

CCASE:

MSHA V. EL PASO ROCK QUARRIES

DDATE:

19810128

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

January 28, 1981

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

Docket Nos. DENV 79-139-PM

DENV 79-140-PM

EL PASO ROCK QUARRIES, INC.

DENV 79-176-PM

#### DECISION

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. •801 et seq. ( Supp. III 1979). Mine Safety and Health Administration (MSHA) inspectors issued citations under section 104(a) of the Act to El Paso Rock Quarries, Inc., for alleged violations of mandatory safety standards. El Paso contested the citations and an evidentiary hearing was held. The administrative law judge held in part for El Paso vacating several of the citations, and in part for the Secretary finding that certain alleged violations occurred and assessing penalties with respect to those violations. Both El Paso and the Secretary sought Commission review of portions of the judge's decision adverse to them. 1/ The Commission granted, in part, each of the petitions for discretionary review. 2/ For the reasons that appear below, we affirm in part, and reverse and remand in part. 3/

Citation No. 159658

This citation involved an alleged violation of 30 CFR

□56.9-22. 4/ The inspector issued the citation because an elevate roadway that provided access to the top of the quarry wall was not equipped with either berms or guards along its outer edges. The roadway was elevated three hundred feet on one side and forty to fifty feet on the other side. Although the roadway was not used by El Paso to haul rocks, it was used to haul explosives and to provide access to areas which were to be drilled and blasted.

---

1/ El Paso sought review of the judge's findings of violation only. It did not seek review of the penalties assessed.

2/ We directed review of seven citations that the judge vacated, and of three citations that the judge upheld.

3/ The citations are treated separately, except where a common question of law or fact is presented.

4/ Section 56.9-22 provides:

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

~36

The judge vacated the citation on the ground that the standard applies only to roads used for loading, hauling and dumping and that the activities that the roadway was used for here did not fall into any of those categories. 5/ We disagree. The hauling of explosives is the kind of haulage contemplated by section 56.9. Therefore, we reverse the decision of the judge, reinstate the citation and remand for further proceedings consistent with this opinion. 6/

Citation No. 159662

This citation also involved an alleged violation of 30 CFR

□56.9-22. The citation was issued because El Paso had allowed haulage trucks to be driven on a "bench" before berms were erected. 7/ The bench where the haulage took place was elevated forty feet above a lower bench. On the basis of those facts, the judge found a violation of section 56.9-22. The question on review is whether a "bench" is an "elevated roadway" within the meaning of the standard. El Paso argues that it is not and that the judge, therefore, erred in finding a violation. We disagree. Under the facts of this case, the quarry bench where the haulage trucks were driven is indeed an elevated roadway within the meaning of section 56.9-22. The judge's finding of a violation is, therefore, affirmed.

Citation Nos. 159660 and 159664

These citations involve a common question of law: whether El Paso may be held liable when its customers or employees of its customers do not comply with mandatory safety standards. 8/ One citation (No. 159660)

---

5/ The judge apparently based his conclusion upon the fact that 30 CFR •56.9 is entitled, "Loading, hauling, dumping."

6/ Because hauling activities were involved here, we do not pass upon the question of whether the provisions of 30 CFR •56.9 are applicable only to loading, hauling and dumping activities.

7/ The term "bench" is in part defined by A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968), as:

A ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank of bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in an open-pit mine or quarry.

8/ The customers and employees of customers were referred to during

the proceeding and in the judge's decision as "rock pickers".

~37

alleged a violation of 30 CFR •56.15-4..9/ It was issued because two rock pickers were not wearing eye protective equipment while breaking rocks with a hammer. The other citation (No. 159664) alleged a violation of 30 CFR •56.3-12.10/ That citation was issued because two other rock pickers, who, while loading onto a truck rocks that were being rolled down to them from the top of the quarry bank, were working between the truck and the bank and did not have access to an adequate escape route.

The judge found that violations of both standards occurred.

