to be guarded against appears, as noted above, to be based on statistics concerning injuries resulting from moving machine parts, and thus appears to be limited to those contacts resulting from either deliberate or purposeful work-related actions.

In addition, the Secretary relies upon MSHA's Program Policy Manual ("PPM") which contains the following language pertaining to Section 56.14107(a), supra: "[a]ll moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection" (Jt. Ex. 1, par. 26). However, it is most instructive, that, regarding when Section 56.140107(a) supra, should be cited at conveyor locations the PPM provides as follows: "[t]his standard is to be cited when a guard at conveyor locations does not extend a distance sufficient to prevent any part of a person from accidentally getting behind the guard and becoming caught, or in those instances when there is no guard at the conveyor-drive, conveyor-head, conveyor-tail, or conveyor take-up pulleys" (Emphasis added.) (Jt. Ex.1, par. 26). Thus the PPM does not provide, as argued by the Secretary, that Section 14107(a), supra, is to be cited in all situations where persons can contact moving parts that cause injury. Rather it indicates that Section 14107(a), supra, is to be cited where an existing guard is not sufficient to prevent accidental conduct, or where there is not any guard present.

Thus, the preamble and the PPM relied on by the Secretary do not unequivocally establish that Section 14107(a), supra, was intended to require guarding to prevent all contact.

2. Deference

In essence, it is the Secretary's argument that the Metal Non-Metal Division of MSHA interprets Section 56.14107(a) supra, as encompassing guarding against any contact not just merely accidental contact, and that this interpretation must be deferred to. In this connection, the Secretary cites case law that established that an adjudicatory body should give great deference to an agency's interpretation of a regulation promulgated by the agency, and that this interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or purpose of the regulation (see, Martin v. OSHRC, 499 US 144, 148-149 (1991), and other Court of Appeals and Commission cases cited on pages 31 and 32 of the Secretary's Brief). However, the Secretary has not set forth with any precision or particularity, the specific citation and embodiment of its authoritative interpretation of the scope of Section 56.14107(a) supra. In this connection, the Secretary cites the PPM and Preamble to Section 56.14107(a) supra, and argues, that "policy issuances, and the regulation's background," support her interpretation. It does not appear that these two documents are unequivocally supportive of the Secretary's interpretation (I(A)(1), infra). Nor is it asserted by the Secretary that the PPM and/or Preamble specially embody her interpretation and constitute her authoritative interpretation. Hence, the Secretary has not convincingly set forth the authoritative source of its interpretation, i.e., precisely where it is set forth, and what specific language does it contain. Further, the PPM and the preamble are not unambiguously consistent with each other, and consistent with the Secretary's argument set forth in its brief. (See, I(A)(1), infra.)

I take cognizance of the deference cases set forth on pages 31 and 32 of the Secretary's Brief. However, it is significant to note that the more recent cases, do not set forth a general rule that the adjudicatory body is mandated to defer to the Secretary's interpretation of the regulation, as long as that interpretation is reasonable and consistent with the Act. Instead these cases discuss various factors that must be considered in evaluating the weight to be accorded the Secretary's interpretation. In United States v. Mead 533 U.S. 218, 150 L. Ed. 2nd 292 [No. 99-1434], (June 18, 2001), the Court analyzed the degree of deference to be accorded an agency's construction of its statutory scheme under the doctrines enunciated in Chevron, U.S.A. Inc. v. Natural Resources Defense Council 467 U.S. 837 (1984). The Court, in Mead, 150 L. Ed. 2nd, supra, at 304, referring to Skidmore v. Swift & Co. 323 U.S. 134 (1944), stated as follows: "The fair measure of deference to an agency administering its own statute as been understood to vary with circumstances, and Courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position ... ." (Emphasis added.)

