FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 25, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2000-44-M WEST 2000-149-M
ALAN LEE GOOD, an individual doing business as GOOD CONSTRUCTION	:	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. ("Mine Act"), Administrative Law Judge Gary Melick affirmed eight citations and vacated two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Alan Lee Good, an individual doing business as Good Construction ("Good"). 22 FMSHRC 1081, 1082-89 (Sept. 2000) (ALJ). Good filed a petition for discretionary review ("PDR"), requesting that the Commission vacate the judge's finding of the eight violations. PDR at 2-5. The Commission subsequently granted Good's petition. For the reasons set forth below, the judge's decision is affirmed in part and reversed in part.

I.

Factual and Procedural Background

Good owns and operates the Brown Road Quarry, a sand and gravel operation located in Lewis County, Washington. Tr. 8, 131. On June 29 and 30, 1999, MSHA Inspector Terry Miller performed a regular inspection of the Brown Road Quarry, accompanied by Good's supervisor Kenneth Gates and Jason Good, an independent contractor in charge of drilling and blasting at the site. 22 FMSHRC at 1082; Tr. 10, 12, 53-54, 88. During the inspection, Inspector Miller observed numerous conditions which he believed violated several of MSHA's safety standards and issued 10 citations. Those at issue in this appeal are Citation No. 7974336 for inoperative

parking brakes on the shop truck in violation of 30 C.F.R § 56.14101(a)(3); Citation Nos. 7974338 and 7974339 for lack of handrails on the elevated platforms in violation of 30 C.F.R § 56.11002; and Citation Nos. 7974337, 7974340, 7974341, 7974342, and 7974343 for unguarded moving machine parts in violation of 30 C.F.R § 56.14107(a). 22 FMSHRC at 1081-88. Subsequently, the Secretary proposed a $200 penalty for Citation No. 7974343, which she alleged was "significant and substantial,"[1] and $55 penalties each for the remaining citations. Good contested the citations, and a hearing was held in Chechalis, Washington on April 27, 2000.

II.

Disposition

The eight citations on review concern three different safety regulations found in 30 C.F.R. Part 56. At issue is whether the judge erred when he found that Good violated section 56.14101(a)(3) for an inoperative parking brake on the front end loader; section 56.11002 for failure to provide handrails on elevated platforms; and section 56.14107(a) for inadequate guards on moving machine parts.

A. Parking Brake Violation

Inspector Miller issued Citation No. 7974336 for an inoperative parking brake on the shop truck in violation of section 56.14101(a)(3).[2] 22 FMSHRC at 1086. At the time the citation was issued, the shop truck was parked next to the highwall above the pit where the crusher equipment was located, and the keys were in the vehicle. Tr. 14. Miller observed that the parking brake was not set and would not latch when Gates tried to engage it. Tr. 13-14. At the time of the inspection, Gates told Miller that he was not sure when the truck was last used or when it would be used again. Tr. 15, 71.

The judge found that Good violated section 56.14101(a)(3) because of an inoperative parking brake on the shop truck. 22 FMSHRC at 1086. He rejected Good's argument that only "equipment to be operated during a shift needs to be inspected on any given day," noting that Good relied on "qualifying language in a different regulatory standard" than the standard cited by the inspector. *Id.* The judge found that the regulation required braking systems on equipment be maintained in a functional condition, and concluded that, because Good conceded the parking

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[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious "any violation of a mandatory health and safety standard that could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] 30 C.F.R. § 56.14101(a)(3) provides: "All braking systems installed on the equipment shall be maintained in functional condition."

brake was inoperative, the evidence established that Good violated the cited standard. *Id.* The judge assessed a penalty of $55. *Id.* at 1089-90.

