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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. LAKE 80-83-M A/O No. 11-01176-05005
v.	Barry Plant No. 8 Dredge and Mill
MISSOURI GRAVEL COMPANY, RESPONDENT	

DECISION

Statement of The Case

Upon remand of this matter, the five guarding violations charged came on for hearing in St. Louis, Missouri on November 4-5, 1982.(FOOTNOTE 1) After an evidentiary hearing, tentative bench decisions issued dismissing three of the citations. Whereupon, the Secretary stipulated that unless his position with respect to the applicable standard of liability is upheld on appeal all of the violations will be dismissed.(FOOTNOTE 2)

The dispositive issue is whether, as the Secretary contends, the "use of machinery" standard imposes strict or absolute liability on an operator to provide expanded metal guards around pulleys where exposure to contact with nip or pinch points is, in any way, conceivable or possible,(FOOTNOTE 3) or whether, as the operator contends, such guards are not required unless it is reasonably predictable or forseeable that miners performing their routine or assigned duties in a normally prudent manner may accidentally, inadvertently or negligently be exposed to contact and injury. Operator's Br., p. 7.

Prior to trial the Secretary vacated the finding that the violations were "significant and substantial" because, it was conceded, none of the conditions cited created a "reasonable likelihood that the hazard contributed to Õi.e., a contactÊ would result in an injury ... of a reasonably serious nature" (Tr. 105-108). Compare, Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981) The Secretary also conceded the violations involved "only a minor degree of gravity." This was congruent with the inspector's finding, made at the time he

issued each of the 104(a) citations, that the likelihood of contact and injury was "improbable," (GX 3, 5, 6) i.e., unlikely that even without the expanded metal guards contact would occur or that if it did it would necessarily result in an injury (Tr. 185-186). Over the objections of his counsel, the inspector said he evaluated the likelihood of contact as "improbable" because other inspectors had approved the guards previously installed by the operator and because he believed that while there was a "chance" that in the long run some one might be hurt there was just as good a "chance" that no one would get "caught" in the cited pinch points (Tr. 81-86).

Having trivialized the charges, the Secretary proceeded to trial on the theory that the standard in question imposes strict liability for an operator's failure to guard pinch points so as to eliminate every "reasonable chance" or "possibility" of contact and injury, including the chance that such contact and injury may result from thoughtless, foolhardy, or even deliberate acts of misconduct or misbehavior unrelated to a miner's routine or assigned duties. I dismissed the charges on the ground that it was not reasonably forseeable that a miner performing his routine or assigned duties in a normally prudent fashion would be likely to accidentally, inadvertently, thoughtlessly or negligently contact the pinch points in question.

Findings and Conclusions

Citation 367379

On August 7, 1979, a federal mine inspector issued this citation for a violation of 30 C.F.R. 56.14-1.(FOOTNOTE 4) The charge was that the drive pulley on the main incline belt conveyor at the Barry No. 8 Plant, Pike County, Illinois, was not guarded. It was further charged that a start/stop switch or button was located approximately one and one-half feet (18 inches) from the pinch point of the pulley (GX-3).

The evidence showed the pinch point in question was located atop a 50 foot high piece of equipment the main access to which was up a steep 200 foot ramp. None of the seven miners employed at the sand and gravel operation was regularly assigned to work or travel in the area near the pinch point. The undisputed photographic evidence and testimony established that in order to abate a prior citation a guard in the form of a 2-inch angle iron railing or barrier 40-inches (waist) high and three and one-half feet (42 inches) from the

pinch point had been installed.(FOOTNOTE 5) In addition, the emergency stop-start switch was 26 inches from the protective railing (18 inches from the pinch point) and could easily be reached without going inside the barrier. The emergency switch could be activated without placing a miner's torso closer than 42 inches and his hand closer than 18 inches to the pinch point. The inspector testified it would be "almost impossible" for a miner to contact the pinch point while standing outside the barrier (Tr. 121). The inspector thought the only way a miner might become entangled in the pinch point without going inside the protective railing was if he would "topple" or fall over the 40-inch waist-high barrier. I find this suggestion too unlikely, remote and speculative to rise to the level of a reasonably forseeable probability, although it was, of course, a possibility. The inspector's imaginative suggestion was also at odds with the Secretary's and his concession that a contact was "improbable" or that if a contact did occur it would not in all probability result in an injury of a reasonable serious nature.

The citation was terminated after the operator installed an expanded metal screen around the front of the pulley nearest the stop-start switch (RX-1, 3). As the photographs graphically show the "guard" approved for abatement did not purport to enclose the pulley motor, gear box or sprocket. Thus, the partial screening provided would not prevent a miner from working near exposed moving machinery parts while the pulley was in motion (RX-1, 3; Tr. 203-204).

If, as the inspector believed, miners will take a chance and perform maintenance or other work on a pulley and its motor while it is in motion, the partial guard which the inspector required would only create a greater hazard as it severly constricted the area in which such work must be performed. For these reasons, I find the method of abatement required failed to provide the failsafe, foolproof protection for which the Secretary contends and, if anything, created a more serious hazard than existed before the protective railing barrier was outlawed.