I note that Mead, supra, involved the issue of the degree of deference to be accorded an agency's interpretation of a statute, whereas the case at bar involves the degree of deference to be accorded an agency's interpretation of its own regulation. However, it would appear that the rationale in Mead, supra, setting forth that the degree of deference varies with the circumstances of the case, would seem to apply to equal force to the case at bar. Indeed, in Akzo Nobel Salt v. FMSHRC 212 F. 3rd 1301 (D.C. Cir. 2000), the Court of Appeals noted, in a split decision, that

the Commission's interpretation of 30 C.F.R. § 57.11050 was the same as that espoused by the Secretary before the Court of Appeals. The Court of Appeals in Akzo, supra, stated that generally it defers to an agency's interpretation of its own regulations, unless that interpretation is erroneous or inconsistent with the regulation. However, the Court of Appeals, in vacating the Commission's decision and remanding the matter to obtain from the Secretary her authoritative interpretation, qualified the general applicability of deference to the Secretary's interpretation as follows: "... we recognize that Courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation, but only where they 'reflect the agency's fair and considered judgement on the matter in question' Auer v. Robbins 519 U.S. 452, 462, 117 S. Ct. 905, 137 L. Ed. 2nd 79 (1997), Church of Scientology of California v. IRS, 792 F. 2nd 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring);" (Akzo, supra, at 1304). Significantly, the Court in Akzo, supra, went on to reason as follows:

> In assessing the likely of such 'considered judgement' we have noted, for example, whether the agency had previously 'adopted a different interpretation of the regulation or contradicted its position on appeal,' National Wildlife Federation v. Browner, 127 F. 3rd 1126, 1129 (D.C. Cir. 1997), as, of course, the Secretary has here. Compare Association of Bituminous Contractors, Inc. v. Apfel, 156 F. 3rd 1246, 1252 (D.C. Cir. 1998), deferring to an agency's litigation position where it appeared simply to articulate an explanation of long standing agency practice. (Id.)

(See also, Nolichuckey Sand Co., Inc., 22 FMSHRC 1057, at 1062, (2000), citing Auer, supra, and Akzo, supra).

In the case at bar, if it is the Secretary's implicit argument that either its litigation position and/or the opinion of the inspector who issued the citation being contested, constitute the Secretary's interpretation that must be deferred to, this argument fails as it has not been established that these interpretations reflect MSHA's "considered judgment". The Court of Appeals in Akzo supra, in its analysis of an agency's considered judgement focused on whether the agency had previously adopted a different interpretation or whether it was articulating an explanation "... of long standing agency practice ... .". (Akzo, supra, at 1304.) In contrast, in the case at bar, the Secretary's litigation position and the interpretation of the issuing inspector, is not in harmony with MSHA's long standing agency practice. I note that the conditions cited have been in existence for several years and had not been cited in past inspections. Although an agency may change its policy (see, Thomas Jefferson University v. Shalala, 512 U.S. 504, 515-18 (1994), the Secretary herein has not articulated any rationale for her having changed her enforcement policy regarding citation of the conditions at issue. Such a change appears to be as a result of the thought processes of one individual, i.e., the issuing inspector, and that the Secretary's litigation position is a "*post hoc* rationalization", to which the Court of Appeals in Akzo, supra, indicated that it would not defer to. (Akzo, supra, at 1304-1305 citing Martin, supra, at 156.)

Therefore, although the Secretary's interpretative position has been considered, I find that it has not been established to be either a considered judgement of the agency, or unequivocally set forth in any authoritative interpretation. Thus, its position need not be deferred to.

B. The Commission's Decision in Thompson Brothers Coal Co., 6 FMSHRC, 2094 (1984)

Further, in evaluating the Secretary's position regarding the scope of Section 56.14107(a) supra, and its applicability to the conditions at issue, I am guided by the Commission's decision in Thompson Brothers Coal, Inc. 6 FMSHRC 2094 (1984), which involved the Commission's review of a decision by a Commission Judge (4 FMSHRC 1763 (September 1982)), who had found that the lack of guarding at certain fan-blades and air-compressor belts and pulleys located in front of a truck's engine, violated 30 C.F.R. Section 77.400(a) which, in essence, requires the guarding of moving machine parts "... which may be contacted by persons, and which may cause injury to persons ... .".[3] The Judge's conclusion was based upon the testimony of the inspector who issued the citations at issue, that a miner checking or repairing the engine while the truck was stationary and the engine was idle, could contact unguarded cooling fan and air compressor belts, and sustain an injury. 4 FMSHRC at 1763. In affirming the Judge, the Commission concluded that the guarding standard at issue (Section 77.400(a), supra.) "... contemplates guarding of machine parts subject to the standard where there is a reasonable possibility of contact and injury." (6 FMSHRC supra at 2096.) The Commission, in reaching its conclusion, reasoned that use of the word may in the key phrases in the standard at issue, i.e., "may be contacted" and "may cause injury", (Emphasis added.) "... introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended." (6 FMSHRC supra at 2097.) Significantly, the Commission went on to find as follows: "[W]e find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." (Emphasis added.) (Id.) The Commission further set forth that the application of this test, "cannot ignore vagaries of human conduct", and "... requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts,

---

[3]The Secretary, in a reply brief, argues that Thompson, supra, should not be relied upon in determining the scope of Section 56.14107(a), supra, since Thompson was decided under Section 77.400, supra, which introduces the element of probability of contact in its use of language requiring the guarding of moving parts "which may be contacted by persons", whereas Section 56.14017(a) supra does not have such language limiting its protection to parts which may be contacted but instead requires guarding to protect persons from contacting moving parts. Although the Secretary is correct in its comparison of the literal wording of Section 77.400, supra, and Section 56.14107(a), supra, I note that significantly, the preamble, relied on by the Secretary in its interpretation of the scope of Section 56.14107(a) supra, states that "... the Standard [Section 56.14107(a), supra,] applies where the moving machine parts can be contacted and cause injury." (Emphasis added.) The common meaning of can is "to have the possibility' (Random House Unabridged Dictionary, 2nd Edition (1998) at 302). Similarly, in common usage, the word may is "used to express possibility" (Random House, supra,at 1189). Significantly, Random House, supra, notes that can and may "... are frequently but not always interchangeable in senses indicating possibility ... .". (Random House, supra at 302). I thus find that although Thompson may not be conclusively relied upon as binding Commission precedent regarding its interpretation of the scope of Section 56.14107(a) supra, the guidelines it sets down for determining the applicability of a guarding standard apply with equal force as an analytical framework in evaluating the applicability of Section 14107(a), supra, to the conditions at issue.

work areas, ingress and egress, work duty, and as noted, the vagaries of human conduct." (Emphasis added.) (Id.) In Thompson, supra, in concluding that the evidence established a reasonable possibility of contact and injury, and hence a violation under the cited guarding standard, the Commission noted following facts: (1) that on occasion mechanics could be called on the examine or work on the engines while the engines were idling; (2) that a miner checking or working on the engine while the engine was running could come in contact with any of the cited machine products; (3) that the operator's witnesses all agreed that contact was possible even though they regarded it as unlikely, and that "[a]t a minimum, contact could result from such causes as a sudden movement, stumbling, or momentary distraction or inattention". (Id). The Commission then summarized the facts presented which led to its conclusion as follows: "[G]iven the physical accessibility of the engine compartment, the fact that mechanics check and work on running engines, and that contact with the cited machine parts could occur, we conclude that a reasonable possibility of contact existed." (Id. at 2097.)

In the case at bar, all of the parts cited, were in area where, at times, miners were present. However, there is no evidence of any work duties of any miners that would require them to be in a situation where there was a reasonable possibility of contact with exposed moving parts. Specifically, there is no evidence in the record, in contrast to Thompson, supra, that miners are required to check and work on running equipment in areas of close proximity to the exposed parts.

