

CCASE:
MSHA V. BURGESS MINING AND CONSTRUCTION
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 9, 1981

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

v. Docket No. SE 79-42-R

BURGESS MINING AND CONSTRUCTION
CORPORATION

DECISION

This proceeding involves the interpretation of 30 CFR 77.1605(k), a mandatory safety standard applicable to surface coal mines and surface work areas of underground coal mines. The standard provides:

77.1605 Loading and haulage equipment; installations

* * * *

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

The Mine Safety and Health Administration (MSHA) cited Burgess Mining and Construction Company (Burgess) for failing to place guards along the sides of a vehicular road on a bridge crossing a river. Burgess contested the citation. The administrative law judge concluded that the standard did not apply to the road in question and vacated the citation. The Secretary filed a petition for discretionary review, which we granted. The Secretary and Burgess filed briefs, and we heard oral argument. For the reasons that follow, we reverse.

The facts are not in dispute. On May 9, 1979, an MSHA inspector issued a citation pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III

1979), alleging a violation of 30 CFR 77.1605(k). The citation stated that the operator had not provided guards on either side of a concrete bridge crossing the Cahaba River. The bridge was constructed by Burgess as part of its haulage road system from the mine site to its preparation plant.

The judge found that five to seven coal haulage trucks normally operate between the pit and preparation plant, with each truck making six to seven daily crossings of the bridge. Thus, the roadway on the bridge was used during the normal mining routine by vehicles conveying coal. The judge concluded, however, that the berm standard was not applicable to Burgess' bridge. Although he stated that the bridge could reasonably be found to be an elevated roadway, he held that the standard is limited to "roads cut along the side of a mountain, hill, pit wall, or earth bank, and not...to a bridge crossing a river."

The Secretary asserts that the judge incorrectly limited the application of the standard. We agree. In *Cleveland Cliffs Iron Co.*, VINC 79-68-PM (February 9, 1981), we held that under the identically worded metal and nonmetal berm safety standard, 30 CFR 55.9-22, berms or guards are required, whether the road has one exposed elevated bank or two. We find the same purpose and the same principles underlie 30 CFR 77.1605(k).

Burgess argues in further support of the judge's result in this case, that even if the standard is not limited to roads cut along the side of a mountain, pit wall, or the like, it nevertheless does not apply to a bridge crossing a body of water. It asserts, first, that a bridge is not a roadway and does not have "banks." We disagree. Nothing logically suggests why a roadway ceases being such when it crosses a bridge. "A bridge is nothing more than that part of a road which crosses a stream." *Oregon Transfer Co. v. Tyee Construction Co.*, 188 F. Supp. 647, 649 (D. Ore. 1960). Further, the hazards addressed by the standard are certainly no less serious and in need of prevention when a vehicle is elevated over a body of water than when it runs along elevated ground..1/ Burgess also asserts that MSHA's and its predecessor's longstanding failure to require guards on the bridge, at the same time the government enforced the standard as to other portions of this roadway, shows that the enforcing agency likewise interpreted the standard as not applicable to bridges. We do not agree that lack of enforcement alone 2/ constitutes an authoritative interpretation by MSHA of its standards, particularly where such an interpretation would lead to illogical results not suggested by the language of the standard.

Accordingly, we conclude that the judge erred in refusing to apply 30 CFR 77.1605(k) to the roadway crossing the bridge, and in vacating the citation. The citation is reinstated and affirmed and the review proceeding is dismissed.

Chairman

Richard V. Backley,

Commissioner

Frank F. Jestrab,

Commissioner

A. E. Lawson,

Marian Pearlman

Nease, Commissioner

1/ The judge noted that the water level of the river varies depending upon the amount of rainfall with the river overflowing the bridge surface several times each year, and, at various times, operator's trucks have crossed the bridge when the water was above the driving surface.

2/ Burgess agrees that the Secretary's lack of enforcement does not estop later enforcement if the standard is applicable.

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