FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 4, 2003

SECRETARY OF LABOR	:	
Mine Safety and Health	:	
Administration, MSHA,	:	
	:	Docket No. WEST 2001-473-RM
v.	:	
	:	
WESTERN INDUSTRIAL, INC.	:	

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners[1]

DECISION

BY THE COMMISSION:

This contest proceeding involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Western Industrial Insulating, Inc. ("Western") under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Administrative Law Judge Avram Weisberger concluded that the violation charged in the citation had occurred and that it was significant and substantial ("S&S"). 24 FMSHRC 269, 273-74 (Mar. 2002) (ALJ). The Commission granted Western's petition for review in which it challenged the judge's conclusions with regard to those issues. For the following reasons, we affirm the judge's decision.

I.

Factual and Procedural Background

In April 2001, Western was employed as a subcontractor at the Holnam Portland Cement Plant in Florence, Colorado. 24 FMSHRC at 269. Holnam had hired CDK General Contractors

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission.

to expand and modify its cement plant, and CDK, in turn, subcontracted with Western to install insulation and sheet metal on duct work and a vertical cyclone.[2] *Id.*; Tr. 9-10.

In order to perform the installation work on the cyclone, Western erected scaffolding with work platforms at varying heights. 24 FMSHRC at 269. Because the cyclone was cone-shaped, the scaffolding was built like a box around it. Tr. 25-26. The lowest work platform was approximately 80 inches above the catwalk at the base of the cyclone. 24 FMSHRC at 269; Tr. 26-27. Each work platform incorporated the horizontal scaffolding bars as a top rail and a mid-rail that were spaced 22 ½ inches apart. 24 FMSHRC at 270; Tr. 27. Below the mid-rail, planking made up the floor of the work platform with a toe-board on the edge to prevent falls. 24 FMSHRC at 269; Tr. 27, 105. Workers accessed the work platform by climbing up a ladder next to it. 24 FMSHRC at 269.

On April 24, 2001, MSHA Inspector Jack Eberling conducted an inspection at the Holnam plant. *Id.* at 270. The MSHA inspection was triggered by a fatal fall from scaffolding maintained by another company. Tr. 93. While examining the north side of the plant where the cyclone was located, Eberling observed Western's scaffolding and the access to the work platform.[3] Tr. 96-97. Eberling issued a citation charging that access to the scaffolding was "unsafe" in violation of 30 C.F.R. § 56.11001. 24 FMSHRC at 270. The citation stated: "The inboard side of the ladder was 15 inches away from the handrail on the 80 inch high working platform, and access required stepping across the span and through the two handrails onto the wood planking." Ex. C-3. The inspector designated the violation as S&S and charged that it was due to Western's unwarrantable failure.[4] *Id.* Western filed a notice of contest, and a hearing was held.

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[2] A "cyclone" is defined as, "[t]he conical-shaped apparatus used in dust collecting operations and fine grinding applications." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 142 (2d ed. 1997).

[3] In moving to the work platform from the ladder, a worker had to stand on a rung on the ladder that was even with the platform. 24 FMSHRC at 270. A gap of 15 inches separated the outer edge of the ladder from the scaffolding. *Id.* at 272-73. To gain access to the work platform a worker had to crouch under a horizontal I-beam that supported another work platform. *Id.* at 270, 273. The worker had to swing his leg across the 15-inch gap and shift his weight from the foot on the ladder to his other foot before it was on the work platform, while crouching below the I-beam, and then fit through the 22 ½ inch opening separating the top rail and mid-rail. *Id.* at 270, 272-73; Tr. 35-37, 97-99, 115-17.

