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SOL (MSHA) V. MASSEY ROCK
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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 80-94-M
v.	A/C No. 04-10854-05003
MASSEY SAND AND ROCK COMPANY, RESPONDENT	MINE: Indio Pit & Mill

Appearances:
Linda R. Bytof, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California,
For the Petitioner

Jack L. Corkill Esq.
Indio, California,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent Massey Sand and Rock Company, (Massey), with a violation of 29 C.F.R. 56.11-1, (FOOTNOTE 1) a regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. Respondent denies that a violation occurred and further contests the appropriateness of the penalty.

After notice to the parties a hearing on the merits was held in Indio, California.

ISSUES

The issues are whether 30 C.F.R. 56.11-1 is unduly vague and thereby violates constitutional due process. Further, did a violation occur, and if a violation is found, what penalty, if any, is appropriate.

FINDINGS OF FACT

1. In April, 1979, Randall Thompson was employed by Massey as a mechanic welder and loader operator (Tr. 9).

2. Thompson's duties included servicing equipment and routine maintenance (Tr. 10).

3. His duties also involved greasing the head pulley above the sand silo.

4. The head pulley is 35 to 40 feet above the ground (Tr. 15).

5. On April 27, 1979, as he had on other occasions, Thompson walked up the conveyor belt to reach the head pulley (Tr. 15-18).

6. There was no walkway, handrail, ladder, or work platform (Tr. 16-17, Exhibit R-6).

7. As he began to grease the head pulley the conveyor started and threw him into the bottom of the silo (Tr. 15, 22).

8. Thompson had never been told not to climb the conveyor belt (Tr. 18-19).

9. Massey abated by installing a ladder to reach a work platform equipped with handrails (Tr. 42, 149).

10. In January 1979, prior to Thompson's fall an MSHA inspector discussed workers climbing conveyors. The inspector indicated a crane and cage could be used to provide safe access if the cage itself complied with MSHA regulations (Tr. 142, Exhibit P-3).

11. Massey has safety programs and frequent tool box safety meetings (Tr. 110, Exhibit R1-R5).

12. All of Massey's other conveyors have work platforms at the head pulleys. These platforms can be reached by ladder or stairway (Tr. 22).

DISCUSSION

The threshold question is whether the regulation in issue can withstand respondent's attack of vagueness.

A statute which either forbids or requires the doing of an

act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential

of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391 (1925). This principle of law also applies to industrial and commercial safety standards that can result in the imposition of civil penalties for their violation. Cf Brennan v. OSHRC, 505 F. 2d 869, 872 (10th Cir. 1974); Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1335-1336, (6th Cir. 1978); Longview Refining Co. v. Shore, 554 F. 2d 1006, 1114 (Temp Emer., Ct. App. 1977), cert denied 434, U.S. 836 (1977).

In deciding whether a safety standard satisfies the principle of due process, the regulation must be examined "in the light of the conduct to which it is applied" Ray Evers Welding Co. v. OSHRC 625 F. 2d 726, 732 (6th Cir. 1980); United States v. National Dairy Products Corp. 372 U.S. 29, 33, (1963).

The appellate courts have considered the vagueness argument in connection with regulations promulgated under the Occupational Safety and Health Act (OSHA), 29 U.S.C. 651 et seq.

One line of cases dealing with the personal equipment regulations have applied an objective "reasonable" test. That is, whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard. American Airlines, Inc. v. Secretary of Labor 578 F. 2d 38, (2nd Cir. 1978); Voegele Co. v. OSHRC 625 F. 2d 1075, 1079 (3rd Cir. 1980); Bristol Steel & Iron Works, Inc. v. OSHRD, 601 F. 2d 717, 723 (4th Cir. 1979) Ray Evers Welding Co. v. OSHRC, supra, 625 F. 2d at 731-732; Arkansas Best Freight's System Inc. v. OSHRC 529 F. 2d 649, 655 (8th Cir. 1976); Brennan v. Smoke Craft, Inc., 530 F. 2d 843, 845 (9th Cir. 1976). The First Circuit explained that "knowledge of the existence of a hazardous situation must be determined in light of the common experience of an industry, but that the extent of precautions to take against a known hazard is that which a conscientious safety expert would take" General Dynamics v. OSHRC, 599 F. 2d 453, 464 (1st Cir. 1979).

