FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 5, 2001

ASARCO INCORPORATED,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2000-603-RM
	:	Citation No. 7945733; 8/07/2000
v.	:	
	:	Docket No. WEST 2000-604-RM
	:	Citation No. 7945734; 8/07/2000
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2000-605-RM
MINE SAFETY AND HEALTH	:	Citation No. 7945735; 8/07/2000
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 2000-613-RM
	:	Citation No. 7945743; 8/08/2000
	:	
	:	Docket No. WEST 2001-44-RM
	:	Citation No. 7945587; 9/25/2000
	:	
	:	Mission Mine Underground
	:	Mine ID. No. 02-02626

DECISION

Before: Judge Manning

These proceedings are before me on notices of contest filed by Asarco Incorporated ("Asarco") against the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act ff 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued five citations against Asarco alleging violations of the Secretary's safety standard at 30 C.F.R. § 57.14131 at the underground mine at its Mission Mine Complex in Pima County, Arizona.

The parties agreed to waive their right to a hearing and submitted joint stipulations of fact. Each party filed a motion for summary decision and responded to the other party's motion for summary decision. These cases present the issue of whether section 57.15131 applies to haulage equipment that is designed for underground use but which is brought to the surface on a regular basis to dump ore. The Secretary contends that the standard applies to the cited haulage trucks because they are used on the surface. Asarco maintains that the standard does not apply to the cited trucks because they are not "surface haulage trucks."

The safety standard at issue provides, in pertinent part:

> **§ 57.14131 Seat belts for surface haulage trucks**.
>
> (a) Seat belts shall be provided and worn in haulage trucks.
>
> . . . .
>
> (c) Seat belts required under this section shall meet the requirements of SAE J386, "Operator Restraint Systems for Off-Road Work Machines," 1985, which is incorporated by reference in accordance with 5 U.S.C. § 552(a).

Five section 104(a) citations are at issue in these cases. Citation No. 7945733 states that the operator of a Toro 40D Haul Truck ("Toro truck" or haulage truck") was not wearing a seat belt while driving on the surface at the mine, in violation of 57.14131(a). Citation No. 7945734 states that the operator of another Toro truck was not wearing a seat belt while driving on the surface at the mine, in violation of 57.14131(a). Citation No. 7945735 states that the seat belt installed in a Toro truck did not meet the requirements of SAE J386, in violation of 57.14131(c). Citation No. 7945743 states that the seat belt installed in another Toro truck did not meet the requirements of SAE J386, in violation of 57.14131(c). Citation No. 7945587 states that seat belt installed in still another Toro truck did not meet the requirements of SAE J386, in violation of 57.14131(c). Four of these citations were issued in August 2000 and the other one was issued in September 2000.

I. JOINT STIPULATIONS

The key factual stipulations entered into by the parties are as follows:

8. The Asarco Mission Complex is made up of the Mission Underground Mine, the Mission Open Pit Mine, and two mills.

9. The portals of the Mission Underground Mine are located near the bottom of the Mission Open Pit.

10. In August 2000, the Mission Mine operated three eight-hour production shifts per day. It changed to two ten-hour shifts per day on October 23, 2000.

11. Asarco Mission Underground mine had three portals to the surface: the north portal, the south portal, and the Pima portal.

12. The south portal is no longer in use. Therefore, the only two portals currently operational are the north portal and the Pima portal. All three portals were

operational in August 2000.

13. Copper ore is hauled from the underground to two ore dumps on the surface.

14. Haul trucks are used to haul ore from the underground to the ore dumps. The trucks haul from 3,000 to 4,000 tons of ore per day.

15. The haul trucks that are used to haul ore from the underground to the ore dumps at the Mission Underground are manufactured by Toro, Inc., and known as Toro 40D haul trucks. Each Toro 40 D haul truck is diesel engine powered mobile equipment and transports an average of 29 tons per load. . . .

