# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**1730 K STREET NW, 6TH FLOOR**

**WASHINGTON, D.C. 20006**

February 18, 1997

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. YORK 94-51-M |
| | : | |
| BUFFALO CRUSHED STONE, INC. | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

## DECISION

BY: Jordan, Chairman[2]

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), involves alleged significant and substantial (AS&S@) violations of three separate safety standards: 30 C.F.R. ' 56.14109(a), for failure to locate an emergency stop cord along a conveyor belt so a person falling against the conveyor could readily deactivate its drive motor; 30 C.F.R. ' 56.11009, for failure to provide cleats on an inclined walkway; and 30 C.F.R. ' 56.11002, for failure to provide an adequate stairway handrail. Administrative Law Judge Avram Weisberger concluded that Buffalo Crushed Stone, Inc. (ABuffalo@) did not violate section 56.14109(a) and that, although it violated sections 56.11009 and 56.11002, those violations were not S&S. 16 FMSHRC 2154, 2158-61 (October 1994) (ALJ). The Commission granted the Secretary of Labor=s petition for discretionary review challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, and remand.

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. 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 designated to exercise the powers of the Commission.

[2] Chairman Jordan is the only Commissioner in the majority on all issues.

I.

Factual and Procedural Background

On December 15, 1993, Samuel Waters, an inspector from the Department of Labor=s Mine Safety and Health Administration (AMSHA@), inspected Buffalo=s Wehrle limestone quarry in Erie County, New York. 16 FMSHRC at 2154. Inspector Waters observed an emergency stop cord, strung alongside a conveyor belt, that was displaced for a length of approximately 20 feet due to a bent Astandard,@ i.e., a vertical piece of steel with a hole through which the cord runs.[3] 16 FMSHRC at 2158; Tr. 40, 45-46. At the center of the 20-foot section, a 2- to 5-foot length of the stop cord had dropped 2 inches below the level of the conveyor belt. 16 FMSHRC at 2158; Tr. 42, 89-90, 92. The inspector determined that, at this location, a person falling on or against the conveyor from the adjacent walkway would not be able to readily deactivate the conveyor drive motor by pulling the stop cord and that injury could result. 16 FMSHRC at 2158. He issued Buffalo Citation No. 4289706, pursuant to section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), alleging an S&S violation of section 56.14109(a).[4] 16 FMSHRC at 2158-59; Tr. 46-48.

In addition, Inspector Waters observed a 16-foot-long section near the bottom of an inclined, wooden walkway that was neither nonskid nor provided with Acleats.@ *Id.* at 2159; Tr. 49-50. Cleats are 1-inch-square wooden boards nailed perpendicular to the walkway=s edges, usually 12 to 18 inches apart. 16 FMSHRC at 2159. The walkway was located outdoors adjacent to a conveyor belt and was approximately 70 to 90 feet long. *Id.*; Tr. 51, 170. The surface of the walkway contained Acompacted material@ that became slippery when wet. 16 FMSHRC at 2159-60. Waters determined that the uncleated portion of the walkway presented a slipping hazard that could result in injury and issued Buffalo Citation No. 4289707, pursuant to section 104(a) of the Mine Act, alleging an S&S violation of section 56.11009.[5] *Id.*

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[3] The total length of the conveyor belt was 75 to 100 feet. Tr. 41.

[4] Section 56.14109 states, in relevant 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 . . . .

30 C.F.R. ' 56.14109.

[5] Section 56.11009 states:

> Walkways with outboard railings shall be provided
>
> wherever persons are required to walk alongside elevated conveyor

belts. Inclined railed walkways shall be nonskid or provided with cleats.

30 C.F.R. ' 56.11009.

Inspector Waters also observed a steep stairway leading to the tail of a conveyor belt. *Id.* at 2160. One side of the stairway was against a wall and the other side was provided with a handrail that varied from 18 to 21 inches in height. *Id.*; Tr. 55. The stairway extended 12 feet above a concrete surface. 16 FMSHRC at 2160. Waters determined that the handrail was too low to prevent a person descending the stairway from falling over the handrail and that injury could result. *Id.* He issued Buffalo Citation No. 4289709, pursuant to section 104(a) of the Mine Act, alleging an S&S violation of section 56.11002.[6] *Id.* at 2160-61; Tr. 59.