He also determined that El Paso was liable for the violations, because the rock pickers were "miners" as that term is defined in section 3(g) of the Act. He concluded, therefore, that the rock pickers were entitled to the same protection as that afforded miners who are employees of the mine owner.

We affirm. First, we hold that the judge was correct in concluding that the rock pickers were miners within the meaning of section 3(g) and were, therefore, entitled to the protections of the Act. We note that section 3(g) defines a "miner" as "any individual working in a coal or other mine". Here, the rock pickers broke, loaded and hauled the rock out of the quarry. In light of these activities the rock pickers were miners as defined by section 3(g). 11/

Second, we hold that the judge was correct in finding that El Paso was liable for the violations. The substantial involvement by the rock pickers in the quarrying operation of El Paso is a sufficient basis upon which to predicate El Paso's liability for the violations committed.

Therefore, we affirm the judge's holding that El Paso is liable for the failure of its customers or the employees of its customers to comply with the mandatory safety standards.

---

9/ Section 56.15-4 provides:

All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

10/ Section 56.3 12 provides:

Men shall not work between equipment and the pit wall or bank where the equipment may hinder escape from falls or slides of the bank.

11/ Neither in that section nor elsewhere in the Act is one's status as a "miner" made contingent upon an employment relationship with the owner or operator of a mine.

~38

Citation No. 159661

Here, the inspector cited El Paso for an alleged violation of 30 CFR •56.9-40(a). That standard provides that men shall not be transported "[i]n or on dippers, forks, clamshells, [or] beds of trucks unless special provisions are made for their safety, or buckets except shaft buckets." The inspector issued the citation upon observing a person riding on the running board of a truck. At the opening of the hearing, counsel for the Secretary moved to amend the citation so as to allege a violation of section 56.9-40(c), rather than section 56.9-40(a). Section 56.9-40(c) provides that men shall not be transported "[o]utside the cabs and beds of mobile equipment, except trains." Counsel for El Paso objected to the amendment and the judge denied the Secretary's motion.

We affirm. Granting or denying amendments is largely a discretionary matter with the judge to whom the motion is made. Although we might have ruled differently as an initial matter, 12/ we conclude that the judge did not abuse his discretion in denying the Secretary leave to amend the citation.

Citation No. 159665

This citation involved an alleged violation of 30 CFR •56.9-87. That mandatory standard requires that where an operator of heavy duty mobile equipment has an obstructed view to the rear, such equipment is to be provided with an automatic reverse signal alarm that is audible above the surrounding noise level, or in the alternative, that an observer is to be present in order to signal when it is safe to back up. The inspector issued the citation upon observing a truck back up with an inoperative reverse signal alarm. The judge vacated the citation on the ground that although the reverse alarm was inoperative, the Secretary failed to establish that El Paso knew or should have known it was inoperative.

The question on review is whether, under the 1977 Mine Act, an operator may be held liable for a violation of a mandatory safety standard regardless of fault. We answer that question in the affirmative. As we have previously held with respect to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. •801 et seq. (1976) (amended 1977), unless the standard itself so requires, an operator's

---

12/ In this regard, we note that Rule 15(a), Fed. R. Civ.P., in part provides:

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon

the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. [Emphasis added.]

~39

negligence has no bearing on the issue of whether a violation occurred. Rather, it is a factor that is to be considered in assessing a penalty. *United States Steel Corp.*, 1 FMSHRC 1306, 1 BNA OSHC -151, 1979 CCH OSHD •23,863 (1979). Therefore, we reverse the decision of the judge, reinstate the citation and remand for further proceedings consistent with this opinion.