1. The No. 22 Tail Pulleys (Citation Nos. 7841254 through 7841267, Docket Nos. LAKE 2001-94 through LAKE 2001-107)

Essentially, the record is clear that a miner could contact the tail pulleys at the twenty-two conveyor in spite of existing guarding and railing. However, in order to contact any moving parts, a miner would have had to approach the guard at approximately chest level and reach over and down in order to deliberately contact the moving parts. The top of the tail pulley itself was 10 inches below the top of the guard (not including the rail) and the pinch point where the belt went around the pulley was 24 inches below the top of the guard (not including the rail) and 13 inches horizontally away from the guard. Although persons have access to the floor grating, which is somewhat adjacent to the tail pulleys, there is no evidence in the record relating such awkward contact to any purposeful or deliberate work-related activity. The belts and pulleys are not in operation when maintenance is performed on the pulleys. Also, regular lubrication of the pulleys is performed by way of grease-lines that extend beyond the guards so that the guards fully protect a person performing this operation from contact with the pulleys.

On the other hand, Bradley G. Nelson, one of Tilden's plant repairmen who performs maintenance, testified that the belts are adjusted when the belt is in operation, by applying a wrench to bolts located on the tail pulleys. However, on cross-examination, he indicated that this maintenance is performed while the guards are still in place, inasmuch as the bolts protrude through holes in the guards and extend beyond the guards. Thus, protection is still provided to prevent contact with the pulleys.

Field opined that, despite the awkwardness of making contact with the pulley which could be physically accessed only by a miner reaching down 24 inches in a vertical distance then reaching out 13 inches in a horizontal distance, there could be inadvertent or accidental contact or contact through inattentiveness. Upon continuing cross-examination, he agreed that accidental conduct would have to be by somebody "walking by very close to the guard". (Tr. Vol II, 136), and that the normal walkway is on the right side of the conveyor. When asked whether miners would walk "right up against the conveyor" (id.), he said they could. However, significantly, he added in response to additional questioning, as follows: "I don't know that anybody would." (Tr. Vol I, 137). Thus, I find Field's testimony to be of insufficient probative value to establish that there was a reasonable possibility of accidental or inadvertent contact.

I note the testimony of Field that, regarding the No. 22-13 conveyor belt, that one "could stumble against the guard and fall into the pulley." (Tr. Vol I, 31) [4] Aside from this conclusionary, statement he did not explain the basis for his opinion. In the absence of any explanation for his opinion, it is difficult to understand how a person stumbling would have any part of his body go over an existing guard that was 50 inches high, extend a further 13 inches in a horizontal distance, and then extend downward approximately 10 inches to contact the top of the tail pulley.

In this vein, I note, the testimony of Leonard R. Parker, Tilden's manager of safety and environment, who worked on the installation of the conveyors at issue, that there would not be any potential for a person walking to the right of the conveyor, or behind the conveyor, and stumbling, to contact the conveyor tail pulley. I accord more probative value to Parker's opinion, rather than Field's opinion, as the former provided a clear basis for his opinion as follows: "I guess, put in simple terms, it's simple physics, a body in motion tends to stay in motion. If you are going parallel to the guard, you would fall forward going down and forward parallel to the guard, not into the guard." (Tr. Vol II, 39).

Taking into account all the above, I conclude that as a consequence of a lack of entire guarding of the tail pulleys at issue, injury from contact was unlikely, contact was unlikely, and that it has not been established that there was a reasonable possibility of contact with any of the moving parts of the No. 22 tail pulleys. Accordingly, I find that it has not been established that conditions at these areas violated Section 14107(a) supra. Hence, the Notice of Contest filed regarding Citation No. 7841266 is sustained. Since the parties agreed that the disposition of this citation should apply to the following citations: 7841254 through 7841267, the Notices of Contest filed regarding these citations are sustained.

[4]However, Field conceded that the presence of a rail in the area would prevent somebody strumbling due to coming to contact with the tail pulley.