Following an evidentiary hearing, the judge concluded that Buffalo had not violated section 56.14109(a) regarding the emergency stop cord and dismissed the citation. 16 FMSHRC at 2159. He noted that the standard does not require the stop cord to be located at a specific height and that there was no evidence that a falling person could not readily deactivate the conveyor at the cited location by pulling the stop cord. *Id.* As to the inclined walkway, the judge concluded that Buffalo had violated section 56.11009 but that the violation was not S&S because the Secretary had failed to establish a reasonable likelihood of injury. *Id.* at 2159-60. Relying on testimony that there was no Adebris@ on the walkway and evidence that the greater portion of the walkway was provided with cleats, the judge found that slipping and falling in the uncleated area was not reasonably likely to occur and assessed a civil penalty of $50. *Id.* at 2160. Concerning the stairway handrail, the judge concluded that Buffalo violated section 56.11002 but that the violation was not S&S because the Secretary had failed to establish a reasonable likelihood of injury. *Id.* at 2160-61. He found that there were no specific facts in the record demonstrating that falling off the stairway was reasonably likely to occur and assessed a civil penalty of $50. *Id.* at 2161.

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[6] Section 56.11002 states, in part:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition.

30 C.F.R. ' 56.11002.

II.

Disposition

1. Emergency Stop Cord[7]

The Secretary argues that the administrative law judge erred when he concluded that no violation of section 56.14109(a) occurred. He asserts the judge ignored testimony that at the cited location the stop cord was not readily accessible to a person who slipped or fell onto the belt. S. Br. 2-3, 8-10. Buffalo responds that the judge correctly concluded that no evidence was presented showing the conveyor could not be readily deactivated. It points out that the standard does not specify the height of the cord relative to the conveyor and that Inspector Waters determination that a violation existed was based solely on his interpretation of the law. B. Br. at 1, 3-4.

Buffalo correctly observes that section 56.14109(a) does not specify a particular placement for the stop cord but requires that it be located so Aa person falling on or against the conveyor can readily deactivate the conveyor drive motor.@ The core interpretive issue, therefore, is the meaning of the term Areadily deactivate.@

Inspector Waters explained that a stop cord is in its Acorrect location@ when it is Astretched tightly@ and is Aabove the belt@ because Ain slipping and falling . . . you want your elbow or arm to hit the stop cord before you hit the belt.@ Tr. 44, 116. He testified that a miner should not have to Aconsciously think to grab the cord and pull it to deactivate it.@ Tr. 116. The inspector stated that the Arule of thumb@ he has been taught to apply is that the stop cord should be Anice and tight@ and located from Asomewhere near the side edge of the belt to as much as four inches above the side edge of the belt.@ Tr. 44, 115. He issued the subject citation because one of the upright steel standards which holds the cord in place was bent and had caused a portion of the stop cord to become slack and fall 2 inches below the conveyor belt. Tr. 40, 42.

It is well established that an agency=s interpretation of its own regulations should be given Adeference . . . unless it is plainly wrong@ and so long as it is Alogically consistent with the language of the regulation and . . . serves a permissible regulatory function.@ *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted); *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 462 (D.C. Cir. 1994). In addition, the legislative history of the Mine Act provides that Athe Secretary=s interpretations of the law and regulations shall be

[7] Chairman Jordan and Commissioner Marks vote to reverse the judge=s determination that there was no violation of section 56.14109(a). Commissioner Riley would affirm the judge=s determination.

given weight by both the Commission and the courts.@ S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). Here, because we conclude that the Secretary=s interpretation of the stop cord standard is consistent with its language and not unreasonable, deference to that interpretation is appropriate.

Section 56.14109(a) requires the emergency stop device to be Alocated so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor.@ The Secretary has interpreted this standard to require stop cords to be taut and located above the conveyor belt so that a falling person=s arm or body can hit the stop cord Aon the way down during the fall.@ Tr. 117. The Secretary=s interpretation is consistent with the language of section 56.14109(a). The standard is directed at protecting someone who is A*falling* on or against the conveyor@ and requires that such person be able to A*readily* deactivate the conveyor drive motor.@ 30 C.F.R. ' 56.14109(a) (emphasis added). It is not limited to protecting persons who have already fallen onto the conveyor belt. Moreover, according to the record, conveyor belts are generally Aanywhere from knee high to above waist high.@ Tr. 43. The Secretary asserts that someone who is Afalling@ toward a moving belt of this height would find it virtually impossible to locate a stop cord that is hanging even slightly below the conveyor and, therefore, would not be able to Areadily@ deactivate the conveyor before landing on it. In our view, the Secretary reasonably concludes that a person in the process of falling will only be able to Areadily deactivate@ the conveyor if he does not have to consciously look for the stop cord. By requiring the stop cord to be located where it is likely a person=s arm or body will automatically deenergize the conveyor belt, the Secretary seeks to reduce the chance that a miner will fall onto that belt while it is still moving, or that a miner will suffer injury by getting an arm caught as he tries to catch himself. Tr. 44, 115, 117.

