CCASE:
SOL (MSHA) V. CLIMAX MOLYBDENUM
DDATE:
19820301
TTEXT:

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 80-157-M
v.	MSHA CASE NO. 05-02256-05005
CLIMAX MOLYBDENUM COMPANY A DIVISION OF AMAX, INC., AND BOYLES BROS. DRILLING COMPANY, RESPONDENTS	MINE: Climax Open Pit

Appearances:

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294,
For the Petitioner

Charles W. Newcom, Attorney for Respondent, Climax Molybdenum
2900 First of Denver Plaza, 633 Seventeenth Street
Denver, Colorado 80202

Carl D. High, District Manager, for Respondent, Boyles Bros.
Drilling Co. 15865 West 5th Avenue, Golden, Colorado 80401

Before: John A. Carlson, Judge

STATEMENT OF THE CASE

CITATIONS 331979, 331980 and 331982

This case arose out of an August 30, 1979 safety inspection of respondent Climax's surface mining operation in Lake County, Colorado. Three closely related citations, 331979, 331980, and 331982, were heard on the merits. As to each of these, the chief issue to be decided is whether a travelway standard published at 30 C.F.R. | 55.11-1 requires that Climax furnish certain pieces of heavy mobile equipment with flashers or with flags attached to "buggy whip" antennae. That standard reads:

> Safe means of access shall be provided and maintained to all working places.

The matter was heard at Denver, Colorado under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). The parties stipulated to jurisdiction. The petitioner seeks a penalty of $106 for each citation.

FINDINGS OF FACT

Upon the entire record, the following findings of fact are made:

(1) Respondent's open pit mine site includes approximately 10 miles of two-way haulage roads with widths ranging from 100 to 150 feet.

(2) In ordinary operation, the mine runs 3 shifts per day using 45 miners per shift. Daily, 80,000 tons of materials are removed and transported over the haulage roads, chiefly in 120 ton trucks. Including pickup trucks, some 45 vehicles are used on the site.

(3) Respondent also operates two heavy water trucks approximately 44 feet long and 12 feet high, and a Caterpillar number 988 B front-end loader 35 feet long and 13 1/2 feet high. These machines are operated on the roads and the pit floors, and are the subject of the Secretary's citations. The water trucks move at slow speeds to spread water to keep dust down.

(4) Respondent had equipped none of these 3 vehicles with an electrically operated flasher atop its highest part, or a "buggy whip" antenna and flag to alert other vehicles of its presence.

(5) Respondent did equip its pickup service vehicles with flashers, but no other vehicles, including its 120 ton trucks had either flashers or flags. The pickup trucks measure approximately 6 1/2 feet at their highest. Operator's eye level on the 120 ton trucks is about 14 feet 8 inches.

(6) Respondent had built berms along all open sides of its haulage roads, including corners. These varied in height from a maximum of 12 feet on the straight sections, declining to about 6 feet in curves.

(7) The roadways contained a number of curves, but these were laid out to provide 200 yards of forward visibility. The single crest or "hilltop" on the roads was flattened at the top and provided 80 to 100 yards visibility.

(8) To reduce the possibility of collisions between vehicles on its roadways the respondent maintained and enforced the following safety practices:

(a) All mine vehicles are painted with high visibility paints.

(b) All equipment has conventional head and tail

lights for night operation.

(c) New operators and drivers are given two weeks of training which includes instruction on speed limits for varying conditions, equipment and areas. Speed limits range downward from a maximum of 20 miles per hour for unloaded trucks proceeding downhill. Climax officials routinely check speeds with a radar gun.

(d) All vehicles are equipped with two-way radios which place operators in contact with all other drivers and a "base coordinator" who is informed of vehicle movements.

(e) All vehicles are fitted with rear-view mirrors, and heavy equipment with reverse alarms.

(f) On roadways, respondent has placed mirrors on posts on the outer edges of the sharper curves.

(9) Climax experienced no collisions in its mine involving any of the three vehicles cited, or any other large pieces of mobile equipment.

(10) All of these findings relate to conditions at the time of inspection in this case.

DISCUSSION OF THE EVIDENCE

One may first question whether the cited standard, relating as it does only to "safe access" to work places, was intended to have application to warning devices on pieces of heavy mobile equipment. Review of the more specific standards which appear as a part of 30 CFR | 55.11 shows that all have reference to ladders, stairs, walkways and similar fixed structures over which miners could be expected to move. The standard at 30 C.F.R. | 55.11-25 does apply to mobile equipment, but merely prescribes the structural requirements for fixed ladders mounted on the equipment itself, presumably to assure to workers a safe access to elevated cabs or other work places.

For the purposes of this decision, however, 30 CFR | 55.11 will be assumed to have the broader sweep which the Secretary claims. It is presumed, that is, to apply to the cited machines because they are used on roadways which are a "means of access."

Even so, for the reasons which follow, I must hold that no violations were proved. The language of the standard itself makes no reference, of course, to flags, flashers, or any other warning devices. When confronted with a standard which specifies neither the type of hazard nor the abatement method contemplated, an operator is placed in a far less certain position than when that standard identifies particular dangers and remedies. If the requirements imposed by a standard can be divined only by guess, fundamental questions of due process inevitably arise.

