# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW**

**SUITE 9500**

**WASHINGTON, D.C. 20001-2021**

December 28, 2007

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. LAKE 2006-60-RM |
| v. | : | |
| EMPIRE IRON MINING PARTNERSHIP | : | |

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involves the contest of a citation issued to Empire Iron Mining Partnership ("Empire") upon investigation of a fatal accident that occurred after a miner attempted to free a stuck equipment part. Administrative Law Judge David Barbour concluded that the Secretary of Labor properly alleged alternative violations in the citation, and affirmed the violation of 30 C.F.R. § 56.14105.[1] 29 FMSHRC 317, 331 (Apr. 2007) (ALJ). He

[1] Section 56.14105, entitled "Procedures during repairs or maintenance," provides:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105.

did not reach the alleged violation of 30 C.F.R. § 56.12016.[2] *Id*. at 329. For the reasons that follow, we affirm the Judge's decision.

II.

Factual and Procedural Background

The relevant facts are largely undisputed. Empire operates the Empire Mine, an open pit mine where taconite ore is mined and processed into ore pellets for use in the steelmaking industry. 29 FMSHRC at 319; Jt. Ex. 6, Stip. 1. After extraction, taconite ore is taken to an ore concentrator, where iron is separated from rock and then concentrated. 29 FMSHRC at 319. After the ore is filtered and concentrated, it is sent to the pellet plant, where it is fed into balling drums. *Id.* In the drums, the ore concentrate is combined with a binding agent, Bentonite, which fixes the concentrate. *Id.*; Tr. 130. The material is further formed into balls or pellets in the drums. 29 FMSHRC at 319. The pellets then travel into a kiln, where they are heated so that the binding agent fuses with the concentrated ore. *Id.* The hot pellets are then transferred to a cooler. *Id.*

A cooler is a ring-shaped machine that has a moving floor frame comprised of 30 segments, or "pallets," that rotate around the cooler's circumference. 29 FMSHRC at 319; Jt. Ex. 1, Stip. 16. The drive motor of the cooler is powered by electricity. 29 FMSHRC at 319. A dump arm with a wheel is attached to each pallet. *Id.* The hot pellets are deposited onto the pallets, where they cool as the pallets rotate. *Id.* The pellets are deposited so that most of the load of the pellets is on one side of the pallet. *Id.* A rail above the wheel on a pallet prevents the off-centered pallet from tipping over and dumping the pellets. *Id.* Each pallet eventually rotates to a dumping point, where the rail changes from a horizontal position to almost a vertical position. *Id.* With the rail no longer holding down the dump arm and pallet, the pallet moves into an almost vertical position, and the pellets fall off the pallet into a hopper. *Id.* Gravity causes the pallet to dump. *Id.* at 320.

---

[2] Section 56.12016, entitled "Work on electrically-powered equipment" provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

30 C.F.R. § 56.12016.

Occasionally a pallet sticks in the horizontal position and will not move into a vertical position to dump the pellets. *Id.* When a pallet sticks, the "sure dump system" is initiated. *Id.* Under that system, a hydraulic cylinder attached to the dump arm is compressed. *Id.* The cylinder applies force to the arm of the pallet and usually frees it. *Id.*

If the sure dump system does not free the stuck pallet, the cooler continues to travel until the dump arm contacts a limit switch. Jt. Ex. 6, Stips. 20, 21. The dump system has two limit switches: the alarm switch and the stop switch. 29 FMSHRC at 323. The alarm switch sends a signal to the cooler control room operator. *Id.* at 320, 323. The stop limit switch opens an electrical circuit that must be closed in order for the cooler to run. *Id.* at 323; Tr. 67. The stop switch does not turn off electricity to the circuit. 29 FMSHRC at 323.

When the cooler's circuit is disrupted, the control room operator will attempt to start the cooler by pressing the start button in the control room. Tr. 53, 185. When he or she does so, that start command stays in the system for five seconds. Tr. 185. During that five-second period, the system examines whether the cooler's drive motor circuit is complete. Tr. 82-83. If the pallet becomes unstuck during that five-second period, the cooler will start. Tr. 185.

On November 6, 2005, a pallet on Empire's No. 4 cooler became stuck. 29 FMSHRC at 317. After the pallet stuck and the cooler stopped, the control room operator made 22 attempts in approximately three minutes to restart the cooler. *Id.* at 322-23. All of the attempts were unsuccessful. *Id.* at 323. Two assistant plant operators, Chad Weston and Jeremy Ring, were instructed to free the stuck pallet. *Id.* at 317, 320-21. Weston tried to position a porta-power[3] correctly under the stuck pallet's dump arm. *Id.* at 321. Weston was unable to position the porta-power after trying twice to do so. *Id.* Ring then tried to position the porta-power and, as he did so, the pallet arm released by itself. *Id.* Weston had moved between the dump arm and the guide rail. *Id.* When the pallet became unstuck and moved on its own, Weston was caught in the pinch point between the dump arm and the guide rail and was fatally injured.[4] *Id.*

MSHA Inspector William Dethloff investigated the accident. *Id*. He stated that placing a porta-power under the dump arm of a pallet usually is not dangerous. *Id.* at 321-22. The inspector explained that a miner steps back once the porta-power has been placed and before the dump arm frees the pallet. *Id.* at 322. If the pallet is freed before the miner steps back, the pallet swings away from the miner's hand. *Id.*

---

[3] A porta-power is a portable hydraulic pump used to add force to the stuck pallet arm. 29 FMSHRC at 320.

[4] At 11:49:01, a start command was given. E. Ex. 4. During the following five-second interval, the stuck pallet released while Weston was positioned in the pinch point. 29 FMSHRC at 321. It is undisputed that at the time of the accident, the stop switch operated as designed, and that the accident was not caused by the drive motor unexpectedly starting up while Weston was trying to free the stuck pallet. *Id.* at 323.

Shortly after the accident, Empire requested and received MSHA's approval to guard the area involved in the accident. *Id.* at 324. MSHA later issued a citation to Empire for its failure to have in place guards on the day of the accident, and Empire did not contest the citation. Tr. 34, 37.

On February 21, 2006, Inspector Dethloff issued Citation No. 6192002 to Empire. Jt. Ex. 6, Stip. 8. The citation alleged violations of 30 C.F.R. § 56.12016 for the failure to deenergize and lock out the cooler before mechanical work was performed on it *and/or* 30 C.F.R. § 56.14105 for the failure to turn off power and block against hazardous motion before performing repairs or maintenance. *Id.*, Stip. 9. The citation alleged that the fatal accident was the result of the operator violating either or both of the standards. 29 FMSHRC at 318 n.1. The inspector testified that, because the guarding was already in place by the time that the citation was issued, miners were protected from hazardous motion. *Id.* at 324. MSHA determined that the only appropriate measures that remained to be taken to abate Citation No. 6192002 were to establish new policies and procedures to require cooler drives to be deenergized and locked out and to post a warning sign at the switch before a miner could begin work to free a stuck pallet. *Id.* In addition, Empire was required to implement plans to train miners who worked on stuck pallets. *Id.* The citation also alleged that the violations resulted from the operator's significant and substantial ("S&S") failure to comply with the standards. *Id.* at 318.

On April 26, 2006, the Secretary moved to amend Citation No. 6192002 from stating that the operator violated section 56.12016 "and/or" section 56.14105, to stating that the operator violated only one of the two standards. Jt. Ex. 6, Stip. 10. In addition, she moved to amend the citation to state that the cited conditions were not a cause of injury on November 6, 2005. *Id.*, Stip. 11. Empire took no position on the motion, and the Judge granted it. 29 FMSHRC at 318 n.1. On May 31, 2006, MSHA issued the amended citation to Empire. *Id.* Empire challenged the amended citation, and the matter proceeded to hearing.

The Judge affirmed Citation No. 6192002 to the extent it alleged that Empire violated section 56.14105. *Id.* at 331. He first determined that the Secretary was permitted to allege violations in the alternative in the citation. *Id.* at 326. Rejecting the operator's argument that analogy to the Federal Rules of Civil Procedure was inappropriate, the Judge reasoned that administrative pleadings are liberally construed and easily amended as long as adequate notice is provided and there is no prejudice to the opposing party. *Id.* He found that Empire had adequate notice of the alternative standards and was not prejudiced by the charge that it violated one of them. *Id.* He further determined that the operator was able to prepare for the hearing, and that it knew what to do to abate the citation. *Id.* at 326-27. The Judge concluded that Empire had violated section 56.14105 because freeing the stuck pallet involved the "repair or maintenance" of the cooler within the meaning of the standard, and the cooler had not been deenergized or locked out, nor had the dump arm been blocked against hazardous motion. *Id.* at 329. He did not reach the issue of whether Empire violated section 56.12016. *Id.* The Judge affirmed the S&S designation and dismissed Empire's contest. *Id.* at 329-30, 331.

Empire petitioned for review of the Judge's decision, and the Commission granted the petition.[5]

II.

Disposition

A. Alternative Violations

Empire argues that the Judge erred in permitting the Secretary to allege alternative violations in the citation. E. Br. at 7-13. It asserts that alternative allegations violate the particularity requirements of section 104(a) of the Mine Act, 30 U.S.C. § 814(a). *Id.* at 7-8. Empire further contends that it did not know what to do to abate the citation because sections 56.14105 and 56.12016 set forth distinct and contradictory requirements. *Id.* at 11-12.

The Secretary responds that the Judge correctly concluded that a citation may allege alternative violations. S. Br. at 7-14. She contends that section 104(a) of the Mine Act does not limit her ability to cite violations in the alternative. *Id.* at 11-12. The Secretary submits that she cited alternative violations because, although she believes that section 56.12016 applies to mechanical work being performed on electrically-powered equipment even when the hazard posed is equipment movement rather than electrical shock, the Ninth Circuit held to the contrary in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). The Secretary explains that citing violations in the alternative allowed her to advance her disagreement with the holding in *Phelps Dodge*, while avoiding being left without an enforcement action if the Judge followed that holding in this case, which arises in the Sixth Circuit. *Id.* at 7-8; Tr.14. The Secretary further contends that Empire was not prejudiced by abating both violations alleged in the citation. S. Br. at 13-14.

We conclude that the Secretary's citation of alternative violations of section 56.14105 and 56.12016 in this instance did not violate the particularity requirements of the Mine Act. Section 104(a) of the Act provides in part that, "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a). The Commission has previously recognized that the purpose of this particularity requirement is to "allow[] the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter." *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993).

[5] In addition, Empire filed a motion requesting oral argument. The Commission hereby denies the request.

Substantial evidence supports the Judge's determination that Empire was able to discern what conditions required abatement and to prepare for a hearing on the matter.[6] First, Empire does not deny that it was able to prepare for a hearing. *See* E. Br. at 12. Second, we find no evidence that the operator was unable to discern what conditions required abatement. 29 FMSHRC at 327. The abatement actions included implementing new policies and procedures that required miners working to free a stuck pallet to deenergize and lock out the cooler drive and post a warning notice, and providing training for miners working to free stuck pallets. Gov't Ex. 3. It is undisputed that the operator adequately abated the citation.

Moreover, we find unpersuasive Empire's argument that it did not know what to do to abate the citation because sections 56.14105 and 56.12016 set forth different requirements for compliance. As Empire argues, section 56.12016 requires that, before work is done on electrically powered equipment, the equipment must be locked out or other measures taken to prevent the accidental re-energization of the equipment, while section 56.14105 does not specifically require that equipment be locked out. The requirements of the standards overlap, however, in that section 56.12016 requires that equipment must be deenergized before mechanical work is performed on the equipment, while section 56.14105 provides that repairs or maintenance of equipment must be performed after the power is off. Empire's abatement action involving implementing procedures for deenergizing and locking out the cooler abated in part both alleged violations. 29 FMSHRC at 397. Thus, Empire was not presented with a situation in which it could abate only one of the violations and did not know which to abate.[7]

Furthermore, we disagree with the operator that the language of section 104(a) prohibits the Secretary from alleging alternative violations in this instance. Section 104(a) refers to "the provision of the . . . standard," in the singular, to be set forth in a citation. However, as noted by the Secretary, Congress has stated in the Dictionary Act that, "In determining the meaning of any act of Congress, unless the context indicates otherwise, words importing the singular include and apply to the plural." S. Br. at 11 (quoting 1 U.S.C. § 1). We see nothing in the context of the section 104(a) language referred to by Empire that indicates that only a single provision may be

