FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

July 31, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. VA 99-17-M
LOPKE QUARRIES, INC.	:	

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

DECISION

BY THE COMMISSION:

In 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"), the Commission granted cross petitions for discretionary review filed by the Secretary of Labor and Lopke Quarries, Inc. ("Lopke") challenging a decision by Administrative Law Judge T. Todd Hodgdon. 22 FMSHRC 899 (July 2000) (ALJ). Lopke challenges the judge's conclusions that it violated 30 C.F.R. § 56.11001, and that the violations were significant and substantial ("S&S") and due to unwarrantable failure. It also appeals the judge's penalty assessment for its alleged violations of section 56.11001. The Secretary challenges the judge's determination that Lopke did not violate 30 C.F.R. §§ 56.14100(b) and 56.14101(a)(2). For the following reasons, we affirm the judge's decision.

I.

Factual and Procedural Background

Lopke operates portable rock crushing plants at various locations throughout the eastern United States, including the Low Moor Mine near Covington, Virginia, owned by Vulcan Materials. 22 FMSHRC at 899. Lopke began operating at Low Moor in November 1997 and increased the size of its plant in April 1998. *Id.* The plant consists of machines that crush rock, which is then transported by conveyor belts and deposited in discrete piles depending on the size

of rock. *Id.* Front-end loaders move the rock from the piles below the conveyor belts to the area where it is stored for delivery. *Id.*

Joe Spitzer began working for Lopke in January 1998 as a superintendent of its Low Moor plant. *Id.* During Spitzer's tenure at Low Moor, the plant was not able to produce enough crushed stone to meet Lopke's expectations. *Id.* at 899-900. In early May 1998, Lopke sent superintendents Peter Lockwood and Joe McCormack to assist Spitzer in meeting production standards at the plant. *Id.* at 900.

On May 15, 1998, superintendent Lockwood was injured on the site. *Id.* James E. Goodale, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), was sent to the mine to investigate the accident. *Id.* After the investigation, Inspector Goodale returned to the mine on May 20, 1998, to conduct a regular inspection. *Id.* Based on this inspection, he issued 14 citations or orders to Lopke. *Id.* The company contested nine of the orders and citations at a hearing before Judge Hodgdon, including the five orders and citations under review. *Id.*

II.

Lopke's Petition for Discretionary Review
(Citation No. 7713973 and Order Nos. 7713974 and 7713975)

The Low Moor Mine utilized three conveyor belts, the 57's belt, the Fines Stacker belt, and the 8's belt. 22 FMSHRC at 900-01. The 57's belt was 45 feet long and elevated approximately 4 to 15 feet above ground level. *Id.* The Fines Stacker belt was 80 feet long and elevated approximately 4 to 18 feet above ground level. Gov't Ex. 5. The 8's belt was 50 feet long and elevated approximately 4 to 18 feet above ground level. Gov't Ex. 6. During the May 20 inspection, superintendent Spitzer told Inspector Goodale that, in order to service the conveyor belts, he and other miners walked up the belts without using fall protection equipment. 22 FMSHRC at 901. He also told the inspector that the belts had to be serviced at least once a week. Tr. 121. The inspector issued Citation No. 7713973 and Order Nos. 7713974 and 7713975 alleging violations of section 56.11001 as to each belt. Section 56.11001 provides: "Safe means of access shall be provided and maintained to all working places."

The judge concluded that Lopke violated section 56.11001 by failing to provide safe access to the three conveyor belts. 22 FMSHRC at 903. In making his determination, he credited Spitzer's testimony that Spitzer and other miners walked up the belts to service them without using fall protection equipment. *Id.* at 902. The judge determined that the three violations were S&S and due to the operator's unwarrantable failure. *Id.* at 904-05. He assessed a $7,000 penalty for each violation, in part because they involved a serious level of gravity and were due to the operator's high negligence. *Id.* at 913.

