

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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July 7, 2010

KNIFE RIVER CORPORATION,	:	CONTEST PROCEEDING
NORTHWEST,	:	
Contestant,	:	Docket No. WEST 2010-1319-RM
	:	Citation No. 8559470; 0602/2010
v.	:	
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Coffee Lake Pond
ADMINISTRATION (MSHA),	:	Mine ID 35-03022
Respondent	:	

DECISION

Appearances by Brief: Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of the Respondent
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Contestant

Before: Judge Rae

Finding of Facts and Procedural History

On April 2-3, 2010, Inspector Richard Roethle of the Mine Safety and Health Administration’s (“MSHA”) conducted an inspection of KRC’s Coffee Lake Pond Mine (“Coffee Lake”). Coffee Lake is a surface sand and gravel operation in Salem, Oregon, and is a mine, as defined by the Mine Act. On April 2, 2010, Inspector Roethle issued Citation Number 8559470 having found:

[T]he existing rubrail on the truck scales were not mid-axle height to the dump trucks using them. This condition could allow trucks to cross over the rail and drop down to the front axles. The existing 5 inch diameter rubrail was 12 foot wide, 80 feet long and 9 inches above the scale deck. This is a manufactured scale with a rubrail. The truck scales are used daily to weight trucks in and out. If a person were to drop an axle off the scale they could be seriously injured.

(Cit. 8559470.)

Roethle found the gravity level of the alleged violation to be “unlikely” to cause injury or illness and that the injury could result in “lost workdays or restricted duty.” (Res- Exh. 2.) The negligence level was found to be “moderate.” (*Id.*)

The two truck scales' platforms are approximately 80 to 100 feet long and 12 feet wide and 36" above the ground at the highest point. They have the manufacturer-installed rub rails along the length of their inner and outer edges. (Con- Exh. D; Res- Exh. 2.) The rub rails are approximately 5 inches thick and 9 inches high and the distance from the truck scale deck to the pavement is approximately 26 to 36 inches. (*Id.*; Con. Brief, at 2; Res.-1-a) To meet MSHA's demands, the rub rail would have to be 20 inches high. (C - Exhibit D; Res.- Declaration of Breland, at 2; Res.- Exh.1-a.) This is determined by subtracting by half the wheel height of the largest truck which usually travels the roadway. (*Id.*) In this case, the height of the wheel of the largest truck that uses the scales is 40-inches high. (*Id.*)

The two truck scales in question have been in operation since March of 1998. (C - Exh. B; C.- Exh. C.) Between then and May of 2010 the scales have weighed approximately 9.630 million tons of aggregate. (Con.- Exh. E.) Based on the approximation that each truck can carry 23 tons per load, on average 33,496 trucks (excluding light weights) cross the scales per year and approximately 401,952 trucks have passed over the scales since they have been in operation. (*Id.*)

When trucks are approaching the scales they are guided by a set of traffic lights that require the trucks to come to a complete stop before entering and exiting the scale. Also, trucks must stop when on the scale to be weighed and again to pick up a weigh ticket after they have moved off the scale. (Con.- Exh. G.) When entering and exiting the scales the trucks travel at approximately 4-5 mph. (*Id.*) MSHA regulations and KRC's company policy requires that occupants of the trucks wear seatbelts while the trucks are in operation. 30 C.F.R. §§ 56.14130 and 56.14131, (Con.- Exhibit H; C- Exhibit Y.) There have been no seatbelt violations at Coffee Lake while the scales have been in operation. (Con.- Exh. O.) The scales are adjacent to two main traffic routes within the facility, but they are not part of any main artery. (Con.- Exh. Q.) The scales, and the roads that travel directly to them from the main arteries, are only accessed to weigh trucks and are not intended to be used as a thoroughfare. (*Id.*; C.- Exhibit E.)

Coffee Lake has been inspected by MSHA 43 times since 1998 and during that time the scales have not been cited for deficient guardrails. (Con.- Exh. S.) The manufacturer, UniBridge Systems, is also not aware of any accidents in which a truck has gone off the side of this particular type of scale, (Con.-Exh. P.), nor are any of the management personnel at the mine. (Con.- Exh. D and E.) Two other KRC operations in Oregon have been cited because of similar circumstances where guardrails were found by MSHA to not meet the required height, however, the Solicitor's brief does not specify whether these citations involved scales or other roadways. (Res.- Brief at 3.) KRS requested additional time to comply with MSHA's requirement that they raise the guardrails and it was granted. (Res.- Brief, at 2.) KRC has since requested estimates from outside contractors to determine the cost of retrofitting the scales with guardrails 20 inches high or higher. (Con.- Exh. V.) According to these estimates, the cost would be \$38,418 per scale. (Con.- Exh. V.) In addition to the two scales at Coffee Lake, KRC has a number of other facilities throughout the country that use similarly-configured scales with the original manufacturer's guardrail. (Con. Brief, at 5.) KRC estimated that it would cost \$1.3 million in order to retrofit their 34 operational scales. (*Id.*)

On June 8, 2010, the Commission received, through their representative, KRS's motion for an expedited proceeding. In a telephone call with the parties on June 16, 2010, I granted the

Contestant's request for an expedited proceeding. The parties stipulated that in lieu of an in-person hearing, they would submit briefs and exhibits. On June 18, 2010, I issued an Order reiterating that the expedited proceeding was granted and that the briefs would be submitted by June 28, 2010.

Argument and Application of Law

30 C.F.R. §56.9300(a) states that “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” 30 C.F.R. § 56.9300(a). 30 C.F.R. § 56.9300(b) states that these “berms or guardrails” need to be “at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.” 30 C.F.R. § 56.9300(b).