16. Toro 40D haul trucks also haul waste material inside the underground area of the mine.

17. Waste material is only moved inside the underground by the Toro 40D haul trucks. Except where trucks are unable to dump underground due to mechanical problems, waste material is not brought to the outside area of the mine.

18. Toro 40D haul trucks are not used to transport anything out of the underground except for ore.

19. There is currently a fleet of seven Toro 40D haul trucks. Since October 23, 2000, an average of four to five trucks operate each shift.

20. At the time the citations were issued, each Toro 40D haul truck made an average of approximately six to seven truck runs per shift carrying ore to the ore dumps.

21. Established routes, or haulage roads, exist by which Toro 40D haul trucks travel from the mine portals to the ore dumps and return to the underground.

22. The distance from the north portal to the north ore dump is approximately 362 feet from the centerline of the dump, with a range of 75 feet to 400 feet. The road between the north portal and the north ore dump has a grade of 0%.

23. The distance from the Pima portal to the Pima ore dump is approximately 360 feet from the centerline of the dump with a range of 75 to 400 feet. The road between the Pima portal and the Pima ore dump had a grade of approximately 5.5%. . . .

24. In August 2000, a road running outside of the underground portion of the mine linked the north portal and the south portal. That road was known as the "goat trail" because it was very narrow. The "goat trail" was approximately one-half mile in length. The Toro 40D haulage trucks also used this road in August 2000. The goat trail was too narrow to be used by the haul trucks from the Open Pit . . .

that are regularly used to transport ore exclusively on the surface.

25. The distance from the Pima portal to the south portal is approximately 1500 feet.

26. The goat trail was specifically designed to be used by underground haul trucks.

27. In approximately November 2000 the goat trail went out of use when the Mission Open Pit started to cut into that area.

28. The method of mining, the use of the haul trucks, and the location of the north ore dump have been relatively unchanged since the mine opened in 1994. The Pima ore dump was not constructed until March 1999.

29. In the course of their regular operations, the Toro 40D haul trucks leave the underground to go to the ore dumps and once the ore has been off-loaded, they immediately return to the underground.

30. At the end of each shift, each of the Toro 40D haul trucks is driven out of the underground to the shop where it is fueled for the next shift. The shop is approximately 400 feet from the north portal.

31. After being fueled, the Toro 40D haul trucks are driven from the shop and parked on a "ready line" where they are lubricated for use on the next shift. The ready line is located about 200 feet outside the north portal. At the beginning of each shift, each of the haul trucks is driven off the ready line and back underground.

32. The Toro 40D haul tricks also leave the underground area of the mine to go to the shop for maintenance or repairs, but for no other purpose. On rare occasions, the Toro 40D trucks travel on the main haulage roads for the Pit between the north and Pima portals.

33. Therefore, the only time that the haul trucks leave the underground portion of the mine is when they are driven to and from the ready line, when they dump ore at the dump, and when they are taken to the shop for repairs.

34. There is sometimes other traffic such as tractors and other types of surface equipment as well as other Toro 40D trucks on the haulage roads near the portals and dump areas.

35. Underground haul trucks have design features unique to that type of vehicle.

36. Underground haul trucks are designed with low ground clearance to fit inside a confined space where there is a limitation on vehicle height.

37. Underground haul trucks are specifically designed to be loaded from a low profile, within the restricted limits of the underground work space.

38. Because of the restricted space in which they primarily operate, underground haul trucks have a load capacity that is smaller than haul trucks that operate on the surface.

39. The Toro 40D haul trucks which were cited in these proceedings are equipped with seat belts.

40. The title of 30 C.F.R. § 57.14131 is "Seat belts for surface haulage trucks."

41. There is no definition of "surface haulage trucks" in Title 30 of the Code of Federal Regulations.

42. 30 C.F.R. § 57.14131 does not explicitly state that it applies to underground haul trucks that are used on the surface at an underground mine.

43. 30 C.F.R. § 57.14131 requires, among other things, that seat belts for surface haulage trucks meet the requirements of the 1985 version of a publication of the Society of Automotive Engineers designated as SAE J386, "Operator Restraint Systems for Off-Road Work Machines."