Lopke argues that it did not violate section 56.11001 because it provided a safe means of

access by making a safety harness available to miners for use when servicing the belts. L. Br. at 5-7. It contends that the judge erred in crediting Spitzer's testimony and that substantial evidence does not support the judge's determination that it violated section 56.11001. *Id.* at 9-16. Lopke asserts that the judge failed in his S&S analysis to consider whether there was "a reasonable likelihood that the hazard contributed to will result in an injury." *Id.* at 22. The operator argues that the judge erred in his unwarrantability analysis by focusing solely on Spitzer's involvement as a supervisor in the violations, and by failing to consider that safe means of access were available to miners. *Id.* at 16-20. The operator further asserts that the judge erred in his penalty assessments because he assigned too much weight to the gravity and negligence criteria. *Id.* at 23.

The Secretary responds that the judge correctly determined that Lopke violated section 56.1101 because it failed to ensure that a means of access to the belts was made safe. Sec'y Resp. Br. at 7-11, 13-16. She asserts that Lopke's argument — that the standard only requires operators to provide a means of safe access but does not require them to ensure that a safe means of access is used — is not before the Commission because it was not raised below. *Id.* at 13. The Secretary argues that the judge considered all the relevant factors in his S&S analysis and that his unwarrantable determination is supported by record evidence. *Id.* at 24, 31 & n.14. She further argues that the judge considered the relevant criteria in his penalty assessment, and that his findings are supported by the record. *Id.* at 34-35.

A. Violation of Section 56.11001

While Lopke and the Secretary focus their arguments on the meaning of the term "provided" in section 56.11001, they pay little attention to the standard's requirement that safe means of access must also be "maintained."[1] We conclude that Lopke violated the standard because it failed to maintain safe access to the belts.

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 Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). The term "maintained" is not defined in the regulation. However, it is defined in *Webster's Third New International*

[1] We disagree with the Secretary's assertion that Lopke's argument — that the standard only requires an operator to make a safe means of access available but does not require it to ensure it is used — is not before the Commission because it was not raised below. In its post-hearing brief, Lopke argued that it did not violate the standard because it made a safe means of access available to miners servicing the belts. L. Post-Hr'g Br. at 10-11. Thus, the judge had an opportunity to pass on the issue. *Cf. Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (declining to consider "theory upon which the judge was not afforded an opportunity to pass.").

Dictionary 1362 (1993) as to "uphold," "keep up," "continue," or "preserve from failure or decline."[2] Based on this plain meaning of "maintained" in section 56.11001, we conclude that the standard requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place. The inclusion of the word "maintain" in the standard thus incorporates an on-going responsibility on the part of the operator to ensure that a means of safe access is utilized, as opposed to a purely passive approach in which an operator initially provides safe access and then has absolutely no further obligation.[3]

We turn next to the issue of whether substantial evidence[4] supports the judge's determination that Lopke violated the standard for Citation No. 7713973 and Order Nos. 7713974 and 7713975. We reject Lopke's argument that the judge erred in crediting Spitzer's testimony that he and other miners serviced the belts by walking up them without fall protection equipment.[5] The operator argues that the judge failed to consider evidence that Spitzer overestimated how frequently the belts were serviced. L. Br. at 10-13. Lopke argues that

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[2] 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), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (mem).

[3] This conclusion is consistent with our analysis in a recent decision, *Central Sand and Gravel Co.*, 23 FMSHRC 250 (Mar. 2001), in which the regulation at issue required that "[o]verhead high-potential powerlines shall be installed as specified by the National Electric Code" ("NEC"). 30 C.F.R. § 56.12045. The operator had argued that the word "installed" limited its obligation to comply with the NEC to the act of initially setting up power lines for use. 23 FMSHRC at 253. We refused to adopt this interpretation, holding instead that it was logical to interpret the standard to require that clearances from overhead powerlines be adhered to beyond the time of initial installation, and noted that the National Electric Safety Code ("NESC") requires that applicable clearances be "'maintained.'" *Id.* at 254. We emphasized that the term "installed" (like the word "maintained" in the regulation at issue here) "does not designate a limited, initial period of time during which the NEC applies. Rather, it is short hand for the constant vigilance that the NESC makes clear is appropriate . . . ." *Id.* at 255.

