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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 89-186 A. C. No. 15-13428-03508
v.	Lanham No. 1 Mine
LANHAM COAL COMPANY, INC., RESPONDENT	

DECISION ON REMAND

Before: Judge Broderick

On September 3, 1991, the Review Commission remanded this case to me to "determine, through application of the reasonably prudent person test, whether Lanham had fair notice that section 77.1710(g) required the use of safety belts or lines under the circumstances of this case." 13 FMSHRC _____. At my request, both parties filed briefs addressed to the issue. Neither wished to submit further evidence.

I

Lanham was the owner and operator of a surface coal mine in Daviess County, Kentucky. It contracted with Caney Creek Trucking Company to haul coal from the mine to Lanham's coal dock. After the coal was loaded into the trucks, Caney's drivers covered the load with a tarp in a parking lot on mine property. Safety belts and lines were not provided or worn by the drivers while tarping their trucks. On December 29, 1988, Charles Daugherty, the owner of Caney and a truck driver, fell from his truck approximately 10 feet to the ground while tarping his truck. He was not wearing a safety belt or line. Daugherty was taken to the hospital and subsequently died from reasons not related to the fall. MSHA issued a citation charging a violation of 30 C.F.R. 77.1710(g).

Prior to the accident, neither Lanham nor the MSHA inspector who issued the citation considered the cited standard applicable to the tarping of trucks. The inspector had never previously cited the practice, and had never observed safety belts or line

used in such situations in more than 40 years of mining experience. MSHA had no standards or guidelines that covered the practice, and Lanham had no specific notice that the practice violated the standard.

II

30 C.F.R. 77.1710 provides in part that surface coal mine employees shall be required to wear "safety belts and lines where there is a danger of falling." The regulation is on its face simple and straightforward. The facts in this case very clearly show that there was a danger of falling: in fact a miner fell.

III

In the Alabama By-Products case, 3 FMSHRC 2128 (1982), the Commission considered the regulation requiring that machinery and equipment be maintained in safe operating condition. It concluded that a reasonably prudent person familiar with the factual circumstances including facts peculiar to the mining industry would recognize that the cited equipment was in an unsafe condition. In United States Steel Corporation, 5 FMSHRC 3 (1983) the Commission held that the reasonably prudent person standard applies to the berm regulation: the issue is whether the operator's berms or guards measure up to the kind that a reasonably prudent person would provide under the circumstances. In Great Western Electric Company, 5 FMSHRC 840 (1983), the Commission in considering the same regulation as in the instant case, held that "the applicability of the standard [should be determined] in terms of whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." 5 FMSHRC 842. In November, 1990, the Commission phrased the test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition of the standard." Ideal Cement Company, 12 FMSHRC 2409, 2410 (1990) [Emphasis added].

The Great Western Electric Company test seemed to be whether the reasonably prudent person would recognize that the factual circumstances created the hazard which the regulation attempted to prevent. The Ideal Cement test, as I read it, involved a subtle change: it is not whether the reasonably prudent person would recognize that the facts create the hazard, for example whether such a person would recognize that tarping a truck by climbing on the load of coal creates a danger of falling, but whether that person would recognize the specific prohibition of the standard, that is, whether such a person would have recognized that attaching a tarp to a truck without utilizing safety belts and lines was prohibited by the regulation. The

change in the test is evident from the terms of the remand: I am required to determine, through application of the reasonably prudent person test, whether Lanham had fair notice that section 77.1710(g) required the use of safety belts or lines under the circumstances of this case.

IV

The law of Kentucky requires that a loaded coal truck be covered with a tarp before the truck is operated on State highways. In order to affix a tarp, the driver is required to mount the back of the loaded truck, which is approximately 8 feet wide, and unroll the tarp while walking backwards on the load of coal. The load is normally uneven and higher in the center than on the sides. In the instant case, it was about 10 feet from the ground to the top of the load.

The tarping of trucks is, and has been for many years, a daily occurrence in the coal industry. The MSHA inspectors who testified in this case had never previously cited the practice involved here. Neither had ever observed coal trucks provided with belts or lines for persons putting on a tarp or removing it from a loaded coal truck. The inspector who issued the citation did not consider the cited practice a violation of the standard before he issued the citation contested here. The evidence establishes that the practice of using safety belts and lines while tarping trucks is rarely or never followed in the coal industry. It also establishes that prior to this case, the practice was rarely or never cited by MSHA.

I think it is clear that a reasonably prudent person would recognize that the activity cited here is hazardous, i.e., it creates a danger of falling. On the other hand, in view of the evidence concerning the practice in the industry and in MSHA's enforcement history, it is equally clear that such a person would not have recognized the specific requirement of the standard, i.e., that tarping a truck requires safety belts and lines.

V

Following Commission precedent in its most recent decision, Ideal Cement Company, and the terms of the remand, I conclude that the evidence does not establish that Lanham violated 30 C.F.R. 77.1710(g) in failing to require safety belts and lines for miners engaged in the tarping of loaded coal trucks.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 3297324 is VACATED.

2. This civil penalty proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge