FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 17, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. YORK 2005-22-M
HANSON AGGREGATES NEW YORK , INC.	: :	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Duffy, Chairman, and Young, Commissioner

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), and involves a citation alleging that Hanson Aggregates New York, Inc. ("Hanson"), violated 30 C.F.R. § 56.14211(c).[1] Following the submission of cross motions for summary decision on stipulated facts,[2] Administrative Law Judge T. Todd Hodgdon granted the Secretary of Labor's motion and held that Hanson had violated the regulation. 27 FMSHRC 833 (Jan. 2005) (ALJ). The Commission thereafter ordered review of the judge's decision. For the reasons that follow, we vacate the judge's decision and remand this proceeding to the judge.

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[1] Section 56.14211(c) provides that "[a] raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component."

[2] The cross motions each contained an identical "Stipulated Factual Background," which the judge set forth in his decision. *See* 27 FMSHRC at 833-34. Each party also included in its respective motion a set of Stipulated Material Facts ("SMF"), which, while not identical, differed little in substance from each other. The SMF citations used herein are to the Secretary's version (S.'s Mot. for Summ. Dec. at 5-8), which was the only complete version submitted to the Commission, and appears to be the version cited by the judge in his decision.

I.

Factual and Procedural Background

The violation alleged arose out of a fatal accident that occurred on the morning of March 23, 2004, at Hanson's Jordanville Plant in Herkimer, New York. *Id*. at 833-34. Several Hanson employees were involved in setting up a 75-ton P & H mobile crane on a ramp leading to the mine's primary crusher. *Id*. at 833. The crew planned to use the crane to lift the crusher's feeder and hopper assembly off the crusher so that the assembly could be repaired. *Id*.

The crane had been inspected twice in the previous month and had been found to be in good working order both times.[3] A hoist ball with a hook was properly secured or rigged to the crane's auxiliary hoist line, which was the proper size and in good condition. 27 FMSHRC at 834; SMF Nos. 12-13. The parties agreed that the load brake on that line constituted a "load locking device" or a device that "prevents free and uncontrolled descent," and that it was working properly at the time. SMF Nos. 7, 14.

The crane was further equipped with an "anti-two-block" device. SMF No. 5. "Two blocking" occurs when an object such as a hoist ball is pulled tight against the tip of a crane's boom, snapping the hoist line. 27 FMSHRC at 834. The parties stipulated that load brakes, anti-two-block devices, and proper rigging are the only load locking devices that Hanson could have used to prevent the free and uncontrolled descent of the hook and ball. SMF No. 15.[4]

The way in which the anti-two-block device functioned depended upon the mode in which the crane was operating. When the crane approached a two-block condition while in "rigging/travel mode," the anti-two-block switch for the hoist approaching the two-block condition was supposed to trip or open, and the Microguard would display a red warning light. SMF 24. If the crane approached a two-block condition while in "work mode," one or both of the anti-two-block switches would trip or open, and the Microguard would activate hydraulic cut

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[3] An equipment services contractor that inspected the crane on February 24, 2004, had determined that the crane did not suffer from any defects, including defects that affected safety. SMF No. 10. Hanson had also conducted a monthly inspection of the crane in early March 2004. SMF No. 11.

[4] The anti-two-block device was a Microguard 424 Rated Capacity Indicator ("Microguard"), a computerized system with anti-two-block elements. SMF No. 22. Those elements included two anti-two-block switches or devices: one for the main hoist line and one for the auxiliary hoist line. *Id*. The anti-two-block device had been inspected during both of the aforementioned inspections of the crane, and had been found to have been functioning properly, but was not inspected on the morning of March 24. SMF Nos. 10, 11, & 26. The Secretary does not consider the crane operator's failure to inspect the anti-two-block device to have been a cause of the accident here. SMF No. 30.

valves depending whether one or both hoists were approaching a two-block condition. SMF 25. The system would also sound an audible alarm and display a red warning light. *Id*. Activation of the hydraulic cut valves would essentially shut the crane down, hydraulically preventing a two-block condition from occurring. *Id*.

