FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 15, 2000

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA)	:	Docket Nos.	SE 99-101-RM
	:		SE 99-102-RM
v.	:		SE 99-103-RM
	:		SE 99-104-RM
NOLICHUCKEY SAND	:		SE 99-105-RM
COMPANY, INC.	:		SE 99-106-RM

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is the decision of Administrative Law Judge Avram Weisberger to affirm six citations issued to Nolichuckey Sand Company ("Nolichuckey") alleging violations of 30 C.F.R. § 56.14109(a).[1] 21 FMSHRC 681 (June 1999) (ALJ). The Commission granted Nolichuckey's petition for discretionary review challenging the decision. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

[1] 30 C.F.R. § 56.14109, entitled "Unguarded conveyors with adjacent travelways," provides in pertinent part:

> Unguarded conveyors next to the travelways shall be equipped with — (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor; or (b) Railings which — (1) Are positioned to prevent persons from falling on or against the conveyor; . . . and (3) Are constructed and maintained so that they will not create a hazard.

I.

Factual and Procedural Background

Nolichuckey operates a sand and gravel pit in Greenville, Tennessee. Notice of Contest; Tr. 15-17. At Nolichuckey's pit, loaders mine sand and gravel, which is then transported by haul trucks to a crusher. Tr. 16-17. The material is then processed and transported along a series of belts throughout the facility. Tr. 17. Platforms are located alongside all the belts and are traveled by miners when they conduct routine inspections and maintenance of the belts. Tr. 45, 48-49, 134-36. Some of Nolichuckey's belts are supported by structures called trusses, which measure 24-inches above the adjacent platform. Tr. 39-40, 141; Ex. C-1. These conveyors are equipped with handrails situated between the belts and the adjacent maintenance platforms. Ex. C-1. The handrails on these belts measure 42 inches above the platforms and extend higher than the belts. Ex. C-1; Tr. 155-56. Other belts at Nolichuckey's pit are supported by trusses measuring 42-inches above the adjacent platforms. Tr. 39, 43, 140; Ex. C-1. These higher belts are between 50 to 54 inches above the maintenance platforms, and extend between 8 and 12 inches above the tops of the trusses. Gov't Exs. 1-12; Ex. C-1. Unlike the belts supported by 24-inch trusses, the higher belts have no separate railing along the platforms. Gov't Exs. 1-12; Ex. C-1.

On January 19, 1999, Elton Hobbs, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Nolichuckey's pit. 21 FMSHRC at 682; Tr. 20. He observed that the conveyor belts supported by 42-inch high trusses did not have either stop cords or railings, and he discussed these conditions with foreman Jerry Knight and Thomas Anthony Bewley, Nolichuckey's president. 21 FMSHRC at 682; Tr. 21. Bewley told Inspector Hobbs that MSHA had previously informed him that if conveyors were supported by 42-inch structures, such as the higher belts at Nolichuckey's pit, they did not need to have railings or stop cords. 21 FMSHRC at 682; Tr. 22, 24-27. Hobbs then spoke with his supervisor, Larry Nichols, who instructed him to allow Nolichuckey to come into compliance, and not to issue any citations. 21 FMSHRC at 682; Tr. 24. Bewley did not agree to install stop cords or railings on the higher belts. 21 FMSHRC at 682; Tr. 27. When Hobbs returned on January 28, he discovered that Nolichuckey had not provided railings or stop cords. 21 FMSHRC at 682; Tr. 27-28, 49-50. Consequently, he issued six citations based on the lack of stop cords or railings on the higher belts. Tr. 27-28. Nolichuckey contested the citations, and the matter proceeded to hearing before Judge Weisberger.

In affirming all six citations, the judge concluded that the platforms in question were "travelways" because they were "regularly used" by miners to inspect and maintain the belts, and therefore the belts alongside them were required to have guards. 21 FMSHRC at 683-84. He rejected Nolichuckey's contention that MSHA's prior enforcement position permitting the cited conditions to exist without citation estopped it from issuing the instant citations. *Id.* at 684. The judge also stated that the belt structure itself did not constitute a guard and therefore did not place Nolichuckey in compliance with the standard. *Id.* at 685. Finally, the judge found that the

operator's diminution of safety argument was not available because it had not fulfilled the prerequisite of filing a petition for modification. *Id.*

II.