Returning to the question of the adequacy of the protective railing, the principle conflict in the testimony related to how often miners were required to go inside the protective railing to lubricate or do maintenance work on the drive pulley. The inspector, who had no personal knowledge, guessed a miner might have to go inside the barrier once or twice a day. On

the other hand, the plant superintendent, who had nine years experience as a supervisor at this plant persuasively pointed out that to his personal knowledge the pulley required lubrication and maintenance only once or twice a year(FOOTNOTE 6) but that in accordance with the company's safety policy which paralleled the mandatory safety standards, the conveyor belt and pulley were required to be deenergized and locked out while maintenance work was being performed.(FOOTNOTE 7) I find there is no probative evidence to support a conclusion that the operator was evading or ignoring approved lockout procedures when maintenance was performed on this equipment.

The inspector also testified that unidentified informants told him that they would on occasion go inside the protective railing to lubricate or do other maintenance work on the conveyor belt and the pulley while the machinery was in motion.(FOOTNOTE 8) The inspector said these miners told him they sometimes did this on

their own initiative but that at other times they were told to ignore company policy and the safety standards by their "boss" (Tr. 114-117, 126, 138). The inspector admitted he had never seen a miner working on the equipment while it was in motion and there is no evidence that a "hot line" or 103(g)(1) complaint was ever received by MSHA about such a practice. Nevertheless, the inspector thought that because it was human nature to take chances, or because of the pressure for production, a miner might (1) on his own, (2) because he thought it was expected of him, or (3) because he was directed, go inside the protective railing or barrier to work on the pulley or other equipment while the machinery was in motion.

I can, of course, give no weight or credence to an inspector's uncorroborated hearsay recitals of what unidentified informer-accomplices allegedly said or did or their motivation for doing so.(FOOTNOTE 9) These recitals are relied upon by the Secretary as proof that the protective railing did not

preclude work on the machinery while it was in motion.(FOOTNOTE 10) The Secretary argues that because miners are inclined, regardless of the personal risk, to work on machinery while it is in motion in the absence of failsafe, foolproof guards, "the operator must install a guard that will physically prevent the employee from contacting the machinery while it is in operation." Secretary's Br. p. 11. Because of the highly prejudicial and incriminating nature of the informers' assertions, fundamental fairness required the Secretary identify and permit cross-examination of the miners who allegedly furnished this information.

The informer's privilege is no excuse for the Secretary's refusal to identify these individuals. In Roviaro v. United States, the Supreme Court recognized that a limitation on the assertion of the informer's privilege arises from the dictates of fundamental fairness. 352 U.S. 53, 60 (1957). There the Court held that where disclosure of the identity of an informer is relevant and helpful to the defense of an accused, or is essential to a fair determination of a criminal case, the privilege must yield to the requirements of due process and and the right of cross-examination. The same exception applies

to civil and administrative proceedings. United States v. Hemphill, 369 F.2d 539, 542 (4th Cir. 1966); Massman-Johnson (Luling), 7 OSHC 1369, 1371 (1980).

The exception is particularly applicable where, as here, the informers were themselves reputedly wrongdoers or were allegedly coerced to participate in or set up and carry out activity that, at least in the inspector's mind, rendered the protective railing, or indeed any removable guard, inadequate. Compare, U.S. v. Ayala, 643 F.2d 244, 246 (5th Cir. 1981); U.S. v. Varella, 692 F.2d 1352, 1355 (5th Cir. 1982); Supreme Court Standard 510(c)(2) (Reprinted in 2 Weinstein's Evidence, 510-1, 1982).

For these reasons, I found "extraordinary circumstances" for identification existed (Rule 59), and upon the Secretary's continued refusal ordered the hearsay recitals stricken. I see no reason to change that ruling now.

I am willing to concede that it is reasonably predictable and forseeable that miners will engage in isolated acts of conscious, knowing or willful self-endangerment. What I cannot find on this record is that the standard in question imposes upon an operator a duty to prevent such aberrational, abnormal or potentially self-destructive conduct by an employee. In fact, I cannot find and have not been advised of anything in the statute or the administrative history of the standard

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that warrants the imposition of a duty to provide an absolutely risk free workplace.(FOOTNOTE 11)

It is one thing to provide strict liability, i.e., liability without fault for reasonably forseeable and preventable acts of ordinary negligence or thoughtlessness by miners performing assigned duties in accordance with the mandatory safety standards, common sense, and safe mining practices. It is quite another to impose such liability for conscious acts of endangerment. Even miners with room temperature intelligence and a modicum of natural caution should have been given pause by the protective railing, the ready availability of the stop-start switch, their presumed knowledge of the mandatory requirement for shutting the machinery down before performing maintenance work, and their employer's instructions. The Secretary discounts these considerations and the protective railing because of the ease with which it could be circumvented. At the same time, the Secretary asks me to ignore the ease with which the metal screen can be removed while the machinery is in motion. As the photographs and testimony show the screen was only partially bolted to the angle iron frame. A twisted metal wire held the two components of the screen together and

to the angle iron frame at a point just opposite the pinch point (RX-1, 3). It is obvious that maintenance or any other work could be performed on the pulley with or without removing the guard (Tr. 203). Consequently, if failsafe protection was the justification for requiring the new screen guard it was clearly not achieved.