We note further that, by interpreting section 56.14109(a) in a manner that reduces the likelihood of a miner who falls coming into contact with a moving belt, the Secretary has taken an approach that is also consistent with the alternative means of compliance provided by 30 C.F.R. ' 56.14109(b). Under that section, in lieu of a *stop cord*, an operator can provide protection from unguarded conveyors by installing *railings* Awhich are positioned to prevent persons from falling on or against the conveyor.@ *Id.* Railings are not directed at miners who have already fallen onto the belt; they afford protection by *preventing* persons from coming into contact with the moving conveyor. Likewise, by requiring stop cords to be located so they will deenergize the belt Aon the way down during the fall,@ the Secretary seeks to prevent miners from coming into contact with the moving conveyor, rather than simply providing miners with a means of deactivating the belt once they have landed on it. Tr. 117.

Unable to explain why the interpretation to which we defer is unreasonable, our dissenting colleague chooses to characterize it as nothing more than the inspector=s Apersonal belief.@ Slip op. at 12. Our colleague misapprehends the circumstances of this case. While we agree that operators should not be penalized on the basis of subjective or inconsistent applications of a

regulatory requirement, these considerations are not present here. The interpretation of the stop cord standard is not the solitary idea of a rogue inspector. On the contrary, the Secretary, through his Solicitor, has urged this Commission to affirm the citation on the very basis articulated by Inspector Waters. S. Br. at 8-10. Moreover, the stop cord interpretation the Secretary advances here is *identical* to his position in *Asarco, Inc.*, 14 FMSHRC 829, 831-32 (May 1992) (ALJ), a case which the Commission did not review. Furthermore, the operator makes no claim that it was unaware of MSHA=s interpretation or subjected to inconsistent applications of MSHA=s stop cord requirement. Indeed, the record shows it had previously been cited for a similar stop cord violation. Tr. 91. Thus, we are not confronted with the situation in which a Aregulated party is not >on notice= of the agency=s ultimate interpretation . . . and may not be punished.@ *General Electric Co. v. EPA*, 53 F.3d at 1334.

Our colleague also contends that the interpretation advocated here constitutes an amendment of the standard, which may only be enforced after a formal rulemaking proceeding. The Secretary=s parameters for compliance, however, do not offer an Ainterpretation that repudiates or is irreconcilable with an existing legislative rule,@ *see American Mining Congress v. MSHA*, 995 F.2d 1106, 1113 (D.C. Cir. 1993), so as to require formal rulemaking; they merely explain the agency=s understanding of the term Areadily deactivate.@ As such, the agency is not required to initiate APA rulemaking when it Aseeks merely to clarify or explain existing law.@ *Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992).

In sum, we conclude that the Secretary=s interpretation of section 56.14109(a) is reasonable and entitled to deference because it is consistent with the language of the standard, it furthers the safety aims of the standard, and it is in harmony with the alternative requirement pertaining to unguarded conveyors.

Applying the Secretary=s interpretation to the facts of this case, we conclude that substantial evidence does not support the judge=s determination that Buffalo did not violate section 56.14109(a). Here, there is no dispute that a portion of the stop cord was slack and had fallen below the conveyor belt. As such, it was not a stop device which could Areadily deactivate@ the conveyor drive motor. Accordingly, we reverse the judge=s determination that Buffalo did not violate section 56.14109(a) and remand for determination of whether the violation was S&S and assessment of a civil penalty.

B. Inclined Walkway[8]

The Secretary argues that substantial evidence does not support the judge=s conclusion

[8] All Commissioners vote to reverse the judge=s determination that the violation of section 56.11009 was not S&S.

that the violation of section 56.11009 was not S&S. He asserts the judge misstated testimony and ignored evidence showing that slipping and falling on the uncleated portion of the walkway was reasonably likely to occur. S. Br. 1-2, 5-6. He also contends the judge erred in relying on evidence that the greater portion of the walkway was provided with cleats. *Id.* at 5-6. Buffalo responds that substantial evidence supports the judge=s finding. It asserts that the judge properly credited evidence that the walkway did not have any tripping hazards, it was not wet or slippery at the time of the inspection, guardrails and stop cords were in place, the standard does not specify the distance between cleats, and no serious injury had resulted or would result from a person falling on the walkway. B. Br. at 1, 2-3.