---

[6] 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). "Substantial evidence" means "'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 (Nov. 1989) (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[7] We further reject Empire's assertion that it was prejudiced by being required to comply with "two distinctly contradictory allegations requiring different abatements" (E. Br. at 10), since, even accepting that the standards required distinctly different abatement actions, the Secretary could have required such abatement through the issuance of separate citations. In fact, as the Secretary stated, because the inspector issued one citation alleging alternative violations, the operator faces the possibility of receiving only one civil penalty rather than two. S. Br. at 14.

described in Citation No. 6192002. In fact, considering that language in context, it is the "nature of the violation" that must be described with particularity. Here, as the Judge found, "the alternatively charged violations were based on the same underlying facts" and involved standards with similar requirements. 29 FMSHRC at 326. Thus, even though the citation set forth alternative violations, we conclude that the nature of the violation was described with sufficient particularity.

We emphasize that our holding is limited to the facts of this case. Although it was cited for alternative violations in a citation, Empire was able to prepare for a hearing and knew what to do to abate the citation. Furthermore, as the Secretary states, the Ninth Circuit's decision in *Phelps Dodge* created some legal doubt regarding which of the two standards applied.[8] We caution the Secretary that circumstances may exist in other cases that would make improper the citation of alternative violations.

B. Alleged Violation of Section 56.14105

Section 56.14105 requires in part that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion." 30 C.F.R. § 56.14105. Empire contends that the Judge erred in finding a violation of section 56.14105 because unsticking a pallet is not repair or maintenance within the meaning of the standard. E. Br. at 14-16. It argues that even if that activity may be considered repair or maintenance, unsticking a pallet falls within the standard's exception that "Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected by motion." 30 C.F.R. § 56.14105; E. Br. at 14-16. Empire explains that movement of the arm was essential to unsticking the pallet and that it had provided effective protection from hazardous motion by means of training, warning against proximity to the pinch point, and the location of the pinch point itself. E. Br. at 17.

The Secretary responds that the Judge properly concluded that the operator violated section 56.14105 because the operator had been engaged in repair or maintenance work while attempting to free the stuck pallet, and the power was not completely removed from the drive motor. S. Br. at 14-19. She asserts that the Commission should reject Empire's argument that the exception contained in section 56.14105 applied. *Id.* at 19-20.

The Commission has defined the term "repair" to mean "'to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state.'"

---

[8] We agree with the dissenting Judge in *Phelps Dodge* that the language of section 56.12016 "is clear and unambiguous." 681 F.2d at 1193 (Boochever, dissenting). As Judge Barbour noted below, "the standard means exactly what it says – to wit, that '[e]lectrically powered equipment shall be de[-]energized before mechanical work is done on such equipment.'" 29 FMSHRC at 328 (alterations in original).

*Walker Stone Co.,* 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076 (citations omitted). Quoting in part the Dictionary of Mining, Mineral, and Related Terms, it further defined "maintenance" as "'the labor of keeping something (as buildings or equipment) in a state of repair or efficiency; care, upkeep . . .'" and "'[p]roper care, repair, and keeping in good order.'" *Id.* In *Walker Stone*, the Commission noted that obstructing rock caused the crusher's drive motor to stall, rendering the crusher defective or inoperable until the rock was removed. *Id.* Accordingly, it concluded that breaking up rocks to unclog a crusher constituted "repair" or "maintenance" within the meaning of section 56.14105. *Id.* It explained that the removal of rock was necessary to restore the crusher to a sound state or to keep it in a state of repair or efficiency, and that a malfunctioning condition had been remedied by restoring the crusher to the same condition it was in before it became clogged. *Id.*

The Judge's conclusion that Empire was involved in the "repair or maintenance" of machinery when miners worked to free the stuck pallet (29 FMSHRC at 329) is consistent with Commission precedent. A malfunctioning condition on the cooler had to be remedied by restoring the cooler to the same condition it was in before the pallet became stuck.[9] Thus, freeing the stuck pallet of the cooler was necessary to restore the cooler to a sound state or to keep it in a "state of repair or efficiency." *Walker Stone*, 19 FMSHRC at 51.