Reasonable men can and did disagree over the adequacy of the various methods of guarding the pulley. Inspectors Horn and Rostler thought the protective railing was adequate. Even Inspector Aubuchon admitted that a miner acting in a safety-conscious manner would not go inside the barrier while the pulley was in motion (Tr. 64). With the normative criteria in such disarray, unguided discretion cannot be accepted as affording the operator fair warning of what was required. As the Supreme Court has remarked, "Where, as here, there are no standards governing the exercise of discretion ... the scheme Õof enforcementÊ permits and encourages arbitrary and discriminatory enforcement." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972); 2 Davis, Administrative Law Treatise, 7:26 at 131 (1979).(FOOTNOTE 12)

Aside from the suspicion of knowing evasion of the guards planted by the miner-informers, the inspector claimed to be privy to the fact that MSHA management had determined to upgrade the protection on pulleys because "they" believed the "barriers weren't doing the job" (Tr. 141). Because no objective or statistical evidence was adduced to support this conclusion, I find such loose, anecdotal evidence is entitled to little or no weight.(FOOTNOTE 13)

I do take notice of the fact that because of the policy and political difficulties that attend the protracted rulemaking process in an era of deregulation, MSHA has increasingly turned to adjudication as the best hope for improving or upgrading the mandatory standards, especially the general standards.(FOOTNOTE 14) In many instances it is easier to eschew the negative policy pitfalls of rulemaking and to proceed with ad hoc litigation because the choice is discretionary, largely unreviewable, and has been broadly approved by the Supreme Court, the courts of appeals and the Commission. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); NLRB v. Bell

Aerospace Co., 416 U.S. 267, 294 (1974); Voegele Co. v. OSHRC, 625 F.2d 1075, 1079 (3d Cir. 1980); Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 654 (8th Cir. 1976); United States Steel Corp., 5 FMSHRC 3, 5 (1983); Alabama By-Products Corporation, 4 FMSHRC 2128, 2129 (1982).

With respect to this standard MSHA is proceeding on both tracks. The notice of rulemaking specifically notes that the "most frequent public criticism of the standard is the impreciseness of the language and lack of clear definition of the terms" in which it is couched. 47 F.R. 10190, 10196 (March 9, 1982).(FOOTNOTE 15) Some of the more frequent of the public criticisms of the "imprecision" of the standard are to be found in the decisions of the Commission's trial judges and more recently the Commission itself. Mathies Coal Company, 5 FMSHRC 300 (1983), appeal pending; John Peterson,

d/b/a Tide Creek Rock Products, 4 FMSHRC 2241 (1982); Basic Refractories, 2 MSHC 1597, 1598 (1981); Kincheloe and Sons, Inc., 2 FMSHRC 1570, 1571 (1980); Applegate Aggregates, 1 MSHC 2557 (1980); Texas Utility Generating Company, 2 MSHC 1028 (1980); FMC Corporation, 2 FMSHRC 1315, 1320 (1980); Lone Star Industries, 1 MSHC 2520 (1979); Massey Sand and Rock Company, 1 MSHC 2111, 2112 (1979); Central Pre-Mix Contrete Co., 1 FMSHRC 1424, 1430-31 (1979).

One need not agree with everything in these decisions to conclude there is a broad spectrum of concern on the part of the trial judges and among the commissioners over the imprecision of the language of the standard and the subjectivity of judgements made in citing guarding violations.(FOOTNOTE 16) Compare, Peabody Coal Company, 2 MSHC 1262-63 (1981). A distillation of these precedents leads me to conclude they foreshadow a holding by the Commission that the penumbra of liability does not extend to exposures that may result from

isolated, aberrational conduct or from a foolhardy or reckless disregard by a miner for his safety. Since such conduct is not forseeable or preventable, I find the condition cited fails to meet the reasonably prudent person standard fashioned by the Commission and the courts to save such charges from the void for vagueness ban. Mathies Coal, supra, and cases cited therein.

While remedial legislation is to be liberally construed, it cannot be stretched to cover every imaginative contingency that an inspector or MSHA can conjure up.(FOOTNOTE 17) A close reading of the Commission's precedents show there is an overwhelming consensus for limiting liability under this standard to contacts that may occur accidentally or inadvertently, i.e., negligently or thoughtlessly, by miners performing their routine or assigned duties in a reasonably, i.e., rationally, prudent manner.

I have deliberately refrained from any hair-splitting discussion of the meaning of the terms "guard" and "may." I think it clear beyond doubt that the protective railing or barrier was a "guard" within both common and dictionary

understanding.(FOOTNOTE 18) I also find the word "may" connotes in the abstract the mere possibility of a contact.(FOOTNOTE 19) What I have been unable to find is that when read in the context of due process notice it connotes a possibility, no matter how unforseeable or unpreventable of a deliberate, intentional or foolhardy contact. On the contrary, I find the barrier in question would cause even the most absent minded miner to stop, look and think. If then his thought was to proceed through heedless of the risk, I would absolve the operator of all responsibility in the absence of a showing that management had a hand in the action. It is, of course, reasonably forseeable that a foreman or other member of management may order or coerce a miner into disregarding any guard. Here, however, the Secretary failed to carry his

burden of showing by competent evidence that such conduct on the part of this operator was forseeable or that the operator's standing safety instructions were a mere hollow mockery. The Secretary, of course, had the burden of showing the inadequacy of the barrier due to the likelihood of knowing or willful noncompliance by management.

