CCASE:
KAISER CHEMICAL V. SOL (MSHA)
DDATE:
19811001
TTEXT:

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

KAISER ALUMINUM AND CHEMICAL CORPORATION, COMPLAINANT v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Contests of Citations Docket No. CENT 81-95-RM Citation No. 157570 Docket No. CENT 81-96-RM Citation No. 157571 Docket No. CENT 81-97-RM Citation No. 157572 Gramercy Alumina Plant

DECISION

Appearances: Stephen H. Booth, Esq., Oakland, California, for Kaiser Aluminum and Chemical Corporation
Eloise V. Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor

Before: Judge Melick

These cases are before me as a result of contests filed by the Kaiser Aluminum and Chemical Corporation (Kaiser) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq., the "Act," to challenge three citations issued under section 104(a) of the Act. (FOOTNOTE 1) The general issue is limited to whether Kaiser has violated the cited mandatory safety standards. An evidentiary hearing in these cases was held in New Orleans, Louisiana, commencing March 24, 1981.

Motion for Default Decision

At hearing, Kaiser moved for a default decision in all cases on the grounds that the Secretary failed to timely answer its notices of contest.2 It is undisputed that the Secretary's answers in these cases were indeed filed late. Kaiser mailed its notices of contest to the Secretary on December 29, 1980, and those notices were received by the Secretary at the MSHA subdistrict office in Dallas, Texas. For undisclosed reasons, the notices were not, however, forwarded to the Office of the Solicitor for the Secretary which represents the Secretary in these matters. The Solicitor's Office was, in any event, notified on January 9, 1981, by the office of Commission Chief Judge James Broderick that Kaiser had filed such notices of contest. The Solicitor's Office thereafter requested copies of the contests from the Commission and those copies were admittedly received by the Solicitor's Office on January 15, 1981. That office nevertheless did not file an answer to the contests until February 3, 1981, 32 days after the Secretary received the notices of contest, 25 days after the Solicitor received notice of its filing, and 19 days after the actual receipt by the Solicitor of the notices of contest.

An exception to the requirement for the timely filing of pleadings has been made where adequate cause has been shown for the belated filing. Secretary of Labor v. Valley Camp Coal Company, 1 FMSHRC 791 (1979). In that case, the mistake or neglect of an attorney and the breakdown of internal office procedures were found to be "adequate cause" justifying the late filing. In these cases since service of the notices of contest was apparently perfected as of December 29, 1980, when they were mailed to the Secretary at the MSHA subdistrict office, it is clear that the Secretary's answer should properly have been filed within 20 days of that date or on or before January 18, 1981. Commission Rules, 7, 8, and 20(d); footnote (FOOTNOTE 2), supra. The Assistant Solicitor assigned to these cases speculated that the notices were "probably" not forwarded by the MSHA office to the Solicitor's Office because MSHA employees "may not have understood that it was a legal document since it was written in letter form." She claimed that she did not file her answers within 15 days of January 15, 1981 (the date the Solicitor actually received a copy of the notice), "simply because of office procedure" and because she did not actually receive the notice on her desk until "3 days after it arrived in our office," i.e., on January 18. It is not explained why the answer was not even then filed until February 3, 1981.

Under the circumstances, it appears that the Secretary's late filing was due to his negligence and to the negligence of his Solicitor. There is no evidence that the Secretary or his Solicitor acted in bad faith in causing the delay and there is no evidence that Kaiser has been prejudiced by the delay. Under the circumstances, "adequate cause" within the framework of the Valley Camp decision appears to exist. See also Secretary of Labor v. Salt Lake County Road Department, 3 FMSHRC 1714 (1981). Accordingly, Kaiser's motion for default decision is denied.