In its petition, Good argues that the judge erroneously rejected its assertion that the functional braking system requirement contained in section 56.14101(a)(3) was qualified by the requirement in section 56.14100(a) that equipment to be used during a shift be inspected before the equipment is placed in service, and the requirement in section 56.14100(b) that the operator correct defects in a timely manner. PDR at 2-3.[3] Good clarified its position in its reply brief, stating that the functional braking system standard only applies to "self-propelled" mobile equipment to be used during a particular shift, and not to all equipment on the mine site. G. Reply Br. at 4-7. Good maintains that the undisputed evidence supports its contention that the shop truck was not in use on the date of the inspection. *Id.* at 3-4.

The Secretary interprets Good's argument as requiring her to first prove that the operator violated the inspection and defect corrections provisions in order to make out a violation of the functional braking system standard. S. Br. at 8. The Secretary contends that substantial evidence supports the judge's finding that Good violated section 56.14101(a)(3), that the judge's finding is in accordance with the plain language of the standard (which requires that braking systems on equipment be maintained in a functional condition), and that Good's reliance on sections 56.14100(a) and (b) so as to limit application of the cited standard is contrary to that standard's plain language. *Id.* at 7-11.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Good's argument that the functional braking system standard only applies to "self-propelled" mobile equipment to be used during a particular shift is inconsistent with the plain language of the cited regulation. Section 56.14101 is clearly a different standard from section 56.14100, with separate requirements. Section 56.14101(a), by its terms, applies to "self-propelled mobile equipment." Unlike sections 56.14100(a) and (b), section 56.14101(a) does not contain any language limiting its application to equipment "to be used during a shift." As long as the cited equipment is not tagged out of operation and parked for repairs, it fits within the definition of "mobile equipment" contained in section 56.14000, and is "self-propelled," section 56.14101 applies, whether or not the equipment is to be used during the shift.

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[3] Good designated its PDR as its opening brief.

Good does not contend that the shop truck is not self-propelled mobile equipment and does not dispute that the parking brake was not functional. Moreover, the requirement that all braking systems on self-propelled mobile equipment be functional avoids the problem of an operator using equipment with defective braking systems despite its initial expectation that such equipment would not be utilized.

Similarly, we are not persuaded by Good's argument that the standard as read by the Secretary would require maintenance of braking systems on all equipment, including the mobile trailers on which the crushing equipment is mounted. According to Good, these trailers are not "self-propelled," but rather, are parked and placed on blocks. G. Reply Br. at 5. As noted, section 56.14101(a) applies only to "[s]elf-propelled" equipment. The preamble to the standard makes clear that not all mobile equipment is self-propelled, and that the words "self-propelled" are used in Subpart M to refer to mobile equipment "capable of moving itself." 53 Fed. Reg. 32496, 32497-98 (Aug. 25, 1988). Thus, Good's trailers would not fall within the definition of "self-propelled" mobile equipment under section 56.14101(a).

Based on the above, we conclude that substantial evidence[4] supports the judge's finding that Good violated section 56.14101(a).

B. Handrail Violations

Miller observed that there were no handrails on the elevated platforms on which the roll crusher and the LJ cone crusher were mounted. 22 FMSHRC at 1086-87; Tr. 24, 27; Ex. R-2 (front top photo), R-5 (front bottom photo), R-6 (reverse bottom photo). He issued Citation No. 7974338 for the absence of handrails on the roll crusher platform, and Citation No. 7974339 for the LJ cone crusher platform, alleging violations of section 56.11002.[5] 22 FMSHRC at 1086-87. The roll crusher and LJ cone crusher were located on separate platforms that were between five and six feet above the ground, and accessible by ladder. Tr. 24-25, 27-29. The areas lacking handrails were located at one end of both platforms, where the access ladders were located, next to the machinery. Tr. 24, 27. The roll crusher platform area adjacent to the location of the missing handrail measured approximately six feet by eight feet; the LJ cone crusher platform area adjacent to the missing handrail measured approximately seven and a half feet by six to seven feet.

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[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] 30 C.F.R. § 56.11002 provides in pertinent part: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition."