Strict liability for noncompliance in providing no guard should not be levitated into an insurer's liability for unforseeable, unpreventable isolated and, on this record, wholly speculative incidents of idiosyncratic behavior by a supervisor. Compare, Ocean Electric Corporation v. OSHRC, 594 F.2d 396, 401 (4th Cir. 1979); Mountain States Tel. & Tel. v. OSHRC, 623 F.2d 155, 158 (10th Cir. 1980). This is not a case, therefore, for uncritical application of the rule that because the Mine Act is a strict liability statute it matters not that the mine operator exercised every reasonable precaution or that the violation was unforseeable. Domtar Industries, 3 FMSHRC 2345, 2348 (1981). When a violation is unforseeable because the standard fails to provide fair notice of what is prohibited the contention that unforseeability is immaterial encounters a due process limitation. I do not, therefore, read the Commission's decisions upholding nofault violations as mandating a holding that this standard imposes an open-ended liability to protect against the most remote, speculative and

aberrational kinds of conduct. Furthermore, if it does provide for such liability, I find the Secretary failed to carry his burden of showing that the new guard an improvement over the old guard or provided any greater protection against the real or imagined hazards testified to by the inspector. Finally, I find the Commission's decisions on strict liability(FOOTNOTE 20) can and must be harmonized with the fair warning requirement of the due process clause.

For these reasons, I reject as contrary to the intent of the standard the Secretary's claim that the operator is absolutely liable for even the most remote possibility imaginable of a harmful contact with the pinch point in question. Such a position is too arbitrary, capricious and subjective to merit adoption as a universal rule on this record. Instead, I find that under the Commission's decisions a rule of reason must prevail and that the Secretary must shoulder the burden of showing that an injurious contact is reasonably forseeable. The Secretary failed to carry that burden. I conclude, therefore, that since the guard provided was adequate to prevent negligent or even thoughtless employee contact with the pinch point in question the violation cited did not, in fact, occur.

Citation 362882

The Secretary's evidence showed that a miner who stooped under the five foot high frame of the belt conveyor and then reached or stood up to a height of five feet five inches (65 inches) could bring his head, arms or some other part of his anatomy into contact with the self-cleaning tail pulley on the log washer conveyor. Based on this, the Secretary argues that whether or not it is reasonable to assume that a miner working in the vicinity of the conveyor frame would negligently or consciously contort himself so as to make contact with the pinch point a violation was shown because the pulley was not physically inaccessible.(FOOTNOTE 21)

The operator's evidence showed that because the conveyor frame was only five feet high a miner could not thoughtlessly or negligently walk into the pinch point but would have to consciously stoop over and then reach or stand up to make contact. It further showed that when the pulley was in motion varying amounts of water, sand, and gravel fell off the end of the pulley and thus, in addition to the design of the equipment, this effluent provided a further natural deterrent against the likelihood that any miner acting

rationally would negligently or inadvertently place himself under the five foot high frame of the belt conveyor while the pulley was in motion.

There was no dispute about the physical dimensions involved in the alleged violation. Accordingly, I find that because of the design and particular location of the pinch point in question it was not reasonably forseeable that it would be contacted by a miner performing his routine or assigned duties in a reasonably prudent manner. I agree that as the operator contends there was no possibility of a contact that might injure a miner when the machinery was not in motion and that to make a contact a miner would have to bend over to place himself under the five foot high frame (Tr. 279-280).(FOOTNOTE 22) I further find that while it was possible for a miner acting in a crazed or foolhardy manner to do this and to place his head or arms in contact with the pinch point while the conveyor was in motion and while water, sand, and gravel was falling in his face it was not reasonably forseeable that this would occur (Tr. 283-284).

For these reasons, I find there was no reasonably forseeable potential for contact and injury. Compare Basic Refractories, 2 MSHC 1597, 1598 (1981); Duval Corp., 1 MSHC 2520, 2521 (1980); Texas Utility Generating Company, 2 MSHC 1028 (1980); Lone Star Industries, 1 MSHC 2167 (1979).

As I have previously indicated, it is one thing to impose strict or no-fault liability for reasonably forseeable possibilities but quite another to impose such liability for unforseeable, unpreventable acts of idiosyncratic or aberrational behavior amounting to conscious or reckless disregard for one's personal safety. On the one hand liability is imposed for failure of an operator to recognize as hazardous a condition which a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have recognized. On the other, liability is imposed on the basis of speculation that isolated, idiosyncratic behavior may occur. Again the Secretary seeks to subsume no-notice liability under the rubric of strict no-fault liability. The Secretary's attempt to impose no-notice liability under the guise of no-fault or strict liability violates fundamental tenents of fairness. The Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty the outer limits of liability under a general standard. When he seeks to expand those limits

under the canon of liberal construction to no-notice liability he exceeds the limits of his authority and faces the salutary ban on arbitrary regulatory action erected by both administrative and constitutional due process. 2 Davis, Administrative Law Treatise, 3:19 at 180 et seq. (1978); NLRB v. Majestic Weaving Co., 355 F.2d 854, 859-61 (2d Cir. 1966).