Motion to Dismiss Citations for Lack of Jurisdiction

At hearing, Kaiser also alleged that the Gramercy Alumina Plant which is the subject of Citation Nos. 157570 and 157571 and the impoundments surrounding the drying beds or tailings ponds which are the subject of Citation No. 157572, are not subject to MSHA jurisdiction under section 3(h)(1) of the Act. In its posthearing brief, Kaiser conceded that the Gramercy Alumina Plant was indeed a "mine" within the scope of the Act, presumably as a mineral milling facility,3 but continued to dispute that the impoundments surrounding the drying beds or tailings ponds located about one-half mile from the alumina plant were within the Act's coverage. Section 3(h)(1) of the Act provides as follows:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways, and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds on the surface or underground, used in, or to be used, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience

> of administration resulting from the delegation to one assistant secretary of all authority with respect to health and safety of miners employed at one physical establishment.

The essential jurisdictional facts are not disputed. Citation No. 157572 alleges a violation in connection with elevated roadways located on the impoundments surrounding the two tailings ponds or drying beds. The tailings ponds are located about one-half mile from the Gramercy Alumina Plant at their closest point and are fed by pipes carrying a liquid residue from the processing of the bauxite ore at the plant. The ore processing begins with an initial mixing with a caustic liquor. High-pressure steam pumps then inject the mixture into high-pressure and high-temperature digesters. Preheated caustic liquor is then added and the alumina hydrate fraction of the bauxite is dissolved leaving behind a red mud residue. The residue is washed to recover as much of the caustic as possible and the insoluble matter is then pumped to the subject tailings ponds. The water eventually separates from the solids, is further neutralized and is then disposed of into the Mississippi River. The residue remaining in the ponds consists of a red mud. It is expected to have some future commercial value but is not yet marketed.

The precise jurisdictional question before me is whether the impoundments surrounding the tailings ponds at issue were "used in, or to be used in" the milling of or the work of preparing the bauxite ore, within the framework of section 3(h)(1) of the Act. The term "used" means "to put into service or employed for some purpose." The American Heritage Dictionary of the English Language, Houghton, Mifflin Company (1976). I find that this definition appropriately reflects the meaning of the term as used in section 3(h)(1) of the Act. Since the impoundments surrounding the tailings ponds at issue in these cases were employed for some purpose in the process of "milling" or "preparing" the bauxite ore, i.e., for the retention of the residual sludge from that process, I find that those impoundments were indeed "used in" and "to be used in" the process of "milling" or "preparing" the bauxite ore. While it is certainly an indirect usage in relation to the separation process here employed, nevertheless, the impoundments were admittedly put into service and employed for some purpose in the separation process and were intended to be so utilized in the future. Accordingly, I find that the impoundments come within the purview of the Act. Kaiser's motion to vacate the citations for lack of jurisdiction is therefore denied.

The Alleged Violations

Citation Nos. 157570 and 157571 allege violations of the standard at 30 C.F.R. | 55.20-3. The standard reads as follows:

> Mandatory. At all mining operations:
> (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

> (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and fast floors, platforms, mats, or other dry standing places shall be provided where practicable.
>
> (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

Citation No. 157570 specifically charges as follows:

> The floor and passageway of the No. 4 bauxite conveyor tunnel, yard materials area, is not being kept as clean and dry as possible. A buildup of bauxite with drainage not being maintained has created a muddy hazardous condition. Persons must use the passageway from one to 10 or more times daily, governed by quality of bauxite. Holes at drainage points are covered by mud creating a tripping hazard by persons using the passageway. This condition also increases the possibility of injury to maintenance personnel while performing work on the conveyor belt also.

The violation charged in Citation No. 157571 is virtually identical to the above except that it is directed to conditions in the No. 5 bauxite conveyor tunnel.

Kaiser first argues that the words "clean" and "orderly" and "so far as possible, dry," as they appear in the cited standard do not give reasonable notice of what is required and that therefore the standard is unenforceably vague (and presumably should therefore be vacated as a violation of due process under the Fifth Amendment to the United States Constitution). The language of the cited standard indeed does not afford any concrete guidance as to what is to be considered "clean and orderly" and "in a clean and, so far as possible, a dry condition." A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an operator unless read to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975), United States v. National Dairy Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed.2d 561 (1963); United States v. Petrillo, 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed.2d 1877 (1947). Unless the operator has actual knowledge that a condition or practice is hazardous, the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Cape and Vineyard, supra. The "reasonably prudent man" has been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics Corporation, Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979). The question before me then is whether Kaiser knew that the cited tunnels in the conditions then

existing were hazardous or whether a conscientious safety expert would have protected against the conditions existing therein because they presented a reasonably foreseeable hazard.

