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GREAT ELECTRIC V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GREAT WESTERN ELECTRIC COMPANY, CONTESTANT	CONTEST OF CITATION PROCEEDINGS
v.	DOCKET NO. WEST 81-213-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Mine: FMC
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS DOCKET NO. WEST 81-258-M
v.	Mine: FMC
GREAT WESTERN ELECTRIC COMPANY, RESPONDENT	

Appearances:
John A. Snow Esq.
VanCott, Bagley, Cornwall & McCarthy
Salt Lake City, Utah,
For Great Western Electric Company

Robert J. Lesnick, Esq., Office of Henry C. Mahlman,
Regional Solicitor, Unites States Department of Labor
Denver, Colorado,
For the Secretary of Labor

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Great Western Electric Company (Great Western), with violating Title 30, Code of Federal Regulations, Section 57.15-5, (FOOTNOTE 1) a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing was held in Green River, Wyoming on September 1, 1981.

Great Western filed a post trial brief.

ISSUES

The issues are whether Great Western violated the regulation, and, if so, what penalty is appropriate.

STIPULATION

At the hearing the parties stipulated as follows:

1. An employee of Great Western was on a ladder twelve feet above the ground. This is at the FMC Mine.

2. The employee was not wearing safety belts and/or lines.

3. The employee was a construction worker.

4. The body of the employee was not totally within the rails of the ladder; specifically, his shoulders were not within the rails of the ladder. There are three exhibits that have been marked Great Western 1, 2, and 3, which are submitted as showing approximately the position of the employee on the ladder. The arms were outstretched towards a light fixture. Both hands of the worker were involved with installing the light fixture.

5. The employee was skilled and experienced in connection with the use of a ladder. He uses a ladder everyday. The employee uses the ladder as many as twenty different times in a day. The employee does a significant amount of his daily work on a ladder.

6. The employee could have been tied off on the ladder.

7. The ladder was tied off top and bottom.

DISCUSSION

The pivitol issue is whether there was a danger of the workman falling. I conclude such a danger existed.

The scenario is this: the worker, while he was standing on the round rung of the ladder without a safety belt, used both hands to install a light fixture. During this time the shoulders of the worker were outside of the rails of the ladder. In these circumstances it appears that the sole factor preventing the worker from falling would be his skill in balancing his body while standing on the rungs of the ladder.

CONTENTIONS

Great Western contends that the regulation is vague, ambiguous, and unenforceable. Further, that any enforcement of the regulation must be in a reasonable fashion. Finally, Great Western declares that even if the regulation is valid it was unreasonably applied in this case.

Is 30 C.F.R. 57.15-5 constitutionally vague and therefore invalid?

A statute that 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 the law. Connally v. General Construction Co., 269 U.S. 385, 391 (1925). This principle of law extends to industrial and commercial safety regulations that can result in the imposition of civil penalties for their violation. Brennan v. OSHRC, 505 F. 2d 869, 872 (10th Cir. 1974); Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1335-1336, (6th Cir. 1978).

In deciding whether a safety regulation 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).

In Kerr-McGee Corporation, 3 FMSHRC 2496, the Commission construed the general meaning of Section 57.15-5. The Commission noted that this section, as contrasted with more detailed regulations, is the kind made simple and brief in order to be broadly adaptable to the myriad activities of a miner. From an operator's standpoint, one benefit of this flexible approach is that it affords considerable leeway in adopting safety requirements to the variable and unique conditions encountered in mines.

Various appellate court decisions support the Review Commission's construction of this regulation. Such appellate decisions arise under the Occupational Safety and Health Act, (OSHA), 29 U.S.C. 651 et seq.

A line of cases dealing with 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. OSHRC, 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). In General Dynamics v. OSHRC, 599 F. 2d 543, 464 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."

I conclude that on the facts presented here that a conscientious safety expert would require that the Great Western worker should tie off while in this situation.

Great Western argues that a worker could fall if he slipped on some substance left on the floor, or he could fall while conducting an activity on the brink of a deep mine, or he could fall while on a step ladder two feet off the ground. Therefore, Great Western declares that safety belts should be worn in almost every mining activity which is obviously not the real world.

As indicated the test is one of reasonableness and I am unwilling to consider in this decision Great Western's various hypothetical situations.

Great Western's additional argument is that the enforcement of Section 57.15-5 must be in a reasonable fashion. As previously indicated reasonableness is a factor considered in determining this case. The worker here was 12 feet, not 2 feet, off of the ground.