Thus, even if the distinction between a reasonably forseeable and unforseeable potential for contact and injury does not make safety-sense it is the standard as written which must bear the blame. The purpose of the Mine Act is to obtain safe and healthful working conditions in the nation's metal and non-metal mines by telling operators what they must do to avoid hazardous conditions. To strain the plain and natural meaning of the phrase "which may be contacted" to embrace any pinch point that is physically accessible for the purpose of alleviating a perceived lack of safety-consciousness on the part of miners or management is to delay the day when the regulation will be written in clear and concise language that all operators will be better able to understand and observe. See, Diamond Roofing v. OSHRC, 528 F.2d 645, 649-650 (5th Cir. 1976); Kropp Forge Co. v. Sect. of Labor, 657 F.2d 119, 122-124 (7th Cir. 1981);

Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192-1193 (9th Cir. 1982); Mathies Coal Company, 5 FMSHRC 300 (1983).

In Mathies Coal the Commission embraced the rule that the canon of liberal construction for remedial statutes does not override the requirements for "fair warning" citing the Phelps Dodge case supra. In Phelps Dodge the court applied the traditional rule that regulations that apply penal sanctions are to be narrowly construed, notwithstanding the fact that they appear in remedial statutes. And in Kropp Forge the court held that "without adequate notice in the regulations of the exact contours of his responsibility" an operator cannot be held liable for violating a safety standard. Compare Dravo Corporation v. OSHRC 613 F.2d 1227, 1234 (3rd Cir. 1980).

As I have indicated, I do not believe adjudication should be used as a substitute for rulemaking when it comes to promulgating substantive changes to the mandatory standards.(FOOTNOTE 23) Compare, Morton v. Ruiz, 415 U.S. 199 (1974). The duty of the Commission is to "construe these regulations, not create them

ourselves." Marshall v. Anaconda Co., 596 F.2d 370, 377, n. 6 (9th Cir. 1979). Further I find it unreasonable to construe this standard as imposing strict liability for an operator's failure to provide failsafe, foolproof guards around the moving machine parts of drive, head, tail, and take-up pulleys.(FOOTNOTE 24) In language apropo of these circumstances, the Third Circuit noted that:

> In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words in a standard to alleviate an unlikely and uncontemplated hazard. The responsibility to promulgate clear and unambiguous standards is upon the Secretary. The test is not what he might possibly have intended, but what he said. If the language is faulty, the Secretary has the means and the obligation to amend. Bethlehem Steel v. OSHRC, 573 F.2d 157, 161 (3d Cir. 1978).

Finally I reject as a justification for an "expansive" reading of the standard the oft repeated refrain that because experience shows that mine operators treat their workforce as mindless automatons the principles of fair warning and

notice with opportunity to comply should yield to what amounts to a post hoc rationalization for imposing liability without fault and without notice. As the Supreme Court observed in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981), such post hoc rationalizations of an agency cannot serve as a sufficient predicate for an enforcement action.

Citation 362889

The undisputed evidence shows that in July 1976, Inspector Harvey Osborn cited the operator for lack of a guard on the drive pulley of the dewatering screen--the same pulley involved in this citation which issued on August 9, 1979 some three years later (Tr. 376-377). Mr. Osborn suggested two pipe railing barriers be installed to bar inadvertant access to the drive pulley pinch point and when this was done the violation was deemed abated and the citation was terminated.

The adequacy of this guard was not questioned thereafter until Inspector Aubuchon decided the barrier approved by Inspector Osborn was inadequate and insisted it be replaced with two locked gates. The inspector's action was a self-initiated effort to upgrade or improve the guard because neither the standard nor the nature of the hazard had changed

in any way in the intervening three years. What had changed, of course, was the inspector.

Inspector Aubuchon sought to justify the requirement for the locked gates on the ground they would render the pulley area physically inaccessible, at least to his mind. He was wrong. Mr. Rhos, the plant superintendent, convincingly testified that neither the locked gates nor the pipe barriers would make the pinch point inaccessible.(FOOTNOTE 25) Each of the plant's seven employees had keys to the gates. Furthermore, the gates, like the pipe barriers, could easily be circumvented by climbing over, under or through them. Neither guard, therefore, provided failsafe, foolproof protection against thoughtless, foolhardy or wantonly reckless conduct by an employee. At best they would afford an employee an opportunity to stop look and think about the risk and to recall that the operator's standing safety instructions and the mandatory standards prohibited proceeding beyond the barrier while the machinery was in motion.

I find Mr. Aubuchon's testimony as to the claimed improvement in protection and diminution in the potential for contact and injury was impugned by the undisputed evidence as to the physical circumstances and therefore, of no probative value.