Disposition

Nolichuckey points to conflicting testimony among the Secretary's witnesses regarding the minimum belt height above which no guards or stop cords are required, and argues that there is no "published MSHA policy to inform mine operators of their responsibilities by providing specific measurement guidance." Amended PDR at 3. The operator claims that the cited maintenance platforms are not "travelways" because they are not regularly used to go from one place to another, and that section 56.14109 is therefore inapplicable. PDR at 1; Amended PDR at 4-6. Nolichuckey further maintains that the judge's interpretation of section 56.14109 is erroneous because it goes beyond the plain meaning of the regulation. Amended PDR at 7. The operator submits that it lacked notice that MSHA's interpretation of the standard covered maintenance platforms next to conveyors. Amended PDR at 4, 6-7. Nolichuckey also argues that the Secretary should be estopped from requiring compliance because her newly articulated policy is contrary to her longstanding enforcement policy. *Id.* at 8. Finally, Nolichuckey claims that the judge erred in refusing to consider its argument that compliance with section 56.14109 would have diminished safety. PDR at 1; Amended PDR at 6.

The Secretary responds that "the evidence in this case supports and indeed compels the conclusion that 42-inch structures are 'unguarded.'" S. Br. at 14. The Secretary also argues that the judge properly interpreted the term "travelway" to include the cited catwalks. *Id.* at 8-18. The Secretary maintains that Nolichuckey had adequate notice of her interpretation of section 56.14109. *Id.* at 18-23. Finally, the Secretary submits that Nolichuckey's argument that compliance with section 56.14109 would create a greater hazard should be rejected because the operator did not first file a petition for modification. *Id.* at 23-28.

A. Threshold Requirements of Section 56.14109

On its face, section 56.14109 contains two threshold requirements which must be satisfied before the regulation's specific requirements apply. First, the cited conveyor belt must be next to a "travelway." Second, the conveyor belt must be "unguarded."

1. Meaning of "Travelway"

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). 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. *See id.*; *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face."), *quoting Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

We have held that the meaning of a broadly-worded regulation may be determined from its plain language. For instance, in *Austin Power, Inc.*, the Commission held that "[a] plain reading of [30 C.F.R. §] 77.1607(g)[2] reveals that it does not limit the protection it affords to any particular class of persons . . . . Rather the standard protects all persons within the potential zone of danger from all reasonably foreseeable hazards resulting from the starting or moving of the equipment." 9 FMSHRC 2015, 2019 (Dec. 1987). In *Inland Steel Coal Co.*, we held that the plain language of a regulation which provides that "each operator of an underground coal mine shall . . . provide bathing facilities . . . for the use of the miners at the mine" extended not only to miners working underground, but also to miners working on the surface at underground mines. 4 FMSHRC 1218, 1221-22 (July 1982).

The judge's decision upholding MSHA's treatment of the maintenance platforms as "travelways" under section 56.14109 is consistent with a plain meaning application of that term. As applied in 30 C.F.R. Part 56, Subpart M, "travelway" is defined as "[a] passage, walk, or way regularly used or designated for persons to go from one place to another." 30 C.F.R. § 56.14000. Nolichuckey does not dispute that the cited maintenance platforms were located adjacent to conveyors, that each platform constituted "a passage, walk, or way," or that the platforms were regularly used by miners to inspect and maintain the belts. Tr. 135-36. Moreover, despite Nolichuckey's insistence that the cited maintenance platforms do not go from one place to another, the plain language of the regulation does not limit the definition of the word "place" to another section of the mine. In this regard, the Commission has looked to the ordinary meaning of terms not defined by statute or regulation. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) (applying dictionary definition of term not defined in statute), *aff'd,* 111 F.3d 963 (D.C. Cir. 1997) (table). "Place" is broadly defined as "a particular portion of a surface." *Webster's Third New Int'l Dictionary* 1727 (1993). Because the end of the platform is a particular portion of the platform, and also a particular portion of the mine, we believe that the end of a maintenance platform may properly be treated as a "place" under the ordinary meaning of that broad term. Therefore, the platforms fit squarely within the definition of travelways. Furthermore, given the explicit aim of section 56.14109 to prevent injury to miners working near conveyors, we see no indication that the rulemakers intended to implicitly exclude conveyors adjacent to maintenance platforms from the regulation's coverage merely because there are no