2. Head pulleys on the No. 26 Conveyors (Citation Nos. 7841268 thru 7841271, Docket Nos. 2001-108 thru 111)

Essentially, it is the Secretary's position that the head pulley, which is the subject of Citation No. 7841268,[5] was not sufficiently guarded because a person could contact the pulley or its pinch-point. This assertion is based upon (1) Field's testimony by that balling area attendants, lube technicians, and maintenance personnel could contact that head pulley, and (2) Nelson's testimony that he could contact the pulley. Specifically, he indicated that as he is 68 inches tall, he could reach upward approximately eight feet. However, the Secretary did not adduce any evidence relating any contact to any purposeful, deliberate or work-related activities. Further, even Field conceded that it was unlikely that a person could contact the pulley. Indeed, as explained by Tilden's witnesses, Parker, and James Paquette, whose testimony in these regards has not been contradicted, impeached, or rebutted, in order to contact the moving head pulley, a person would have to overcome the trip-cord, a conveyor belt, a pulley or an idler. I also find persuasive Paquette's testimony that due to the height of the pulley, being approximately 80 inches above the ground, it is doubtful that a person could contact the pulley if one were to fall down in the area.

Also, vertical and horizontal access to the head pulley was limited somewhat due to the presence of two vertical steel structures that left an opening between them of only eight to 10 inches measured on a horizontal plane. Moreover, since the pulley at issue is above another conveyor belt, and extends more than one foot beyond it, the emergency stop-cord on the lower belt would be between a miner and the head pulley at issue. Hence, the possibility of contact would be further limited.

For these reasons I find that although the head pulleys were unguarded, it has not been established that there was reasonable possibility of contact with these moving parts (see, Thompson, supra). Thus, I find that it has not been established that the conditions at the cited head pulleys violated Section 10407(a) supra, and the Notices of Contest regarding Citation Nos. 7841268 through 7841271 are sustained.

3. Take-Up and Wrap-Over Pulleys on the No. 26 Conveyor Belt (Citation Nos. 7841269 thru 7841281, Docket Nos. LAKE 2001-109 thru LAKE 2001-121)

Essentially, it is the Secretary's position that contact could be made with the take-up and wrap-over pulleys of the No. 26 conveyor line, and thus the citations issued for these violations should be affirmed.

---

[5]Citation Nos. 7841270, and 7841271 also involve such a head pulley. The parties agreed that the decision regarding Citation No. 7841268 should also apply to Citation Nos. 7841269, 7841270 and 7841271.

Thirteen citations[6] involve the adequacy of guarding at sets of two wrap-over pulleys and one take-up pulley, which, in combination, act the keep tension on the conveyor belt located above these pulleys. The take-up and wrap-over pulley units were protected by railings or expanded metal guards on three sides. The bottom area of the take-up wrap-over pulley units located above a grating where a person might stand, are separated from the floor grating area by a double-rail (Citation Nos. 7841269, 7841271, 7841272, 7841275, 7841279, 7841280, and 7841281). In another cited unit there was a single-rail between the deck area and the take-up wrap-over pulley unit. (Citation No. 7841274.) A triple-rail was between the deck area and the take-up wrap-over pulley unit cited in Citation No. 7841277. Regarding the last four units cited (Citation Nos. 7841270, 7841276, 7841273, 7841278), a metal screen was between the deck area and the take-up wrap-over pulley unit.

a. The Wrap-over Pulleys

The grating or deck area was separated from the take-up wrap-over pulley unit by a steel I-beam 19 inches high. The front wrap-over pulley of each unit was 80 inches above the deck grating, and recessed back from the edge of a rail or screen by approximately one foot. The second wrap-over pulley was located behind the front wrap-over pulley and the take-up pulley. There was a limited amount of traffic in the area under the conveyor belt where the take-up wrap-over pulleys were located. However there is insufficient evidence in the record to establish a relation between purposeful or work-related activities in the area and contact with these pulleys. The areas were accessed by miners to perform lubrication. However, this operation was performed by way of extended grease-lines which permitted lubrication from the walkway parallel to the belt. Although there was a possibility of contact with the wrap-over pulleys, the evidence fails to establish that such contact would have been reasonably possible. (See Thompson, supra) Due to the height of the wrap-over pulley, being approximately 80 inches above the floor grating where a person would stand, even allowing for the vagaries of human conduct, the record does not establish any basis for a conclusion that these pulleys could have been contacted by a person stumbling or being careless or inattentive. The only way for a person standing next the mesh guard to contact the wrap-over pulley, would have been to reach around or under the railing or over the top of the railing one foot to make contact. There is nothing in the record relating the possibility of this type of contact to any purposeful or work-related activity.