For these reasons, I conclude the Secretary failed to prove by a preponderance of the reliable, probative and substantial evidence the violation charged. Compare, Basic Refractories, 2 MSHC 1597, 1598 (1980); Lone Star Industries, 1 MSHC 2167 (1979). I further conclude that in the absence of proof that the operator had notice as to the claimed insufficiency of the original guard and an opportunity to contest or comply, the inspector's action in issuing this citation was in excess of statutory authority, a clear abuse of discretion, and a violation of the right to fair warning of prohibited conduct. Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-1338 (6th Cir. 1978); Auto Sun Products, 9 OSHC 2009, 2012 (1981).

Opinion

I fully realize that a general standard like the guarding standard must be applied in a myriad of circumstances. But

so must common sense. As the Commission has held "even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard." Mathies Coal Company, 5 FMSHRC 300 (1983), appeal pending.

In this case we have circumstances in which guards had either previously been approved as adequate or the design and placement of the equipment was such that no person acting in a rational manner could be endangered. Further, the record shows that the so-called "improved" guards provided no additional protection against individuals bent on foolhardy, wantonly reckless or deliberately self-destructive acts. For these reasons, I conclude the standard as applied in each of these circumstances was so impermissibly imprecise as to fail to give the operator fair warning of the conduct or condition prohibited.

The claim that the operator had notice of MSHA's change in the guarding requirement is without merit. The two publications identified in the record as Government Exhibits 1 and 2 were issued long after the citations in question. Government Exhibit 2-A, which issued a year before the challenged citations, was an internal memorandum directed to district and subdistrict managers. There is no evidence the operator was aware of this document which in any event

addressed only the adequacy of chain barriers and warning signs, not protective railings or pipe barriers. Inspector Aubuchon's alleged verbal warnings were so vague, indefinite and contradicted by other inspectors and the prior pattern of administrative enforcement as to be unworthy of credence by the operator. I find therefore that at the time of issuance of these citations, in August 1979, the operator was not aware, nor should he have been aware, of any authoritative administrative, Commission, or judicial interpretation of the standard as requiring failsafe, foolproof guards.(FOOTNOTE 26)

In a closely analogous factual context, the court of appeals in Diebold, Inc., supra, 585 F.2d 1335-1337, held that if on the basis of a prior pattern of enforcement an employer is led to believe that he is in compliance with a guarding standard, he cannot retroactively be held in violation of the standard in the absence of a showing that he was aware of an

authoritative change in the enforcing agency's interpretation of the standard. Consequently, even if I were persuaded that the proffered interpretations of the standard are correct, that would not inexorably lead to the conclusion that the standard may be applied in the instant case. As the court noted:

> Among the myriad applications of the due process clause is the fundamental principle that statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid. In our jurisprudence,
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> > because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
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> The principle applies with special force to statutes which regulate in the area of First Amendment rights, but the due process requirement of fundamental fairness is hardly limited to that context. Even a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those who activities are governed. See Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 48-50 (1966); Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).
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> There is no doubt that the violation ÕchargedÊ exposed Diebold to penalties ... Our concern, therefore, is with the question whether the regulation gave Diebold sufficient warning that press brakes were within the scope of its point of operation guarding requirements. The question is to be answered, of course, "in the light of the conduct to which the regulation is applied.' United States v. National Dairy Products Corp., 372 U.S. 29, 36 (1963). Moreover, the constitutional adequacy or inadequacy of the warning must be "measured by common understanding and commercial practice.' (Citations omitted.)

The court then went on to hold that where an employer and an agency have agreed on a method of guarding it would "indulge a fiction having little relation to reality" to find it was proper to impose a duty on the part of the employer to inquire as to the adequacy of his compliance. Citing McDonald v. Mabee, 243 U.S. 90, 91, the court held that "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." Id. at 1337.

On the undisputed facts of this case, I am unable to find that a duty of inquiry on the part of this operator had been triggered. The evidence shows that the Secretary's written interpretations were either issued long after the alleged violations occurred, were not germane, or were not brought to the operator's attention. Further, the record shows there was substantial dispute between Inspector Aubuchon and his colleagues over what constituted compliance. With the agency itself in such disarray over what the guarding requirement was in August 1979, I conclude that it would indeed indulge a fiction having little relation to reality to find Missouri Portland had received notice that MSHA had authoritatively determined that failsafe, foolproof guards were required as protection against the hazards presented by pinch points.

It may be experience has shown the only way to insure against fatal or disabling injuries as the result of miners

becoming entangled in pinch points is to require all such areas be guarded with foolproof enclosures. If that is so, advantage should be taken of the present rulemaking proceeding to promulgate an improved standard that specifically mandates failsafe, foolproof guards. This might be accomplished by incorporating the MSHA Guide to Equipment Guarding (GX-1). This guide, of course, was not in existence at the time the conditions challenged in this case arose. What is even more disturbing, however, is the fact that the preproposal standard issued February 11, 1983, long after this case was tried, makes absolutely no reference to the MSHA Guide. Thus while the Secretary urges me on the one hand to hold the operator to the guarding requirements of the MSHA Guide he apparently thinks so little of it that he has not incorporated it into his proposal for an improved standard. It is this type of uncoordinated, inconsistent, standardless enforcement action that leads to industry's cry for clarification, reform and more even handed treatment. Uncritical, some might say selective, enforcement serves only to discredit the entire regulatory program.