Tr. 25, 27-28, 113. These areas had handrails along one side of the platforms, but not on the side where the access ladders were located. Tr. 25, 28, 120. Miller testified that miners accessed the platforms to examine and perform maintenance on the machinery. Tr. 26, 77-79. Gates testified that the platform areas lacking handrails were about six to eight feet away from the platform areas accessed to service the machinery, and that miners never used these areas. Tr. 94-95, 97-98.

The judge concluded that Good violated section 56.11002. 22 FMSHRC at 1086-87. He rejected Good's argument that the cited areas were elevated platforms and not "travelways," and inferred from the inspector's testimony that the areas of the platforms cited were of sufficient size to permit walking. *Id.* at 1087. Based on his findings, the judge concluded that the areas of the elevated platforms cited were "elevated walkways" within the meaning of the standard, and assessed penalties of $55 for each violation. *Id.* at 1087, 1089-90.

Good asserts that the judge erred by concluding that it violated section 56.11002. It contends that the record clearly supports a finding that the areas of the platforms accessed by miners had handrails, while the cited areas without handrails were empty, unused spaces. PDR at 3; G. Reply Br. at 7-9. Good argues that the evidence does not support a finding that the cited areas were "travelways" or "elevated walkways." PDR at 3-4; G. Reply Br. at 7-9. The Secretary responds that substantial evidence supports the judge's conclusion that Good violated section 56.11002 because the platform areas cited were "elevated walkways." S. Br. at 11-13. She disagrees with Good's contention that the cited areas are not "travelways" within the meaning of section 56.2. *Id.* at 12-14.

First, we consider whether the judge properly concluded that the cited platform areas were "elevated walkways" within the meaning of section 56.11002. There is no dispute that the platforms were "elevated." However, it is not clear whether these platforms constitute "walkways" within the meaning of the standard. The term "walkway" is not defined in subpart J. A "walkway" is defined in the dictionary as "a passageway used or intended for walking . . . a passageway in a place of employment . . . designed to be walked on by the employees in the performance of their duties." *Webster's Third New Int'l Dictionary Unabridged* 2572 (1993).[6] A "passageway" is defined as "a way that allows passage to or from a place or between two points." *Id.* at 1650.

The judge's analysis of this issue was terse. He stated: "It may reasonably be inferred . . . from the testimony of the citing inspector, that the cited area . . . was of sufficient size to permit actual 'walking'." 22 FMSHRC at 1087. The judge's inference that the platform constituted a "walkway" is problematic for several reasons. Based on the ordinary definition of "walkway," the relevant question is whether the areas in question were used, or intended to be used, for walking.

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[6] In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

The inference that the areas were of sufficient size to permit actual "walking" does not answer that question.

The judge did not evaluate the record evidence pertaining to whether the cited platform areas were used for walking by miners, or were intended for such use. However, we need not remand this matter to the judge for analysis of the record evidence on this point, because we find that the record simply cannot support a conclusion that the cited platform areas constitute "walkways" within the meaning of section 56.11002. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (holding remand unnecessary because evidence could justify only one conclusion). With regard to Citation No. 7974338, although cited as an unguarded "walkway," even the citation describes the area as a "platform." 22 FMSHRC at 1086. In addition, none of the record testimony describes the cited areas as walkways or travelways as referenced in the regulation. For example, Inspector Miller testified that miners walked on the platform, and that the cited area was designed for miners to "walk on" or to "stand on." Tr. 24, 77. However, when asked whether the platform was an elevated walkway, he responded that it was an "elevated platform." Tr. 77. He further testified that the cited area was "unused space," and that "workers don't normally access the platform unless it is for maintenance and if so, when they climb to the top of the ladder," they would be looking at the machinery located in front of them and to their right, and would not likely fall down the ladder or the side where the ladder was located. Tr. 26, 77; Ex. R-2 (front). With respect to Citation No. 7974339, Inspector Miller testified that the platform had railings on one side, but that "the end of the trailer where persons would access to get up and check the machinery" did not have a handrail. Tr. 28, 79; Exs. R-1 (front top photo); R-5 (front). He conceded that an accident was unlikely because of "the distance a person would have to go walking to the end of the trailer to fall off . . . and the absence of workers." Tr. 29. Gates testified without contradiction that the unguarded areas of the platforms were empty, unused spaces, about six to eight feet away from the guarded areas which miners accessed to service the crushers, and that there was no reason for anyone to go to the unguarded areas. Tr. 94-97.