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. *Cement Div., Nat=l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 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). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary 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. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second elements of the *Mathies* criteria have been established: the judge found that Buffalo violated the standard and that a person traveling along the uncleated portion of the walkway would be exposed to the risk of slipping and falling. 16 FMSHRC at 2159-60. The issue on review is whether the judge erred in concluding that the Secretary failed to establish the reasonable likelihood of an injury-producing event.

In concluding the Secretary failed to establish the third *Mathies* element, the judge noted that A[a]ccording to [Buffalo employee Thomas] Rashford, there was no debris on the walkway. The greater portion of the walkway was properly provided with cleats.@ *Id.* at 2160. We agree with the Secretary that the judge misstated Rashford=s testimony. Rashford testified that there was debris on the walkway but that it did not present a stumbling hazard. Tr. 164. Further,

testimony that the material on the outside walkway became slippery when wet (Tr. 50-52, 97, 170) was not refuted. Buffalo=s argument that the walkway was not slippery at the time of the inspection is not determinative because an evaluation of the reasonable likelihood of injury is to be made assuming continued normal mining operations. *U.S. Steel*, 7 FMSHRC at 1130. In addition, the judge erred in considering that the greater portion of the walkway was provided with cleats. The fact that a portion of the walkway is cleated is irrelevant to the likelihood of slipping in the uncleated area.

Buffalo=s remaining arguments are unavailing. While the standard=s failure to specify the distance between cleats would be relevant to whether there was a violation, it is not relevant to whether the violation was S&S. In addition, evidence that guardrails on the walkway and stop cords on the adjacent conveyor belt were in place is not dispositive of the reasonable likelihood that slipping on the walkway surface would result in an injury. Similarly, the fact that no injuries had been reported as a result of the condition of the walkway is not determinative of a conclusion that the third *Mathies* element has not been established. *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

In sum, we conclude that substantial evidence does not support the judge=s determination that Buffalo=s violation of section 56.11009 was not reasonably likely to result in an injury. Accordingly, we reverse the judge=s holding that the violation was not S&S and remand the matter for reassessment of the civil penalty.[9]

C. Stairway Handrail[10]

[9] Although the judge did not expressly consider the fourth *Mathies* element, the evidence establishes that an injury resulting from slipping on the walkway would be of a reasonably serious nature. Inspector Waters testified that slipping on the walkway could result in a head injury or a finger or wrist fracture. 16 FMSHRC at 2160.

[10] Chairman Jordan and Commissioner Riley vote to affirm the judge=s determination that the violation of section 56.11002 was not S&S. Commissioner Marks would reverse the judge=s determination.

The Secretary argues that substantial evidence does not support the judge=s conclusion that the violation of section 56.11002 was not S&S. He asserts the judge ignored evidence that falling down the stairway was reasonably likely to occur. S. Br. 1-2, 7-8. Buffalo responds that substantial evidence supports the judge=s finding. It asserts that, given the 54 degree angle of the stairway, the handrail was in the proper location to restrain a miner of average height if he slipped. B. Br. at 1, 3.[11]

[11] Buffalo did not, however, challenge the judge=s ruling that it violated the standard. Consequently, that issue is not before us.

The issue on review is whether the judge erred in concluding that the Secretary failed to establish the reasonable likelihood of an injury-producing event, the third *Mathies* element.[12] Inspector Waters testified that the stair treads were a nonskid surface and that there were no tripping hazards on the stairs. Tr. 105. Further, Waters acknowledged that, as the steepness of a stairway increases, Athe handrail should be more consistent with where [one=s] hands or a comfortable position would be.@ Tr. 106. He conceded that a person descending the stairway would be able to hold the handrail from a standing position without bending forward (Tr. 124), establishing that the handrail was positioned consistently with the location of a miner=s hand.

We therefore conclude that the judge correctly determined that the Secretary failed to prove the reasonably likely occurrence of an injury resulting from Buffalo=s violation of section 56.11002. Accordingly, we affirm the judge=s holding that the violation was not S&S.

III.

Conclusion

For the foregoing reasons, we reverse the judge=s determinations that there was no violation of section 56.14109(a) and that the violation of section 56.11009 was not S&S, and we remand for further consideration consistent with this opinion. We affirm the judge=s determination that the violation of section 56.11002 was not S&S.

Mary Lu Jordan, Chairman

[12] Contrary to the Secretary=s assertions, the judge expressly recognized that the stairway was steep and that one side of the stairway was against a wall. 16 FMSHRC at 2160.

