FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 16, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. LAKE 95-180-RM
ADMINISTRATION (MSHA)	:	through LAKE 95-183-RM
	:	
v.	:	and
	:	
DAANEN & JANSSEN, INC.	:	LAKE 95-290-M
	:	LAKE 95-313-M
	:	LAKE 95-352-M

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether Administrative Law Judge David Barbour properly determined that Daanen & Janssen, Inc. (AD&J@), violated 30 C.F.R. ' 56.14101(a)(3),[1] by failing to maintain in functional condition a component of the service braking system of a front-end loader, and 30 C.F.R. ' 56.9101,[2] when a

[1] 30 C.F.R. ' 56.14101(a) provides in pertinent part: A(1) Self-propelled mobile equipment shall be equipped with a service braking system capable of stopping and holding the equipment . . . . (3) All braking systems installed on the equipment shall be maintained in functional condition.@

[2] 30 C.F.R. ' 56.9101 provides that, A[o]perators of self-propelled mobile equipment shall

D&J employee operating the loader traveled through a berm and was fatally injured. 18 FMSHRC 1796, 1798-800, 1804-08, 1812-14 (October 1996) (ALJ). The Commission granted D&J=s petition for discretionary review (APDR@) challenging the judge=s determinations. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

D&J operates the Bay Settlement Mine, a limestone quarry in Scott, Wisconsin. *Id.* at 1797-98. At the quarry, limestone is extracted and stockpiled on the quarry floor, where it is later loaded into haulage trucks by front-end loaders. *Id.* at 1799. All such mobile equipment reaches the quarry floor via an access road, which has an overall grade of approximately 10 percent and has berms on both sides. *Id.*

On the morning of October 6, 1994, a front-end loader operated by D&J employee Richard Van Vonderen descended towards the bottom of the quarry via the access road. *Id.* Van Vonderen traveled down approximately one-third of the road when the loader drifted far left, twice hitting the left berm. *Id.* The loader traveled forward approximately another 34 feet, ran through the berm, and fell 40 feet to the quarry floor. *Id.* Van Vonderen was then taken to a local hospital, where he was pronounced dead. *Id.* at 1800.

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maintain control of the equipment while it is in motion.@

Later that day, Thomas Pavlat, an investigator with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), was assigned to investigate the accident. *Id.* Pavlat did not inspect the loader=s brakes, based on his determination that the damage to the loader was too extensive to ascertain the pre-accident condition of the brakes. Jt. Ex. 1B at 2. During his investigation, Pavlat discovered that Van Vonderen repeatedly had reported that rear Aslack adjusters@ or Aadjusting bolts@ on the front-end loader were Afrozen@ and would not turn.[3] 18 FMSHRC at 1805; Tr. 96.

On August 20, 1994, approximately seven weeks before the accident, Richard Sobieck, D&J=s assistant mechanic, had inspected the loader because Van Vonderen had informed him that the loader was pulling to the left. 18 FMSHRC at 1806. Sobieck moved the adjusting bolts, thereby adjusting the brakes. *Id.* After he made those adjustments, however, he could not again turn the bolts; they were frozen. *Id.* Sobieck stated that he informed D&J=s production supervisor, Aaron Kinney, about the bolts, and that Kinney had planned to fix or replace the bolts in October, when space would become available in the repair shop. *Id.*

As a result of his investigation, Pavlat served D&J with four citations. *Id.* at 1797. Pavlat issued D&J a citation alleging that the frozen rear adjusting bolts on the loader=s service braking system constituted a violation of section 56.14101(a)(3), and a citation that Van Vonderen failed to maintain control of the loader in violation of section 56.9101. *Id.* at 1800. The inspector also issued two other citations, alleging violations of the seatbelt standard in 30 C.F.R. ' 56.14130(h) and the berm standard in 30 C.F.R. ' 56.9300(a). *Id.* D&J challenged the citations and the matter proceeded to hearing before Judge Barbour. *Id.* at 1797.

[3] Adjusting bolts serve to move the brake shoes closer to the brake drum to exert the maximum amount of stopping power for the service brake system. 18 FMSHRC at 1805; *see* Tr. 111, 390. When they are frozen, the adjusting bolts cannot be turned any further to alter the clearance between each brake shoe and brake drum. 18 FMSHRC at 1805.