Moreover, substantial evidence supports the judge's determination that the pallet was not deenergized or blocked against motion.[10] First, it is undisputed that the dump arm was not

---

[9] We reject Empire's argument that the Judge's conclusion did not focus on industrial realities, i.e., that such work was not considered in the industry to be repair or maintenance. Although Empire's witnesses testified that they considered freeing the stuck pallet to be operational work rather than repair or maintenance (Tr. 147, 198), Inspector Dethloff testified that freeing the stuck pallet was maintenance (Tr. 76). The Judge, having noted such conflicting testimony (29 FMSHRC at 323 & n.14, 324 n.15), found that freeing the stuck pallet involved repair or maintenance. *Id.* at 329. The Commission has repeatedly recognized that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We see no reason to overturn the judge's finding. In any event, the Tenth Circuit rejected the operator's similar argument in *Walker Stone* that breaking up rocks to unjam machinery was not recognized in the industry as repair or maintenance of such machinery. 156 F.3d at 1081. The Court noted that in defining maintenance, the Commission had appropriately relied on a dictionary specifically focused on the mining industry. *Id.*

[10] Our dissenting colleague attempts to transform this case into a violation of a guarding standard. Slip op. at 14-16. However, the guarding standard, 30 C.F.R. § 56.14107(a), and section 56.14105 impose separate and distinct duties upon the operator. The latter standard not only requires that equipment be blocked against hazardous motion, but also that the power must be off. The dissent also discredits the additional abatement required by MSHA in this case, including new policies and procedures requiring the cooler drive to be de-energized and locked

blocked against hazardous motion, as evidenced by the unencumbered motion that killed Weston. 29 FMSHRC at 329. As to whether the cooler was deenergized, we reject Empire's argument that the cooler was "turned off" by the operation of the limit switch. E. Br. at 14, 16 & n.6. It is undisputed that, although the stop switch shut down the cooler by opening the electrical circuit necessary to run the cooler, the switch did not turn off electricity to the circuit. 29 FMSHRC at 323, 329; Tr. 44, 67, 77-78, 82. The judge therefore correctly held that the cooler drive motor was not "off" within the meaning of the standard because the stop limit switch did not de-energize or lock out the power. 29 FMSHRC at 329.

The Judge erred, however, by failing to examine whether Empire's actions in working to free the stuck pallet fell within the exception that machinery motion is permitted to the extent that adjustments cannot be performed without motion, provided that persons are effectively protected from hazardous motion. As argued by Empire, it would appear that movement of the pallet dump arm was integral to the work of releasing the arm. E. Br. at 17. Nevertheless, even if adjustments could not be performed without motion of the dump arm, we, along with our dissenting colleague, slip op. at 14, disagree with Empire that it provided adequate protection against hazards. *Id.* Contrary to Empire's assertions, the position of the pinch point clearly did not provide adequate protection to Weston from hazardous motion. Moreover, the warnings and training provided by Empire were not adequate protection. As the Tenth Circuit has recognized, the fact that an employee failed to comply with company policy does not mean that the company provided effective protection within the meaning of the exception. *Walker Stone*, 156 F.3d at 1085. Thus, although the Judge erred by failing to consider the exception, we consider such error to be harmless and affirm in result the Judge's determination that Empire violated section 56.14105.

---

out with a warning notice at the switch, and additional training of miners.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that the Secretary properly alleged alternative violations in Citation No. 6192002 and that Empire violated section 56.14105.[11]

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[11] We do not reach the issue of whether Empire violated section 56.12016.

Chairman Duffy, dissenting:

Three mandatory safety standards were cited in this case, only one of which is implicated in the fatal accident that occurred in the cooling facility of Empire's taconite plant. The Secretary cited the first standard three months after the fatality, on January 30, 2006, when she issued citation number 6175971. Tr. 34, 37. The citation alleged a violation of 30 C.F.R. § 56.14107(a), which provides that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." *See* Mine Safety & Health Admin., Data Retrieval System ("MSHA DRS"), http://www.msha.gov/drs/drshome.htm (Empire Iron Mining Partnership ("Empire Iron"), Violations).