While the other members of the crew were extending the crane's outriggers and roping off the working radius of the crane, the crane operator, Robert Kimball, was setting up the crane and conducting his pre-shift examination. 27 FMSHRC at 834; SMF No. 28. As Kimball raised the crane's boom approximately 71 degrees and extended the boom about fifty feet, he apparently failed to lower or extend the auxiliary hoist line. 27 FMSHRC at 834.

The extending boom eventually pulled the hoist ball tight against the tip of the boom, snapping the auxiliary hoist line. *Id*. The supervisor of the crew, Dean Robertson, was the designated signal or ground man, and at the time of the accident was standing to the side of the crane. *Id*. The hoist ball and hook fell and struck him, killing him instantly. *Id*.

The Department of Labor's Mine Safety and Health Administration ("MSHA") subsequently investigated the accident.[5] MSHA was unable to determine whether the Microguard system was in "rigging/travel mode" or "work mode" when the accident occurred. SMF No. 3. Moreover, while MSHA conducted tests on the crane, it could not determine whether the anti-two-block device was working properly and consistently on the day of the accident. SMF No. 6.[6]

MSHA thereafter issued Citation No. 6002658 to Hanson. 27 FMSHRC at 834. The citation eventually charged Hanson with violating 30 C.F.R. § 56.14211(c), alleging that "[t]he crane's anti-two-block device either was not activated or malfunctioned and there was no other functional means to prevent accidental lowering." *Id*.

In ruling upon the cross motions for summary decision, the judge identified the only issue in this case to be whether the hook and ball were secured to prevent lowering, as required by

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[5] The Secretary's brief to the Commission cites the MSHA Report of Investigation into the accident and, in so doing, states background information on the case not included in the stipulated narrative of facts or any SMF. *See* S. Br. at 1-6. In its reply brief, Hanson requested that the Commission disregard the new factual allegations not included in the Stipulated Factual Background or the individual SMF. H. Reply Br. at 2, 6-7. The Secretary responded with a letter to the Commission acknowledging that the report had not been submitted to the judge and stating that her citations to the report were only for background and did not constitute probative evidence. Letter from Solicitor's Office, dated May 19, 2006. We did not consider the information from the report cited in the Secretary's brief in reaching our decision here.

[6] During the tests, the anti-two-block device worked at angles of 50 degrees or below, but failed to work consistently at angles above 50 degrees. SMF No. 6.

section 56.14211(c). *Id*. at 835. Based on the description of the Microguard system, the judge posited three possible scenarios under which the accident might have occurred, depending upon the mode in which the crane was operating. *Id*. at 836. Drawing inferences from the stipulated facts, he disregarded as "unlikely" the scenario which assumed that the anti-two-block device did not malfunction. *Id*. at 836. The judge also rejected Hanson's argument that the load brake on the auxiliary hoist line and the proper rigging of the ball and hook to the line constituted compliance with section 56.14211. *Id*. at 835. Consequently, the judge granted the Secretary's motion for summary decision, denied Hanson's cross motion, affirmed the citation, and assessed the $9,100 penalty proposed by the Secretary. *Id*. at 837-38.

II.

Disposition

Hanson contends that the judge's finding of material fact that the anti-two-block device did not function properly was erroneous in that it was improperly based on inferences which the judge drew from the limited record in the case. H. Br. at 12-16; H. Reply Br. at 3-6. The operator further maintains that because the crane was equipped with the only three load-locking devices that could have prevented the free and uncontrolled descent of the hook and ball, and that at least two of those devices were functioning properly, Hanson was in compliance with section 56.14211(c). *Id*. at 9-12.

The Secretary responds that under section 56.14211 a device intended to prevent the hook and ball from suddenly descending must be functioning; and the fact of the accident establishes that the crane's anti-two-block device was not doing so in this instance. S. Br. at 8-13. According to the Secretary, the factual inferences which the judge drew in this case are undisputed, and thus the judge was well within his authority to rely on those inferences, in conjunction with the undisputed facts of the case, to reach the legal conclusion that Hanson violated section 56.14211(c). *Id*. at 13-14.

Section 56.14211 is entitled "Blocking equipment in a raised position" and provides in pertinent part:

> (b) Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. . . . .
>
> (c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

> (d) Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

30 C.F.R. § 56.14211(b), (c)-(d).

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) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *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)).