The judge determined that D&J violated the braking and failure to control standards.[4] *Id.* at 1808, 1813. The judge affirmed the braking violation, concluding that the rear adjusting bolts, Aintegral component[s]@ of the loader=s service braking system, were frozen and inoperative. *Id.* at 1808. He reasoned that the plain language of section 56.14101(a)(3) requires that all components of a braking system be able to perform their intended function, and that the standard does not require that the brakes meet specific performance requirements. *Id.* at 1806-07. The judge concluded, however, that the violation was neither Asignificant and substantial@ (AS&S@) nor caused by D&J=s unwarrantable failure, and assessed a penalty of $300 rather than the proposed penalty of $1000. *Id.* at 1810-12. In addition, the judge found a violation of section 56.9101, reasoning that the Arecord allows for no other plausible explanation for the accident than that Van Vonderen failed to control the moving loader.@ *Id.* at 1813. The judge determined that the violation was S&S but that D&J was not negligent. *Id.* at 1814. Accordingly, he assessed a civil penalty of $400 rather than the proposed penalty of $5000. *Id.* at 1815.

The Commission subsequently granted D&J=s PDR, challenging the judge=s determination that it violated sections 56.14101(a)(3) and 56.9101.[5]

II.

Disposition

A. Braking Violation

1. Interpretation of Section 56.14101(a)(3)

[4] In addition, the judge affirmed the seatbelt citation (Docket Nos. LAKE 95-180-RM and LAKE 95-290-M), and vacated the citation alleging a berm violation (Docket Nos. LAKE 95-183-RM and LAKE 95-352-M). *Id.* at 1802, 1804, 1818. Neither party petitioned for review of these determinations. PDR at 2 n.1; *see* S. Br. at 1.

[5] D&J did not petition for review of the judge=s determination that its violation of section 56.9101 was S&S.

D&J argues that plain language of the braking standard does not support the judge=s finding of violation. PDR at 7-8.[6] It explains that the standard=s plain language requires a finding of violation only when the braking system fails to serve its primary purpose of stopping and holding the vehicle, and that no such evidence exists in the record. *Id.* at 6, 8. The Secretary responds that the judge=s finding that D&J violated the braking regulation is supported by the plain language of the standard. S. Br. at 6. The Secretary submits that the plain language of the standard mandates a finding of violation when a component of the braking system is not maintained in functional condition, regardless of whether the braking system is capable of stopping and holding the vehicle. *Id.* Alternatively, the Secretary contends that her interpretation of the standard, outlined in MSHA=s *Program Policy Manual* (A*PPM*@), is reasonable and entitled to deference. *Id.* at 5-10.

Where 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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a regulation is ambiguous, courts have deferred to the Secretary=s reasonable interpretation of it. *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) (Aagency=s interpretation is >of controlling weight unless it is plainly erroneous or inconsistent with the regulation=@) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). The Secretary=s interpretation of a regulation is reasonable where it is Alogically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.@ *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (quoting *Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991)). The Commission=s review, like the courts=, involves an examination of whether the Secretary=s interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992).

[6] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. ' 2700.75(a), D&J designated its PDR as its brief.

Both parties advance plain language interpretations of the standard to support their respective positions. As evident from the parties= interpretations, the standard supports at least two plausible and divergent interpretations.[7] We conclude, therefore, that the standard is ambiguous rather than plain.[8] *See* 2A Norman J. Singer, *Sutherland Statutory Construction* ' 45.02, at 6 (5th ed. 1992) (AAmbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.@); *Ehlert v. United States*, 402 U.S. 99, 105 (1971). Accordingly, we must consider whether the Secretary=s interpretation of section 56.14101(a)(3) is reasonable.

We hold that the Secretary=s interpretation is reasonable. First, the Secretary=s interpretation is consistent with the language of the regulation. In the absence of an express regulatory definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *rev. denied*, 111 F.3d 963 (D.C. Cir. 1997) (mem.). The common usage of the term Asystem@ contemplates Aa complex unity formed of many often diverse parts subject to a common plan or serving a common purpose,@ and Aan aggregation or assemblage of objects joined in regular interaction or interdependence.@ *Webster=s Third International Dictionary (Unabridged)* 2322 (1986). Because the definition of the term Asystem@ entails an interrelationship of component parts, it follows that for the system to be considered functional,

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[7] Commission administrative law judges have differed in their interpretations of the standard. In several decisions, judges found violations of section 56.14101(a)(3) where brakes of the vehicle in question failed to stop it. *See, e.g.*, *Elmer James Nicholson, emp. by A-Rock Inc.*, 16 FMSHRC 1967, 1968-69 (September 1994) (ALJ); *Morris Sand & Gravel*, 16 FMSHRC 624, 628-29 (March 1994) (ALJ); *Herba Sand & Gravel*, 13 FMSHRC 219, 220 (February 1991) (ALJ). In other decisions, judges found violations of the standard where a component of the braking system was not maintained, despite evidence that the braking system could stop and hold the vehicle. *See, e.g.*, *Acme Brick Co.*, 17 FMSHRC 1459, 1461-62 (August 1995) (ALJ); *New Point Stone Co.*, 16 FMSHRC 2466, 2468 (December 1994) (ALJ); *Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2015 (September 1993) (ALJ).