44. The Society of Automotive Engineers has published new guidelines on Operator Restraint Systems for Off-Road Work Machines since 1985.

45. At the time the citations were issued, the seat belt assemblies in the Toro 40D haul trucks did not comply with SAE J386 (1985).

46. There is no definition of "surface haulage trucks" in MSHA's Program Policy Manual.

47. There is no definition of "surface haulage trucks" in MSHA"s Program Policy Letters.

48. MSHA has issued no written guidelines as to the definition of "surface haulage truck."

49. The Program Policy Letters do not state whether 30 C.F.R. § 57.14131 applies to underground haul trucks brought to the surface areas of an underground mine.

50. There is no definition of "surface haulage trucks" in MSHA's Program Information Bulletins.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary maintains that the Toro trucks are required to comply with section 57.14131 when they are operated on the surface area of the underground mine. She contends that any haulage trucks operating on the surface must comply with the safety standard. She reasons that "haulage trucks are haulage trucks regardless of design, manufacturer, labels, or names." (S. Motion 10). If haulage trucks are operated on the surface areas of underground mines, then the trucks are required to comply with the seat-belt requirements of the standard.

The Secretary argues that the words "surface haulage trucks" in the title of the safety standard refers to the location of the trucks not the type of truck that is covered by the standard. A haulage truck that is used on the surface of an underground mine is a "surface haulage truck," whether it is used exclusively on the surface or underground and on the surface. She states that the stipulated facts establish that the haulage trucks routinely travel to the surface areas of the mine to dump mined ore as part of the ongoing mining operations.

In support of her position, the Secretary relies upon the regulatory history of section 57.14130, as well as the cited standard. In addition, she maintains that her interpretation is reasonable, is consistent with the language and purpose of the standard, and should be accorded deference. The Secretary believes that she provided fair notice of her interpretation of the safety standard and that there is no evidence of inconsistent enforcement. The Secretary contends that the alleged violation described in each citation has been established.[1]

B. Asarco

Asarco maintains that the plain language of the safety standard excludes the cited haulage trucks from its scope as a matter of law. The plain language of the safety standard limits its application to "surface haulage trucks." The trucks cited by MSHA are not surface haulage trucks. Asarco argues that anyone familiar with mining equipment will instantly identify the Toro trucks as "vehicles designed and intended for use underground." (C. Motion 7). As a consequence, these trucks are not surface haulage trucks, which are an entirely different type of vehicle. Asarco contends that all the citations must be vacated because the cited trucks are not subject to the requirements of section 57.14131.

In support of its position, Asarco relies upon the plain language of the safety standard, the reasonably prudent person test, the deposition testimony of MSHA officials, and the fact that there can be no dispute that the cited vehicles are underground haulage trucks. Asarco also argues that, even if the safety standard can be said to include the cited vehicles, SAE J386 does

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[1] The Secretary's objection, filed by letter dated February 23, 2001, to the declaration of Peter Graham filed by Asarco is **DENIED**.

not apply to them. Finally, it contends that even if SAE J386 is applicable, the seat-belt assembly on the haulage trucks met the requirements of that provision. Asarco maintains that all five citations must be vacated in these cases.[2]

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Interpretation of the Safety Standard

This case appears to present an issue of first impression before the Commission. The issue boils down to what is meant by the phrase "Seat belts for surface haulage trucks" in the title for section 57.14131. Asarco contends that the title defines the scope of the safety standard. The title tells the world that the safety standard only applies to "surface haulage trucks" and to no other type of truck. Part 57 of the Secretary's regulations contains the safety and health standards for underground metal and nonmetal mines. Section 57.1 explains that "part 57 sets forth mandatory safety and health standards for each underground metal or nonmetal mine, including related surface operations ...." The provisions of sections 57.14000 through 57.14219 (subpart M of part 57) contain safety standards for machinery and equipment. Most of the standards in subpart M do not contain language that limits their application to particular areas of the mine. Asarco maintains that the fact that section 57.14131 contains such limiting language demonstrates that the standard was intended to apply only to surface haulage trucks.

