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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEST 80-314-M A.C. No. 02-00151-05016
v.	
MAGMA COPPER COMPANY, RESPONDENT	San Manuel Mine

DECISION

Appearances: Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
N. Douglas Grimwood, Esq., Twitty, Sievwright and Mills, Phoenix, Arizona, for Respondent

Before: Administrative Law Judge Charles C. Moore, Jr.

This case was heard December 2, 1980, in San Manuel, Arizona, pursuant to the Federal Mine Safety and Health Act of 1977 ("the Act"). (FN.1) A violation of 30 C.F.R. 57.19-100 was alleged (FN.2) and Petitioner proposed a $170 penalty. It was stipulated that the San Manuel Mine is large, producing over 4 million tons of copper in 1979, and that its prior history is moderate, consisting of 113 assessed violations during the 2 years preceding this citation, and that Respondent demonstrated good faith by abating the citation 4 hours after it was issued. (FN.3)

Inspector Alvarez conducted a regular inspection of the San Manuel Mine on November 14, 1979, and issued a citation to Respondent for failing to have a substantial safety gate in front of one of the shaft compartments at the 3A shaft landing. The 3A shaft landing is on the "1055" level, or the highest level of the mine, 1,055 feet below the surface. The landing consists of a

shaft divided into four compartments, across from which is a set of railroad tracks with a dump pocket located between the tracks [Petitioner's Exh. 1 (PX-1) and Respondent's Exh. 3 (RX-3)]. Eight-ton cars loaded with muck dump their contents into the dump pocket. The muck falls into conveyances inside two of the shaft compartments and is raised to the surface (Tr. 51). Miners work in the shaft-landing area dumping the cars and loading and unloading supplies from the shaft (Tr. 31).

Shaft compartment 1, the subject of this citation, is between 15 and 18 feet tall and 5 feet wide (Tr. 24, RX-4), and the shaft is equipped with an elevator used to transport men and supplies to various levels of the mine (Tr. 16). Two chains stretch across the compartment opening at heights of 3 and 4 feet, respectively, joined together by two vertical chains to form a Roman numeral "II" (PX-1 and RX-4). Witnesses for Respondent testified that a toeboard, a piece of backlagging or wood, 3 inches by 6 inches, was in place along the bottom of the shaft opening (Tr. 56). The inspector did not remember a toeboard (Tr. 32), and testified that had a toeboard been in place, he would have issued an additional citation for a tripping hazard (Id.).

Before issuing the citation, the inspector observed a piece of muck (rock) fall from a passing car onto the shaft landing and roll within 2 feet of the open shaft (Tr. 36). In his opinion, rolling pieces of muck posed a hazard to miners at lower levels, if pieces fell down the shaft and out of similarly unguarded openings, as well as to miners at the 1055 level, if muck fell from the surface. He had a brief discussion with an accompanying employee of Respondent regarding the situation, and issued Citation No. 380078. (FN.4)

Respondent's defenses are: that the gate in place at the time the citation was issued, together with the toeboard, satisfied the standard; that experiments conducted by Respondent showed no muck could possibly roll into the shaft; and that Petitioner's case is limited to showing the hazard of muck rolling into the shaft, as no mention was made of the possibility of muck falling out of the shaft when the citation was issued (Tr. 37). An additional issue was whether the tracks curved on their way past the shaft.

Respondent concedes in its posthearing brief that whether or not the railroad tracks curved in front of the shaft is a minor issue (Brief at 4). At the hearing, Respondent claimed that the tracks were straight (Tr. 62), contradicting PX-1 which shows a curve in the tracks. Petitioner obviously thought a curve in the tracks would jostle the muck cars and cause greater spillage onto the landing and into the shaft. Although there was no testimony at the hearing about the speed of the muck cars, if they stopped to empty their contents into the dump pocket opposite the shaft landing, they had to be traveling at such a slow speed that a curve in the tracks would not appreciably affect the amount of muck falling from the cars nor the force at which it would fall. For this reason, I agree with Respondent that whether the tracks curved is not a material issue.

Respondent's second contention is that Petitioner was barred from proving that muck falling down and out of the shaft from the surface into the landing area was part of the hazard posed by the gate, as the inspector had failed to inform Respondent of this when he issued the citation. Both the standard and the language of the citation state that gates shall be constructed so that materials cannot go through them. (FN.5) The word "through" obviously means materials falling into as well as out of the shaft. I know of no case limiting the Secretary to proving whatever was alleged by the inspector at the time the citation was issued. There may be situations in which an inspector is unaccompanied so that nothing is said to the operator when the citation is issued. This does not mean that nothing may later be proved by the Secretary at a hearing.