[4] 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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[5] As the judge noted, none of the witnesses, apart from Spitzer, were at the mine before early May 1998, so no one but Spitzer could testify directly about what happened at the mine prior to that time. 22 FMSHRC at 902.

Spitzer's testimony that the belts had to be walked up at least once a week is undermined because the 57's belt had a grease line installed which allowed it to be greased from the ground. L. Br. at 12. The judge noted that the 57's belt had a grease line installed, but determined that the belt gearbox and electric motor could not be serviced from the ground. 22 FMSHRC at 903 n.3. Spitzer also testified that, because grease lines often break, management required the 57's belt to be serviced by walking up it. Tr. 208-09. Jason Lewandrowski, the plant operator, testified that no one walked up the 57's belt to grease it, but on cross examination admitted that he had testified in his deposition that the 57's belt had to be walked up to grease it. Tr. 270, 284. In sum, we conclude that ample record evidence supports the judge's decision to credit Spitzer.

Nor are we persuaded by Lopke's assertion that the judge erred in crediting Spitzer's testimony because he failed to consider evidence that Spitzer was biased against the operator. The judge considered evidence that Spitzer was unhappy with his job, that the company was pressing him to increase production, and that Spitzer viewed Lockwood as his replacement. 22 FMSHRC at 902. He determined that the frustrations faced by Spitzer were common to mine superintendents. *Id.* The judge noted that only a month after Spitzer left his job with Lopke, the operator offered him a position as superintendent at another mine which he accepted. *Id.* The judge found it "hard to believe" that Spitzer would accept another position with Lopke if he felt animus toward the company or that the company would offer him another position if it believed he "had intentionally admitted to violations that did not occur." *Id.* The judge concluded that, based on "Spitzer's demeanor and manner while testifying[,] . . . it did not appear that he was dissembling, bore a grudge against Lopke, or was testifying untruthfully." *Id.* at 903. The judge determined that Spitzer was a credible witness and gave "great weight to his testimony." *Id.*

Based on the foregoing, we find that the judge thoroughly analyzed the bias claim and set forth ample reasons for rejecting it and crediting Spitzer. The Commission does not lightly overturn a judge's credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd on other grounds sub nom Sec'y of Labor v. Keystone Coal Mining Corp.* 151 F.3d 1096 (D.C. Cir. 1998). We find no compelling reason to overturn the judge's decision to credit Spitzer.

Regarding Lopke's argument that it complied with section 56.11001 because it made the safety harness available to miners, we hold that the standard requires something more than simply making a safe means of access "available." At a minimum, the standard's requirement that operators "maintain" safe access to working places mandates that management officials utilize that access, and require other miners to do so. It is clear from Spitzer's credited testimony, however, that Lopke failed to take any measures to ensure that miners actually used the safety harness. Even its own superintendent, the person in charge of safety at the plant, accessed the belts without using the safety harness. He also allowed other miners to access the belts without using the safety harness. Consequently, we conclude that substantial evidence supports in result the judge's determination that Lopke violated section 56.11001. Accordingly, we affirm the judge's determination upholding Citation No. 7713973 and Order Nos. 7713974 and 7713975.

B. S&S

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*., 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHR*C, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985).

We agree with Lopke that the judge failed in his S&S analysis to apply the third *Mathies* factor concerning whether there was a reasonable likelihood that the hazard contributed to will result in an injury. Nevertheless, we affirm the judge's S&S determination because the record compels the conclusion that there existed a reasonable likelihood of an injury. The judge credited Spitzer's testimony that miners regularly walked up the belts without fall protection equipment. 22 FMSHRC at 901-02; Tr. 195-97, 199-200. It is undisputed that, when the inspector issued the citation and orders, the belts were not equipped with handrails or safety cables and that neither a man-lift nor a ladder was being used to access the heads of the belts. 22 FMSHRC at 901. It is also uncontroverted that the belts rose to a height of 15 to 18 feet above the ground and that the surface of the belts could become slippery because of dust and rain. Tr. 57, 60. Moreover, the operator did not refute the inspector's testimony that the belts swayed when a miner walked up them and material on the belts could cause a miner to fall. Tr. 60. Inspector Goodale also testified that the practice of walking up the belts without fall protection would be likely to result in a fatality. Tr. 56-57. Finally, the judge in his civil penalty assessment also determined that "[w]alking up the conveyor belts without handrails or safety belts was highly risky." 22 FMSHRC at 913.