Thus, while the record evidence clearly indicates that miners accessed the platforms to maintain and service the equipment, it cannot support a conclusion that miners walked in the areas of the platforms that were missing handrails, or that those areas were intended to serve as walkways. Accordingly, we reverse the judge's finding of the handrail violations.[7]

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[7] Commissioner Jordan agrees that these elevated platforms do not constitute "elevated walkways" within the meaning of section 56.11002, and therefore, joins in reversing the judge's finding of violations of that standard. However, she notes that section 56.11027 requires handrails on working platforms. 30 C.F.R. § 56.11027. Based on the record evidence, she would conclude that the elevated platforms are "working platforms" within the meaning of section 56.11027, and that consequently handrails would be required under that provision.

Commissioner Beatty would vacate and remand these two citations, rather than simply reverse the judge's findings of two violations of section 56.11002, to enable the judge, as the trier

C. Guarding Violations

Miller issued five citations to Good for violations of section 56.14107(a),[8] as follows:

Citation No. 7974337: alleging that rollers on the roll crusher were not guarded. 22 FMSHRC at 1082. The rollers had a handrail in front of them, and were guarded on the sides. Tr. 20, 93. Miller testified that when he stood in front of the handrail, he could reach out and touch the rollers, which were approximately two feet away, and five feet above the platform. Tr. 20. He also testified that he discussed the violation with Gates at the time of the inspection, and that Gates agreed that he could touch the rollers. Tr. 21.

Citation No. 7974340: alleging that a portion of the v-belt drive located beneath the trailer platform on which the LJ cone crusher was mounted was not guarded. 22 FMSHRC at 1083; Tr. 32-33. The belt drive was about one-foot wide and was located about four feet from the edge of the platform. Tr. 35. It extended approximately one foot beneath the trailer platform. Tr. 35. The portion of the belt drive located above the platform was guarded on the top and sides. Tr. 34. However, the portion below the platform was exposed. Tr. 99. Miller testified that miners were required to go beneath the trailer to perform maintenance or repair work on the equipment, and that they could come into contact with the unguarded belt drive when working in the area. 22 FMSHRC at 1083; Tr. 34-35, 80, 99.

Citation No. 7974341: alleging that a tail pulley on the feed underbelt of the LJ cone crusher was not guarded. 22 FMSHRC at 1083-84. Once material is sized by the LJ cone crusher, it exits from the bottom of the crusher onto the feed underbelt where it then travels to a screen plant. Tr. 38. The tail pulley of the feed underbelt was located below the trailer platform on which the LJ cone crusher was mounted, and was accessible beneath the trailer. Tr. 38-39, 80, 99. The pulley was about three feet wide and located about two feet from the edge of the trailer in the center of the platform. Tr. 39. Gates testified that a miner would only go beneath the platform for maintenance or repair work about twice a year and that the machinery was shut down before the miner entered the area. Tr. 100-01, 151-52, 156-57; Exs. R-1, R-3.

Citation No. 7974342: alleging that a guard on the tail pulley of the double-deck screen was inadequate. 22 FMSHRC at 1084. The double-deck screen is a piece of equipment separate from the crushers, approximately 12 to 15 feet high and eight feet wide, and is used to size and sort rocks that come from the crushers on a conveyor belt. Tr. 41. The tail pulley was guarded on the side and top, and two-thirds of the backside, but the bottom of the pulley was not guarded.

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of fact, to make factual findings on whether, and to what extent, the two areas in dispute were actually used by miners as walkways.

[8] 30 C.F.R. § 56.14107(a) provides: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Tr. 42-43; Ex. R-6. The pulley extended beyond the shaker screen about three feet above the ground. Tr. 42. Miller testified that he could walk right next to the conveyor and tail pulley and that a miner could reach out and touch the moving part while maintaining or servicing the equipment. Tr. 43, 81. Gates testified that the tail pulley was adequately guarded, and had passed previous inspections. Tr. 101.

Citation No. 7974343: alleging that the guarding of the flywheel on the jaw crusher was inadequate. 22 FMSHRC at 1084. The flywheel was approximately five feet in diameter and was located on the lower level platform of the crusher, next to the walkway and ladder used to access the platform. Tr. 45-46. The flywheel was located along the edge of the trailer and was approximately four feet above the ground. Tr. 47, 51. The outer side of the flywheel next to the ladder was guarded, but the inside of the flywheel, which was about two feet away from the crusher, was not guarded. Tr. 46-47, 51-52. The jaw crusher operator climbed the ladder onto the platform and walked past the flywheel to access the operator station located on the second level of the platform above the flywheel. Tr. 45-46. According to Miller, once a miner climbed the ladder and stood on the platform, he could reach out and touch the exposed flywheel. Tr. 47. Miller testified that the flywheel moved at fast speeds and that a miner could get a part of his clothing or body caught in the wheel and be crushed. Tr. 51-52. Gates testified that the jaw crusher operator would not pass the flywheel while it was operating, that no other miner would access the area while the equipment was operating, and that the part of the flywheel that was guarded was sufficient. Tr. 101-02.

The judge relied on Inspector Miller's testimony to conclude that Good violated section 56.14107(a). 22 FMSHRC at 1082-85. The judge rejected Good's contention that the standard was previously inconsistently enforced and therefore unconstitutionally vague, holding that Good had failed to provide "necessary factual support." *Id.* at 1082. The judge held that, to prevail on this claim, Good had to provide credible testimony of an inspector who "had inspected the precise areas now cited and found those areas adequately guarded." *Id.* Characterizing the inspector as a reasonably prudent person, the judge found that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have been on notice that section 56.14107(a) applied to the unguarded portions of the machinery cited by MSHA. *Id.* The judge concluded that the violation for the unguarded flywheel (Citation No. 7974343) was "significant and substantial," and assessed a penalty of $200. *Id.* at 1084-85, 1089-90. For the remaining four violations, he assessed penalties of $55 each. *Id.* at 1089-90.

Good contends that the language of section 56.14107(a) does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years. PDR at 4-5; G. Reply Br. at 11-13. Good argues that the judge erred by ignoring Gates' testimony regarding prior inconsistent enforcement, by relying solely on Inspector Miller's testimony regarding the violations, and by failing to make any findings of fact with regard to the conflicting testimony. G. Reply Br. at 10-11. Good disclaims an affirmative defense of estoppel. *Id.* at 13.

The Secretary maintains that the language of section 56.14107(a) is sufficiently specific to provide adequate notice and is not unconstitutionally vague. S. Br. at 14-16. The Secretary asserts that Good's argument that the cited conditions were previously inspected and not cited by other inspectors is an estoppel argument which must be rejected as a matter of law. *Id.* at 16-17.

Distilled to its essence, Good's appeal rests on its contention that it did not have adequate notice of the requirements of section 56.14107(a). The parties do not dispute the facts regarding what parts of the machinery were or were not guarded. Good does not challenge the application of the regulation to the machinery cited. Thus, we construe Good's challenge to the judge's finding of violations as a defense of lack of notice of the Secretary's interpretation and application of the standard to the cited exposed moving parts based on prior inconsistent enforcement.

The Commission's vote on the guarding violations is split. Chairman Verheggen and Commissioner Riley would reverse the judge's decision. Commissioners Jordan and Beatty would vacate the decision and remand to the judge for further consideration. However, Chairman Verheggen and Commissioner Riley concur in result with their colleagues' remand opinion in order to avoid the effect of an evenly divided decision.[9] The separate opinions of the Commissioners follow.

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[9] For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision would be to allow the judge's decision to stand as if affirmed.

III.

Separate Opinions of the Commissioners

Commissioners Jordan and Beatty, in favor of vacating the finding of guarding violations, and remanding to the judge for further consideration of the notice issue:

To determine whether Good had adequate notice of the Secretary's interpretation of the regulation, we must first consider whether the regulation is plain or ambiguous. We conclude that the standard is ambiguous, since its language is broad and does not specify the extent of guarding required or explain how moving parts should be guarded. Accordingly, we would normally be required to decide whether the Secretary's interpretation of the regulation is reasonable. *See Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (Commission must decide whether the Secretary's interpretation is reasonable, which is separate from the inquiry as to whether there was fair notice of its requirements). We must defer to an agency's interpretation of a regulation as long as it is reasonable, consistent with statutory purpose, and not in conflict with the statute's plain language. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *see Nolichuckey Sand Co., Inc.*, 22 FMSHRC 1057, 1062 (Sept. 2000) (traditional principles of regulatory interpretation must be applied to determine if the Secretary's interpretation of guarding regulation was reasonable and entitled to deference). In this case, the judge did not consider whether the regulation is plain or ambiguous or address the issue of the reasonableness of the Secretary's interpretation that all moving machine parts be guarded, skipping immediately to the notice issue. 22 FMSHRC at 1082. Since neither the judge nor the parties discuss the reasonableness issue, we choose not to address it.

When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). To determine whether an operator received fair notice of the agency's interpretation, the Commission asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Because we conclude that the judge erred when he applied this test, we would vacate his decision and remand the case to him for additional analysis.

The judge "inferred" that the inspector was a reasonably prudent person familiar with the mining industry and the protective purposes of the standard, and that consequently his testimony sufficed to prove that adequate notice existed, pursuant to the criteria in *Ideal Cement*. 22 FMSHRC at 1082. The "reasonably prudent person" test, however, is an objective standard. *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). Relying solely on the testimony of the inspector to determine whether an operator had fair notice of a regulation's requirements (as the judge did in this case) transforms this analysis into a subjective inquiry based on the views of an MSHA inspector. Although an inspector's views are generally relevant to the notice

inquiry, they do not automatically equate to what the prototypical "reasonable person" would conclude about the scope of the guarding requirements at issue here. On this basis alone we would vacate the judge's decision and remand for him to use the objective standard we have consistently applied.

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416; *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141, 1142 (Sept. 1988); *Al. By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982). Also relevant is the testimony of the inspector and the operator's employees as to whether certain practices affected safety. *Ideal Cement Co.*, 12 FMSHRC at 2416. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.[1] *Island Creek Coal Co.*, 20 FMSHRC at 24-25*; BHP Minerals*, 18 FMSHRC at 1345, citing *U.S. Steel Corp.,* 5 FMSHRC 3, 5 (Jan. 1983). On remand, the judge should discuss and evaluate all of these factors.

Of all of the factors listed above, Good relies most heavily on the lack of prior enforcement of this regulation. In rejecting this defense the judge declared: "Respondent could very well have prevailed in it's [sic] argument if any of those inspectors had offered credible testimony at trial that he had inspected the precise areas now cited and found those areas adequately guarded." 22 FMSHRC at 1082. The judge erred in so limiting the manner in which Good could prove prior inconsistent enforcement. In fact, Commission Procedural Rule 63 suggests that "relevant" evidence can serve to satisfy a party's burden of proof. 29 C.F.R. § 2700.63.

Both Gates and Alan Good testified, without contradiction, that other MSHA inspectors had inspected and not cited the same conditions that are at issue in this case. Tr. 93-94, 99, 101-02, 133, 168-69, 177-79. The record indicates that in the 24-month period preceding the hearing, Good received three citations, and the judge determined that these citations were not issued for the same conditions cited by Miller. 22 FMSHRC at 1089; G. Pre-Hearing Report at 3; S. Consol. Pre-Hearing Submission at 3.[2] On remand, the judge should take this into account.