The bauxite conveyor tunnels are described as underground structures each about 300 feet long, 7 to 8 feet wide, and 12 feet high. Each contains a conveyor belt running about 45 to 50 inches from the floor and an adjacent passageway about 30 inches wide. The tunnels run adjacent to the Mississippi River, the level of which may rise to 13 feet above the tunnels. Water therefore seeps into the tunnels. The tunnels convey raw bauxite ore from ore boats on the Mississippi and reclaimed ore (from spillage and cleanup) to the processing plant. It is not disputed that when the conditions herein were cited, the steam-siphon system used to force the excess water out of the tunnels was not properly functioning. Water and spilled bauxite had therefore accumulated on the tunnel floor. According to the undisputed testimony of MSHA inspector Rembold, the wet bauxite mud created particularly slippery conditions on the passageways adjacent to the conveyors. In some places, the mud was more than ankle deep and concealed several 18-inch holes in the passageway floors.

Rembold described the hazards associated with the conditions he found. Maintenance personnel would travel the tunnels at least once a day checking for such problems as ore spillage. In addition, if there was a belt breakdown, maintenance employees would be required to carry heavy tools along the passageways. If persons would trip or fall as a result of the slippery conditions, they could come in contact with the rollers along the belt line, thereby causing serious injuries. The rollers were at least partly exposed. He observed that similar conditions elsewhere have resulted in torn limbs and even death. The concealed holes also posed an additional hazard of sprains and fractures. Rembold testified that over a period of several years before he issued the instant citations, there had been many safety meetings and negotiations between the union and Kaiser regarding what had commonly been known as a constant problem in the tunnels from a lack of drainage and a buildup of bauxite spillage.

Within this framework of essentially undisputed evidence, I find it indeed disingenous for Kaiser to contend that it did not know what was meant by the requirement to keep passageways and the floors of workplaces in a "clean and orderly" and "in a clean and, so far as possible, a dry condition" in the context of the cited violations. The types of conditions described by Inspector Rembold clearly had existed periodically for some time and presented such an obvious hazard that any "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable" would seek to abate them. General Dynamics, supra. I find, therefore, that under the circumstances of this case, Kaiser had adequate notice of the standard as it was applied.

I also observe that Kaiser has not challenged the language of paragraph (c) of the cited standard which relates to the

existence of holes in floors, working places, and passageways. Thus, even assuming, arguendo,

that paragraphs (a) and (b) of the cited standard were unenforceably vague as alleged, sufficient allegations are set forth in the citations at bar to charge violations of the unchallenged paragraph (c). For this additional reason, Kaiser's motion to vacate the citions is denied. Since Inspector Rembold's undisputed testimony, noted above, also supports a finding that the violations alleged in Citation Nos. 157570 and 157571 did in fact occur, I find that the violations are proven as charged.

Citation No. 157572 charges a violation of the standard at 30 C.F.R. | 55.9-22.4 The standard appears under the subheading "Loading, hauling, dumping" and reads as follows: "Mandatory. Berms or guards shall be provided on the outer banks of elevated roadways." The citation specifically alleges as follows:

Berms or guards are not provided on the outer banks of the elevated roadway along the mud lakes or surge ponds. The angle of repose is such that a vehicle would turn over and roll down the embankment if the wheels went off the edge of the road. The embankment is approximately 45 to 100 feet in some areas and is about a 3 to 1 slope. Pickup trucks, vans, and/or cars travel this roadway daily. The largest vehicle to travel the roadway has an axle height of approximately 24 inches.