Lopke did not contest the judge's determinations on the other *Mathies* factors. Accordingly, we find that no remand is necessary and we affirm in result the judge's determination that the operator's violations of section 56.11001 were S&S.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Regarding the duration of the violations, the judge considered in his unwarrantability analysis that the violations lasted several weeks. 22 FMSHRC at 905. Concerning the operator's knowledge of the violations, he noted that management knew that miners were walking up the belts without fall protection and that such actions were unsafe. *Id.* He also considered that Spitzer, Lopke's superintendent in charge of the operation, was directly involved in the violations.[6] *Id.*

[6] We reject Lopke's argument that the judge erred by failing to consider that Spitzer's behavior was "aberrational." L. Br. at 17. Several miners, not just Spitzer, walked up the belts without fall protection equipment. 22 FMSHRC at 905; Tr. 195-202, 205. Even if Spitzer had been the only miner to walk up the belts without fall protection equipment, as Lopke's superintendent, his actions would still constitute an aggravating factor. *REB Enters.*, 20 FMSHRC at 225.

In terms of abatement, the judge noted that, although management knew miners were using an unsafe means of access to service the belts, it did nothing to stop them. *Id.* He observed that Spitzer had suggested to higher management that handrails were needed on the belts (as handrails would have been an alternative means of complying with the safe access requirement). *Id.* The judge also considered that Vulcan, the company that hired Lopke to run the operation at the Low Moor Mine, had informed Lopke's management that handrails should be installed on the belts, but Lopke failed to act on that advice. *Id.* It is undisputed that Lopke did not install handrails on the belts until after the citations were issued. *Id.* at 901-02. Moreover, Lopke correctly points out that the judge did not consider whether the harness did, in fact, provide a safe means of access.[7] In his analysis of whether the operator violated section 56.11001, the judge merely determined that it was "questionable" whether using the safety harness was a safe means of access to the belts.[8] *Id.* at 903 n.2. Consequently, even if it had been properly utilized, it is unclear whether this would have constituted compliance with the standard. In any event, the existence of the safety harness would not have been a mitigating factor here because the credited evidence establishes that generally miners did not use the harness and, hence, this means of access was not maintained. Tr. 50-51, 56, 195-98.[9]

Given the record evidence establishing the existence of aggravating factors, we conclude that substantial evidence supports the judge's finding that Lopke's conduct was unwarrantable and, accordingly, affirm his finding.

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[7] Although Lopke also asserts (L. Br. at 5) that it provided a second safe means of access to the belts because the belts could be lowered to the ground for servicing, there is no evidence that the belts were ever lowered to service them.

[8] Lopke's superintendent Lockwood testified that the harness provided miners servicing the belts with safe access, but Inspector Goodale testified that it was unlikely that the harness provided a safe means of access. Tr. 67-69, 312.

[9] Commissioner Beatty also believes that the judge erred by failing to consider the obviousness or danger posed by the violations. The record indicates that the belts were tall structures (up to 18 feet high) located outside and in clear view of the main area of the operation. *See* photographs at L. Ex. R-5 & R-6. A miner walking up to the top of the belts without fall protection would have been clearly and readily visible to those working nearby at the operation. This evidence compels the conclusion that the violations were obvious. With respect to the danger factor, the inspector testified that the danger posed by walking up the belts without fall protection was "falling off and striking ground level and dying." Tr. 53. Spitzer testified that the danger posed by the violations was "falling off and somebody getting hurt or killed." Tr. 209. The operator did not offer any testimony that servicing the belts without fall protection was safe. Given the testimony of the inspector and Spitzer, the height and conditions in which the miners had to walk to service the tops of the belts, as well as the judge's S&S finding, Commissioner Beatty believes that the evidence compels the conclusion that the violations posed a considerable danger to the miners.