[4] The S&S terminology is taken from section 104(d)(1) of the Act which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology also is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id.*

In addressing the fact of violation and Western's contentions that the standard at issue is overly broad and provides inadequate notice as to what constitutes compliance or noncompliance, the judge stated that the test for evaluating the regulation was "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized the applicability of the standard to the cited facts at issue." 24 FMSHRC at 270 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). The judge credited the testimony of MSHA Inspector Eberling, who had climbed scaffolding frequently during inspections and in prior jobs, that he had never seen such restricted clearance and that the access was dangerous. 24 FMSHRC at 272. The judge found that Western's witnesses had no basis for their assertions that the access was safe. *Id.* at 271-72. The judge concluded, based on Eberling's testimony, that a reasonably prudent person would have recognized that the access was unsafe and did not meet the requirements of section 56.11001.[5] *Id.* at 272-73.

With regard to the inspector's S&S designation, the judge concluded that the violation contributed to a hazard and that workers would have continued to use the access to reach the work platform during normal operations, subjecting them to a risk of injury by losing their balance and falling over six feet to the floor below. *Id.* at 274. Therefore, the judge concluded that the violation was S&S. *Id.* The judge further concluded that Western's conduct was not aggravated and, therefore, the violation was not the result of its unwarranted failure.[6] *Id.*

II.

Disposition

Western argues that the judge erred in concluding that it violated section 56.11001 and that the violation was S&S. W. Br. at 1-4. It submits that substantial evidence does not support the judge's conclusion that the scaffolding was unsafe. *Id.* at 4-7, 9-10; W. Reply Br. at 4-7. Western further contends that section 56.11001 failed to provide adequate notice that the cited conditions were prohibited by the standard. W. Br. at 7-9. Finally, it asserts that there is insufficient evidence to support an S&S finding because there was no showing of a hazard resulting from the violation. *Id.* at 11-14; W. Reply Br. at 7-8.

The Secretary responds that the judge's decision should be affirmed. S. Br. at 32. She argues that Western had fair notice of the requirements of the regulation, and that the objective criteria relied upon by the judge compel a conclusion that Western should have recognized the hazard. *Id.* at 6-7, 8-10. In addition, the Secretary contends that substantial evidence supports the

[5] The judge inadvertently referred to section 56.11002, instead of section 56.11001, in this portion of his decision. 24 FMSHRC at 273.

[6] The Secretary did not appeal the judge's unwarrantability conclusion; therefore, that issue is not before the Commission.

judge's determinations that Western violated the standard and that the violation was S&S. *Id.* at 13-31.

Section 56.11011 requires "[s]afe means of access . . . to all working places." 30 C.F.R. § 56.11001. The Commission has held that "section 56.11001 comprises the dual requirements of providing and maintaining safe access to working places." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (citation omitted). In reading and applying the terms of section 56.11001, the Commission has previously utilized a plain meaning approach. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-708 (July 2001) (using plain meaning of word "maintained" in the regulation). Here, the judge examined the definition of "safe" in *Webster's Third New International Dictionary* 1998 (1993), which defines "safe" as "secure from threat of danger, harm, or loss."[7] The case, then, turns on whether the record supports the judge's determination that the access to the work platform posed a danger to the workers.

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.[8] 30 U.S.C. § 823(d)(2)(A)(ii)(I). We find that there is substantial credited evidence to support the judge. Inspector Eberling testified that even a casual observer would have recognized that the access to the work platform was dangerous. 24 FMSHRC at 272. He added that he had never seen such restricted clearance. *Id.* As Eberling explained, a worker would have to shift his weight from his foot on the ladder rung to his foot that was extended across a 15 inch gap to reach the work platform and squeeze through the 22 ½ inch opening between the top and mid-rail. *Id.* at 272-73. Additionally, in accessing the platform, a worker would have to crouch under an I-beam that limited overhead clearance. *Id.* at 273. Based on Eberling's testimony, the judge concluded that this awkward maneuvering subjected a worker to a risk of injury by causing him to lose his balance and fall over six feet to the catwalk below. *Id.*

In contrast to Eberling's testimony, the judge noted that Western's director of industrial safety, Michael Howell, gave no basis for his opinion that the access was safe, nor did he explain it. *Id.* at 271. Similarly, the judge found that David Aldridge, who was Western's project

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[7] 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. *Lopke Quarries, Inc.*, 23 FMSHRC at 708 n.2 (citing *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (mem.)).