Decisions under the Act thus far have not dealt at length with this problem. (FOOTNOTE 1) The courts, however, have addressed the same problem under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) in numerous cases concerned with arguments of "unconstitutional vagueness." As a generality, these cases place a higher burden on the prosecutor than those involving narrow or specific standards. First, the courts have reasoned that the Secretary of Labor in enforcing these broad standards is held to essentially the same tests adopted under the "general duty clause" of the Occupational Safety and Health Act, (a clause which has no direct counterpart in the Mine Safety and Health Act). McLean Trucking Co. v. OSHRC 503 F. 2d 8, 10 (4th Cir. 1974); Cape and Vinyard Div. of New Bedford Gas v. OSHRC, 512 F. 2d 1148, 1152 (1st Cir. 1975).

Recognizing that some standards are necessarily broad, the courts have ultimately fashioned this test for standards such as the one we deal with here:

> The question then becomes what precautionary steps a conscientious safety expert would take to avoid the occurrence of the hazard. General Dynamics v. OSHRC, 599 F. 2d 453, 465 (1st Cir. 1979).

In its widest sense, the hazard in the present case is that other drivers might not see the massive loader or water trucks in time to avoid accidents. The Secretary claims that the best way to meet this hazard is to mount a small warning flag on an antenna, or to equip the vehicles with an electronic flasher. Climax contends that its existing safety practices [as described in the findings] were well calculated to minimize the hazard, and that the variations now proposed to the Secretary would be of dubious or even negative value. Through exhibits and testimony, for example, respondent seeks to show that the small, standard size warning flags (8 1/2 x 13 inches), of which the inspector approved, add nothing to the visibility of hugh, brightly painted vehicles. Climax also contends that flashers on machines in the pits create troublesome mirror reflections and other distractions to operators in loading areas during the night shift. Other shortcomings are more obvious. The real concern of the inspector was that roadside berms and banks hide vehicles in turns (Tr. 64, 65, 71). Obviously, to the extent that a road curves around a hillside, a mere flag flying above the loader or truck would still be obscure by a hill of any size. As to berms, the evidence tends to show that the superstructures of the cited vehicles should be visible far above the highest berms in turns. The inspector acknowledged that during daylight flashers would not reduce the hazard he envisioned; mounted atop the highest point on the vehicle they would not be visible over the brow of a hill or from around a corner (Tr. 69).

The evidence does not convince me that the precautionary measures taken by respondent were less than the standard requires. On the contrary, the precautions appear to have been conscientiously devised and carried out. Respondent's accident-free record tends to show that. Moreover, the inspector himself, presumably a "conscientious safety expert" of the sort mentioned in General Dynamics, volunteered that he saw no problems as he watched the machines in use. Only after a vehicle operator raised the matter did it occur to the inspector that flags or flashers were necessary (Tr. 23). The ad hoc quality of this supposed requirement is thus apparent.

In sum, the Secretary attempts to hold the operator to an arbitrary and somewhat whimsical construction of the "safe access" standard, but fails to show that the measures already in force were not "the reasonably precautionary steps" implied by the standard. Cf. Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F. 2d 460, 463, (8th Cir. 1974). I therefore conclude that the cited standard was not violated. To hold otherwise would be to deprive Climax of due process. If the Secretary is convinced that flags or flashers are indeed the preferred way to minimize the hazard, a specific standard corresponding to those mandating backup alarms and similar warning devices should be promulgated.

CONCLUSIONS OF LAW

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent did not violate 30 CFR | 55.11-1 as alleged in citations 331979, 331980 and 331982.

ORDER

Accordingly, the petition for assessment of civil penalties is ORDERED dismissed and the underlying citations are ORDERED vacated.

FURTHER ORDER ON SETTLED CITATIONS

This case included three additional citations, 331981, 331983 and 565721, which were not tried on the merits. Respondent agreed at trial to withdraw its contest of the $78 penalty sought in connection with citation 331981, and to pay that penalty. The proposed penalty is therefore ORDERED affirmed, and Climax shall pay the sum of $78 within 30 days of the date of this order.

At trial the parties indicated that the remaining two citations, 331983 and 565721, were the proper responsibility of Boyles Bros. Drilling Company, an independent contractor. They also indicated that that company was willing to substitute itself as the respondent, to accept full responsibility for the violations, and to pay in full the proposed penalties. Boyles Bros., by letter received October 5, 1981 formally agreed to do

those things.

In accordance with the agreements then, Boyles Brothers Drilling Company is ORDERED substituted as the respondent with respect to citations

331983 and 565721; in that capacity it is ORDERED to pay, within 30 days of this order, a civil penalty of $66 in connection with citation 331983, and $72 in connection with citation 565721; and the attendant "history of previous violations" for those citations are ORDERED to be recorded against Boyles Bros. and shall be not reflected upon the record of the original respondent, Climax.

John A. Carlson
Administrative Law Judge

ÄÄÄ

~FOOTNOTE_ONE

1 See, however, two thoughtful, unreviewed judge's decisions, which discuss the matter in considerable depth: Evansville Materials Inc. 3 FMSHRC 704 (1981), Judge Fauver; Massey Sand and Gravel Rock Co., --- FMSHRC ....., WEST 80-9-M (Feb. 2, 1982), Judge Morris.