

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 26 1981

MATHIES COAL COMPANY, : Notice of Contest
Contestant :
v. : Docket No. PENN 80-260-R
: Citation No. 839028; 5/16/80
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Mathies Mine
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 81-35
Petitioner : A.O. No. 36-00963-03120F
v. :
: Mathies Mine
MATHIES COAL COMPANY, :
Respondent :

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for MSHA;
Jerry F. Palmer, Esq., Pittsburgh, Pennsylvania, for
Mathies Coal Company.

Before: Judge Merlin

This consolidated proceeding is a notice of contest filed by the operator challenging a section 104(a) citation and a petition for the assessment of a civil penalty based upon the alleged violation set forth in the citation.

A hearing was held on July 22, 1981 at which the parties represented by counsel appeared and presented documentary and testimonial evidence.

At the hearing the parties agreed to the following stipulations (Tr. 5-6):

- (1) The operator is the owner and operator of the subject mine.
- (2) The operator and the mine are subject to the jurisdiction of the 1977 Act.
- (3) I have jurisdiction of these cases.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) Imposition of a penalty will not affect the operator's ability to continue in business.

(7) The alleged violation was abated in good faith.

(8) The history of previous violations is average.

(9) The operator's size is large.

(10) The witnesses who testify are accepted generally as experts in coal mine health and safety.

At the conclusion of the taking of evidence counsel waived the filing of written briefs and agreed instead to make oral argument (Tr. 152). I advised the parties that I would issue a decision after receipt of the administrative transcript (Tr. 152).

Discussion and Analysis of the Evidence

Findings and Conclusions

This consolidated proceeding arises from an alleged violation of 30 C.F.R. 75.1722(a) which provides as follows:

Gears, sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

The condition or practice which is set forth in the contested citation and which is the basis for the penalty petition is as follows:

It was revealed during a fatal accident investigation that the automatic elevator and associated parts at the Gamble Shaft Portal was not guarded adequately to keep persons from coming in contact with the elevator as it was moving in the shaft along the stairways at the first and second landings.

The testimony at the hearing set forth the physical circumstances at length. Briefly they are as follows: At the Gamble Shaft Portal an elevator transports men between the surface and the underground. The elevator has a device called a retiring cam which is attached to and protrudes out from one side of the elevator. The retiring cam does not move independently of the elevator but rather moves up and down with it. When the elevator reaches the top or bottom, the retiring cam hits a

switch on the side of the shaft; this contact causes the elevator doors to open. Next to the elevator shaft is a stairwell also going from the surface to the underground. The stairwell is 273 feet deep with 27 landings and eleven steps between each landing. At the top landing there is a door to the outside at the surface and at the bottom landing there is a door to the bottom of the mine. There are no other doors out of the stairwell. From approximately 24" ^{1/} above the second (i.e. next to the top) landing down to the bottom of the mine corrugated metal separates the elevator shaft from the stairwell. Where the corrugated metal ends above the second landing, there is an "I" beam separating the elevator shaft from the stairwell (MSHA Ex. 2). When the elevator passes by there is a space of 9 inches between the "I" beam and the elevator. In addition, on one side of the elevator shaft beginning at the level of the I beam and extending upwards there is a metal grating. There is a horizontal space of 26" between the grating and the elevator guide and there is a perpendicular space of 54" between the I beam and the top landing (MSHA Exh. 2). It is this area, 26" x 54", which the Solicitor contends was unprotected and required guarding.

The grating is significant for another reason. It is only about 2-1/2 feet below ground level so that an individual walking along the "I" beam to the outer edge of the elevator shaft could push out the grating, step out and reach the surface. This is just what the decedent was doing and how he was killed. The undisputed evidence shows that the decedent was trying to sneak out of work early. The decedent had climbed the stairs in the stairwell to the top, opened the door at the top landing to exit from the stairwell, and stepped outside onto the surface. However, he then saw his foreman. In an attempt not to be seen by the foreman, the decedent went back through the door onto the first landing and then went down the steps until he reached the "I" beam which as already noted separates the elevator shaft from the stairwell. He stepped onto the "I" beam going towards the grating with the apparent intent to push the grating out and climb up the 2-1/2 feet to the surface without being seen. Unfortunately, when the decedent was on the "I" beam the elevator began to descend and the decedent's tool pouch or belt was caught by the elevator's retiring cam. The decedent fell down the shaft and was killed.

The first and principal issue to be resolved is the existence of a violation. 30 C.F.R. 75.1722(a) covers certain specified machine components and "similar exposed moving machine parts." There are some differences over the measurements involved but there is agreement between the parties that the elevator was exposed for most of the area in question above the "I" beam. The operator's principal defense is that the elevator is not a machine "part" but rather an entire machine and therefore, not

^{1/} According to the operator the corrugated metal extended 32" above the second landing, but as appears infra, this makes no difference in the result.

within the standard. I cannot accept this argument because of testimony given by the operator's own witness, a metallurgical and environmental engineer whose job it is to analyze failures of machines and machine components. The engineer made clear that the men were in fact transported by the elevator cage and that the entire machine in question was composed not only of the cage but also of pulleys and motors which supplied power to the cage enabling the cage to move. He stated the pulleys were above the cage and that the motor also was in another location. It is apparent, therefore, that what was cited by the inspector was the elevator cage. I find this is sufficiently clear from the citation and was known to the operator, who was aware of all the circumstances. I conclude that the cage together with its retiring cam constituted moving parts of a machine made up of the cage, retiring cam and other units described by the engineer.

