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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 PROCEEDINGS Docket No. WEST 82-155-M A.C. No. 42-00716-05015 Docket No. WEST 83-60-M A.C. No. 42-00716-05503
v.	
KENNECOTT MINERALS COMPANY, UTAH COPPER DIVISION, RESPONDENT	Magna Concentrator

DECISION

Appearances: James H. Barkley, Esq., and Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Kent W. Winterholler, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act), arose as the result of an inspection of respondent's tailings pond. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any liability for these incidents.

After notice to the parties, a hearing on the merits was held in Salt Lake City, Utah on September 20, 1983.

Respondent filed a post trial brief.

Issues

The issues on the contested citations are: whether the doctrine of res judicata and collateral estoppel bar the citations; whether the standard applies to respondent's tailings pond; and whether the standard is mandatory or merely advisory.

In the above case the parties proposed the following settlement:

Citation No.	30 C.F.R. Sectio Violated	Assessed Penalty	Proposed Disposition
577649	55.20-8	$ 24.00	$ 24.00
577650	55.12-25	40.00	40.00
577651	55.12-32	40.00	20.00
579422	55.20-3A	26.00	Vacated
579423	55.20-3A	26.00	26.00
579426	55.20-3A	26.00	26.00
577707	55.11-1	72.00	72.00
579429	55.16-5	52.00	52.00

(Transcript at pages 10-13 in Docket No. WEST 83-5-M)

On the basis of the record I find that the proposed settlements are reasonable and they should be approved.

Litigated Citations

WEST 82-155 and WEST 83-60-M each contain a citation alleging a violation of 30 C.F.R. 55.9-22. The standard cited by the Secretary provides as follows:

> Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

Summary of the evidence

The evidence, generally uncontroverted, focuses on the same general area of respondent's tailings pond. This decision will first consider the tailings pond area itself and then, in chronological order, the three citations involved in the evidence. The first of the three citations was assigned to Commission Judge George A. Koutras. The subsequent citations are contested in each of the pending cases.

The tailings pond

A public highway intersects respondent's 4800 acre tailings pond at its Magna and Arthur Concentrators (Tr. 11, 12, 128, 131). The tailings pond assimilates each day some 85 tons of residue derived from the crushing of ore. The deposits in the pond, about 27 percent solid, causes a buildup in the sludge. From time to time it is necessary to increase the height of the discharge pipes (Tr. 12-14, 128-131).

The roadway cited by MSHA furnished access from one side of the tailings pond area to the roads (Tr. 15, 19, 21; Exhibits P1, P2). Contractors, maintenance personnel, dikemen and supervisors travel this road (Tr. 15). At various times respondent has placed berms on the road located below the upper dike level. But these berms, by trapping rainwater, have created unstable conditions for vehicles on the road. Phreatic water and erosion problems have also increased. Any dike failure could cause water to flow into the Great Salt Lake (Tr. 140, 141, 153).

Citation 583706

In due course the above citation evolved into FMSHRC case WEST 81-283-M.

The evidence in the instant case together with the Commission file in WEST 81-283-M establish that on December 10, 1980 MSHA Inspector William W. Wilson issued Citation 583706 (FOOTNOTE 1) alleging a violation of 30 C.F.R. 55.9-22 at respondent's tailings pond (Tr. 54-59; R-1). After a meeting in January, 1981, the citation was modified to indicate that it applied to inclined access roads at the tailings pond (Tr. 60; Exhibit R-1). MSHA apparently considered that 55.9-22 applied to inclined access roads (Tr. 60).

Respondent contested the foregoing citation and the issues, as previously stated, were docketed before the Federal Mine Safety and Health Review Commission in Case No. WEST 81-283-M. The case was assigned to Commission Judge George A. Koutras (Exhibit J-1).