[8] "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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

manager at the Holman plant, did not provide any basis for his opinion that the access was safe. *Id.* at 272. The judge further found that the opinions of two other Western employees were hearsay. *Id.* at 271. Finally, the judge noted that no CDK employee testified concerning safe access to the platform, even though CDK inspected the area daily. *Id.* at 272.

Western asserts that the judge erred in crediting Eberling over Western's witnesses. However, the Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Here, there is no compelling reason that would lead us to take the extraordinary step of overturning the judge's decision to credit the opinion of Eberling that the scaffolding access was unsafe. Indeed, the judge articulated a well-grounded factual basis for crediting the Secretary's witness over Western's witnesses. *See Lopke Quarries, Inc.*, 23 FMSHRC at 709.

In a further effort to overturn the violation, Western argues that Eberling did not attempt to use the ladder to access the work platform nor did he observe anyone accessing the platform. W. Br. at 6-7; W. Reply Br. at 4-5. Once an inspector has identified a violation, there is no requirement in the Mine Act or Commission case law that he endanger himself or a miner by exposure to the conditions giving rise to the violation.[9] Nor does Western offer any support for the argument that the inspector had to consider the age and physical condition of individual workers who used the work platform in determining whether a regulation was violated.

Finally, with regard to the merits of the violation, Western urges the Commission to consider that access to the work platform was changed by moving the ladder only two inches closer to the platform to abate the violation. However, the method of abatement is not determinative of the existence of a violation. *See also Asarco Mining Co.*, 15 FMSHRC 1303, 1309 (July 1993) (method of abatement not before Commission in a contest proceeding); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2308 n.6 (Oct. 1984) (judge's discussion of abatement method in resolving merits of S&S finding was error). In short, the manner of abatement is not pertinent to the existence of a violation.

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[9] Western cites *Virginia Slate Co.*, 22 FMSHRC 378, 384-85 (Mar. 2000) (ALJ), in support of its assertion that a citation cannot be upheld if there is insufficient evidence to establish how the violative "condition is actually used." W. Reply Br. at 4. However, the portion of the judge's decision upon which Western relies was not appealed to the Commission, although other issues in the case were. *See Virginia Slate Co.*, 23 FMSHRC 482 (May 2001). Accordingly, even if the analysis in the judge's decision upon which Western relies were analogous to the instant facts, it was unreviewed and, therefore, under Commission Rule 72, 29 C.F.R. § 2700.72, is not precedent binding upon the Commission. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 n.3 (Sept. 2000) (citation omitted).

At its core, Western's "notice" argument is in furtherance of its position that the access was not unsafe and, therefore, not within the scope of the regulation. Western does not contend that the language of the regulation was vague or ambiguous; rather, it argues that its director of industrial safety, Howell, and others, who evaluated the ladder access to the work platform, thought it was safe. W. Br. at 9-10 ("While one cannot argue with the basic premise that access should be safe, the legal and factual bases do not exist to sustain this violation, as the Secretary seeks to apply that standard to the circumstances here." *Id.* at 10.). Moreover, when the meaning of a standard is clear from its plain language, it follows that the standard has provided the operator with adequate notice of its requirements. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation).

Western challenges the judge's S&S determination. Western disputed generally the inspector's S&S designation in its Notice of Contest. However, Western did not raise any issue or make any evidentiary or legal arguments related to the S&S designation in its post-trial brief to the judge. W. Proposed Findings of Fact and Legal Argument at 6-12. Therefore, Western is foreclosed from asserting before the Commission that the factors in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), are not met. Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); *accord* 29 C.F.R. § 2700.70(d). *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). In the absence of any explanation from Western regarding why it failed to raise the S&S designation before the judge, we cannot find good cause to consider Western's arguments relating to the S&S designation.

III.

Conclusion

Based on the foregoing, we affirm the judge's decision that Western violated section 56.11001 and that the violation was S&S.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

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