The Secretary takes the position that all haulage trucks that travel on the surface at underground mines are surface haulage trucks. She contends that the title to the standard identifies the area in which the standard applies rather than to the design of the truck. She believes that the fact that the Toro trucks were designed for underground use is irrelevant because the trucks were, in fact, used on the surface. Any haulage truck used on the surface is a "surface haulage truck" no matter what the manufacturer's intent was when designing the truck.

The first inquiry is whether the language of the safety standard is clear on its face. It is significant that the body of the safety standard does not include any limiting language. It simply states that "[s]eat belts shall be provided and worn in haulage trucks." The limiting language is provided only in the title. Nevertheless, the title of a safety standard provides notice of the scope of the regulation to mine operators. I find that the title of the safety standard is somewhat ambiguous. "Ambiguity exists when a [regulation] is capable of being understood by reasonably well-informed persons in two or more different senses." *Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (citation omitted). I believe that a reasonably informed person might interpret the title to section 57.14131 to mean that its scope is limited to trucks designed and used exclusively as surface haulage trucks. There can be no dispute that the cited haulage trucks were designed for underground use.

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[2] For good cause shown, Asarco's motion objecting to certain photographs and the captions for other photographs that were submitted by the Secretary is **GRANTED**.

Because the phrase "surface haulage trucks" is ambiguous, I must determine whether the Secretary's interpretation of this phrase is reasonable. The Commission recently summarized the appropriate analysis in *Island Creek*, 20 FMSHRC at 18-19, as follows:

> If ... a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. V. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). *Accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") [citation omitted]. The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. . . .

The issue is whether the Secretary's interpretation is reasonable, not whether Asarco's interpretation is more reasonable. The Secretary's interpretation of a safety standard may be reasonable even if it diverges from what a "first-time reader of the regulation[] might conclude was the 'best' interpretation of [the] language." *General Elec. Co.* at 1327.

I find that the Secretary's interpretation that the title of the safety standard identifies the area in which the standard applies is reasonable. First, this interpretation is "consistent with the protective purposes of the Mine Act." *Rock of Ages Corp. v. SOL*, 170 F.3d 148, 155 (2d Cir. 1999). The purpose of the safety standard is to protect persons driving haulage trucks on surface areas at underground mines. Including all haulage trucks that operate on the surface furthers this protective purpose. If, for example, a mine operator purchases used underground haulage trucks at a good price for use on the surface, the operator would be required to comply with section 57.14131, despite the fact that the trucks were designed for underground use. The hazards associated with driving haulage trucks on the surface are not mitigated by the fact that the trucks were designed for underground use.

Second, the Secretary has not taken conflicting positions with respect to her interpretation of the standard. She has previously maintained that haulage trucks and other equipment are subject to the provisions of sections 57.14131 or 57.14130 if they are used on the surface. In their depositions, MSHA Inspectors Ronald S. Goldade and Tyrone Goodspeed testified that they have issued similar citations in the past. (Goldade Depo. 33, 53; Goodspeed Depo. 54-56). In *Au Mining, Inc.*, 22 FMSHRC 771 (June 2000)(ALJ), the Secretary alleged a violation of section 57.14130(a) because a loader was not equipped with a roll-over protective structure ("ROPS") or a seat belt. The loader brought ore out of an underground mine, dumped the ore on the surface, and then returned underground for another load. 22 FMSHRC at 776. It made up to 20 trips per

day. The mine operator argued that the loader was not "surface equipment," as that term is used in the standard. The Secretary successfully argued that her interpretation was reasonable because the loader was used on the surface. Thus, the Secretary's position in the present case does not present "the sort of "*post hoc* rationalization[]" to which the courts will not defer." *Azco Nobel Salt v. FMSHRC*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (citation omitted).