Commissioner Marks, concurring in part and dissenting in part:

For the reasons expressed in the majority opinion, I concur in the conclusion to reverse the judge=s negative finding of violation regarding the emergency stop cord citation. I also concur in the decision to remand this matter for the judge=s determination of whether the violation was S&S and for the assessment of a civil penalty.

Regarding the inclined walkway violation, I concur in the conclusion to reverse the judge=s negative S&S determination and I also concur in the determination to remand for reassessment of the civil penalty. However, in disposing of the S&S issue, my colleagues find that substantial evidence does not support the judge=s determination that the violation Awas not reasonably likely to result in an injury@ as set forth in the Commission=s so-called *Mathies* test. Slip op. at 6-8 (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984)). Although I do not disagree with that finding, I continue to urge that the ambiguous language of the *Mathies* test, and in particular the third element therein, argues for Commission clarification of its interpretation of the Act=s S&S language. It seems extraordinary to me that neither the Secretary nor affected operators have taken issue with the *Mathies* language which has, for 13 years, continued to cause increased litigation, time, and expense to all parties concerned in the cases brought before the Commission. Thus, for the reasons set forth in my concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868 (June 1996), I conclude that reliance upon the third *Mathies* element is an inappropriate basis upon which to support the S&S conclusion. In this case, the record evidence referenced in the majority opinion clearly demonstrates that the violation posed a risk of injury that was neither remote nor speculative. Therefore, on that basis, I concur in the reversal of the judge=s negative S&S conclusion.

My colleagues affirm the judge=s determination that the stairway handrail violation of 30 C.F.R. ' 56.11002 was not S&S. Slip op. at 8-9. I disagree and therefore I dissent. Once again my colleagues= persistence in applying the *Mathies* test, and in particular the third element, results in a ruling that I believe is inconsistent with the law.

Citation No. 4289709, charging a S&S violation of section 56.11002, states:

> The stairway leading to the tail area on the No. One conveyor was not provided with an adequate handrail. On the side away from the wall, the handrail provided (one rail only) was found to be eighteen inches (18 in.) to twenty[-]one inches (21 in.) above the stair steps. The handrail was insufficiently high to protect a worker descending the stairs if he were to slip, trip, or otherwise fall. This was a potential fall of person hazard. The staircase consisted of twenty[-]one (21) steps, with an approximate fall of person height of up to twelve (12) feet to concrete below.

In concluding that the violation was proven by the Secretary, the judge determined that,

> Waters [the MSHA inspector who issued the citation and who testified] opined that the handrail at issue was too low to restrain a person who might fall using the stairway. Respondent did not impeach or contradict this opinion. It therefore is accepted.

16 FMSHRC 2154, 2161 (October 1994) (ALJ). That crucial finding by the judge, and his conclusion that the Alack of a proper handrail contributed to the hazard of a person falling off the stairway@ (*id.*), coupled with testimony that the subject handrail Awasn=t quite knee high,@ the steep 54 degree inclined stairway was frequently used by miners who routinely carried equipment and tools, and the risk involved a fall of a distance of 12 feet onto a concrete floor, causes me to conclude that the Secretary established that the violation was S&S. *See* Tr. 55, 57-59, 160, 168-171. Thus, on this record, I conclude that the violation posed a risk of injury that was neither remote nor speculative and therefore it was S&S.

Accordingly, I dissent and would reverse the contrary ruling of the judge.

Marc Lincoln Marks, Commissioner

Commissioner Riley, dissenting in part:

With regard to the emergency stop cord issue, my colleagues imagine specificity where the regulation demands flexibility. Imagination may be the soul of creativity, but it does little in this case to fill the void where the law is silent.

The judge, after hearing the testimony of the witnesses, examining the evidence, and considering the scope of the regulation, found the stop cord falling within the minimal parameters adopted by the Secretary for this regulation. I concur with his judgment.

As set forth in the facts, 30 C.F.R. ' 56.14109 provides:

> 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 . . . .

Slip op. at 2 n.4 (emphasis added).

The inspector who issued the citation testified that he had overheard other inspectors say the stop cord should be located Asomewhere near the side edge of the belt to as much as four inches above the side edge of the belt.@ Tr. 44-45. This, according to the record, appears to be the sum total of everything MSHA Ataught@ their inspectors regarding stop cord placement prior to the Secretary filing his opening brief. In this inspector=s judgment the stop cord was Amaybe six inches below where I would like to see [it].@ Tr. 88. The inspector recognized that the regulation does not specify a height requirement. He also admitted that his issuance of the citation for the stop cord was a Ajudgment call.@ Tr. 44-45, 90, 126.