[8] Commissioners Marks and Riley agree with the judge that, under the plain meaning of section 56.14101(a)(3), D&J violated the braking standard. They find that the judge correctly determined the standard clearly requires all components of a braking system to be able to perform their intended function. In support of this proposition, they believe the frozen and inoperable rear adjusting bolts were an Aintegral component@ of the loader=s service braking system. The cited standard provides that Abraking *systems* installed on the equipment shall be maintained in functional condition.@ 30 C.F.R. ' 56.14101(a)(3) (emphasis added). Components such as adjusting bolts compensate for inevitable wear and deterioration caused by normal use and operate solely to ensure that the entire braking system functions properly at all times. Inoperable adjusting bolts are a weak link in a chain of vital components that make up a braking system, and are clearly prohibited by the cited standard. Commissioners Marks and Riley thus do not reach the question of whether the Secretary=s interpretation of section 56.14101(a)(3) is reasonable.

each of its component parts must be functional.

Second, the Secretary=s interpretation advances the Mine Act=s goal of protecting the safety of miners. *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (April 1994) (AA safety standard >must be interpreted so as to harmonize with and further . . . the objectives of= the Mine Act.@) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). By allowing a citation to issue before the entire braking system fails, the Secretary=s interpretation is preventive and seeks to cure equipment defects before serious accidents occur. This interpretation, therefore, promotes the Mine Act=s primary objective of miner safety. *See Ace Drilling Coal Co.*, 2 FMSHRC 790, 791 (April 1980), *aff=d*, 642 F.2d 440 (3d Cir. 1981) (unpublished table decision); *cf. Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 844 (April 1981) (holding that interpretation similar to one advanced in instant case Ais more likely to prevent accidents, a primary goal of the Act@). In contrast, under D&J=s interpretation, MSHA could not issue a citation until the braking system was completely unable to stop the vehicle.

Third, the Secretary has consistently applied the interpretation embodied in the citation.[9] The *PPM*, which the Commission long has recognized as evidence of MSHA=s policies and practices (*Dolese Bros.*, 16 FMSHRC at 693 n.4), succinctly states the interpretation of the braking standard advanced here by the Secretary. The *PPM* provides: AStandard [56].14101(a)(3) should be cited if a component or portion of any braking system on the equipment is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above.@ IV *PPM*, Parts 56/57, at 55-55a (1991); *see* S. Br. at 6-13.

Finally, the Secretary=s interpretation of the braking standard gives meaning to all subsections of the standard. A[A] fundamental rule of construction is that effect must be given to every part of a statute or regulation, so that no part will be meaningless.@ *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994). Under the Secretary=s interpretation, subsection (1) of the braking standard is cited if the service braking system is not capable of stopping and holding equipment, while subsection (3) is cited if a component of the braking system is not maintained in functional condition. This interpretation gives independent meaning to each part: subsection (1) is a performance standard, while subsection (3) is a maintenance standard. D&J=s interpretation suggests that a citation under subsection (3) is proper only when the system as a whole fails to stop and hold equipment, essentially equating subsections (1) and (3). While D&J asserts that its position renders neither subsection (1) nor subsection (3) superfluous, it does not make clear how a violation of (3) could occur without also violating (1). *See* PDR at 8. Therefore, we conclude that the Secretary=s interpretation of section 56.14101(a)(3) is reasonable.

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[9] D&J asserts that A[n]o conscientious mine operator reading the Standard possibly could find in its terms a requirement that each >component= of a braking system, as opposed to the entire system, be maintained in functional condition.@ PDR at 7. To the extent that D&J argues that it received inadequate notice of the standard=s requirements, we find that the *PPM* provided D&J with sufficient notice that each component of a braking system must be maintained in functional condition. *See Dolese Bros.*, 16 FMSHRC at 694 (holding that MSHA Program Policy Letter provided operator with sufficient notice of standard=s requirements).