As the judge found, the requirements of section 56.14211(c) can be broken down into four elements: (1) a raised component of mobile equipment; (2) must be secured to prevent accidental lowering; (3) when persons are working on or around the equipment; and (4) are exposed to the accidental lowering of the component. *See* 27 FMSHRC at 835. There was no dispute that the crane was a piece of mobile equipment on or around which Robertson was working, and while doing so he was exposed to the accidental lowering of the hook and ball. *Id.* Moreover, the parties stipulated that "[t]he 'raised component' of the crane that Hanson allegedly failed to secure is the hook and ball originally secured to the crane's auxiliary hoist line." *Id.*; SMF No. 16. Consequently, the judge concluded that the only issue that remained to be decided on the cross motions for summary decision was the mixed question of law and fact: "whether the hook and ball were secured to prevent accidental lowering" at the time of the accident. 27 FMSHRC at 835.

Summary decisions are governed by Commission Procedural Rule 67. Commission Procedural Rule 67(b) provides that:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
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> (1) That there is no genuine issue as to any material fact; and
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> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that[] '[s]ummary decision is an extraordinary procedure,'" and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).[7]

In addition, appellate review of summary judgment decisions issued pursuant to Federal Rule 56 is *de novo*, in that the reviewing court applies the same Rule 56(c) standard as the trial court. 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2716, at 273-74 (3d ed. 1998). Moreover, the Supreme Court has stated that "we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion," and that "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Consequently, the Commission has held that when it reviews a summary decision and determines that the record before the judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316 (Aug. 1995); *Missouri Gravel*, 3 FMSHRC at 2473.

Here, the judge's summary decision rests upon a factual dispute that he purported to resolve. Drawing upon the description of how the Microguard system worked, the judge posited that one of three scenarios took place prior to the accident:

> (1) The crane was in the "rigging/travel mode," the anti-two-block switch for the hoist did not trip or open and/or the red warning light was not displayed; (2) The crane was in the "work mode," the anti-two-block switches did not trip or open and/or the hydraulic cut valves were not activated, the audible alarm was not sounded and the red warning light was not displayed; or, (3) The crane was in either the "rigging/travel mode" or the "work mode," the hydraulic cut valves were activated, the audible alarm was

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[7] Rule 56(c) provides for the filing of motions for summary judgment and states that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

> sounded and/or the red warning light was displayed and the crane operator ignored them.

27 FMSHRC at 836.

Under the first two scenarios, the Microguard system would not be considered to be a device that was "functioning," but under the third it may have. The judge went on, however, to discount the possibility of the third scenario:

> It seems unlikely that condition No. 3 occurred without there being any evidence of it. As noted above, if the hydraulic cut valves had been activated, the crane would have shut down whether the operator ignored the situation or not, and the accident would presumably have been prevented. Further, bystanders would have noticed the shut down. Similarly, if an audible alarm had sounded, bystanders would have heard it. Moreover, when MSHA tested the anti-two-block device after the accident, it worked when crane's boom was at 50° and below, but it did not work consistently when tested above 50°. (SMF 6.) When the accident occurred, the crane's boom was at approximately 71° according to the stipulated narrative.

Id. The judge stated that he relied not only on the evidence, but also on "logical inferences to be drawn therefrom" in concluding that the Secretary had established that the anti-two-block device had not been working properly. *Id*.

We conclude that the judge erred in granting summary decision in this case. First, he incorrectly held at the outset that because the Secretary and Hanson had each stipulated to the facts, the requirement of Rule 67(b)(1) that there be "no genuine issue as to any material fact" had been met in this case. *See* 27 FMSHRC at 833. However, each of the cross motions was predicated on the filing party's position on what constituted the material facts necessary to dispose of the case according to *that* party. That does not necessarily mean that, when taken together, the two motions conclusively established the universe of facts that were in fact material to determining whether Hanson violated section 56.14211. That is not a question for the parties to decide, but rather for the judge. *See generally Federal Practice and Procedure* §§ 2725 at 401 ("the principal *judicial* inquiry required by Rule 56 is whether a genuine issue of material fact exists"), 2720 at 335-36 (in case of cross motions for summary judgment, "the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard. Both motions must be denied if *the court finds* that there is a genuine issue of material fact.") (emphases added); 11 James Wm. Moore, et al., *Moore's Federal Practice* § 56.11[5][a], at 56-105 to 107 (3d ed. 1999) ("*Courts* ruling on summary judgment motions *are to review the submissions* of the parties *and*

determine whether a factual dispute of sufficient magnitude exists to warrant trial.") (emphases added).