Prior to a hearing the parties discussed a settlement. A letter, approved by the company, was forwarded to MSHA's counsel. It stated, in part,

> Kennecott will withdraw its Notice of Contest of the citation and the proposed civil penalty in this action if the Department of Labor will agree that the penalty to be imposed for the alleged infraction of that mandatory standard cited will be $235.00. The currently proposed penalty assessment is $295.00. In addition, this settlement agreement will specify an understanding that the specific standard which Kennecott is alleged

> to have violated in Citation number 0583706, i.e. that mandatory standard found at 30 C.F.R. 55.9-22 would be considered to apply at Kennecott's Arthur Concentrator, specifically the tailings pond area, only to inclined access roads, and not to the entire tailings pond dike. This is our understanding of the agreement or understanding reached between Kennecott and the Federal Mine Safety and Health Administration in the termination of the citation which is the subject of this proceeding.
>
> (Tr. 155; Exhibit J-1).

Subsequently MSHA's counsel filed a motion before Judge Koutras seeking his approval of the settlement. Paragraph number 2 of the motion states as follows:

> It is to be noted in this settlement that the mandatory standard found at 30 C.F.R. 55.9-22 is to be applied at Kennecott's Arthur Concentrator, specifically the tailings pond area, only to inclined access roads and not to the entire tailings pond dike. See respondent's attached agreement.
>
> (Exhibit J-1).

There was no hearing and on October 19, 1981, Judge Koutras entered a decision approving the settlement.

As a result of the foregoing agreement the company believed it did not have to seek a variance. Respondent's witness Pinder indicated the company believed it would only have to berm inclined access roads (Tr. 155). Pinder further stated that the road cited in the pending cases was flat (Tr. 167).

In 1982 and 1983 MSHA's counsel and MSHA's representatives Hansen and Plimpton disputed the company's position relating to inclined roads (Tr. 161, 162, 182-184; Exhibit P-6).

In the instant cases Inspector Wilson explained that he modified the 1980 citation to show that the road was inclined. He sought to thereby distinguish it from the term "elevated" (Tr. 186-189). MSHA's position, as stated at this hearing, is that a berm is required on an elevated, inclined, declined, or level road (Tr. 190). The inspector did not intend to forever limit MSHA's authority to issue citations on access roadways at respondent's tailings pond (Tr. 189).

WEST 82-155-M - Citation 579431

On January 26, 1982 Inspector William Wilson issued Citation 579431 alleging a violation of 30 C.F.R. 55.9-22. The citation alleges there was no berm or guard on the road adjacent to the Magna dike pump house.

Inspector Wilson had observed during his inspection that the road providing access on the south side of the tailings pond was unbermed and unguarded for approximately 150 feet (Tr. 15, 20-21). The road, adjacent to the dike house, furnished primary access to the dike area, other pump houses and pipes (Tr. 15). The road was elevated 8 to 12 feet above an adjacent overflow drainage stream (Tr. 19-22; P1, P2). If a vehicle overtraveled the road a serious or fatal injury could result (Tr. 22, 23).

Individuals using the roadway included contractors, maintenance personnel, electricians, dikemen, and supervisory personnel (Tr. 15, 24).

A company representative discussed with the inspector the problem caused by the berm trapping the rainwater. The area has a history of collecting water (Tr. 29). This citation was terminated when a berm was installed (Tr. 31).

WEST 83-60-M - Citation 2083505

A year later, in January 1983, in the same area Inspector Wilson found only remnants of a berm on the roadway. The conditions remained the same as in 1982 (Tr. 31-34). There were no berms or guards for a 150 foot length of the roadway. There were no means available to prevent overtravel on this portion of the road (Tr. 35, 36; P3, P4). Citation 2083505 was issued (Tr. 31-32).

The 1982 citation had been designated as one of a significant and substantial nature. The inspector testified the 1983 citation should likewise have been designated as an S & S violation (Tr. 37).

The 1982 and 1983 citations, if unabated, would ultimately result in an injury (Tr. 38).

The area of the roadway without berms was inclined. The incline was very gentle, like a camel's hump (Tr. 78).

Discussion

Respondent's initial contention is that the decision of Judge George A. Koutras, approving the settlement of the parties, has a res adjudicata effect on the two citations in contest here. It argues that the decision applied 55.9-22 to "inclined" roads. Further, respondent argues that since the road here is flat the citations cannot be sustained.