By the time the citation was issued, Empire had already installed guarding around the pinch point between the dump arm and the guide rail which caused the death of Mr. Weston so that the citation was, in effect, abated upon issuance. 29 FMSHRC 317, 324 (Apr. 2007) (ALJ); Tr. 33, 143; E. Ex. 9. Empire did not contest that citation and it appears that the operator paid the penalty of $35,500. *See* MSHA DRS, http://www.msha.gov/drs/drshome.htm (Empire Iron, Violations).

On February 21, 2006, three weeks after the guarding citation was issued, the Secretary issued a citation alleging that Empire had also violated 30 C.F.R. § 56.12016 and/or 30 C.F.R. § 56.14105. 29 FMSHRC at 317-18 & n.1; Jt. Ex. 6, Stip. 9. Finally, on April 26, 2006, five and one-half months after the fatal accident, the Secretary successfully moved to amend the February 21, 2006, citation to allege that Empire had violated either section 56.12016 or section 56.14105, but not both. 29 FMSHRC at 318, n.1; Jt. Ex. 6, Stip. 10. In my view, the matter should have ended with the issuance of the earlier guarding citation, for I believe that the standard set forth in section 56.12016 does not apply in this case, and that Empire complied with the standard set forth in section 56.14105 to the extent that the standard was not duplicative of section 56.14107(a). Accordingly, I would reverse the judge and vacate the citation on review. In so doing, I take exception to the judge's and my colleagues' conclusion that the Secretary may allege violations of alternative standards in the same citation.

I have highlighted the time line in this case in recognition of the fact that in the aftermath of a serious accident or fatality, it is not uncommon for the Secretary to take weeks, months, or even years to issue citations or orders for the underlying violations alleged to have been found after extensive investigation. The vast majority of enforcement actions, however, are taken contemporaneously with an inspector's discovery of what he deems a violation. Whatever position the Commission takes, therefore, on the issue of whether section 104(a) of the Act authorizes the Secretary to allege violations of alternative standards in the same citation, will apply to on-the-spot enforcement actions, where abatement is immediately required, as well as to enforcement actions taken after extensive deliberation by the Secretary's inspectors and solicitors, and long after abatement measures have been taken to address the conditions giving rise to the accident or fatality.

Thus, notwithstanding the majority's disclaimer that its holding "is limited to the facts of this case" (slip op. at 7), they have embraced the proposition that the Secretary can allege violations of separate standards in the same citation. I believe this to be a troublesome precedent because it will result in mixed signals to operators regarding the measures necessary to abate citations.

In approaching the issues presented here, it is helpful to consider how the Mine Act is designed to operate. First, the Secretary, under section 101 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), sets mandatory safety and health standards for mining and mineral processing that, if followed, will reduce, if not eliminate, accidents, injuries, and fatalities. 30 U.S.C. § 811. Then, pursuant to section 103 of the Act, the Secretary's representatives inspect mines to determine whether the conditions and practices they encounter comport with the standards. *Id*. § 813. If those conditions or practices do not meet the standards, enforcement action is taken in the form of citations and orders issued pursuant to section 104 of the Act. *Id*. § 814. The consequences of those enforcement actions are twofold. First, under risk of a mine closure order and prior to the opportunity for a hearing to determine the legitimacy of the Secretary's enforcement action, the operator must abate the citation or order by correcting the conditions or practices so as to conform, once again, with the standard. *Id*. § 814(b). Second, sanctions are imposed—civil penalties, or, in more egregious cases, closure orders or criminal penalties. *Id*. §§ 814, 815, 820.

For purposes of deciding this case, I find that the ultimate method of abatement provides the starting point for determining which standards Empire was appropriately charged with violating. In other words, what corrective actions was Empire required to take in order to re-establish compliance with the standards and were those actions warranted *by the terms of the standards cited*? When all is said and done, the operator was required to provide guarding around the hazardous area, which constitutes abatement of the citation issued for the violation of section 56.14107(a), and to de-energize, lock out, and tag the circuit supplying power to the cooling facility, which constitutes abatement of the citation issued for a violation of section 56.12016.