Citation Nos. 159669, 159675 and 159695

Each of these citations involved an alleged violation of 30 CFR □56.11-2. 13/ The inspector issued the citations upon observing tools bars, pulleys, hooks, wire rope and rocks lying near the edge of elevated walkways that were not equipped with toeboards (i.e., raised edges around the perimeter of the walkway platforms). The inspector believed that the absence of toeboards constituted a violation of section 56.11-2 because the loose material lying on the walkways could fall over the sides of the platforms and onto employees working below. The judge vacated the citation on the ground that the standard is intended to protect only those employees working on the elevated walkways, and not those employees working underneath them. We disagree. In view of the remedial nature of the 1977 Mine Act, we hold that one of the purposes of the toeboard provision contained in that standard is to protect persons working below elevated walkways from falling objects. 14/ Therefore, we reverse the decision of the judge, reinstate the citations and remand for further proceedings consistent with this opinion.

---

13/ Section 56.11-2 provides:

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided. [Emphasis added.]

14/ The Occupational Safety and Health Review Commission has also recognized such a purpose of toeboards in similar standards under the Occupational Safety and Health Act. See *Western Waterproofing Co., Inc.*, 7 BNA OSHC 1625, 1979 CCH OSHD %23,785 (1979); *Truax & Hovey Drywall Corp.*, 6 BNA OSHC 1654, 1978 CCH OSHD %22,799 (1978). Also, with respect to toeboards. the Accident Prevention Manual For Industrial Operations, National Safety Council, 7th ed. (1978) states: Open-sided floors or platforms more than 4 ft above floor or ground level, and scaffolds more than 10 ft above floor

or ground level, should be guarded by a 36 to 42 in. high railing (with midrail). If persons can pass beneath or if there is moving machinery or other equipment with which falling materials could create a hazard, the guardrail should also have a 4 in. high toeboard. Screening can also be added. [Fig. 16 7, at p. 389; emphasis added.]

~40

Citation No. 159691

This citation involved an alleged violation of 30 CFR □56.12-68.15/ The inspector issued the citation upon observing that the gate to a fence surrounding an electrical power transformer was not locked. In vacating the citation, the judge stated that it had apparently been issued within minutes after the issuance of another citation alleging the existence of a hole in the same transformer fence. The judge concluded that because of the hole in the transformer fence, El Paso was no longer under an obligation to keep the transformer gate locked at the time that the unlocked gate citation was issued.

We reverse. The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard. Therefore, we reverse the decision of the judge, reinstate the citation and remand for further proceedings consistent with this opinion.

Accordingly, the judge's decision is affirmed with respect to Citation Nos. 159662, 159660, 159664 and 159661. With respect to Citation Nos. 159658, 159665, 159669, 159675, 159695 and 159691, the judge's decision is reversed and the citations are reinstated and remanded for further proceedings consistent with this opinion.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Backley, Chairman, dissenting in part -

I dissent from that part of the majority opinion that would reverse the judge's decision vacating Citation No. 159691. This citation involved an alleged violation of 30 CFR Sec. 56.12-68, which requires that transformer enclosures be kept locked against unauthorized entry. The record discloses that this citation was issued to the operator two minutes after the latter had received a citation for having a hole two feet wide in the transformer fence.

---

15/ Section 56.12-68 provides:

Transformer enclosures shall be kept locked against unauthorized entry.

~41

The citations of the inspector were laudable - to a point.

In issuing Citation No. 159691, the inspector gave the operator 30 hours to install a lock on the gate. The operator abated in 4 1/2 hours. The operator was given 4 days to repair the fence. He abated this violation in 9 1/2 hours.

The purpose of keeping a transformer fence locked is clear.

What is not clear is whether the manner of enforcement present in this case accomplishes the purpose - keeping unauthorized persons out of the enclosure - where there is no enclosure. Had the operator abated both citations at the maximum time allowed by the inspector, he would have had a locked transformer fence with a hole in it. Somewhere, I miss the point.

Richard V. Backley, Chairman

~42

Distribution

Ralph W. Scoggins, Esq.

El Paso Rock Quarries, Inc.

Suite 342

5959 Gateway West

El Paso, Texas 79925

Cynthia L. Attwood, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Administrative Law Judge Charles C. Moore, Jr.

FMSHRC

5203 Leesburg Pike, 10th Floor

Skyline Center #2

Falls Church, Virginia 22041