In the case of each of these citations, it appears that neither the inspector nor the solicitor was fully acquainted with MSHA's previous pattern of enforcement; failed to appreciate the fact that the so-called improved guards did not provide foolproof protection; and blindly assumed the

trial judge was required to find a violation because the pinch points were physically accessible. The solicitor should realize he assumes a heavy burden of persuasion when he asks the trial judge to uphold redundant citations for conditions previously abated without change in the hazards addressed. Such prosecutions prima facie do violence to the requirement of fundamental fairness and fair play.

A violation of due process can occur as much by harassment as by other more obvious means. The Government is not a ring-master for whom individuals and corporations must jump through a hoop at their own expense each time it commands. Vigorous enforcement is to be commended; vexatious enforcement must be curbed.

Order

The premises considered, it is ORDERED that the challenged citations be, and hereby are, VACATED; the proposals for an assessment of penalties DENIED: and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

FOOTNOTES START HERE-

1 In my summary decision of July 8, 1980, I rejected the Secretary's claim that "any conceivable exposure" to moving machinery parts is per se a violation of the uniform moving machinery parts standard found at 30 C.F.R. 55/56/57.14-1 and 75.1722(a) and 77.400(a). I found that due to the presence of existing guards or physical location each of the nip or pinch points cited was so inaccessible that it was highly improbable that in the course of performing his routine or assigned duties any normally prudent miner was likely to come in contact with moving machinery parts. The Commission reserved decision on whether I "properly interpreted and applied the standard" but reversed on the ground there was a genuine dispute of material fact with respect to the "potential for contact and injury." 3 FMSHRC 2470, 2471, 2473, n. 3 (1981).

2 See the parties' stipulation of April 7, 1983 and posthearing briefs in support of and opposition to the tentative decisions.

3 Trial counsel's articulation of the standard for liability was "any reasonable chance" for contact and injury. Secretary's Br. p. 5. In his earlier appeal, the Secretary's appellate counsel embraced a "reasonably forseeable" standard and eschewed an interpretation that would include liability for totally irresponsible or aberrational behavior that resulted in exposure to contact and injury (Tr. 143, 210-212).

4 This and the other use of equipment standards read as

follows:

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

5 Assessment Office conference notes of October 1979 submitted as part of the Secretary's prehearing submission stated that the penalty was reduced from $78 to $36 because "Inspectors Rostler and Osborne had previously accepted this (2" angle iron barrier) as this had been used to abate Mr. Rostler's citation" for a chain and sign guard. The record does not show the date of Inspector Rostler's citation. An identical chain and sign guard was cited by Inspector Ogden on May 24, 1979, only two months before the inspection under review. On contest the violation charged was sustained by Judge Fauver on the ground that the guard was inadequate to prevent contact by miners who might slip and fall while performing their regularly assigned duties. Missouri Gravel Company, 3 FMSHRC 1465 (1981).

6 The plant operated only seven or eight months a year from April to November.

7 See 30 C.F.R. 56.12-16, 56.14-29, 56.14-34, 56.14-35. An exception to this is found in 30 C.F.R. 56.14-6 which permits machinery to be operated without guards during testing. In Union Rock and Materials Corp., 1 MSHC 2377 (1980), the trial judge held this exception applies to testing or repair of mechanical parts due to a malfunction. Nothing in Inspector Aubuchon's testimony in this case indicated a recognition of this exception.

8 Counsel refused to allow the witness to disclose the names of informants on the ground it was against departmental policy to do so.

9 There is nothing in the inspector's contemporaneous notes or other written statements to support his hearsay recitals. With respect to credibility, the record is replete with the inspector's flashes of hostility and resentment toward both his fellow inspectors and the operator over their differences with respect to the adequacy of the protective railing guard.

10 As we have seen, even the guard installed to achieve abatement did not preclude work on the machinery while it was in motion. In fact, no guard will preclude access to machinery while it is in motion, since all guards are removable. The partial expanded metal guard installed to abate was merely bolted and wired to a frame mounted on the front of the pulley and was easily removed.

11 The standard is an administrative not a statutory regulation issued under the authority of section 6 of the Federal Metal and Non-Metallic Mine Act of 1966, 30 U.S.C. 725 (1976 ed.). See also 34 F.R. 12511 et seq. July 31, 1969. The administrative history indicates the standard was originally

intended to prevent "inadvertant" or "accidental" contact with moving machine parts. See References 7 through 10 attached to Secretary's Brief.

12 Professor Davis contends that,

> Lack of standards or rules to guide discretion, in almost any setting, may encourage arbitrary and discriminatory action, as in the Papachristou case. Vagueness of enforcement policy or of any other policy may be unconstitutional because it permits arbitrary and discriminatory action; courts may accordingly require that the vagueness be corrected by guiding standards or rules. Id.

13 The record in neither this nor the rulemaking proceeding shows any correlation between the frequency of citation of this standard and the incidence of fatal or disabling injuries attributable to contacts with pinch points. How MSHA decided, therefore, that the protective railing barriers are inadequate is somewhat of a mystery. The determined effort to "upgrade" this standard without empirical evidence to support the need therefor is another instance in which the regulators seem to be engaged in an unceasing effort to build an ever expanding and intrusive body of rules from what appear to be unproven, if not unrealistic, premises.

14 The metal and nonmetal standards are, however, the subject of a revised rulemaking proceeding that commenced in March 1980. The proceeding reached the preproposal stage on February 11, 1983. Time for comment on the preproposals expired April 15, 1983. Comments on the preproposals will be considered and then an improved standard will issue to be followed by a further period for hearings and comment by the industry. Thereafter, final revisions will be issued to become law. It is expected this is at least a year or more down the road.

15 In response to industry's expressions of concern over the ambiguity in the standard, MSHA's preproposal draft of .14-1 would change the standard to state that "exposed moving machine parts which may be contacted and which could cause injury shall be guarded to prevent a miner from inadvertently contacting those parts. Guarding is not required where the exposed moving parts are physically inaccessible and located out of the reach of miners." Mine Safety & Health Reporter, Current Report, p. 444, 2/23/83. The industry continues to press for a "reasonably foreseeable" standard. Mine Safety & Health Reporter, Highlights, p. 572, 4/20/83.

16 In Mathies Coal, supra, the Commission in circumscribing the reach of the standard noted that:

> Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its

agents. Quoting from Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). Accord, Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982).

17 This does not mean that in an appropriate case upon competent evidence an operator may not be held liable for knowingly, or willfully ordering or authorizing a miner to expose himself to contact with moving machinery parts. See section 110(c), (d) of the Act.

18 The applicable generic definition is a "fixture or attachment designed to protect or secure against injury." Webster's 3d International Dictionary, p. 1006.

19 In Mathies Coal, supra, Judge Merlin's decision (3 FMSHRC 1998, 2002) found that the phrase "may be contacted" meant "to be capable of being contacted" but that this did not include an "indeterminate degree of probability" and certainly not a "miner's aberrant behavior which could not be forseen or prevented by the operator and which harmed only himself." The finding of liability by the trial judge was predicated on his determination that the condition cited was hazardous to a miner "while performing his regular duties in a prudent manner." Id. 2001. Liability for a forseeable hazard having been established, the miner's "wantonly reckless and irresponsible behavior" served only to mitigate the operator's negligence and the amount of the penalty warranted. On appeal, the Commission reversed on the issue of liability finding the language of the standard too imprecise to cover the type of moving machine parts involved in the claimed violation.

20 See, Nacco Mining Company, 3 FMSHRC 848 (1981); El Paso Rock Quarrier, 3 FMSHRC 35, 38 (1981).

21 The inspector found that contact was improbable and the Secretary conceded the violation was not such as to create a reasonable probability of a reasonably serious injury, supra p.2.

22 Where there was a conflict between the testimony of the inspector and the operator on the opportunity for contact and injury it was resolved in favor of the operator. I found the inspector's testimony too contradictory to lend credence to his speculation as to how contact and injury might occur (Tr. 282).

23 The elaborate consultative procedures found in 101 of the Act for the formulation of "improved" standards represented the Congressional answer to the fears expressed by industry and labor over the prospect of unchecked administrative discretion to make substantive changes. Zeigler Coal Company v. Kleppe, 536 F.2d 398, 402-403 (D.C. Cir. 1976).

24 The comparable OSHA standard clearly and unambiguously requires pulleys be guarded by guards made of "expanded metal, perforated or solid sheet metal, wire mesh on a frame of angle iron, or iron pipe securely fastened to floor or to frame of machine." 29 C.F.R. 1910.219(d)(m)(o). This comes much closer to describing the type of foolproof guard the Secretary contends for

than anything in the existing MSHA standards. I would think that without doing undue violence to the territorial imperative of either bureauracy the Secretary of Labor, who presides over both, might persuade MSHA and OSHA to consider adopting a unitary standard. I may be wrong but I would assume that whether it appears in an MSHA or an OSHA facility a pinch point is a pinch point is a pinch point.

25 An expanded metal guard was impractical because of the heavy vibration of the dewatering screen. This vibration would shake loose the welds or bolts of such a guard within a very short time, necessitating a burdensome replacement requirement. Both inspectors obviously recognized the cost-benefit of such a requirement could not be justified. Inspector Aubuchon found the potential for contact and injury was improbable and the Secretary conceded there was no reasonable probability of a reasonably serious injury.

26 Professor Davis has preceptively observed that the true vice of an enforcement policy based on unannounced and uncontrolled discretion is that it encourages a regime of arbitrary and discriminatory enforcement of the law. The solution he suggests is judicially required rulemaking to the end that the "enormous power of selective enforcement" be brought under the intelligible control of a responsible governmental authority. 1 Davis, Administrative Law Treatise 3:9, 3:15, pp. 180-181, 213-215 (1979). Section 101 of the Mine Act reflects an attempt by Congress to assure that enforcement policy is set in accordance with publicly announced policy to the end that operators be judged by uniform principles rather than administrative whim.