FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 1, 2002

WESTERN INDUSTRIAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 2001-473-RM
	:	Citation No. 7943039; 4/24/01
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine: Portland Plant
	:	Mine ID No.: 05-00037 S19

DECISION

Appearances: Mark W. Nelson, Esq., Harris, Karstaedt, Jamison & Powers, P.C. Englewood, Colorado, for the Contestant; Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary.

Before: Judge Weisberger

This case is before me based on a Notice of Contest filed by Western Industrial Incorporated, ("Western") contesting the validity of a citation issued to it by the Secretary of Labor alleging a violation of 30 C.F.R. Section 56.11001. Subsequent to the filing of an Answer by the Secretary, a hearing was held in Colorado Springs, Colorado. Subsequent to the hearing the parties each filed proposed findings of fact and a brief.

FINDINGS OF FACT

In April 2001, Western was working as a subcontractor for CDK General Contractors, installing insulation and sheet metal on a vertical cyclone located at the Holnam Portland Cement Plant in Florence, Colorado. In order to perform this work, a series of work platforms (scaffolds) were constructed. Each work platform was at a different height above the ground, and encircled the outer perimeter of the cyclone.

On April 24, 2001 the lowest work platform, which was approximately 80 inches above a metal grating catwalk, had been in existence approximately a month, and was being used by Western's workers to install insulation on the cyclone, and cover it with sheet metal. A vertical ladder provided the only means of access to the platform. The horizontal distance between the outer edge of the ladder, and the outer edge of the work platform where a toe board was located, was 14 inches. However, due to the width of the toe board, the actual distance from the edge of

the ladder to the closest point on the work platform where a worker would place his foot, was more than 15 inches.

In accessing the work platform from the nearest ladder rung which was even with the platform, a worker would be required to bend under a horizontal I- beam, which supported another platform located approximately three feet above this ladder rung, then bend between the top rail of the platform and the mid- rail, a vertical opening of approximately 22 inches. At this point of access, the horizontal distance between the outer edge of the ladder and the mid-rail was approximately 15 inches.

On April 24, 2001, MSHA Inspector Jack Eberling inspected the Holnam facility. He issued a citation alleging that the access from the ladder to the work platform was in violation of 30 C.F.R. § 56.11001 which provides as follows: "[s]afe means of access shall be provided and maintained to all working places."

DISCUSSION

1. Violation of Section 56.11001, supra

A. Commission Case Law

Western concedes that the work platform in question was a "working place" but argues, in essence, that since Section 56.11001, supra, is broadly worded, it (Western) did not have notice that Section 56.11001, supra, applied to the cited conditions.

The Commission has held that in determining whether an operator has notice of the applicability of a broad standard to a cited condition, the test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Ideal Cement Co. 12 FMSHRC 2409, 2416 (Nov. 1990). Subsequent to Ideal Cement, supra, the Commission held that the "reasonably prudent person test, is an objective standard." BHP Minerals International Inc. 18 FMSHRC 1342, 1345 (Aug. 1996).

In evaluating whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized the applicability of the standard to the cited facts at issue, the Commission has analyzed a number of factors including the ordinary definition of the terms of the text of the regulation at issue, the consistency of the Secretary's enforcement, and whether MSHA has published notices regarding its interpretation of the standard in question. (See Secretary v. Allen Lee Good, supra, at 1005, citing Island Creek Coal Company, 20 FMSHRC 14 at 24-25; Morton International Inc., 18 FMSHRC 533, 539 (Apr. 1996); U.S. Steel Mining Co. 10 FMSHRC 1138, 1141, 1142 (Sep. 1988); and Alabama By-Products. Corp., 4 FMSHRC 2128, 2131-32 (Dec. 1982). Additionally, the Commission has

considered the testimony of the inspector[1] and the operator's employees as to whether certain practices affected safety (see, Allen Lee Good, id., citing Ideal Cement Co. 12 FMSHRC at 2416), as well as considerations unique to the mining industry and the circumstances at the operators mine. (Allen Lee Good, id., citing BHP Minerals International Inc., supra, 18 FMSHRC 1342, at 1345.)