Kaiser first argues that even though the cited roadways on the impoundments are in fact elevated above the surrounding area (the evidence indicating at a height of 25 to 30 feet), since the embankments were sloped down from the roadway at a 1 to 3 ratio, they were not "elevated roadways" within the meaning of the cited standard. Kaiser cites no authority for this proposition and since there is indeed no exception provided in the regulation where the slope from the elevated roadway is at a 1 to 3 ratio, I reject the argument. While the extent of the hazard presented is obviously reduced as the degree of slope is reduced, it is nevertheless at least a technical violation of the standard. Recognition of a reduced hazard may be made in any subsequent civil penalty proceeding. In any event, it is apparent that the premise to Kaiser's argument herein is not wholly supported by the evidence. Indeed, Kaiser's own witnesses conceded that sections of the slope had been washed out, thus creating a much greater hazard than presented by other sections of the slope.

Kaiser next claims that the cited elevated roadways were not used for "loading, hauling or dumping," an apparent prerequisite to the application of the standard. See Secretary v. Cleveland Cliffs Iron Company, Inc., 3 FMSHRC 291 (1981). While there is no dispute that parts for the pumps used in both tailings ponds were occasionally transported by pickup truck over the cited roadways on an irregular basis, usually not more than once a month (and presumably parts were loaded and unloaded at the ponds), that a "cherry picker" vehicle occasionally traversed the roadways for working on the pumps and that security vehicles patrolled the roadways on a daily basis, the essential question is whether these activities constituted "loading" or "hauling." In Secretary v. Cleveland Cliffs Iron Company, Inc., supra, the Commission held that the term "hauling" as used in the standard at 30 C.F.R. | 55.9-22, the standard at issue herein, "should be broadly construed, and includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the normal mining routine." (Emphasis added.) The Commission also cited with apparent approval the definition of "haulage" applied by Chief Administrative Law Judge James Broderick in his decision in the same case (1 FMSHRC 1965), i.e., "the drawing or conveying in cars or otherwise, or movement of men, supplies, ore and waste both underground and on the surface." Dictionary of Mining at 531. While the pump parts in this case were indeed only occasionally loaded and hauled along the cited elevated roadways, I find that such activities even though occurring no more than once a month were clearly a part of the "normal mining routine" so as to be within the purview of the cited standard. The infrequency and irregularity of the

"loading" and "hauling" is not the significant factor so long as those activities are within the normal mining routine. Cleveland Cliffs, supra. Accordingly, the evidence is sufficient to support a violation of the cited standard.

I do not find, however, that the daily patrolling of security vehicles on the cited roadway or the infrequent use of a "cherry picker" constitute "loading," "hauling," or "dumping" within the intended scope of the standard. No evidence exists to show that anyone other than the driver of the security vehicle performed the patrol functions or that the patrol vehicle was used to transport any particular tools or equipment. Similarly, credible evidence is lacking to demonstrate that the "cherry picker" was in any way used to load, haul or dump. While the superintendent for the processing plant admitted that some dry mud from the chemical plant had in the past been occasionally "dumped" at the ponds, it is also clear that such dumping had been forbidden for some time before the citation here at issue. There is no evidence that such "dumping" was continuing to occur on any regular basis as part of the "normal mining routine" and, accordingly, I cannot find that such activity was occurring here. The evidence that a green, white, and gray muddy substance had been found dumped at one of the impoundments sometime after the citation was issued is not sufficient to establish that it was part of the normal mining routine. Accordingly, I do not find that these particular activities constituted "loading," "hauling," or "dumping" within the meaning of the cited regulatory provisions.

Kaiser contends, finally, that even assuming that a violation existed here (1) the violation was de minimis, and in accordance with decisions of the Occupational Safety and Health Review Commission, was too trifling to warrant imposition of an abatement requirement or the assessment of a civil penalty, and (2) it would be economically infeasible to abate the condition by berming or guarding the elevated roadways here at issue. While these arguments could very well be relevant in a civil penalty proceeding under section 105(b) of the Act, it is clear that the contentions do not go to any issue relevant to this contest case under section 105(d) of the Act. While I would ordinarily have consolidated those issues and proceedings for a single disposition, the parties herein have sought to have a separate decision first on the issue of whether the violation has in fact occurred. See n. 1, supra. I note, moreover, that MSHA did not prescribe any particular mode of abatement in the citation at bar and that various alternative modes of abatement apparently exist at much less cost. Accordingly, I give the arguments no consideration in this case.