Third, the regulatory history of the safety standard supports the Secretary's position. Section 57.14131 was promulgated in 1988 along with section 56.14131, which is the identical standard for surface mines that is entitled "Seat belts for haulage trucks." 53 Fed. Reg. 32496 (August 25, 1988). As applied to underground mines, the preamble states that the "new standard requires that seat belts be provided and worn in haulage trucks at . . . surface areas of underground mines." 53 Fed. Reg. at 32512-13. Before this standard was promulgated, seat belts were required only for surface equipment that was required to have ROPS. Because haulage trucks were not required to be equipped with ROPS, seat belts were not required. Although the preamble does not discuss haulage trucks that are used underground and on the surface, the clear implication is that any haulage trucks used on the surface at underground mines are required to comply with section 57.14131. This language envisions a use test not an equipment design test for coverage under the safety standard. Nothing in the preamble suggests that haulage trucks designed for underground use are not required to comply with the safety standard when they are used on the surface.

In sum, I find that the Secretary's interpretation of the phrase "surface haulage trucks" to be reasonable. It effectuates the purpose of the safety standard by ensuring that drivers of haulage trucks are protected by seat belts. Although Asarco has taken steps to make sure that the Toro haulage trucks are segregated from the much larger haulage trucks used in the open pit, other conditions are present that create potential hazards to the drivers of the Toro trucks. Seat belts would help protect these drivers from injury. I limit my decision to the facts presented in this case. My holding on this issue and the notice fair issue, discussed below, might be different if the Toro haulage trucks were brought to the surface solely for repair and maintenance.

B. Fair Notice of the Secretary's Interpretation

The Secretary is required to provide fair notice of the requirements of her safety and health standards. The Commission recently summarized this requirement *Island Creek*, 20 FMSHRC at 24, as follows:

> Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313,1317-18 (Aug. 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency's

> interpretation may be "permissible" but nevertheless fail to provide notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F.3d at 1333-34. The Commission [does not require] that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

Asarco maintains that the Secretary did not make any public statements, either in the form of recommendations or requirements, that would put operators on notice that she intends to apply section 57.14131 to underground haul trucks that operate on the surface. It points to the depositions of MSHA Supervisory Inspector Goldade and MSHA Inspector Horning in support of its position. These individuals testified that MSHA did not issue any policy statements to provide guidance to mine operators. Inspector Horning agreed that the title of the safety standard is confusing and suggested that mine operators "ask around" to find out if it applies to underground haulage trucks that operate on the surface. MSHA Inspector Eubanks stated that an operator could contact the local MSHA office for guidance. Inspector Eubanks stated that he was taught at an MSHA training class in 1992 that "whenever a haul truck is used on the surface it becomes a surface haul truck." He further testified that he knows of no written material that contains such an interpretation. Asarco contends that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that the Toro haulage trucks were covered by the safety standard taking into consideration the design of the trucks and the fact that they were primarily used underground.

The Secretary contends that the language of the standard provides adequate notice of its coverage. In addition, she argues that the language in the preamble for the standard provided notice to mine operators that any haulage truck used at surface areas of underground mines was covered by the safety standard. The Secretary states that her placement of the standard in both parts 56 and 57 provides notice that she intended the standard to apply to specified geographic locations rather than to particular truck designs. The Secretary also maintains that she is "not required to promulgate interpretations through rulemaking or the issuance of policy guidance, but may instead do so through litigation or enforcement." (S. Reply 3 *citing National Wildlife Fed'n. v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997)). She states that her enforcement history provides notice of her consistent interpretation of the standard.

I find that the Secretary provided fair notice of the requirements of the standard as applied to the facts in these cases. The phrase "surface haulage trucks" appears only in the title of section 57.14131. But for the presence of this phrase, all haulage trucks at underground mines would be required to be equipped with the type of seat belts specified at SAE J386. A reasonably prudent person would first look to see if the phrase "surface haulage truck" is defined by the Secretary in 30 C.F.R. Part 57, in her program policy manual, or in any other policy statements. If the Secretary were using the phrase as a technical term of art to refer to a particular type of

haulage truck, one would expect to see a definition. The absence of a definition indicates to a reasonably prudent person that the Secretary did not intend the phrase to have a technical meaning. One would not expect to see the phrase defined if the Secretary intended it to mean a haulage truck that is used on the surface.