B. Further Discussion

Webster's Third New International Dictionary (1993 Ed.) defines "safe", as pertinent, as "... 2 (a) not exposed to danger ... 3; affording protection from danger ... ." (Webster's at 1998.) Webster's defines danger, as pertinent, as "... 3 the state of being exposed to harm: liability to injury, pain, or loss: peril, risk ... ." (Webster's at 573.) Hence, the crucial analysis of Section 56.11001, supra, regarding the wording and applicability of the text of Section 56.11001, supra, necessitates an inquiry as to whether a reasonably prudent person, as defined in Ideal Cement Co., supra, at 2416, would have realized that the cited conditions exposed a miner to danger, i.e., liability to injury.

Neither side has adduced any evidence that MSHA has published any notice regarding its interpretation of Section 56.11001, supra, as it applies to the cited conditions. Additionally, since safety regulations promulgated by the Occupational Safety and Health Administration, 29 C.F.R. Section 1926.451, regulate access from ladders to work platforms or scaffolds in industries other than mining, it is clear that the cited conditions are not unique to the mining industry.

In its brief, Western argues, in essence, that its evidence established that it had made a "thorough and thoughtful" determination that the ladder provided safe access to the work platform. In this connection, Western cites the videotaped deposition of Michael Howell, who was its industrial safety director during the period at issue, and who indicated that he had inspected the area of the scaffold, including the ladder and work platform at issue, on a daily basis for approximately one month prior to April 24, 2001. He indicated that he did not conclude that this access was unsafe. However, he did not provide any basis for this opinion, nor did he explain it. Western also relies on Howell's hearsay statement that both Luis Ibarra, Western's foreman who had constructed the access to the platform, and German Carchure, a construction crew member had told him (Howell) that "it was safe". (Tr. 42) However, neither Ibarra nor Carchure testified, nor did Howell state that either of these two had provided any basis or explanation for their opinions.

Western also cites Howell's statement that CDK General Contractors "spent daily

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[1]In a recent split decision, Secretary v. Allen Lee Good, d/b/a Good Construction, 23 FMSHRC 995, all Commissioners agreed that since the proper test to be applied was an objective standard, relying solely on the inspector's testimony in determining whether an operator had fair notice of the regulation's requirement, transforms the analysis "into a subjective inquiry based on the views on an MSHA inspector." Id. at 1004, 1005.

inspections ... in these areas everyday" (sic.). (Tr. 30-31.) However, no agent of CDK testified or related to Howell any opinion regarding safe access to the work platform. Lastly, Western relies on the testimony of David Aldridge, its Industrial President, who was the Project Manager of the work Western performed at the Holnam facility. Aldridge testified that he had observed the location and dimensions of the access from the ladder to the work platform, and concluded "[t]hat it was totally within providing safe access. (Sic.) There was no other way to build it any safer, and this was totally safe enough." (Tr. 71) Beyond this statement, he did not elaborate any further, or explain or provide any basis for his opinion that, considering the conditions at issue, access was safe.

Lastly, relating to the issue of the consistency of the agency's enforcement, Western relies on Howell's videotaped deposition, wherein Howell was asked whether MSHA Inspector Eberling, "... ever passed any judgement or lent any criticism to this condition prior to April 24, 2001." (Emphasis added.) (Tr. 30.). He answered as follows: "No, sir" id. However, Howell's deposition does not establish that Eberling had, at any time prior to April 24, actually inspected or observed the specific access in question that was specifically cited. In this connection, in the deposition, after Howell testified in response to a series of questions regarding dimensions of the ladder, its distance from the work platform, and the length of time the ladder and work platform had been in existence prior to April 24, he was then asked "... had Mr. Eberling inspected this area before?" (Tr. 29.) In response, Howell testified as follows: "He inspected the raw mill several times." (Tr. 30) This answer was not responsive to the question asked. Hence, at most, Howell's testimony establishes that Eberling had inspected the "raw mill", but falls short of establishing that he had, prior to April 24, observed the specific cited conditions. In this connection, it is significant, that Eberling testified at the hearing, but Western did elicit from him, nor did he so testify on direct examination, that he had observed the cited conditions at any time prior to April 24. Thus, I find that it has not been established that there have been any inconsistencies in the agency's enforcement.