ORDER

Citation Nos. 157570, 157571 and 157572 are AFFIRMED and the contests of those citations are accordingly DISMISSED.

Gary Melick

Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 The parties had initially requested the consolidation of these cases with corresponding civil penalty proceedings. However, counsel for the Secretary recently informed the undersigned that MSHA would not file such proceedings as to Citation No. 157572, until a decision is rendered in the corresponding contest case now before me. Accordingly, the motions for consolidation are denied.

~FOOTNOTE_TWO

2 Commission Rule 20(d), 29 C.F.R. | 2700.20(d), provides as follows: "Answer. Within 15 days after service of a notice of contest, the Secretary shall file an answer responding to each allegation of the notice of contest." Under Commission Rule 7, 29 C.F.R. | 2700.7, a notice of contest of a citation "shall be served by personal delivery or by registered or certified mail, return receipt requested." Under that rule, service by mail is complete upon mailing. Under Commission Rule 8, 29 C.F.R. | 2700.8, when service of a document is by mail, 5 days may be added to the time otherwise allowed by the rules for the filing of a response.

~FOOTNOTE_THREE

3 In Aluminum Company of America v. Morton, Civil Action No. 74-1290, U.S. District Court for the District of Columbia, 3 OSHC 1624 (1975), the Bayer alumina refining process, the same process as used in the Gramercy Alumina Plant here at issue, was held to constitute "milling" as that term was used in the Federal Metal and Nonmetallic Mine Safety Act. That definition was also found to be consistent with the interpretation of the authority and responsibility of the former Mining Enforcement and Safety Administration (MSHA's predecessor) in a Memorandum of Understanding, 39 F.R. 27382 (July 26, 1974).

~FOOTNOTE_FOUR

4 As a result of testimony concerning this citation at hearing, the undersigned first requested, then issued, subpoenas for, "a copy of a letter from Mr. Sale [a Kaiser official] to the Federal Mine Safety and Health Administration in which, Inspector Rembold testified, there existed admissions against interest by Mr. Sale in reference to Citation No. 157572." The parties moved to quash the subpoenas on the grounds that the subject letter related to confidential settlement negotiations and presumably was therefore inadmissible as evidence under that part of Rule 408 of the Federal Rules of Evidence that excludes evidence of conduct or statements made in compromise negotiations. Even assuming, arguendo, the applicability of the Federal Rules of Evidence to Commission hearings (but see 29 C.F.R. || 2700.1 and 2700.60(a)), the Secretary has recognized in his brief that the rule does not provide for the exclusion of such evidence when it is offered for another purpose, such as proving the bias or prejudice of a witness or for other impeachment purposes. See 10 Moore's Federal Practice, |408, John McShain, Inc. v. Cessna Aircraft Company, 563 F.2d 632 (3d Cir. 1977). As a general rule, the need to evaluate a witness' credibility outweighs the

policy of encouraging compromises. 2 Weinstein's Evidence, U.S. Rules, %57 408 [05].

The MSHA inspector in these cases testified regarding the existence in the subject letter of factual admissions by an agent for the operator, Mr. Sale. However, Sale denied in his testimony that he had made any such statements. The precise nature of the statement that was in fact made in the subject letter is therefore relevant to the credibility of these witnesses. Under the circumstances, the evidence is not inadmissible even under Federal Rule 408. In apparent recognition of this, the Secretary in his brief suggested that the judge should examine the subpoenaed document to determine its admissibility under this exception to the Rule--the same proposal suggested by the undersigned at hearing. The motions to quash are therefore denied. However, since MSHA has also unequivocally conceded that the testimony of its inspector about Sale's alleged admissions was in error, there is no longer any need for the document itself. There is accordingly no longer any need for the subpoenas issued in these cases and they are therefore withdrawn.