As noted above, the guarding citation has been conceded by Empire and is not before us. As for the citation requiring de-energizing and locking out the circuit supplying power to the cooling facility, there is a fundamental question regarding its application in these circumstances owing to the Ninth Circuit Court of Appeals' decision in *Phelps Dodge Corp. v. FMSHRC,* 681 F.2d 1189 (9th Cir. 1982), which held that what is now 30 C.F.R. § 56.12016 is aimed only at protecting against electrical shock, not against unexpected hazardous motion during repair or maintenance work.

I fully concur with the Court's decision in *Phelps Dodge.* The purpose of the lockout/tagout requirement of section 56.12016 is to insure that only the person working on an

electrical circuit can re-energize it.[1] The Secretary would have the Commission arrive at an interpretation of section 56.12016 different from that reached by the Ninth Circuit because this case arose in a different circuit. I decline, however, to accept the Secretary's invitation for the Commission to engage in non-acquiescence with the Ninth Circuit's opinion; doing so would balkanize mine safety and health enforcement when a fundamental purpose for federal primacy in mine safety and health matters is uniformity across the several states.

As for the violation of section 56.14105, I agree with the majority that the standard generally applies in this case, inasmuch as the actions taken to free the stuck pallet constitute "repair and maintenance" for purposes of the standard. Slip op. at 8. I part company with my colleagues, however, with respect to the degree to which Empire was not in compliance with the standard.

First, the stop switch effectively removed power from the cooler for purposes of the standard, since the standard says nothing about de-energizing and locking out the entire circuit. While it is true that the stop switch does not de-energize the entire circuit, it does shut down the cooler assembly. Tr. 177-78, 197. The switch was entirely under the control of the control room operator who had dispatched Weston and Ring to the cooler. 29 FMSHRC at 320-21. The judge found that the stop switch was functioning properly. *Id*. at 323.[2]

Second, the conditions relating to the stuck pallet and the efforts of Mr. Weston and Mr. Ring to free it bring the circumstances under the exception set forth in the standard, that is, machinery or equipment motion or activation is permitted to the extent that "adjustments . . . cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion." 30 C.F.R. § 56.14105. As the judge found, after all other measures failed, the porta-power had to be brought in to release the dump arm. 29 FMSHRC at 321-23. Moreover, there was no feasible means to block the dump arm against movement. *Id*. at 329

[1] The decision in Phelps Dodge is now twenty-five years old. During that period the Secretary has not seen fit to amend section 56.12016 to specify that it applies to the circumstances presented here. On the other hand, the Secretary did revise section 56.14105 in 1988, six years after the Phelps Dodge decision, but did not elect to incorporate into that standard the requirements to de-energize, lock out, and tag an electrical circuit prior to commencing repair or maintenance. 53 Fed. Reg. 32,496, 32,508, 32,523 (Aug. 25, 1988).

[2] Even if section 56.14105 could be read to require de-energizing and locking out the circuit, the judge found that there was "no testimony establishing the dangers faced by miners if the cooler drive motor unexpectedly started up while a miner was trying to free a stuck pallet. Nor was there evidence of other electrical hazards compliance would prevent." 29 FMSHRC at 328 n.22.

n.23. Indeed, the whole point of Weston and Ring's efforts was to cause the dump arm to move so as to free up the stuck pallet.[3] *Id.* at 320-21.

In any event, the judge concluded that Empire ultimately achieved compliance by installing guarding around the cooler to prevent miners from gaining access to the pinch point. *Id.* at 324. That, however, was precisely the means used to abate the section 56.14107(a) guarding violation.

Given my view that the power was off for purposes of the standard, and that the actions taken to free up the stuck pallet fell within the exception allowed for under the standard, the only element of the standard that Empire failed to meet was "effectively protect[ing]" Weston "from hazardous motion." That failure also provides the basis for Empire's violation of section 56.14107(a). As such, citing Empire under both section 56.14107(a) and section 56.14105 was duplicative. Duplicate citations for the same violative condition are foreclosed under well-established case law holding that the Secretary cannot issue separate citations under two different standards unless those standards "impose separate and distinct duties on the operator." *Western Fuels-Utah, Inc.,* 19 FMSHRC 994, 1003 (June 1997); *see also Cyprus Tonopah Mining Corp.,* 15 FMSHRC 367, 378 (March 1993).