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[1] To analyze the "circumstances at the operator's mine" in this case, the judge would need to make additional findings regarding the existing guarding on each moving part, the location of each part in relation to where miners traveled and worked, and when and how miners accessed each part, if at all.

[2] The Secretary did not address the issue of prior inconsistent enforcement below or on review.

We also note that, as the above-cited cases indicate, prior inconsistent enforcement is only one of several factors that the Commission considers in evaluating whether an operator has received fair notice of the Secretary's interpretation of an ambiguous regulation. In his analysis of the notice issue, however, the judge only looked at prior inconsistent enforcement, and failed to consider the other notice factors.[3] On remand, the judge should also consider these other factors, including the language of the regulation, its purpose, the regulatory history, whether MSHA has published notices informing the regulated community of its interpretation of the standard, and the facts of each violation to determine whether Good would have had notice that the standard required the moving machine parts to be guarded entirely. In this connection, the judge failed to make necessary findings of fact on matters such as the existing guarding on each moving part, the location of each part in relation to where miners worked and traveled, and when and how miners accessed each part. Based on such findings, the judge should have determined whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have understood that the partial or area guarding Good provided on each moving part was inadequate to protect miners from contacting it.

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[3] In Commissioner Beatty's view, Chairman Verheggen and Commission Riley continue this error when they direct the judge, on remand, to focus exclusively on his prior finding of no prior inconsistent enforcement, with no mention of the other factors that, under Commission law, are entitled to consideration in evaluating the notice issue. *See* slip op. at 16. He suspects that this may be the result of the determination by his colleagues that there is "nothing else in the record to indicate that Good knew or should have known that its guarding might have been considered inadequate by some at MSHA." *Id.* (footnote deleted). Commissioner Beatty believes that this factual determination by Chairman Verheggen and Commission Riley usurps the role of the judge as the trier of fact. Where, as here, a judge fails to adequately address the evidentiary record, a remand is necessary for fuller evaluation. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994). It is Commissioner Beatty's position that the judge, as fact finder, is in the best position to evaluate the relevant factors relating to the notice issue.

In sum, we would vacate the judge's finding of the guarding violations and remand for further consideration of whether Good had adequate notice of the Secretary's interpretation of section 56.14107(a). On remand, we would instruct the judge to consider all of the relevant record evidence in applying the notice factors discussed above, and to determine whether a reasonably prudent person would have known that the conditions at issue violated the standard.

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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, who would reverse the judge's findings of liability on all of the guarding citations, but who concur in result with their colleagues' remand opinion in order to avoid the effect of an evenly divided decision:

To determine whether Good had adequate notice of the Secretary's interpretation of the regulation, we must first consider whether the regulation is plain or ambiguous. The judge did not examine this question or attempt to construe section 56.14107(a). 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)).

We conclude that the language of section 56.14107(a) is ambiguous as applied to the circumstances of this case. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1062-63 (Sept. 2000) (finding that the term "unguarded" as used in 30 C.F.R. § 56.14109 was ambiguous). Section 56.14107(a) provides that moving machine parts shall be guarded "to protect persons from contacting" types of moving machine parts covered by the regulation. The term "guarded" is not defined in subpart M. Although the standard clearly applies to the moving parts in question, i.e., rollers, tail pulleys, flywheels, and belt drives, it does not make clear how or the extent to which the moving parts should be guarded.[1]

Normally, we would turn next to the question of whether the Secretary's interpretation of the standard is reasonable. During the course of this litigation, the Secretary has maintained consistently that section 56.14107(a) requires all moving machine parts be guarded even if located in areas where miners do not frequently work or travel or may work or travel only when the equipment is shut down. Good has not argued that the Secretary's interpretation is unreasonable.