The preamble to the safety standard also provides a clue that the title does not have a technical meaning. It states that seat belts are required to be "provided and worn in haulage trucks at . . . surface areas of underground mines." 53 Fed. Reg. at 32512-13. This language clearly suggests that the limitation in the title is geographic in scope. It does not impart any sense that the safety standard is limited to a particular type of haulage truck used on the surface. Reading that language, a reasonably prudent person would conclude that haulage trucks used on the surface are covered by the safety standard.

Asarco relies on the deposition transcripts of four MSHA inspectors to support its position. These inspectors acknowledge that the title of the safety standard is somewhat ambiguous. They agree that the Toro trucks contain features, such as roof fall protection devices, that clearly indicate that they are designed for underground use. This testimony does not establish that a reasonable prudent person would conclude that the Toro trucks are not covered by the section 57.14131. The reasonably prudent person test does not imply that the person would have recognized the specific requirement of the standard on his "first reading." In some instances the reasonably prudent person may be required to put some thought to the matter. The large haul trucks that Asarco contends are covered by the standard are generally not used at underground mines. Section 56.14131 is applicable to large off-road haul trucks that are used at quarries and open pit mines. Asarco's interpretation of section 57.14131 would significantly narrow its scope to the point that it would be applicable to very few haul trucks. The only haul trucks covered would be those designed for surface use that transport material from one point to another on the surface at an underground mine and those that are designed for surface use that are nevertheless used underground.

All of the inspectors testified that MSHA has consistently interpreted section 57.14131 to cover haul trucks that are used to haul material on the surface from the underground. MSHA looks at how the haul truck is used not the design of the truck to determine whether it must be equipped with an SAE seat belt. This interpretation is the most logical construction of the safety standard and would be understood by a reasonable prudent person. As Inspector Horning stated, a "reasonable operator should assume that if the truck is used on the surface, the [the safety standard] would apply." (Horning Dep. 57). MSHA has issued similar citations at other underground mines that have apparently not been contested by mine operators.

Although this issue has not arisen with great frequency, the Secretary has been consistent in her application. Inspectors Goldade and Goodspeed testified that they have issued similar citations in the past. The judge's decision in *Au Mining, Inc.*, provides notice of the Secretary's interpretation of section 57.14130, a similar provision. Asarco argues that section 57.14130 helps its case because that provision lists types of equipment covered by the standard. Asarco states that it was reasonable for it to believe that the Secretary intended the phrase "surface

haulage trucks" to refer to a particular type of haulage truck. Its argument is not convincing. Section 57.14130(a) serves notice that certain types of equipment operating on the surface are required to have ROPS. Likewise, under section 57.14131, haulage trucks operating on the surface are required to have off-road seat belts.

This case does not present a situation in which the Secretary is offering a *post hoc* rationalization for MSHA's actions. Inspector Eubanks stated that his 1992 training class included instruction on this safety standard that was consistent with the Secretary's position here. Thus, the Secretary's position reflects the "agency's fair and considered judgment on the matter." *Auer v. Robbins*, 117 S.Ct. 905, 912 (1997). The Secretary is not required to have a written document interpreting every safety and health standard she has promulgated. She is simply required to provide fair notice of the requirement of each standard. Although there is some ambiguity in the title for the standard, as discussed above, I find that a reasonably prudent person, after due consideration, would understand that haulage trucks used to transport material on the surface at an underground mine are required to meet the requirements of the safety standard, even when the truck is loaded underground and was designed to meet the conditions of an underground environment. Asarco's contrary interpretation is overly technical and illogical.