2. Substantial Evidence

D&J argues that, even if the judge correctly concluded that a non-functioning component of a braking system constitutes a violation of section 56.14101(a)(3), substantial evidence does not support his conclusion that the adjusting bolts were not functioning. PDR at 12-15. D&J submits that, although the adjusting bolts were frozen, there is no evidence establishing that the bolts failed to maintain proper clearance between the brake drums and linings. *Id*. at 13-14. The Secretary asserts that substantial evidence supports the judge=s finding that the adjusting bolts were not maintained in functional condition. S. Br. at 11-13.

When reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means A>such relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.=@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Midwest Material Co*., 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Even if the adjusting bolts were frozen in a position that maintained adequate clearance between the brake drums and linings on the day of the accident, substantial evidence supports the judge=s decision that the bolts were inoperative. Adjusting bolts are adjustment mechanisms; that is, they are designed to adjust the service brakes. Tr. 390, 434. The evidence is undisputed that the bolts could no longer perform their designated function. The rear adjusting bolts had been frozen since their last adjustment on August 20. *See* 18 FMSHRC at 1806; Tr. 203-04, 241. Sobieck testified that he intended to either Afree up@ or replace the bolts in October when the loader was to be brought to the repair shop. Tr. 247, 256. As stated by the Secretary=s expert witness, Joseph Judeikis:

> If [an adjusting bolt] is not able to be manipulated or [to] perform either manually or automatically the function it is intended to perform, that being to provide an adjustment mechanism within the brak[e] system, then it . . . is not functioning, and as part of the brake system, the brake system should not be considered maintained in functional condition. Tr. 434.

Because adjusting bolts are a component of a loader=s service braking system, we affirm the judge=s determination that the loader=s braking system was not maintained in functional condition in violation of section 56.14101(a)(3).

B. Failure to Maintain Control Violation

D&J argues that the judge erred as a matter of law in finding that A[t]he accident itself speaks to the violation@ of section 56.9101 (18 FMSHRC at 1813), and that, excluding consideration of the accident, there is not substantial evidence in the record to support a finding of violation. PDR at 15. The Secretary responds that the judge did not err in finding a violation of the standard because, as the judge stated, A[t]he record allows for no other plausible explanation for the accident@ than that Van Vonderen failed to maintain control of the loader. S. Br. at 14 (quoting 18 FMSHRC at 1813).

We conclude that the judge did not err in relying upon the accident to find a violation. As D&J argues, the Commission has recognized that an accident by its occurrence does not necessarily prove that a violation occurred. *See Lone Star Indus., Inc.*, 3 FMSHRC 2526, 2529 (November 1981); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (October 1982). The rationale underlying *Lone Star* and its progeny, however, is distinguishable from the present case. We explained in *Lone Star* that an accident does not necessitate a finding of violation because Athe reasons for an accident may have nothing to do with the substance of the standard allegedly violated.@ *Lone Star*, 3 FMSHRC at 2529. Here, by contrast, the circumstances surrounding the accident illustrate Van Vonderen=s loss of control over the loader, and are closely connected with the substance of section 56.9101, which requires that equipment operators Amaintain control of the equipment while it is in motion.@ 30 C.F.R. ' 56.9101.

In addition, substantial evidence supports the judge=s finding of violation. We have held that Athe substantial evidence standard may be met by reasonable inferences drawn from indirect evidence.@ *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Apossibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them.@ *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106 (1942) (per curiam). The Commission also has emphasized that inferences drawn by the judge are Apermissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.@ *Mid-Continent*, 6 FMSHRC at 1138.

The record reveals that the loader driven by Van Vonderen veered to the left side of the access road, hit the berm twice, and soon thereafter, drove through the berm, plummeting 40 feet. 18 FMSHRC at 1799; Tr. 62, 67, 89. There is no evidence that Van Vonderen intentionally drove through the berm. 18 FMSHRC at 1813; Tr. 69. Therefore, the judge=s inference that the accident Awould not have happened if Van Vonderen had maintained control while the loader was in motion@ (18 FMSHRC at 1813) is inherently reasonable, and there is a rational connection between the evidence and the inference that Van Vonderen lost control of the moving loader.

Moreover, the judge correctly dismissed other explanations for the accident, such as that Van Vonderen might have looked over his shoulder, driven at excess speed, or been distracted by wasps. 18 FMSHRC at 1813. The reasons for a loss of control are irrelevant to consideration of whether control over moving equipment was maintained. In any event, the proffered explanations for Van Vonderen=s failure to control the loader are speculative and unsupported in the record.

Id.; *see* Tr. 69-70, 135, 317-19. Accordingly, we affirm the judge=s determination that D&J violated section 56.9101.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s determination that D&J violated sections 56.14101(a)(3) and 56.9101.

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