Separate from the issue of regulatory interpretation, however, is whether Good had received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a civil penalty is at issue, considerations of due process "prevent[] . . . deference [to an agency's

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[1] Significantly, the regulatory history of the standard suggests that the degree of protection required may vary according to the circumstances. The preamble to section 56.14107(a) states that the purpose of the standard is "to protect persons from coming into contact with hazardous moving machine parts," and that a "guard must enclose the moving parts *to the extent necessary to achieve this objective*." 53 Fed. Reg. 32509 (Aug. 25, 1988) (emphasis added).

interpretation] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). As we explain below, we find that Good did not have fair notice, and thus need not reach whether the Secretary's interpretation of section 56.14107(a) is reasonable.

The Commission has not required that an operator receive actual notice of the Secretary's interpretation of a cited standard. Rather, the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. *E.g., Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In deciding whether a party had adequate notice of a regulation's requirements, the Commission has also examined, among other factors, the consistency of the Secretary's interpretation. *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998).

Prior inconsistent enforcement (i.e., a lack of consistency in the Secretary's interpretation) is the bedrock of Good's defense of inadequate notice. In rejecting this defense, the judge held that, essentially, prior inconsistent enforcement can only be proven by testimony *from MSHA inspectors* that they previously found areas now cited to be adequately guarded. 22 FMSHRC at 1082 (stating that Good could have carried its burden on the defense by offering "credible testimony at trial that [MSHA inspectors] had inspected the precise areas now cited and found those areas adequately guarded"). We join our colleagues in rejecting this higher burden of proof for a prior inconsistent enforcement defense. Slip op. at 11. To the contrary, Commission Procedural Rule 63 suggests that any "relevant" evidence can satisfy a party's burden of proof. 29 C.F.R. § 2700.63.

Based on the record evidence, we conclude that substantial evidence does not support the judge's conclusion that there was no prior inconsistent enforcement. Most significantly, the Secretary failed to rebut the testimony of Gates and Alan Good that other MSHA inspectors had inspected the same conditions at issue in this case and not issued any citations. Tr. 93-94, 99, 101-02, 133, 168-69, 177-79. In fact, Good had maintained the cited areas for 18 years, during which time MSHA inspected them repeatedly — as many as twenty times (Tr. 176-77) — and did not cite them. We also note that during the 24 months before the citations were issued, Good received only three citations, none of which were issued for the conditions cited by Miller. 22 FMSHRC at 1089; G. Pre-Hearing Report at 3; S. Consol. Pre-Hearing Submission at 3. Significantly, the Secretary did not address the issue of prior inconsistent enforcement either below or on review.

We find nothing else in the record to indicate that Good knew or should have known that its guarding might have been considered inadequate by some at MSHA.[2] We thus conclude that Good did not have notice of the Secretary's interpretation of the regulation that led her to issue the citations under review here. We thus would reverse the judge's decision and vacate the five guarding citations.

However, in order to avoid the effect of an evenly divided decision, we concur in result with our colleagues' remand opinion. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (holding that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought). We thus join Commissioners Jordan and Beatty in remanding the case, but only on the following grounds: first, the judge must reconsider his finding that there was no prior inconsistent enforcement in light of the ample record evidence to the contrary. We also agree with our colleagues that the judge improperly transformed his notice analysis "into a subjective inquiry based on the views of an MSHA inspector" (slip op. at 10-11) when he found that Good was on notice of the Secretary's interpretation by virtue of Miller somehow embodying the "reasonably prudent person familiar with the mining industry and the protective purposes of the standard" (*Ideal Cement Co.*, 12 FMSHRC at 2416). *See* 22 FMSHRC at 1082. The judge must therefore also reconsider this finding, again in light of the record evidence of the Secretary's inconsistent prior enforcement.

Accordingly, we join our colleagues in vacating the judge's findings of guarding violations and remand for reconsideration of whether Good had adequate notice of the Secretary's interpretation of section 56.14107(a).

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Theodore F. Verheggen, Chairman

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James C. Riley, Commissioner

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[2] The Secretary attempted at trial to introduce into evidence a guarding handbook which Miller gave to Good approximately one month after issuing the guarding citations. Tr. 67. The judge, however, did not admit the pamphlet into evidence and struck it from the record after the Secretary's counsel conceded it was not relevant. Tr. 68.

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