In sum, as I view this case, the single cause of the fatality was the lack of proper guarding. I believe that the guarding citation captures the violative conditions adequately–particularly when it is tied to the ultimate means of abatement accepted by the Secretary.

As to the Secretary's argument that she can allege violations of alternative standards in the same citation (S. Br. at 7-14), I do not believe section 104(a) permits that type of enforcement action. I view section 104(a) of the Act as clear and unambiguous: one violation per citation. The "particularity" criterion expressed in the provision relates directly to the nature of the violation which, in turn, includes "a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a).

The Secretary's recourse to the Dictionary Act, endorsed by the majority (*see* slip op. at 6), is unavailing. That statute does not apply when the "context indicates otherwise." 1 U.S.C. § 1. Here, the context provided by the Mine Act clearly indicates that the use of the singular in 104(a) is intentional. For example, section 110(a)(1) of the Mine Act provides:

[3] The judge indicated that lack of feasibility of compliance is not a defense to a citation. 29 FMSHRC at 323. That may not necessarily be true. In *Sewell Coal Co.,* 3 FMSHRC 1380 (June 1981), *aff'd*, 686 F.2d 1066 (4th Cir. 1982), the Commission acknowledged that impossibility of compliance might be a defense to a citation and cited to Interior Board of Mine Operations Appeals decisions under the 1969 Coal Mine Health and Safety Act where citations were vacated "because of the unavailability of required equipment in the marketplace." 3 FMSHRC at 1381 n.5.

> The operator of a coal or other mine in which *a violation* occurs of *a* mandatory safety and health *standard* or who violates any other *provision* of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $[6]0,000 *for each such violation.*

30 U.S.C. § 820(a)(1) (emphases added).[4] *See also* 30 C.F.R. § 100.3(a).

As a practical matter, allowing the Secretary to allege violations of alternative standards in the same citation serves to muddy the distinctions between the two standards, both as to their discrete requirements and the means by which they are to be abated. That is certainly the case here, for it seems to me that what the Secretary, the judge, and my colleagues have done is to treat section 56.14105 as a kind of hybrid of sections 56.14107(a) and 56.12016 and ascribe to it requirements that it does not possess on its own.

The problem with that approach is that it does not adequately take into account the exception provided in section 56.14105, i.e., that removing the power and blocking the equipment against hazardous motion is not required if "adjustments or testing cannot be performed without motion or activation," a circumstance that clearly exists in this case. Moreover, it results in Empire's having to comply with section 56.14105 by undertaking the abatement measures required by section 56.12016, even though Empire has not been found to have violated that standard. Lastly, it results in Empire's being cited twice for the same offense: failing to guard the pinch point.

Finally, when the Secretary argues that the Commission can find a violation of section 56.14105 or section 56.12016, but not both, she is presenting the Commission with what logicians call a false dichotomy. If someone tells me that black is black and white is white, I have no trouble following him. If he says, however, that if black is black, then white cannot be white or if white is white, then black cannot be black, I have a great deal of trouble following him.

Therefore, to avoid such confusion, the Secretary should have chosen which standard to pursue or chosen to pursue both standards by way of separate citations. In either case I would not have found a violation, but such a litigation strategy would not have stretched section 104(a) of the Mine Act beyond logical comprehension.

_____

Michael F. Duffy, Chairman

[4] It is obvious from the precise language of section 110(a) that Congress did not intend to allow the Secretary to assess one civil penalty for two separate violations cited in the same citation. Slip op. at 6 n.7.

Distributions:

R. Henry Moore, Esq.
Arthur M. Wolfson
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

Cheryl C. Blair-Kijewski, Esq.
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard, 22nd Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Jerald S. Feingold, Esq.
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard, Room 2220
Arlington, VA 22209-3939

Administrative Law Judge David F. Barbour
Federal Mine Safety and Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D. C. 20001