FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 94-92-M
FLUOR DANIEL, INCORPORATED	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issue of whether Fluor Daniel, Inc. ("Fluor") violated 30 C.F.R. § 56.14101(a)(1) (1995).[1] Administrative Law Judge Jerold Feldman concluded that Fluor did not violate the section. 16 FMSHRC 2049, 2054 (October 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's vacation of the citation. For the following reasons, we reverse the judge's decision.

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[1] 30 C.F.R. § 56.14101(a)(1), entitled "Brakes," states:

> Minimum requirements. Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

I.

Factual and Procedural Background

On April 21, 1993, Steven Crapps, an employee of Fluor, was operating a Komatsu forklift truck at the Ridgeway Mine, an open pit gold mine located near Ridgeway, South Carolina. 16 FMSHRC at 2050-51. At the top of the highwall, Crapps put the forklift into neutral, set the parking brake, and shut off the engine. *Id.* at 2051. The forklift started to roll forward and Crapps applied the brake pedal; however, the brakes did not respond. *Id.* The forklift traveled approximately 15 feet down a 5 to 6 percent grade and pushed Johnny Ray, also an employee of Fluor, over a berm whereupon he fell to a bench 86 feet below. *Id.* Ray sustained fatal injuries. *Id.*

The Department of Labor's Mine Safety and Health Administration ("MSHA") began an accident investigation on the morning of April 22. *Id.* That same day, MSHA issued a citation to Fluor alleging a significant and substantial ("S&S")[2] violation of section 56.14101(a)(1)[3] for an alleged defect in the service brakes. *Id.*; *see* Ex. P-6, at 4. On April 24, the forklift was removed from the mine and taken to Greensboro, North Carolina for further inspection and testing. 16 FMSHRC at 2051-52.

The forklift truck was equipped with an accumulator designed to activate the service brake system with the engine off. *Id.* When functioning properly, the accumulator forces accumulated brake fluid into the service brake system, permitting effective operation of the brake fluid pump for approximately five to ten depressions of the brake pedal, which should stop and hold the forklift when the engine is not running. *Id.* MSHA examined the service braking system with the engine running and found that there was adequate hydraulic fluid and pressure. *Id.* However, with the engine off, a pressure gauge test of the accumulator indicated no pressure. *Id.* at 2052; Ex. P-6, at 2.

Fluor contested the violation and, after an evidentiary hearing, the judge vacated the

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[3] In connection with the accident, MSHA also issued an imminent danger order under 30 U.S.C. § 817(a) requiring immediate removal of the forklift. 16 FMSHRC at 2051, 2054. Two other citations were issued against Fluor alleging violations of 30 C.F.R. § 56.14101(a)(2), for a defective parking brake, and 30 C.F.R. § 56.14100(a), for inadequate inspection of the forklift. The judge affirmed the order and the two citations. *Id.* at 2051, 2054-60. They were not appealed and are not at issue before the Commission.

citation. Construing section 56.14101(a)(1) in conjunction with 30 C.F.R. § 56.14101(b),[4] the judge stated that section (a)(1) "relates to the service brakes' effectiveness in stopping *moving* (in service) vehicles in that tests to support violations of this mandatory standard are conducted on *moving* vehicles." 16 FMSHRC at 2053-54 (emphasis added). The judge explained that the service brake system functioned adequately when the engine was running and thus the Secretary failed to establish a violation of section 56.14101(a)(1). *Id.* The judge noted that 30 C.F.R. § 56.14101(a)(3), requiring all braking systems to be maintained in functional condition, was applicable to the accumulator malfunction but the Secretary did not cite Fluor under that section. *Id.* at 2054.

II.

Disposition

The Secretary argues that section 56.14101(a)(1), by its plain terms, requires a service brake system to be capable of stopping and holding moving equipment, regardless of whether the equipment's engine is on or off. PDR at 8. Additionally, the Secretary asserts that the Commission must give weight to his interpretation of the regulations and that his interpretation of section 56.14101(a)(1) effectuates its purposes. *Id.* at 7-10.

Fluor counters that the judge correctly construed section 56.14101(a)(1) to apply only to the effectiveness of service brakes on moving vehicles with engines running. F. Br. at 4-5. It asserts that adequate brakes had been installed, that the standard provides the method and criteria for testing under subsection (b), and that, because it was stipulated that the brakes met the requirements of subsection (b), the brakes did not violate the standard. *Id.* at 7-8, 10-11. Fluor further contends that section 56.14101(a)(1) does not require that brakes once installed be maintained in functional condition and that the Secretary cited Fluor under the wrong provision of that standard. *Id.* at 7-8, 12.

"Where the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written . . . ." *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Section 56.14101(a)(1) provides: "Self-propelled

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[4] Section 56.14101(b), involving testing of brakes, provides in part:

> (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair;
>
> (2) The performance of the service brakes shall be evaluated according to Table M-1.

mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." That section does not limit the braking requirement to moving vehicles with engines running. Under its plain language, the service brakes must be capable of stopping and holding the equipment on the maximum grade it travels. The uncontroverted evidence established that the forklift's brakes failed to meet this requirement. 16 FMSHRC at 2051-52. Thus, the judge erred in vacating Citation No. 4094231 and we reverse his determination that the Secretary failed to establish a violation of section 56.14101(a)(1).

We reject Fluor's argument that section 56.14101(b) limits the scope of subsection (a) and requires a different result. Section 56.14101(b) relates only to the testing of service brakes when there is "reasonable cause to believe that the service brake system does not function, as required . . . ." Section 56.14101(a)(1) does not state that the tests contained in subsection (b) are the exclusive means of determining the effectiveness of service brakes. As the Notice accompanying the publication of this rule in the Federal Register stated, "Testing would only be utilized in those instances when there is disagreement about the performance capabilities of the service brakes." 53 Fed. Reg. 32,496, 32,505 (August 25, 1988). That the forklift's brakes failed at the time of the accident and in subsequent testing was not disputed. Therefore, MSHA properly cited a violation of section 56.14101(a)(1). Moreover, even if section 56.14101(b) were applicable here, it does not specify that the effectiveness of brakes can only be determined with the engine running. To the extent that the judge read into section 56.14101 any of these additional requirements, he erred.

In addition, even if the forklift's lack of braking capability could have been cited under section 56.14101(a)(3) or 30 C.F.R. § 56.14100(b),[5] as Fluor asserts (F. Br. 12), we conclude that the condition was properly cited under section 56.14101(a)(1). A hazardous condition may violate more than one standard and the fact that MSHA determines not to issue citations under all applicable sections does not render invalid the citations it does issue. *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).

[5] Section 56.14100(b) provides:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

III.

Conclusion

For the foregoing reasons, we reverse the judge's vacation of the citation alleging a violation of section 56.14101(a)(1). At the hearing, the parties stipulated that a violation involving the failure to have operational service brakes was properly characterized as S&S. 16 FMSHRC at 2052. We remand for reassessment of penalty, including consideration of the S&S nature of the violation.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner