



inspection of the quarry. He was accompanied by quarry Superintendent Chris Pons. During the course of the inspection, the inspector asked to examine a Caterpillar 345 B excavator and a Komatsu D65Px dozer. Although neither piece of equipment had been in operation during the shift, the two pieces of equipment were not tagged out and were parked in production areas. Superintendent Pons insisted that the vehicles be taken through the pre-operational examination required under section 56.14100(a) before being operated for the inspection.<sup>2</sup> The MSHA inspector acquiesced to Pons' demand. 33 FMSHRC at 1205; *see also* S. Br. at 1.

During the examination, it was discovered that the service horns on both vehicles did not work. 33 FMSHRC at 1205. MSHA then issued Citation Nos. 6512366 and 6512367 to Wake Stone, alleging violations of 30 C.F.R. § 56.14132(a) for failure to maintain the service horns in functional condition. Wake Stone contested the citations, and the parties filed cross-motions for summary decision.

The Judge vacated both citations, rejecting the Secretary's assertion that the plain meaning of section 56.14132(a) dictates that if a horn fails to function, it has not been maintained and a violation has occurred. *Id.* at 1206-08. He found that the Secretary's interpretation was "misguided" and reasoned that one of the few ways an operator can determine whether a horn is malfunctioning is by trying the horn. *Id.* at 1207. The Judge stated that "[s]ection 56.14100 [which requires mobile equipment operators to pre-shift their vehicles] was created to catch a malfunctioning vehicle before it has the opportunity to endanger miners' lives." *Id.* He concluded that applying the Secretary's interpretation would trivialize the effect of section 56.14100 and diminish the operator's motivation and incentive to conduct a thorough examination of equipment prior to placing it in service. *Id.* The Judge declined to "place strict liability in this situation" because he believed it would discourage thorough pre-shift examinations. *Id.* at 1208. He concluded that "if an operator discovered a problem with a horn during a pre-shift inspection and subsequently corrected the problem, then the operator has *maintained* the horn." 33 FMSHRC at 1207 (emphasis in original).

## II.

### Disposition

#### A. The Plain Meaning of the Standard

The issue before us involves the interpretation of section 56.14132(a) of the Secretary's standards, which provides that:

Manually-operated horns or other audible warning devices  
provided on self-propelled mobile equipment as a safety feature  
shall be maintained in functional condition.

30 C.F.R. § 56.14132(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

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<sup>2</sup> 30 C.F.R. § 56.14100(a) provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

meaning or unless such a meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)); *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997).

The Secretary argues that the plain meaning of section 56.14132(a) requires that horns always be maintained in functional condition. We agree. The plain language of the standard requires that horns or other audible warning devices must function at all times unless the equipment has been taken out of service for repair. The Commission has held that the term “‘maintain’ [means] that warning devices shall be capable of performing on an uninterrupted basis and at all times. . . . [and] imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.” *Nally & Hamilton Enter., Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011); *see also Sedgman*, 28 FMSHRC 322, 329 (June 2006); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997). Additionally, the term “functional” in section 56.14132(a) means to be “capable of performing” or “operative.” *See Nally*, 33 FMSHRC at 1763.

It is undisputed that the service horns on both the Caterpillar 345 B excavator and the Komatsu D65Px dozer were not functioning when the MSHA inspector attempted to examine the vehicles. 33 FMSHRC at 1205. Because the service horns were defective at the time of the inspection and the equipment had not been tagged out of service, we conclude that the horns were not being “maintained in functional condition” as required by the language of section 56.14132(a).

Contrary to the Judge’s decision not to “place strict liability in this situation” (33 FMSHRC at 1208), section 110(a) of the Act, 30 U.S.C. § 820(a), imposes strict liability upon operators who are found in violation of the Act. *See Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff’d*, 676 F.3d 1109 (D.C. Cir. 2012). Imposing strict liability under the Mine Act is not optional – it is mandatory. Therefore, we reject the idea that Wake Stone’s strict liability under the maintenance standard is somehow negated by compliance with the pre-operational standard. *See* 33 FMSHRC at 1208. According to the plain meaning of section 56.14132(a) and the principles of strict liability as applied to this regulation, the Secretary need only prove that the service horns were not “maintained in functional condition.”

#### **B. The Effect of the Pre-operational Inspection Requirement**

The Judge held that the maintenance requirement of section 56.14132(a) must be read in concert with the pre-operational inspection requirement of section 56.14100(a). This interpretation is inconsistent with the plain meaning of the standard and thus is an impermissible construction. Section 56.14132(a) is devoid of any language that makes its enforcement dependent on another regulation. “To read a limitation into the [regulation] that has no basis in the [regulatory] language” would be impermissible. *See Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995).

In *Alan Lee Good*, the operator similarly argued that the functional braking system requirement of section 56.14101(a)(3) was applicable only to “‘self-propelled’ mobile equipment to be used during a particular shift” and was qualified by the pre-operational inspection and

correction requirements of section 56.14100. 23 FMSHRC at 997. The Commission categorically rejected this approach, reasoning that “[s]ection 56.14101 is clearly a different standard from section 56.14100, with separate requirements.” *Id.*

The same is true here. Sections 56.14100(a) and 56.14132(a) are separate and independent regulations, each with its individual mandate. The text of section 56.14100(a) clearly states that it applies to equipment “to be used during a shift” and requires inspection of said equipment “before being placed in operation.” In contrast, section 56.14132(a) does not contain language limiting its application to equipment only “to be used during a shift” or to equipment that has or has not been “placed in operation.”

Accordingly, we conclude that the Judge’s decision to construe the language of section 56.14132(a) in concert with the language of section 56.14100(a) was in error.