[2] 30 C.F.R. § 77.1607(g) provides, in pertinent part: "Equipment operators shall be certain . . . that all persons are clear before starting or moving equipment."

exits on the other ends of the platforms. This is particularly so where, as here, miners have to traverse the platforms and then make a return trip, thereby doubling their exposure to the conveyor hazards section 56.14109 is expressly designed to prevent.[3]

Courts have held that an agency's interpretation may be permissible but nevertheless fail to provide the notice required to support imposition of a civil penalty. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Where the imposition of a civil penalty is at issue, considerations of due process "prevent[] . . . deference [to an agency's interpretation] 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) (citations omitted).

We find no merit in Nolichuckey's assertion that it lacked notice that its platforms were "travelways" under the Secretary's regulation. The Commission has held that, where "the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements." *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998); *see also Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation). Accordingly, because the meaning of "travelway" as defined in section 56.14000 and as applied to Nolichuckey's maintenance platforms by section 56.14109 is clear from the plain language of the regulations, it follows that the standard itself provided Nolichuckey with notice of its meaning.[4]

2. Meaning of "Unguarded"

In this case, the Secretary issued citations alleging violations of section 56.14109 because she determined that the conveyors supported by 42-inch trusses were unguarded. Tr. 44 (Hobbs

---

[3] In support of its claim that the cited maintenance platforms are not "travelways" within the definition set forth in section 56.14000, Nolichuckey cites several unreviewed administrative law judge decisions. Amended PDR at 5. Commission Procedural Rule 72, 29 C.F.R. § 2700.72, provides that unreviewed administrative law judge decisions are not precedent binding upon the Commission. *See Capitol Aggregates*, 2 FMSHRC 1040, 1041 n.1 (May 1980). In any event, the cases Nolichuckey relies on are readily distinguishable from the instant matter. *See Magma Copper Co.*, 1 FMSHRC 837, 857 (July 1979) (holding that the cited area did not constitute a "travelway" because it was not regularly used); *Consolidation Coal Co.*, 8 FMSHRC 1946, 1958 (Dec. 1986) (same); *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 410 (Mar. 1996) (holding that work platform was not a walkway because it was an employee work station and was not used to go from one place to another or to gain access to equipment).

[4] Commissioner Riley believes that the term "travelway" is ambiguous, but would affirm the judge's treatment of the cited platforms as travelways based on his belief that the Secretary's interpretation is reasonable. However, he has concerns about whether Nolichuckey was on notice of the Secretary's interpretation.

testifying that he determined that the cited conveyors were unguarded). However, we are unable to discern the basis for this determination.

The term "unguarded" is not defined in 30 C.F.R. Part 56, Subpart M. Moreover, nothing in the legislative history of section 56.14109 provides guidance in determining whether the cited conveyors should be considered unguarded. In the course of defending the instant citation, the Secretary offered several explanations for how she decided whether a conveyor was unguarded. In describing the circumstances under which they would not issue citations for violations of section 56.14109, the Secretary's witnesses failed to present a coherent interpretation of when a belt is considered "guarded."

For instance, Inspector Hobbs testified that "if a conveyor is high enough to where it doesn't create a hazard, then a railing or stop cord does not have to be provided." Tr. 70. Furthermore, the Secretary stipulated that previous inspectors had treated all of Nolichuckey's belts as complying with the standard because the belts were equipped with 42-inch trusses. Tr. 22, 24-26. The Secretary's *Program Policy Manual*, however, states that the conveyor installation or framework cannot be considered an allowable guard even though it may conform to the standard railing height of 42 inches. IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57, at 55a-55b (1991). Is a higher framework an allowable guard? Testimony from the Secretary's witnesses seemed to indicate it could be. Hobbs estimated that a conveyor located seven feet above a walkway would not require stop cords or guarding. Tr. 70-71. Nichols stated that "[a]nything above head high then we'd have a possibility it wouldn't be a violation." Tr. 125. He admitted, however, that a problem with a head-high exception is that it implicitly requires different belt heights depending on the height of the individual on the platform. Tr. 126-27.