Respondent's contentions lack merit. Section 55.9-22 does not require berms based on the inclination of a road. It is obvious on the record here that this portion of the roadway was elevated 8 to 12 feet above the adjacent stream (Tr. 20, 21; Exhibits P1, P2, R2, R3, R4). Accordingly, berms are required.

Respondent further contends that the roadway was flat; therefore, no berms were necessary. On this credibility issue I credit Inspector Wilson's testimony which is supported by the photographs. The evidence is rather clear that the road was inclined. But in any event whether the road was inclined is not relevant under the regulation.

In addition, the doctrine of res judicata cannot be invoked because at no time did Judge Koutras adjudicate the issues of whether respondent violated the berm standard on this stretch of roadway. The citations were issued for conditions that occurred in 1980, in 1982 and in 1983. Each violative condition was abated. Accordingly, in his decision on October 19, 1981, Judge Koutras could not adjudicate conditions that did not occur until 1982 and later again in 1983.

Respondent further claims that MSHA's citations are barred by the doctrine of collateral estoppel.

Virtually all of the evidence on this issue arises from the letter forwarded to MSHA's counsel from respondent's counsel. Subsequently, MSHA's counsel incorporated the letter in his motion filed with Judge Koutras seeking approval of the settlement (Exhibit J-1). Other than in the modification of the 1980 citation, I note that MSHA's officials took no affirmative action concerning what respondent now considers to be its agreement with the Secretary.

At the outset we can agree that equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules. City of Chetopa v. Board of County Com'rs, 156 Kan 290, 133 P.2d 174, 177 (1943). Generally four elements must be present to establish the defense of estoppel. These are (1) the party to be estoppel must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has the right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. United States v. Georgia Pacific Company, 421 F.2d 92, 96, (1970), (9th Cir.). In this case elements (3) and (4) are not factually present in this record.

But even if the record established all of the factual elements to support the doctrine it would not be applied to deprive miners of the protection of the Mine Safety Act because of a public official's mistaken action. Maxwell Company v. NLRB, 414 F.2d 477 (1969); Udall v. Oelschlaeger, 389 F.2d 974 (1968). For a discussion of the doctrine of collateral estoppel also see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

For the foregoing reasons respondent's pleas of res adjudicata and collateral estoppel are denied.

The second contention is that 30 C.F.R. 55.9-22 does not apply to respondent's tailings pond. Initially respondent argues that 30 C.F.R. 55.9 speaks to those activities in metal and non-metal open pit mines that are defined in the scope note of the section as "Loading, Hauling and Dumping."

Respondent's contention lacks merit. The Commission has previously rejected this exact argument and ruled that the term "hauling" should be broadly construed. The term includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the practice of normal mining. Cleveland Cliffs Iron Co. Inc., 3 FMSHRC 291, (1981).

The facts in this case clearly fall within the Commission's definition in the cited case. The unbermed roadway furnished access to the dike house, the pump house, the electrical substations and the pipeway (Tr. 78). All of the roads are interconnected. It is uncontroverted that the inspector observed respondent's personnel and its vehicles using the road (Tr. 83, 85, 87).

Respondent further claims that neither this Act nor its predecessor, the Federal Metal and Non-Metallic Safety Act of 1966, include within their definitions of a mine the term "tailings pond." Since 30 C.F.R. 55.9-22 became a standard under the present Act by virtue of 30 U.S.C. 961(b)(1) it is asserted that the Secretary must engage in rulemaking procedures to apply 30 C.F.R. 55.9-22 to its tailings pond. In support of its position respondent relies on Usery v. Kennecott Copper Corporation, 577 F.2d 1113, (10th Cir., 1977). In the cited case the Secretary of Labor under the OSHA (FOOTNOTE 2) Act adopted an ANSI standard but in the transition the Secretary changed a word from "should" to "shall" without following any rulemaking procedures.

Respondent's contentions lack merit. Even if one assumes that respondent's tailings pond was not within the coverage of the 1966 Act, the present Act remedied any such defect when the Congress enacted an expansive definition of what constitutes a "mine." Congress further stated that the Act "must be given the "broadest possible interpretation' " with "doubts resolved in favor of inclusion." Cypress Industrial Minerals Corp., 3 FMSHRC 1, (1981); See also Marshall v. Stout's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir.1979). cert. denied, 444 U.S. 1015 (1980).