### **C. The Contention that the Vehicles Were Not in Use**

We also reject Wake Stone’s argument that a violation did not occur because the vehicles had not been in use when the defects were discovered, thus entitling it to perform a pre-operational examination prior to the MSHA inspection. The purpose of section 56.14132(a) is to shield miners from the hazards posed by operating defective equipment. *See* 30 C.F.R. § 56.1. Absent specific limiting language, the Commission has consistently determined that standards requiring maintenance in functional condition are enforceable when the cited equipment is not in actual use, unless it has been removed from service. *Alan Lee Good*, 23 FMSHRC at 997; *see Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990); *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 844-45 (Apr. 1981).

In *Ideal Basic*, the Commission reversed a judge’s finding that 30 C.F.R. § 56.9-2, which requires that defects be corrected before the equipment is placed in use, had not been violated because the defective coupling in question had not been used. 3 FMSHRC at 843. Finding the Judge’s “interpretation of the standard too narrow,” we held that “use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation.” *Id.* at 844. The Commission further stated that if defective equipment affecting safety that has not been “rendered inoperable” “is located in a normal work area, fully capable of being operated, that constitutes ‘use.’” *Id.* at 845; *see also Alan Lee Good*, 23 FMSHRC at 997 (reinforcing the rule that equipment not tagged out of operation and parked for repairs must be maintained in functional condition, “whether or not the equipment is to be used during the shift.”); *Mountain Parkway*, 12 FMSHRC at 963 (relying on *Ideal Basic* and interpreting the term “used” broadly to include equipment that was parked in the mine in turn-key condition and not removed from service).

In the instant case, the excavator was located in the rockbreaker area of the pit, and the dozer was parked in the pit area of the mine. *See* W.S. Answer to Sec’y’s 1st Req. for Adm. at 2. Wake Stone does not contend that either vehicle had been locked and tagged out of service when the MSHA inspector began his inspection. Because the defective vehicles were located in a normal work area, were capable of being used, and had not been locked and tagged out, we conclude that the dozer and excavator were in “use” at the time of inspection.

We emphatically reject the Judge's notion that sustaining these citations for failing to maintain equipment that is in a work area somehow trivializes section 56.14100(a). The operator is not being punished for finding defects during a pre-operational inspection. It is being cited for failing to maintain the horns in an operative condition. Thorough and diligent pre-operational inspections are a key component of assuring that safety equipment will be maintained and functional when equipment is in use. No operator should read this decision as creating anything other than an incentive to conduct thorough pre-operational inspections in order to minimize the chance that equipment will be at the job site in a defective condition.

Indeed, it would be odd if operators could insist on a section 56.14100 pre-operational examination upon learning of an impending MSHA inspection, and thereby avoid liability under section 56.14132(a). The strict liability nature of the Act does not allow for this sort of gamesmanship.<sup>3</sup> As we have previously stated, restricting an operator's liability to hazards identified in pre-shift examinations, or in this case, pre-operational examinations, runs counter to the Act's safety objectives and would lead to perverse incentives. *Nally*, 33 FMSHRC at 1764. Instead, requiring that operators continuously keep machinery in operational condition encourages more vigilance with regard to instituting and enforcing effective maintenance procedures. *Id.*<sup>4</sup>

Accordingly, we find that the Judge's interpretation of 30 C.F.R. § 56.14132(a) is invalid and conclude that Wake Stone violated the standard when it failed to "maintain in functional condition" the horns on both the excavator and the dozer. Because we find the standard's language to be plain and unambiguous, we do not reach the Secretary's deference argument or the operator's notice argument. *See Exportal Ltda v. U.S.*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton Indus., Inc.*, 26 FMSHRC 146, 151 (Mar. 2004); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (holding that when the language of the standard is found to be clear and unambiguous, fair and adequate notice to operators is provided).

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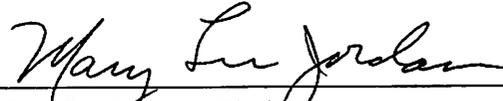
<sup>3</sup> We note that the operator here only asserted the requirements of section 56.14100(a) after the MSHA inspector announced his intention to inspect the vehicles.

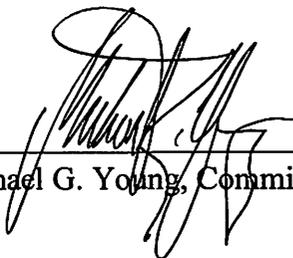
<sup>4</sup> Wake Stone's contention that the Secretary's interpretation of the standard will lead to absurd results, because the Secretary will be required to issue citations when malfunctioning horns are noted in pre-operational examination records, is likewise without merit. W.S. Br. at 11-15. The citations were issued based on the condition of the equipment at the time of the inspection. Further, "as a general matter, the Secretary does not automatically issue a citation based solely on information in examination records." S. Reply Br. at 4; *see also* Examination of Work Areas in Underground Coal Mines for Mandatory Health or Safety Standards, 77 Fed. Reg. 20700-02, 20703 (2012) (discussing the final rule on examinations of work areas in underground coal mines and stating that "[g]enerally, at the beginning of an inspection, an inspector will review an operator's examination records). As is the case under the existing standard, recording a violation does not automatically result in a citation.").

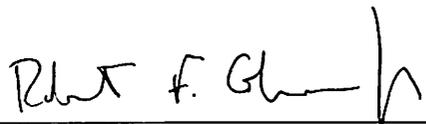
III.

Conclusion

For the reasons set forth herein, we reverse the Judge's finding that Wake Stone did not violate 30 C.F.R. § 56.14132(a) and remand the case to the Judge for assessment of penalties.

  
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