The Commission has held that a safety standard cannot be Aso incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.@ *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citation omitted). Since the inspector=s citation was not based on the language of the regulation, MSHA=s Program Policy Manual, a program policy letter, an interpretive bulletin, or Commission precedent, it represents nothing more than his personal belief or agency lore regarding the proper height of the stop cord. To his credit, the judge declined to hold the operator to the inconsistent and subjective standard enunciated by the inspector, adopted post hoc by the Secretary (absent prior notice to the regulated community and even, according to the record, his own MSHA staff), and now affirmed by the majority.

The Secretary obviously wishes he had promulgated a more specific regulation consistent

with the inspector=s detailed testimony that the cord must be situated so as to automatically deenergize the conveyor if someone falls against the belt. My fellow Commissioners are determined to make up for the Secretary=s oversight by retroactively promulgating a specific regulation. No doubt there are efficiency-in-government advantages to dispensing with inconvenient and time-consuming statutory mandates like prior notice and public comment. However, the Commission should not short-circuit the legal prerequisites of formal rulemaking.

I cannot find any definition of Areadily@ that is synonymous with the word Aautomatically.@ Nor do I find any language to support the majority=s adoption of the inspector=s Anot . . . consciously think@ standard as the most reasonable interpretation of where and how to position a stop device. Tr. 116. It is well established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions. *See McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987); 2 Am. Jur. 2d *Administrative Law* ' 239 (1994). AJust as a single word cannot be read in isolation, nor can a single provision of a statute.@ *Smith v. United States*, 508 U.S. 223, 233 (1993). Section 56.14109(a) becomes the only section of the Mine Act that I am aware of which does not require the miner to be conscious of and attentive to his surroundings!

Furthermore, I am at a loss to understand why the majority finds support for its decision in *Asarco, Inc.*, 14 FMSHRC 829 (May 1992) (ALJ). While the Secretary did raise the identical position almost 2 years earlier, the majority fails to note that the judge soundly rejected the Secretary=s interpretation that the cord had to be placed where it is likely a person=s arm or body will automatically deenergize the conveyor belt. The judge stated:

> This standard does not require that an operator locate its stop cords so that it guarantees that a person who falls on or against a conveyor will first fall on or through that stop cord. . . .
>
> . . . The standard does not define, mandate nor restrict the Alocation@ of the stop cord, other than to state that it must be Areadily@ accessible to the person who is falling. It does not prohibit stop cords below, at, or above any particular component of a conveyor. With respect to a belt conveyor, the standard does not dictate placement vis-a-vis the floor, the upper or lower belts, the upper or lower idlers, the pulleys, or the drive motor.

*Id.* at 834. The judge concluded his decision with some words of advice for the Secretary:

> If the Secretary truly desires to direct the specific location of stop cords and further wishes to require that a person falling on or against a conveyor first fall Athrough@ the stop cord, then the

> Secretary must pursue this goal through notice-and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but also clearly inform the mine operator what he must do for compliance. In short, the Secretary=s interpretation (1) contradicts the Aplain meaning@ of this performance standard; and (2) violates the rulemaking requirements of the Mine Act.

*Id.* at 836.

The majority acknowledges that the Commission did not review *Asarco*. Slip op. at 6. They omit that the Secretary did not challenge that ruling nor did he, in the interim, attempt to promulgate any different interpretation of the regulation than that to which he acquiesced by default in *Asarco*. Does the majority honestly believe that the mining community had a legal obligation to make significant changes to its stop device configurations based entirely on the Secretary=s *losing* position in *Asarco*? In the instant case the parties have changed, the facts vary as well from *Asarco*, but the legal principle remains constant -- the Secretary=s interpretation of 30 C.F.R. ' 56.14109(a) is still contrary to the Aplain meaning@ of the regulation.

The majority decision arbitrarily affirms a capricious standard, which finds no foundation in the language or history of the regulation. If a conveyor belt that a person can Areadily deactivate@ actually means a belt that Aautomatically deenergizes@ whenever a person approaches, the regulation should be revised by the Secretary through formal rulemaking. This process would afford MSHA an opportunity to include in the regulation an appropriate standard supported by safety engineering studies, rather than the arbitrary standard here imposed by administrative fiat without the benefit of consultation with the mining community.

James C. Riley, Commissioner

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