In contrast to Western's witnesses, Eberling, who climbed scaffolds frequently as an inspector and in his previous jobs, testified that even a casual observer would have recognized that the access at issue was dangerous, and that he had never seen such restricted clearance.

In analyzing whether a reasonably prudent person would have realized that the cited access was unsafe, i.e., exposed a worker to possible injury, (see Webster's, supra), and thus would have had notice of the applicability of Section 56.11001, supra, most weight is place upon the specific circumstances at issue. (See Island Creek, supra, and BHP Minerals, supra.) In this connection, I note that although the horizontal distance from the edge of the ladder to the edge of the work platform was 14 inches at the level of the work platform, in accessing the platform from the ladder, due to the width of the toe board on the work platform, a worker would have had to place one leg on the ladder and reach out 15 inches horizontally with the other leg, in order to place that foot down on the platform. It is clear, as explained by Eberling, that this maneuver is unsafe, because in extending a foot horizontally over the void between the ladder and the work platform located at least 15 inches away, a person's weight is shifted to this foot before it is

placed on the platform. Additionally, in accessing the platform, a person would have had to squeeze himself between the top and mid-rails of the work platform, a distance of only 22 ½ inches, and reach the platform by bending under a I-beam, allowing a vertical clearance of approximately 36 inches. Accordingly, based on Eberling's uncontradicted testimony, I find that this awkward maneuvering would have subjected a worker accessing the platform to a risk of suffering injury by losing his balance and falling over six feet to the grating floor below.

Considering all the above, I conclude that the Secretary has established that a reasonably prudent person would have recognized that the cited access at issue was unsafe, i.e., exposed a worker to possible injury (see Webster's, supra), and thus would have recognized that it did not conform with the requirements of Section 56.11002, supra.

2. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel*

Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

As discussed above, the evidence establishes that Western did violate a mandatory standard, and that this violation did contribute to the hazard of an employee falling six and a half feet, and injuring himself. Since the cited access was the only means of access to the work platform, which was being used by employees, and would have so continued to be used during the continuation of normal operations, I conclude that an injury was reasonably likely to have occurred. Further, based on Eberling's testimony, which was not contradicted or rebutted, I find that an upper torso or head injury as the result of falling due to the cited condition and hitting the grating floor below, would have been reasonably likely to have occurred. Thus, I find that it has been established that the violation was significant and substantial.

3. Unwarrantable Failure

According to Eberling, the violation was as the result of Western's unwarrantable failure inasmuch as the cited condition was obvious, had been in existence for a month, had been examined daily, and that Howell had observed persons accessing the area.

As discussed above, the evidence establishes that Western should reasonably have known that the access was unsafe. Thus, the issue for resolution is whether the level of its negligence in this regard reached the level of "aggravated conduct", so as to be equated with unwarrantable failure (See Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)). I find that the degree of Western's negligence is mitigated to some degree, based on the uncontradicted testimony of Howell that the two persons who had built the work platform had told him that it was safe. Further, Howell indicated that he saw the records of CDK, the main contractor, which indicated that the area had been inspected by CDK on a daily basis, and that he (Howell) never thought that the access was unsafe. Further, Aldridge, the project manager at the site, indicated that the contract that Western had with CDK, the main contractor, required Western to follow CDK guidelines, and that Western's policy regarding safe access is normally to use OSHA guidelines. In this connection, he noted that OSHA guidelines require that horizontal access from another surface to a scaffold be no more than 14 inches. 29 C.F.R. § 1926.451(e)(8). The parties appear in agreement that the horizontal distance from the ladder to the work platform, at a point level with the platform, was approximately 14 inches. Although someone accessing the platform would be required to step out at least 15 inches from the ladder to reach the platform, access was within substantial compliance with the OSHA regulation. (Id.) Thus, I find that although the level of Western's negligence was more than moderate, it did not reach the level of aggravated conduct, and hence was not the result of its unwarrantable failure. (See Emery, supra)

ORDER

It is **ORDERED** that the Notice of Contest be partially sustained in that the unwarrantable failure allegation in Order No. 7943039 be vacated. It is **ORDERED** that in all other aspects the Notice of Contest not be sustained.

Avram Weisberger
Administrative Law Judge

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