b. The Take-up Pulleys

Each take-up pulley, located between two wrap-over pulleys, was only 36 inches above the level of the grating. However, for the most part, the tail pulleys were covered by a conveyor belt, and recessed two feet behind either railings or expanded metal screen guards. Further, contact with the take-up pulleys from below, i.e., from the deck were a person might stand, was limited due to the presence of either rails, or a metal screen. Moreover, the fact that the take-up pulleys were recessed two feet horizontally behind either railings or metal screen guards, would further

[6]Citation Nos. 7841269 through 7841281.

limit the possibility of contact. Also, as set forth above, (III(C)(1)), there is no evidence relating the possibility of contact with the take-up pulleys through either purposeful or work-related activities. For all the above reasons I conclude that the record has failed to establish that there was any reasonable possibility of contact with either the wrap-over or the take-up pulleys that were cited.

4. The No. 26-A Conveyor Tail Pulley (Citation No. 7841282, Docket No. LAKE 2001-122)

The No. 26-A tail pulley that was cited was equipped with a guard that extended eight inches beyond the edge of the pulley. The pulley was located 64 inches above the floor grating, and approximately 12 inches from the edge of the floor grating. To contact the pulley, a person would have to lean forward or against the moving conveyor belt, reach around the existing guard and then reach toward the back of the pulley. Further, wheels on the conveyor belt would prevent a miner from positioning his body against the conveyor belt to reach the pulley. The record does not establish that such an awkward contact would have had any relation to the performance of purposeful or work-related activities. Indeed, extended grease-lines are provided. Also, the issuing inspector set forth in the citation at issue that foot traffic in the area was "slight". (Gx. 18.) It is also significant to note that the inspector, in the citation, indicated that contact was "unlikely". (Id.)

Taking into account all the above, I conclude that it has not been established that the conditions at the tail pulley of the No. 26-A conveyor belt were such that there was a reasonable possibility of contact with the tail pulley. Accordingly, I find that it has not been established that the cited conditions violated Section 56.14107(a), supra.

CONCLUSION

Based on all the above reasons, I conclude that the Secretary has failed to establish that any of the citations issued in these proceedings constituted violations of Section 56.14107(a) supra,[7]

[7]The parties stipulated that if it is found that there is no violation with respect to Citation No. 7841266, then Citation No. 7841254 thru 7841267 should be dismissed. Similarly, the parties stipulated, in essence, that should a finding be made of no violation regarding Citation Nos. 7841268, 7841270, and 7841272,a similar finding should be made regarding the following Citation Nos.: 7841269, 7841270, 7841271, 7841273 7841275, 7841276, 7841278, 7841279, 7841280, and 7841281.

ORDER

It is **Ordered** that the Notices of Contest regarding the following Citations are sustained: Citation Nos. 7841254, 7841255, 7841256, 7841257, 7821258, 7841259, 7841260, 7841261, 7841262, 7841263, 7841264, 7841265, 7841266, 7841267, 7841268, 7841269, 7841270, 7841271, 7841272, 7841273, 7841274, 7841275, 7841276, 7841277, 7841278, 7841279, 7841280, 7841281, and 7841282. It is also **Ordered** that the following Docket Nos. are **Dismissed**: Docket No. LAKE 2001-94 thru and including Docket No. LAKE 2001-122.

Avram Weisberger
Administrative Law Judge

Distribution: Certified Mail

Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Fl. Pittsburgh, Pennsylvania

Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, Illinois

/sc