Great Western cites appellate court decisions for the proposition that the test of liability should rely solely on whether a reasonably prudent employer familiar with the custom and practice of the industry would have protected against the hazard. It is correct that industry standards and customs have been held determinative of what constitutes reasonableness. This point was suggested in Ryder Truck Lines, Inc. v. Brennan, 497 F. 2d 230 (5th Cir. 1974) and B & B Insulation, Inc. v. OSHRC, 583 F. 2d 1364 (5th Cir. 1978).

But the First and Third Circuits have not followed the Fifth Circuit in limiting the reasonableness test 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, at 464; accord Voegele Co., supra, at 1078.

Ray Evers Welding Company, supra, relied on by Great Western, is not persuasive authority for its position. The case deals with an OSHA regulation, (29 C.F.R. 1926, 28(a)), totally different from the regulation here. In Ray Evers the court overruled the claim of vagueness asserted there but held that there was a lack of substantive proof in the case.

Great Western's argument is further denied on the grounds that the Mine Safety Act seeks to promote safety and health in the mining industry. Great Western's position runs counter to that mandate. Title 30, Code of Federal Regulations describes the purpose of the Part 57 regulations as "the protection of life, the promotion of health and safety, and the prevention of

accidents . . . ." Consistent with that general aim, the specific purpose of section 57.15-5 is the prevention of dangerous falls, Kerr McGee Corporation, supra,

at 2497. A dangerous fall may well be at hand if Great Western's employee continues this approach in replacing light fixtures.

Great Western hypothetically assumes that Section 57.15-5 is valid but that it was unreasonably applied in this case. Great Western urges there was no danger of the worker falling because the worker was stationary and not moving about. Further, there was no danger of falling because the worker had one arm extended through the rails and between the upper two rungs of the ladder (Exhibits 1, 2, and 3).

I am not persuaded by Great Western's argument or by its cited authorities. Merely being stationary with an arm extended as claimed might not prevent a fall. It is common knowledge that the mechanics of a fall generally defy set patterns. Further, if the light fixture was to be installed, the worker could not remain stationary.

The authorities cited in its brief do not support Great Western's position: In Brown v. McKee, 8 OSHC 1247, workers had access to an unsecured ladder. The citation was affirmed. In Bristol Steel and Iron Works Inc., 7 OSHC 1462 (601 F. 2d 717), the appellate court held that the general safety standard, 29 C.F.R. 1928.28(a), was not applicable to the erection of skeleton steel. In Hurlock Roofing Company, 7 OSHC 1867 (1979), the Occupational Safety and Health Review Commission (OSHRC) affirmed a citation requiring fall protection for workers performing roofing work on a flat roof. In Voegele Company, Inc., 7 OSHC 1713, OSHRC affirmed a violation of 29 C.F.R. 1926.28(a) because a worker was standing in an 18 inch gutter near the edge of the roof. In Power Plant Division, Brown & Root, Inc., 7 OSHC 1713, an OSHRC Judge affirmed a violation of 29 C.F.R. 1926.28(a) because a reasonable person would have recognized that workers 50 feet above metal forms and rebars should have used fall protection.

Great Western also declares that its worker was skilled in the use of a ladder therefore that element is a necessary factor in determining whether a danger of falling existed.

I disagree. The skill of a worker could be a factor in assessing a penalty as it would relate to the operator's negligence. But, since the Act provides for the imposition of liability without regard to fault, the skill of a worker would not constitute a defense to a violation of the regulation. Kerr McGee Corporation, supra.

I reject Great Western's additional argument that no violation occurred because the ladder itself was secured and constructed in a substantial manner (30 C.F.R. 57.11-3, 57.11-4). The most secured and most substantial ladder would not prevent this worker from falling if he lost his balance.

Great Western also asserts that requiring the use of a safety belt in these circumstances is unreasonable. Great Western's final argument merely restates its prior views which have already been discussed.

For the reasons stated and on the stipulated facts I conclude the worker could have sustained a dangerous fall from his position twelve feet above the floor while balancing himself on the rungs of the ladder.

The citation should be affirmed.

CIVIL PENALTIES

The parties stipulated that the amount of the proposed penalty was not an issue. Further, the parties accepted the recommendation of the Secretary's assessment office.

Considering the statutory criteria in Section 110(i) of the Act, [30 U.S.C. 820(i)], I deem that the proposed civil penalty is appropriate.

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

ORDER

Citation 576985 and the proposed penalty therefor are affirmed.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 The cited regulation provides as follows:

57.15-5 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.