Second, certain factual findings the judge made by drawing inferences from the stipulated facts do not withstand scrutiny when viewed in the light most favorable to the party opposing the motion, Hanson. For instance, the judge found that bystanders would have heard the Microguard system's audible alarm if it had sounded (27 FMSHRC at 836), despite the lack of any evidence regarding how the working environment was at the time in question. For example, the limited facts reveal nothing about ambient noise, where all potential witnesses might have been positioned, what they heard or observed, or the relative volume of the audible warning. Consequently, this was not a proper inference to draw in ruling upon a motion for summary decision. Likewise, inferring that MSHA's post-accident testing established the pre-accident condition of the anti-two-block device ignores the possibility that the device was functioning properly before the accident but was damaged during the accident. The judge can rely on inferences to make such findings only after the record has been more fully developed.[8] As stated by the Commission in a previous case, "[i]n entering summary decision . . . , the judge was trying issues of fact through the summary decision procedure. This he cannot do." *Missouri Gravel*, 3 FMSHRC at 2473.

Similarly, the judge, in inferring that the accident could only be explained by a malfunction in the Microguard system, failed to take into account evidence that the accident instead could be attributed to operator error. Indeed, the parties specifically stipulated that "operator error was a root cause of the accident." SMF No. 17. The judge acknowledged the stipulation, but stated that "no information beyond that enigmatic statement is provided." 27 FMSHRC at 836 n.1. However, while the stipulation may not supply much information when viewed in isolation, according to another of the stipulations, it appears that the crane operator

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[8] We stress that inferences that could be considered reasonable in the context of a full record may not be sufficiently supported by the scant record stipulated to at this stage of the proceedings. The Commission has consistently held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence," and that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). However, the grant of a summary decision motion is not reviewed under the substantial evidence standard, but rather, as discussed, under the more stringent de novo review of whether the Procedural Rule 67(b) standard has been met. Furthermore, even if the lower standard of review is applied, the thin record in the case necessarily prevents a determination of whether the inferences the judge drew were reasonable. As the Commission recognized in *Mid-Continent*, drawing inferences from evidence is particularly appropriate "where . . . it is impossible or there is only a remote possibility of obtaining direct evidence to establish a violation." 6 FMSHRC at 1138. Here, where the parties made little effort to develop the record and no evidentiary hearing took place, it was premature for the judge to rely on the inferences that he did in concluding that there was a violation.

was conducting a preshift inspection at the same time he was raising and extending the boom. SMF No. 29. Further factual development is necessary on this issue, another clearly material issue.

In addition, the sparse factual record that we have been presented with is particularly problematic given the Secretary's failure to explain what she expects of operators under the terms of subsection (d) of section 56.14211. In interpreting section 56.14211(c), we cannot ignore the import of subsection (d). *See Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990) (reading regulatory provision in context to determine whether its meaning was plain or ambiguous). Subsection (d) states that "[u]nder this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent." As noted, the parties stipulated that: (1) the ball and hook were properly rigged to the hoist line; (2) the load brake on the line, constituted, using the exact terms of section 56.14211(d), "a 'load locking device' or a device that 'prevents free and uncontrolled descent;'" and (3) the load brake was working properly at the time of the accident. SMF Nos. 7, 12, 14. We are unable to determine from the record developed in this case whether such conditions satisfied the requirements of section 56.14211(d). This is a question on which the judge first needs to pass, after the benefit of an evidentiary hearing which could include factual and expert testimony and the submission of documents.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision granting the Secretary's motion for summary decision and remand this case for a full evidentiary hearing.