Respondent's cited case is not factually controlling. In this case, by adopting the Act Congress eliminated the necessity of the Secretary to follow any rule making procedures to apply the berm standard to a tailings pond.

Respondent's final argument centers on the proposition that 30 C.F.R. 55.9-22 is fatally flawed. The focus of the argument centers on the proposition that the regulation as promulgated is advisory and not mandatory.

I agree with respondent's position. In order to resolve these contentions it is necessary to review the public records pertaining to the development of the berm standard at 30 C.F.R. 55.9-22.

The standard, when initially proposed in 1969, read as follows:

> 55.9-26 Mandatory - OPAC
> Berms or guards shall be provided on the outer banks of elevated roadways.
> (Emphasis added).
> 34 Fed.Reg. 656, January 16, 1969

Prior to the promulgation of the Chapter 55 standards comments were solicited and received. The berm standard was not promulgated as a part of the initial 30 C.F.R. Part 55 issuance on July 31, 1969. See 34 Fed.Reg. 12503, 12506 (July 31, 1969).

Subsequently, the Secretary of the Interior, the official responsible at that time, promulgated the following standard:

> 55.9-22 Mandatory. Berms or guards should be provided on the outer bank of elevated roadways.
> (Emphasis added)
> 35 Fed.Reg. 3663, February 25, 1970.

The Secretary of the Interior, in commenting about the changes between the originally proposed standards and the finally

promulgated standards, stated, in part, in his prefactory comments at 35 Federal Register 3663 as follows: "In a few instances in which the language of a proposed mandatory standard appeared to impose a requirement not within the intendment of the standard, the standard has been rephrased." The Secretary then cites some examples, but there are no references to the berm standard in his published remarks.

The situation then is that the Secretary originally proposed a standard in a mandatory form (shall), received comments, and finally promulgated the standard in an advisory form (should). Clearly supportive of the "should" language in the standard is the BNA (FOOTNOTE 3) Reference File which publishes 30 C.F.R. 55.9-22 as follows:

> Mandatory. Berms and guards should be provided on the outer bank of elevated roadways.

The Commission has not ruled on this issue. Cleveland Cliffs Iron Co., Inc., supra, does not address the point; hence, it cannot be considered as precedent.

A situation much akin to these facts can be found in Jim Walter Resources, Inc., 3 FMSHRC 2488, at 2490 (1981). In the cited case the Commission dealt with the phrase "shall be used as a guide". In ruling the standard unenforceable the Commission noted the mandatory nature of the word "shall," (FOOTNOTE 4) but concluded the term "guide" was something less than a mandatory requirement.

The term "shall" has almost universally been considered as the word used in regulations to express what is mandatory. Marshall v. Pittsburg Des Moines Company et al, 584 F.2d 638, 643 (3rd Cir., 1978); Usery v. Kennecott Copper Corporation, supra; C.J.S. Statutes 380(a); Webster's New Collegiate Dictionary, 1056, (1979).

In sum, the Secretary proposed the standard in mandatory form and promulgated it in advisory form. The Secretary's

comments are, at best, unclear as to why the change occurred. These factors, in connection with the BNA publication, cause me to conclude that the Secretary's proposal to access a civil penalty cannot be sustained.

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

ORDER

WEST 82-155-M

1. The proposed settlement agreement is approved and the following citations and penalties are affirmed:

Citation	Penalty
577649	$ 24.00
577650	40.00
577651	20.00
579423	26.00
579426	26.00
577707	72.00
579429	52.00

2. The following citations and all proposed penalties therefor are vacated:

Citation	579422
Citation	579431

WEST 83-60-M

3. Citation 2083505 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE
1 The Secretary strenuously objected to respondent's evidence relating to this citation (Tr. 54, 61-62).

~FOOTNOTE_TWO
2 Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq.

~FOOTNOTE_THREE
3 Bureau of National Affairs, Inc., Mine Safety and Health Reporter.

~FOOTNOTE_FOUR
4 3 FMSHRC at 2490.