Further, both the standard and the citation sufficiently apprise Respondent of the violation with which it is being charged so that it may prepare an adequate defense. A noncriminal statute will only be found impermissibly vague where, "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127 70 L.Ed. 322 (1926). The provision before me is not such a statute. (FN.6)

Respondent also conducted a series of experiments which it maintains prove that muck could never fall from loaded cars into the shaft. The experiments consisted of two employees of Respondent standing between the railroad tracks and tossing pieces of muck in the direction of the shaft. They found that the pieces would shatter on impact and fall short of the shaft. At most, these experiments establish that the probability of muck falling into the shaft is low. They do not prove that muck would never fall into the shaft

or that pieces of muck falling from the surface would never fall out of the shaft. Just before issuing the citation, the inspector saw a piece of muck fall from a car and roll within 2 feet of the shaft (Tr 36). Respondent's witness who accompanied the inspector did not remember seeing this (Tr. 55, 63). The inspector countered that the witness had been looking away from the shaft at the time, talking to a contractor's employee (Tr. 79). This assertion was not contradicted at the hearing. The inspector also stated that he had seen pieces of muck accidentally fall down the shaft from the surface (Tr. 40). The same witness for Respondent, Richard Skelton, a safety engineer for Magma Copper Company, testified that he had never seen muck fall down shaft compartment No. 1 from the surface (Tr. 54). It is not crucial that pieces of muck actually be seen falling down the shaft before a violation can be found. It is enough that there is testimony to that effect and that the possibility of falling muck exists. From the description at the hearing of the activities which routinely take place at shaft landing 3A, it seems possible that muck has fallen down shaft compartment No. 1 in the past and that it will in the future. The Act is remedial in nature, its primary objective being "to assure maximum safety and health of miners." UMWA v. Consolidation Coal Co., 1 FMSHRC 1300, 1302 (September 1979). As such, it does not require the eventuality it is designed to prevent to actually occur before a citation may issue. MSHA v. Ace Drilling Coal Co., Inc., 2 FMSHRC 790, 791 (April 1980).

Respondent's final defense is that the gate, including the toeboard, complied with the standard. The presence of the toeboard is in dispute. Respondent testified that it was in place when the citation was issued (Tr. 56). Inspector Alvarez, however, does not recall the toeboard and bolstered his recollection by testifying that he would have issued an additional citation for a tripping hazard had the toeboard been present (Tr. 31-32).

Because the standard requires a type of gate which would prevent the passage of materials through or under it this gate, with or without the toeboard, did not meet the standard. The toeboard only covered the bottom 6 inches of a shaft 15 to 18 feet tall, and the chains would not impede most materials.

The standard describes the function a gate must serve without specifying its structure. The inspector declined to state what constituted a substantial gate, saying that he had been instructed to refrain from telling operators what they must do to comply with standards (Tr. 24). The standard was not so vague as to make compliance difficult since the operator successfully abated the citation. Mr. Skelton testified at the hearing that the gate in place when the citation was issued was sufficient (Tr. 61). However, the gate failed to perform the functions required by the standard. I find that the gate in place when the inspector issued the citation was inadequate.

The violation was moderately grave, the operator was negligent, and I find the proposed penalty will not prevent the

operator from continuing in

business. Respondent is hereby ORDERED to pay to MSHA $170 within 30 days of the date of this DECISION.

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 30 U.S.C.   801 et seq.

~FOOTNOTE_TWO

2 Section 57.19-100 reads:

"Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances."

~FOOTNOTE_THREE

3 There is a dispute as to whether the citation was abated in 4 hours as per stipulation [Hearing Transcript, page 4 (Tr. 4)] or in 4 days, as shown by the date of the abatement order (Tr. 29). I will dispose of this matter by finding that Respondent demonstrated good faith in either case.

~FOOTNOTE_FOUR

4 Respondent claims the inspector fabricated the rock incident and asserts further that the inspector would have informed Respondent of this hazard had he actually seen anything (Respondent's posthearing brief at 2). Aside from the question of the inspector's veracity, whether rock actually ever fell down the shaft, and the significance of what Inspector Alvarez told Respondent's employee when the citation was issued, are discussed, post. Respondent further notes (at Brief, pp. 2-3) that the inspector's drawing of the 3A shaft landing is dated October 28, 1980, almost 1 year after the citation was issued, whereas he testified at the hearing that he drew the diagram 1 to 2 months after he wrote the citation (Tr. 10). The time for Respondent to raise this inconsistency was at the hearing. Since it did not, I do not know if there was an explanation. In any event, if the drawing was accurate the contradiction's sole significance is as an unsuccessful attack on the inspector's credibility.

~FOOTNOTE_FIVE

5 See n. 2, supra, for the language of the standard. The citation reads as follows:

"There were no safety gates of substantial quality, that materials or rocks would not go through through [sic] them at the 1055 3A shaft landing. This landing was [approximately] 12 feet from a dump pocket being used to dump 10-ton cars full of muck."

~FOOTNOTE_SIX

6 See n. 2, supra.