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Michael F. Duffy, Chairman

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Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The threshold question in this case — indeed, the central question — is the proper interpretation of the regulation at issue. That standard is entitled "Blocking equipment in a raised position" and provides in relevant part:

> (c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.
>
> (d) Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

30 C.F.R. § 56.14211(c)-(d).

Hanson contends that the prohibition against accidental lowering contained in section (c) is qualified by the language of section (d). H. Br. at 9-12. According to this view, an operator whose equipment has a properly working load-locking device cannot be cited under the regulation, even if the device fails to prevent an accidental lowering. In the present case, Hanson's crane was equipped with three load-locking devices. 27 FMSHRC 833, 835 (Nov. 2005) (ALJ). The parties stipulated that two of the three were working properly at the time of the accident. Stipulated Material Facts ("SMF") Nos. 7 and 12. Nonetheless, the hoist ball and hook accidently fell, killing Dean Robertson, who was standing next to the crane. 27 FMSHRC at 834.

The accident resulted from an occurrence commonly known as "two blocking." *Id.* The two-blocking accident occurred despite the fact the crane was equipped with an anti-two-block load-locking device. The judge held that even though Hanson was not required to equip the crane with the anti-two-block device, once it chose to provide that mechanism, it had to make sure it functioned properly. *Id.* at 836-37. The judge inferred, on the basis of stipulated facts, that the anti-two-block device was not working properly at the time of the accident, and he upheld the violation on that basis. *Id.* My colleagues conclude that the scant stipulated record at this stage of the proceedings does not support the judge's inferences. Slip op. at 8-9. They further conclude that summary judgment is not an appropriate vehicle for deciding this case because the parties' stipulations do not establish the universe of facts that are material to a determination of whether Hanson violated section 56.14211. *Id.* at 7-8.

I agree with my colleagues that certain of the judge's inferences are not supportable; however, those faulty inferences are only relevant to the judge's determination that the anti-two-block system malfunctioned at the time of the accident. Unlike the judge, I do not consider such

a finding to be a necessary precondition for upholding the Secretary's enforcement action. Moreover, in contrast to my colleagues, I believe the stipulated facts provide a sufficient record for deciding the matter before us.

Among other things, the parties have agreed that the hook and ball constituted a "raised component" of the crane that Hanson allegedly failed to secure. SMF 16. There is no dispute that this ball and hook fell. 27 FMSHRC at 834. There is also agreement that a person was "working . . . around mobile equipment and . . . exposed to the hazard of accidental lowering." *Id*.

The Secretary maintains that these facts support a violation of 56.14211(c), because that provision states that a "raised component must be secured to prevent accidental lowering." S. Br. at 8-9. Although 56.14211(d) allows an operator to secure the raised component by using a "functional load-locking device," the Secretary does not consider a load-locking device to be "functional" as that term is used in 56.1411(d) if, despite the presence of that device, a free and uncontrolled descent nevertheless occurs. S. Br. at 8. Because none of the load-locking devices on the crane served to prevent the ball and hook from suddenly descending, the Secretary concluded the crane was not equipped with a functional load-locking device within the meaning of the regulation. *Id.* at 12.

Hanson contends that a violation occurs only when there is no properly working load-locking device, and that this is not the situation here. H. Br. 11-12. Indeed, Hanson contends it exceeded its obligation under the regulation by equipping the crane with two load-locking devices which were working properly at the time of the accident: load brakes and correct rigging. *Id.* This case therefore presents the issue of whether an operator violates section 56.14211(c) whenever there is an accidental lowering of a raised component, or whether the Secretary is precluded from issuing a citation if, despite the accidental lowering, the operator demonstrates that the equipment contains at least one load-locking device that is shown to be in working order. Because the language of the regulation does not explicitly resolve this dispute, I consider it ambiguous.

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). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y 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. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory

function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus.*, Inc., 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary construes the phrase "functional load-locking device" in section 56.14211(d) to apply only to devices which prevent the accidental lowering of raised components referred to in section 56.14211(c). S. Br. at 8. Under this view, a stipulation that a particular load-locking device was in working order (e.g. SMF No. 7) does not absolve Hanson from liability if a free and uncontrolled descent nevertheless occurs, even if the device might have prevented a different kind of accident. Given the purpose of the regulation, this is not an unreasonable interpretation.