D. Civil Penalties

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[10] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg,* 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

The judge considered the six section 110(i) penalty criteria in his penalty assessment. 22 FMSHRC at 913. He determined that the proposed penalties would not adversely affect Lopke's ability to stay in business, that its operation at the Low Moor site was a small one, and that it was a small- to medium-sized company. *Id.* He found that Lopke's history of violations was relatively good and that it demonstrated good faith in rapidly abating the violations after citation. *Id.* He also determined that the violations involved high negligence because walking up the belts without fall protection equipment was "highly risky" and that the gravity of the violations was serious. *Id.*

Lopke's assertion that the judge erred in his penalty assessments by assigning undue weight to the negligence and gravity criteria is inconsistent with Commission precedent. Judges have discretion to assign different weight to the various factors, according to the circumstances of the case. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). The judge did not abuse his discretion by weighing Lopke's high negligence and the high gravity of its violations more heavily than he weighed the other penalty criteria. Accordingly, we affirm the judge's

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[10] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

penalty assessments.

III.

Secretary's Petition for Discretionary Review

A. Order No. 7713976

During the May 20 inspection, Inspector Goodale examined a safety device connected to the driver's seat and seatbelt on a New Holland loader. 22 FMSHRC at 906. The safety device was intended to prevent the driver from being struck by the loader's bucket when he exited the driver's cage. *Id.* It was supposed to lock up the hydraulics of the loader so that its lift arms could not be raised or lowered or the loader moved when the driver stood up. *Id.* It was located out of sight under the driver's seat. *Id.*

The inspector discovered that the safety device was not functional because its wires were broken. *Id.* He testified that such a safety device was not required by MSHA's regulations and that there were signs posted on the arms of the driver's cage warning the driver not to get out of the cage without turning the loader off. *Id.* at 907. Nevertheless, because the safety device was defective, the inspector issued Order No. 7713976 to Lopke for violating section 56.14100(b), which provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner . . . ."

The judge determined that the defect affected safety but that no one at the mine was aware that the loader had such a device or that it was defective. 22 FMSHRC at 906-07. He concluded that, to determine whether the operator failed to correct the defect in a timely manner, it is necessary to ascertain when the operator first knew about the defect. *Id.* at 907. Because the operator had no knowledge of the defect, the judge determined that there was no evidence to show that the operator failed to correct it in a timely manner. *Id.* Thus, the judge concluded that the Secretary failed to establish that Lopke violated the standard and he vacated the order. *Id.*

The Secretary argues that section 56.14100(b) is not limited to situations where an operator knows about a defect. Sec'y PDR at 6-7.[11] She maintains that the judge's conclusion that the standard requires the operator to know about the defect discourages operators from being knowledgeable about their equipment. *Id.* at 7. The Secretary asserts that the judge also erred in concluding that the operator did not know about the existence of the safety device. *Id.* at 8. Lopke responds that, because there is no evidence of how long the defect existed, it cannot be determined whether Lopke failed to correct the defect in a timely manner as required by the standard. L. Resp. Br. at 5-6. Lopke argues that it could not have failed to repair the safety device in a timely manner because it did not know the defect existed. *Id.* at 7.

[11] The Secretary designated her petition for discretionary review as her opening brief.

Whether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.[12] The safety device on the loader may have been defective for only moments before it was discovered by the inspector, or it may have been defective for a considerably longer period. Because there is no evidence in the record indicating when the device became defective, we agree with the judge that the Secretary failed to establish that the defect was not corrected in a timely manner. Accordingly, we affirm his determination that Lopke did not violate section 56.14100(b).

B. Order No. 7713979

During the same inspection, Inspector Goodale tested the parking brake on a Dresser 555b front-end loader. 22 FMSHRC at 908. He tested it by instructing the driver to let the loader coast down an incline of approximately 12 to 14 percent from a stop. *Id.* When the loader was traveling at approximately three to five miles an hour, he told the driver to apply the parking brake but to not use the foot brake. *Id.* The inspector determined that the loader continued to travel down the incline at a slower rate after the parking brake was applied. *Id.* He then asked the driver to stop the loader by applying the foot brake, which the driver did. *Id.* The inspector repeated the test a second time with the same results. *Id.* Spitzer testified that he knew about a parking brake problem on the loader for about a week or a week and a half before the inspection. Tr. 99-100, 218.