I have not overlooked the engineer's subsequent testimony that the machine parts specifically identified in 75.1722(a) transmit power from one source to another whereas he stated this is not true of the elevator cage which transports men. I received the indelible impression that this purported distinction was offered in **recognition** by the witness of the fact that he had conclusively identified the cage as a machine component rather than a total machine. Even assuming the engineer's differentiation based upon transferring energy was well-taken and overlooking the fact that the matter was hardly touched upon by either counsel at the hearing, I reject this as too fine a distinction for present purposes. The Act is to be liberally construed. The operator has offered no basis in the law or legislative history for me to so constrict the terms in question. In the absence of anything to the contrary and in light of the Act's avowed purposes I believe "similar" refers to the exposure to moving machine parts,. Accordingly, I conclude that the cage with the retiring cam itself fallswithin the standard. Insofar as the cam is concerned, it moves and is exposed. Nothing in the standard indicates the moving part has to move independently of everything else.

The next issue is whether the exposed elevator cage and its retiring cam "may be contacted" by persons. The principal definition of "may" is "to be physically capable." Webster's New World Dictionary (1972); Funk & Wagnalls Standard College Dictionary (1966); Random House American College Dictionary (1970). The fatality in this case occurred because of the wantonly reckless and irresponsible behavior of the decedent in attempting to sneak out of work early without his supervisor's knowledge. However, the record makes clear that the entire stairwell was required to be examined weekly. Moreover, it could be used to enter and leave the mine if, for example, the elevator was not working. As already noted, there is some difference between the government and the operator over the exact dimensions of the exposed space but this is not determinative because regardless of whose measurements are accepted, it is clear that an individual while performing his regular routine work duties in a prudent manner might lose his footing and trip and fall on the second

landing thereby putting part of his body into the unguarded space and coming into contact with the elevator and its retiring cam if the elevator were descending at that time. Also, the arm of an individual descending the stairs from the top to the second landing could come in contact with a descending elevator cage. Admittedly, these events would have to occur simultaneously for the hazard to exist. But the history of mine disasters has been the history of unfortunate coincidences of unlikely factors. I cannot incorporate into this mandatory standard some sort of requirement for an indeterminate degree of probability. Such a requirement would be wholly subjective and open-ended and if pushed to its logical extreme would vitiate the standard itself. Moreover, I have no authority to read into the standard something which is not there.

In light of the foregoing I conclude a violation existed.

Gravity must now be considered. A fatality occurred. However this fatality cannot be divorced from the wantonly reckless and irresponsible actions of the decedent. The Solicitor expressly admitted that the operator should not be held accountable for the decedent's behavior. I believe the proper way to assess gravity is to determine it in terms of an individual discharging his work-related duties in a reasonably prudent fashion. As already noted, such an individual could trip and fall coming into contact with the descending elevator. A serious injury could result. However, as has also been discussed, the occurrence of such an injury depends upon a coming together of many factors; the likelihood of which is remote. Therefore, this mitigates gravity. I conclude the violation was serious.

Many of the foregoing circumstances, of course, affect negligence. I have previously held that a miner's aberrant behavior which could not be foreseen or prevented by the operator and which harmed only himself cannot be charged against the operator. Nacco Mining Company, Dec. 17, 1976 (Docket No. ~~INS~~ 6x99-P). This decision was upheld by the Commission in Secretary of Labor v. Nacco Mining Company, 4 FMSHRC 848 dated April 29, 1981. See also my decision in Marshfield Sand and Gravel, June 10, 1980 (YORK 79-68-M). The aberrational conduct of the decedent in this case went far beyond that considered in the cited cases. The operator is not to be held responsible for what the decedent did here. Nevertheless I find the operator was guilty of ordinary negligence in not guarding the area in question. The fact that this type of space had not been cited previously for a guarding violation has been taken into account but is not a basis for a finding of no negligence.

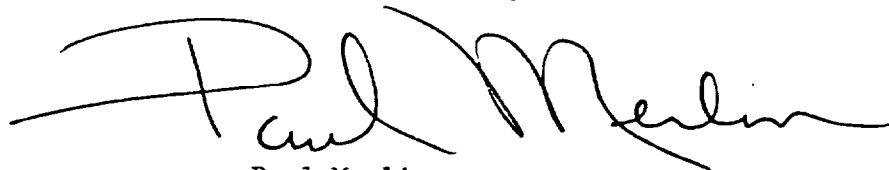
As set forth above, the remaining factors affecting the amount of the penalty have been stipulated to by the parties.

After taking all the relevant factors into account a penalty of \$750 is assessed.

ORDER

The operator is ORDERED to pay \$750 within 30 days of the date of this decision.

The operator's Notice of Contest is hereby DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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