The regulatory history of section 56.14211 makes clear that this provision is about more than a mere requirement to provide certain devices on mobile equipment:

> When persons work on top of, under, or from mobile equipment in a raised position, or a raised portion of that equipment, there is a hazard that the raised portion may descend without warning. Miners have been seriously injured or killed when raised equipment or raised components of equipment have fallen unexpectedly. This standard sets forth safety requirements that are intended to prevent these occurrences.

53 Fed. Reg. 32,496, 32,516 (Aug. 25, 1988). Thus, section 56.14211 was promulgated not simply to require that operators provide certain devices on cranes, but to actually protect against accidental lowering of raised components.

The Commission decision in *Fluor Daniel*, 18 FMSHRC 1143 (July 1996), also supports the Secretary's position here. In that case, the operator was charged with a violation of 30 C.F.R. § 56.14101(a)(1), which requires that self-propelled mobile equipment be provided with a service brake system capable of stopping and holding the equipment. The operator argued that since the standard provided the method and criteria for testing brakes under subsection (b), and since it was stipulated that the brakes met the requirements of that subsection, the brakes did not violate the standard. The Commission concluded:

> Under its plain language, the service brakes must be capable of stopping and holding the equipment on the maximum grade it travels. The uncontroverted evidence established that the forklift's brakes failed to meet this requirement. . . . Thus . . . we reverse [the

judge's] determination that the Secretary failed to establish a violation of section 56.14101(a)(1).

18 FMSHRC at 1146.

In upholding the citation, the Commission rejected Fluor's argument that section 56.14101(b) limited the scope of subsection (a), pointing out that "[s]ection 56.14101(b) relates only to the testing of service brakes when there is 'reasonable cause to believe that the service brake system does not function, as required'" and that "the tests contained in subsection (b) [were not] the exclusive means of determining the effectiveness of service brakes." 18 FMSHRC at 1146.

I do not find the Secretary's result-oriented approach to be unreasonable, given the language and purpose of the regulation. Subsection (c) could reasonably be read in this manner, as it requires that the raised component *must* be secured and that accidental lowering *must* be prevented. Moreover, Hanson's interpretation of the regulation — that it need only utilize a device specified in subsection (d) that is in working order to be in compliance — in effect reads subsection (c) out of the regulation. This contradicts the elementary rule of construction that effect must be given to every word, clause and sentence in a statute,[1] and that it should be construed so that effect is given to all its provisions so that no part will be superfluous. Norman J. Singer, 2A Statues and Statutory Construction, § 46.06 (6th ed. 2000); *see also Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1438 (D.C. Cir. 1989) (rejecting a regulatory interpretation that read one subsection as circumscribed by another).

Even if one could determine that Hanson's interpretation is reasonable, it is certainly not the only logical interpretation possible. It is not the role of the Commission to decide which of the two interpretations at issue is correct; our role is merely to determine if the Secretary's view is reasonable. *See Sec'y of Labor v. Mutual Mining, Inc.,* 80 F.3d 110, 115 (4th Cir. 1996) (deferring to Secretary's interpretation of statutory provision regarding unemployment compensation). The D.C. Circuit emphasized this principle in *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320-321 (D.C. Cir. 1990) (adopting the Secretary's view that a training regulation that exempted "supervisory personnel" did not apply to supervisors when they were working as miners, even though the operator's facial reading of the standard was also reasonable).

I conclude that the Secretary's interpretation of section 56.14211 is a reasonable one and should be accorded deference.[2] Accordingly, I do not believe any further fact finding on the part

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[1] The principles or rules of statutory construction apply to administrative regulations. 2 Am. Jur. 2d *Administrative Law* § 245 (2004).

[2] Separate from the issue of regulatory interpretation is whether the operator has received fair notice of the Secretary's interpretation of the regulation. *Gates & Fox Co. v. OSHRC*, 790

of the judge is necessary, and therefore would not remand this case to him for a trial. Rather, I would affirm the judge's decision in result.[3]

Mary Lu Jordan, Commissioner

F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). However, that issue is not before us because on review Hanson has not asserted that it did not have adequate notice.

[3] Consistent with my analysis of the regulation, I disagree with the judge's statement that the result in this case could possibly be different if Hanson had not installed an anti-two-block device. Given that an accidental lowering occurred, pursuant to my analysis, this fact would not be relevant.

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