On the other hand, the Fifth Circuit, by contrast, has linked the reasonableness standard to the custom and practice of the industry. In Ryder Truck Lines, Inc. v. Brennan 497 F. 2d 230, 233 (5th Cir. 1974) the Court said the general industry safety standard was not unconstitutionally vague as long as it "affords a reasonable warning of the proscribed conduct in the light of common understanding and practices", B & B Insulation, Inc. v. OSHRC 583 F. 2d 1364 (5th Cir. 1978). See also Cotter & Company v. OSHRC 598 F. 2d 911 (5th Cir. 1979); Power Plant Division, Brown & Root, Inc. v. OSHRC 590 F. 2d 1363 (5th Cir. 1979).

The other circuits have not followed the Fifth Circuit in limiting reasonableness to the custom and practice of the industry because, as the First Circuit explained, such a ruling "would allow an entire industry to avoid liability by maintaining inadequate safety training." General Dynamics supra. supra 2d at 464, accord Voegele Co., supra at 1078. The

Sixth Circuit said that industry standards and customs should not be determinative of reasonableness because there may be instances where a whole industry has been negligent in providing safety equipment for its employees" Ray Evers Welding, supra at 732.

Under either line of cases Massey cannot complain that the regulation is vague. The photographs show that Massey maintains an extensive conveyor system (Exhibit R-6, photographs 2 and 3). All of Massey's conveyors, with the single exception of where Thompson was injured, have work platforms at the head pulleys. The platforms are reached by ladder or stairways. From these facts I conclude that Massey, as its own conscientious safety expert recognized the hazard by providing work platforms for all but one head pulley.

Massey's post trial brief argues that MSHA regulations do not prohibit its employee from walking on the conveyor belt. Massey's argument overlooks the thrust of the regulation. The regulation requires safe access to all working place. One method of safe access could be the installation of a ladder, and a work platform with handrails. Another method of safe access could have been the use of the crane and man cage. In this case Massey abated with the former and failed in the proof of the latter.

The cases cited by Massey are not inopposite this view. In Cape and Vineyard Division of New Bedford Gas v. OSHRC 512 F. 2d 1148 (1st Cir. 1975) the Court stated: "an appropriate test is whether a reasonable prudent man familiar with the circumstances of the industry would have protected against the hazard." As previously stated here Massey recognized the hazard.

In Diebold, Incorporated v. Marshall, 585 F. 2d 1327 (6th Cir. 1977), the Court held that a point of operation guarding of power presses was properly applied to press brakes. However, the Court would only apply the standard in the future. This was based on the view that a portion of the standard was unartfully drafted, that there was a common industry understanding regarding the guarding of press brakes, and that there was administrative enforcement indicating that the safety regulation was inapplicable to press brakes. None of the above situations obtain here. The standard is clear and concise. There is no common industry understanding that work platforms should not be provided. Further, there is no showing that MSHA ever considered the regulation inapplicable.

In Kent Nowlin Construction v. OSHRC 593 F. 2d 368 (10th Cir. 1979) the Court reversed the finding of a violation of 29 C.F.R. 1926. 652(h) The Court ruled that Kent Nowlin "should not be penalized for deviating from a standard the interpretation of which, in relation to kindred standards cannot be agreed upon by those responsible for compelling compliance with it and with oversight of the procedures for its enforcement."

The fact that Massey provided work platforms at all other of its head pulleys which were reached by ladder or stairways would clearly indicate that the cited doctrine is inapplicable. Massey's also relies on Fleutic v. Rosenberg 302 F. 2d 652 (9th Cir. 1962); Jordan v. DeGeorge 341 U.S. 223 (1951); and Rodine-Becker Co. Docket No. 75-651 but those cases are not applicable to these facts.

CIVIL PENALTY

Section 110 of the Act, (30 U.S.C. 820(i)), provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Concerning the Massey's history: there have been four violations in the previous 24 months (Tr. 4). Massey is a small to medium size operator: the company operates 40,098 man hours per year. The Indio pit and mill operates 18,250 man hours per year (Tr. 4). The assessment of a penalty will not affect Massey's ability to continue in business (Tr. 4).

The company was negligent since the lack of a work platform was apparent. The gravity of the violation was severe since an employee was working in an unguarded position at the head pulley 35 to 40 feet above the ground. Massey rapidly complied and installed the necessary platform and safe access.

The Secretary proposed a special assessment of $2,500.00 (Exhibit P-2). I disagree. The Secretary's proposal overly concentrates on the gravity of the violation. The remaining favorable statutory criteria cannot be ignored. Considering the statutory criteria I assess a civil penalty of $500.00.

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Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 379052 is affirmed.

2. A civil penalty of $500.00 is assessed.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 The cited regulation provides as follows:

56.11 Travelways, 56.11-1 Mandatory. Safe means of access shall be provided and maintained to all work places.