The D.C. Circuit has stated that, when interpreting an ambiguous regulation, deference is normally owed to the Secretary's litigation position before the Commission. *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000). The Supreme Court has upheld the government's interpretation of a regulation, even where it had articulated a prior inconsistent interpretation. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515-18 (1994). However, courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation only where they "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *accord Akzo*, 212 F.3d at 1304.

The Secretary's failure to advance any consistent interpretation of "unguarded" suggests that she has in fact never grappled with — and thus never exercised considered judgment over — the regulation's ambiguity. Therefore, we do not pass on the permissibility of any of the interpretations advanced at the hearing. Instead, we remand for the judge to secure from the Secretary an "authoritative interpretation" of what constitutes an unguarded conveyor within the meaning of section 56.14109. *See Akzo*, 212 F.3d at 1305. Upon obtaining the Secretary's interpretation, we direct the judge to apply traditional principles of regulatory interpretation to determine if the Secretary's interpretation is reasonable and entitled to deference. *See Secretary*

of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. at 414) (other citations omitted).[5]

Separate from the question of whether to accord deference to the Secretary's interpretation of an unguarded conveyor is whether the operator was on notice of the regulation's requirements. However, because we do not know what the Secretary's interpretation of the regulation is or what it requires, we cannot address at this juncture the issue of whether Nolichuckey was afforded notice that its maintenance platforms were unguarded within the meaning of section 56.14109. After obtaining the Secretary's interpretation, the judge on remand must decide whether the operator was on notice of the regulation's requirements. In addressing the notice issue, the judge must also reconcile the Secretary's claim that Inspector Hobbs provided actual notice to the operator, with her claim that it is unreasonable for operators to rely on the oral assertions of MSHA inspectors when applicable regulations and government manuals provide notice of the operator's obligations. S. Br. at 21-22.

B. Stop Cord or Railing Requirements

If the initial conditions of section 56.14109 are present, the plain terms of the regulation require the installation of either guard railings *or* stop cords. The standard, which states that conveyors falling under the standard must be equipped with "(a) [e]mergency stop devices . . . or (b) [r]ailings" is plainly disjunctive. In his analysis, the judge focused solely on the guard rail requirement of the standard. While he discussed in the fact section of his opinion the possibility of compliance through installation of stop cords, he failed to address in his analysis the possibility that compliance could be achieved through installation of stop cords. *See* 21 FMSHRC 684-85. We also observe that the operator nowhere claims that installation of stop cords, if required by the regulation, would pose a safety hazard. If on remand the judge finds that the threshold requirements of section 56.14109 existed, he must examine both the stop cord and railing compliance options set forth in subsections (a) and (b) of the standard.

C. Estoppel

The Commission has held that the estoppel defense is not ordinarily available against the government. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Furthermore, the Commission has held that an inconsistent enforcement pattern by its inspectors does not estop MSHA from proceeding under an interpretation of the standard that it concludes is correct. *U.S.*

---

[5] Commissioner Verheggen believes that, for the reasons set forth in his dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999), the relevant question here and on remand is whether "'we will accord special weight to the Secretary's view of the [Mine] Act and the standards and regulations [she] adopts under them'" (quoting *Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979)).

Steel Mining Co., 15 FMSHRC 1541, 1546-47 (Aug. 1993) ("[T]he fact that U.S. Steel was not cited prior to July 1990 for failing to conduct weekly examinations of the items cited . . . is not a viable defense to liability."); *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1142 (Sept. 1988); *Bulk Transp. Servs.*, 13 FMSHRC 1354, 1361 n.3 (Sept. 1991). Consistent with our prior approach to estoppel claims against the government, we hold that previous inspectors' representations about the requirements of section 56.14109 did not estop MSHA from issuing the instant citations against Nolichuckey.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Nolichuckey violated section 56.14109 and remand with instructions that the judge obtain from the Secretary a definitive interpretation of what constitutes an unguarded conveyor, and for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Adele L. Abrams, Esq.
Mark N. Savit, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

Robin A. Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041