The inspector issued Order No. 7713979 to the operator for violating section 56.14101(a)(2), which provides: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." He determined that the violation was not S&S because the foot brake worked, but that it was due to unwarrantable failure because management, through superintendent Spitzer, knew about the defective brake but failed to correct it. Gov't Ex. 9; Tr. 98-100.

The judge determined that, instead of testing whether the loader's parking brake would "hold" the stationary loader on an incline as required under section 56.14101(a)(2), the inspector inappropriately tested whether the brake would "stop" the already moving loader on an incline. 22 FMSHRC at 908. He vacated the order against Lopke because the Secretary failed to establish that the parking brake would not hold the loader on an incline. *Id.* at 909.

The Secretary argues that the plain language of the standard does not require testing to show a violation. Sec'y PDR at 9. She asserts that, even if the inspector did not test the parking brake properly, management's admission that the parking brake was defective was sufficient to

[12] Lest an operator be tempted to remain ignorant of defective conditions, we note that Lopke was also cited for failing to inspect the loader before putting it into operation. 22 FMSHRC at 907.

support a finding that Lopke violated the standard. *Id.* at 9-12. Lopke responds that the judge properly determined that it did not violate section 56.14101(a)(2) because the Secretary failed to establish that the parking brake could not hold the loader on an incline. L. Resp. Br. at 15. Lopke asserts that, even if management knew beforehand that the parking brake needed "adjustment," this does not prove that it could not hold the loader on an incline. *Id.* at 16.

We reject the Secretary's argument that, regardless of the way the inspector tested the parking brake,[13] Lopke violated the standard because management knew beforehand that the parking brake was malfunctioning. The Secretary points out that superintendent Spitzer testified that he knew the parking brake was a problem a week to a week and a half before the inspection. In reference to the parking brake, Spitzer testified that "[s]ometimes it would work, sometimes it wouldn't. . . . Sometimes it would hold partially, sometimes it wouldn't. I don't believe it ever completely let loose and wouldn't hold at all." Tr. 218-19. The Secretary also cites to superintendent Lockwood's testimony to support her argument. He testified that two days before the inspection the parking brake required adjustments and that it was adjusted and cleaned before the inspection. Tr. 320-21. When asked if it worked after the adjustment "for some period of time," Lockwood testified that "[s]ometimes it did, sometimes it didn't." Tr. 321.

The testimony of Spitzer and Lockwood is simply unclear on the degree to which the parking brake was not functioning. For example, it is not clear from Lockwood's answer whether the parking brake worked but needed further minor adjustments or whether it sometimes did not work at all. It is also not clear from his testimony whether the subsequent problems with the parking brake after it was adjusted occurred before or after the inspection because Lockwood also testified that Lopke had problems with the parking brake after the inspection. Tr. 322. Certainly, neither Spitzer nor Lockwood testified that the parking brake would have failed to hold the loader "with its typical load on the maximum grade it travel[ed]." *See* 30 C.F.R. § 56.14101(a)(2). Accordingly, we conclude that substantial evidence supports the judge's finding that the Secretary did not prove the violation, and we affirm his decision to vacate the order.

[13] On review, the Secretary does not claim that the inspector's test showed that the parking brake violated the standard.

IV.

Conclusion

For the foregoing reasons, with respect to Citation No. 7713973 and Order Nos. 7713974 and 7713975, we affirm the judge's decision that Lopke violated section 56.11001 and that the violations were S&S and unwarrantable. We also affirm the judge's penalty assessments for these violations. In addition, we affirm the judge's decision vacating Order Nos. 7713976 and 7713979 on the ground that the Secretary did not prove that Lopke violated sections 56.14100(b) or 56.14101(a)(2), respectively.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

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