Contestant asserts two reasons for its request to dismiss the citation issued by MSHA. First, that the cited standard does not apply to the operation because the truck scales cannot be considered a roadway or, alternatively, because there is neither a grade nor elevation that would require a berm or guardrail. Secondly, the operator was not given fair notice that the cited standard applies to the scales at Coffee Lake as they had never been cited before.

Having considered counsels' briefs and exhibits I find that the Contestant's argument that the scales are not roadways or that they have been deprived of fair notice are not meritorious.

Contestant asserted that trucks traverse the scales at a rate of 5 mph, and stop on either end of the scales and to be weighed, and then continue onto the roadway to exit the mine. Only the dump trucks being weighed use the scales; other vehicles use the adjacent roadway to enter and exit the mine without the necessity of crossing the scales. Relying on the definition of a “roadway” from *Merriam-Webster Online* and *dictionary.reference.com*, Coffee Lake contends that a roadway is the same as a road which is used for travel to or from a destination. The scales, to the contrary, are for the purpose of selling the mined material and are equipment. (Res. Motion for Summary Decision 8-9). Moreover, Respondent contends that there is a dissimilar purpose for regulating scales as opposed to mine roads. Additionally, the manufacturer opined that should the scales be used as roadways, their precision would be diminished. (Con-Exh. P).

I do not find Respondent's argument persuasive. While there is a roadway adjacent to the scales which can be used by vehicles, by Respondent's own admission, all trucks carrying the products from the mine must cross the scales in order to sell the material to the end user. Approximately 33,496 trucks cross the scales each year (almost 100 per day). The scales are an integral part of the road used by the trucks and are an essential part of the commercial trek from the pit to the consumer. I find Judge Weisberger's opinion that the common meaning of the term roadway is the entire route traveled by the trucks including the scales. The assertion that scales are merely equipment because travel across them is limited to 5 mph, stopping in route, is too narrow an interpretation of the word. *Secretary of Labor v. APAC - Mississippi, Inc.*, (October 2004). I also note the decision by Judge Manning, *Secretary of Labor v. Carder, Inc.*, 27 FMSHRC 839 (November 2005), which found that scales fit within the scope of the standard under §56.9300.

The Contestant's assertion that they have been deprived of fair notice because they have never been cited for the scales before or specifically notified of the application of the standard to the scales is also not persuasive. An operator is deprived of fair notice of the applicability of a standard when it is "so incomplete, vague, indeterminate or uncertain that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Secretary of Labor v. Ideal Cement Co.*, (November, 1990) quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1988). Explicit notice to the operator is not required. Put another way, "when the language of a regulatory provision is clear, that terms of the provision must be enforced as they are written unless the regulation clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results," *Secretary of Labor v. Lode Star Energy Inc.*, 24 FMSHRC 689 (July 2002), citing *Dyer v. United States*, 832 F. 2d 1062 (9th Cir. 1987).

The standard for requiring a berm is sufficiently clear and the language is meant to apply to a variety of circumstances, *Ideal Cement Co.*, *supra*; *Alabama By-Products Corp.*, *supra*; *Secretary of Labor v. IMCO Services*, 5 FMSHRC 1 (January, 1983).

I do find, however, that the Secretary has failed to meet her burden of proving by a preponderance of the evidence that the scales are of a depth and/or grade that would trigger the application of the standard.

Respondent addresses the issue of whether the scales are considered to be a roadway in her brief as well as whether Coffee Lake has been deprived of fair notice of the application of the standard to these scales. However, the determination that the scales are a roadway is only one prong of the standard triggering the need for a guardrail. She has not addressed the depth and grade issue.

While the operator's argument that there has never been an accident on the scales is irrelevant as the Mine Act demands strict compliance once the standard is found applicable, there is no evidence provided in this case upon which to find the standard applies to these particular scales. The Secretary alleges that the scales are 36" at their highest point and nothing further. (Contestant alleges that the scales are only 26 ½" from the scale's deck to the pavement in her brief at page 3). Lacking is an expert's statement, case law or any other authoritative guidance as to how or why a 26 ½" to 36" elevation for some undetermined distance on the scales is of sufficient depth as to pose a danger of a vehicle overturning or endangering persons in equipment.

The inspector who issued the citation found merely that a truck could drop an axle resulting in injuries but that it was unlikely. (Res. Exh. 2.) The statement of Supervisor Brad Breland indicates that he is considering amending the citation to read "reasonably likely" to occur with "permanently disabling" results (Res.-Brief Declaration of Breland). However, Mr. Breland gives his reasons for these contemplated changes as his familiarizing himself with the conditions without giving any underlying factual basis for this statement. His statement is silent on information regarding how the height or grade of the scales considering all other relevant factors such as their width, size of the trucks and the like would trigger the standard. The Secretary has also provided photographs of the scales, however, it would be inappropriate for me to draw inferences from photographs alone without some authority upon which to rely in finding

that they depict an elevation or grade sufficient to cause a truck to overturn or endanger persons in the trucks. I have also reviewed case law and find nothing that sets a standard or minimum height at which the standard would apply.

Having provided no case law setting a precedent, any authority or expert opinion, I find that the Secretary has not met her burden of proof by a preponderance of the evidence as required, *Secretary of Labor v. United States Steel Corp.*, 5 FMSRC 3(January 1983); *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F3d 1096 (11th Cir. 1998); *Ormet Primary Aluminum Corp.*, 23 FMSHRC 1330 (December 2001).

ORDER

It is **ORDERED** that Citation No. 8559470 be DISMISSED.

Priscilla M. Rae
Administrative Law Judge

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