C. The Application of SAE J386 to Asarco's Toro Trucks.

Asarco argues that by its own terms, SAE J386 does not apply to the Toro trucks. SAE J386 states that it applies to "off-road, self-propelled work machines commonly used in construction, logging and, mining as referred to in SAE J1040c . . . ." (A. Motion at 25). That provision lists categories of work machines that are recommended for coverage under SAE J386. There is no question that the Toro trucks do not fall in any of these categories. Asarco argues that, for this reason, its Toro trucks were not required to comply with the requirements of section 57.14131. Asarco also argues that it was reasonable for it to rely on the language in SAE J1040c for guidance in the interpretation of the safety standard.

The Secretary argues that the plain language of section 57.14131(c) makes clear that the reference to SAE J386 is solely for the purpose of indicating the type of seat belt that must be installed in haulage trucks. The safety standard does not refer to any provision of the SAE guidelines for the purpose of establishing what types of equipment are covered by the standard.

I agree with the Secretary. The reference to SAE J386 in section 57.14131(c) is clear and unambiguous. Mine operators are directed to SAE J386 for the sole purpose of obtaining information about the type of seat belt that is required to be installed in haulage trucks. Section 57.14131(c) provides that "[s]eat belts required under this section shall meet the requirements of SAE J386. . . ." It was unreasonable for Asarco to assume that the SAE guidelines also delineate the types of off-road work machines to which the Secretary's safety standard applies.

Finally, Asarco argues that Citation Nos. 7945743 and 7945735, alleging that there were no tethers connecting the seat belts to the floor of two trucks, must be vacated. It states that the use of tethers is permissive under SAE J386, Part III 5.1.2. (A. Motion at 30). It relies, in part,

on the decision of Chief Judge Barbour in *Daanen & Janssen, Inc.*, 18 FMSHRC 1796, 1802 (Oct. 1996). The parties stipulated, however, that "[a]t the time the citations were issued, the seat-belt assemblies in the Toro 40D haul trucks did not comply with SAE J386 (1985)." (Stip. ¶ 45). Consequently, this argument is not well taken and I therefore reject it.

D. The Penalty Criteria of Gravity and Negligence.

The parties did not enter into stipulations concerning the inspectors' evaluation of gravity and negligence. In section 104(a) citations, gravity, including the significant and substantial determination, and negligence are only considered when assessing a civil penalty under section 110(i) of the Mine Act. The Secretary submitted a two-page affidavit of Inspector Goldade, dated February 21, 2001, containing some evidence to support the inspectors' determinations with respect to gravity and negligence. Asarco did not offer any specific evidence or argument on the gravity and negligence criteria, although many of the facts and arguments it presented on the merits would be equally applicable to these penalty criteria. In her reply to contestant's motion for summary decision, the Secretary argues that I should credit her evidence and affirm the inspectors' evaluation of the penalty criteria because Asarco did not offer any other evidence.

I reject the Secretary's position because entering findings with respect to two of the six penalty criteria is beyond the scope of the motions for summary decision in these pre-penalty contest proceedings. I cannot assess civil penalties in these cases. Penalties assessed by Commission judges must "reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act." *Hubb Corp.*, 22 FMSHRC 606, 611 (May 2000) (citations omitted). Inspector Goldade's affidavit does not provide sufficient information for me to enter findings with respect to gravity and negligence. Consequently, I decline to do so. Once penalties are proposed for these citations and the penalty cases are assigned to me or another judge, the parties can consider how they wish to proceed with respect to the six criteria in section 110(i) and MSHA's proposed penalties.

IV. ORDER

For the reasons set forth above, the notices of contest filed by Asarco Incorporated in these cases are **DENIED**. The Secretary established that Asarco violated 30 C.F.R. § 57.14131 as set forth in each citation, as modified. Citation Nos. 7945733, 7945734, 7945735, 7945743, and 7945587 are **AFFIRMED**. Because I did not make any findings with respect to the inspectors' evaluation of the gravity and negligence criteria, this order does not apply to Section II, Parts 10 and 11, of the citations. Those issues can be resolved in the subsequent civil penalty case. Accordingly, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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