CCASE:
MSHA V. THE HANNA MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 22, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

	Docket Nos.	LAKE 79-103-M
v.		LAKE 79-137-M
		LAKE 79-139-M

THE HANNA MINING COMPANY

DECISION

This civil penalty case is brought under the 1977 Mine Act, 30 U.S.C. $801 et. seq. (Supp. III 1979). On review the Hanna Mining Company contests the administrative law judge's findings of violation with respect to five citations issued by an inspector of the Mine Safety and Health Administration (MSHA). For the reasons stated below, we affirm the judge's decision.

CITATION 290181

This citation alleges a violation of 30 CFR $55.9-54, which states:

Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The citation was issued after the inspector observed a large haulage truck preparing to dump waste material. The truck had a 100 ton capacity, a 1,000 horsepower engine, and its tires were about 9 feet in diameter. The cab of the truck was about 5-1/2 to 6 feet high and the driver was seated about 20 feet from the back of the truck. The truck's back wheels were 1-1/2 to 3 feet from the dump ledge and resting against a 2 to 3 foot high berm. The ledge was 75 to 80 feet high and the berm was constructed of loose, unconsolidated material. The judge affirmed the citation finding that the berm "was not sufficient to prevent overtravel or overturning," and that "[t]he evidence [did] not establish that other means were provided to prevent overtravel or overturning."

Hanna argues that the finding of a violation was based "solely" on a "secret" berm height requirement. This argument is based upon the inspector's testimony that, as a "rule of thumb", in order for a berm to properly perform its warning and restraining functions it should be equal in height to the rear axle of the largest truck on the jobsite. Hanna argues that reliance on this requirement not found in the

standard's language is inappropriate. Hanna submits the evidence
establishes that a berm was provided at the dumpsite and, therefore,
that it was in compliance with the standard.
We find substantial evidence of record supporting the judge's
finding of a violation. We find that the record as a whole reveals
that the 2 to 3 foot high berm present at Hanna's dumpsite was
inadequate "to
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prevent overtravel and overturning." Thus, the facts of this case
establish noncompliance with the standard's plain language. Resort to
the inspector's asserted "mid-axle" guideline is unnecessary to
establish a violation. Cf. Clinchfield Coal Co., NORT 78-417-P
(1979)(administrative law judge)(1 MSHC 2027), aff'd, No. 79-1306, 4th
Cir., April 18, 1980 (1 MSHC 2337)(finding of illumination violation
not based on agency guidelines).
The judge's finding that 30 CFR $55.9-54 was violated is therefore
affirmed. 1/
CITATION 294629
This citation alleges a violation of mandatory standard 30 CFR
$55.11-1, which states:
Safe means of access shall be provided and maintained to
all working places.
The inspector issued the citation based on his observation of
an area where workers could travel underneath an overhead belt.
The judge found that this area was an unsafe means of access to a
working place, and, therefore, that a violation existed. The judge
also found that there was another means of access to the same working
place and that this means of access was safe.
Hanna contends that the standard's mandate was met given the
judge's finding of one safe means of access to the working place. We
disagree. We agree with the Secretary and the judge that the standard
requires that each "means of access" to a working place be safe. This
does not mean necessarily that an operator must assure that every
conceivable route to a working place, no matter how circuitous or
improbable, be safe. For example, an operator could show that a cited
area is not a "means of access" within the meaning of the standard, by
proving that there is no reasonable possibility that a miner would use
the route as a means of reaching or leaving a workplace.
In the present case, Hanna failed to make such a showing and there
is substantial evidence to support the judge's finding that the cited
area was an unsafe means of access to a working place. Therefore, we
affirm the violation. 2/

1/ The judge also found that the evidence failed to establish that
"other means" were provided to prevent overtravel or overturning.

Hanna argues that a dumpman was present at the site and that this
constituted a "similar means" of compliance as provided for by the
standard. Hanna assumes, and we agree, that the judge implicitly
found that no dumpman was present at the time of the alleged
violation. We conclude that substantial evidence of record supports a
finding that no dumpman was present. Therefore, we need not decide
whether such a person, if present, would constitute a "similar means"
to prevent overtravel and overturning within the meaning of the
standard.

2/ We note that at the hearing the area where the cited and
alternative routes were located was depicted through blackboard
drawings which were not preserved. The use of such evanescent
exhibits unnecessarily complicates meaningful review and may seriously
disadvantage parties who later seek to rely upon them.

CITATION 294667

This citation also alleges a violation of 30 CFR $55.11-1 for
failure to provide a safe means of access.

The inspector issued this citation based on his observation of a
large ore spill in an aisle. The spill consisted of a pile of
egg-size or larger taconite pellets located in an aisle bounded on
one side by the outside wall of the building and on the other side by
a row of machines. The accumulation was approximately chest high and
extended out 15 to 18 feet from the apex of the pile. The spill was
caused by a mechanical defect in a conveyor belt located above the
aisle. The immediate area around the accumulation was not barricaded,
nor was notice of the hazard posted to keep persons from entering the
area. The judge found that the area was a means of access to a
working place. He held that as a result of the spill, and the fact
that material was still falling at the time of inspection, the means
of access was unsafe and violative of 30 CFR $55.11-1.

Hanna contends that alternative safe means of access were provided
and that the pile itself presented a barricade blocking travel in the
aisle so that the aisle was no longer a "means of access."

Again, we disagree. As we previously stated, 30 CFR $55.11-1
requires an operator to make each means of access to a working place
safe. Therefore, if the aisle was a "means of access" Hanna's duty
was to make the aisle safe regardless of the presence of additional
safe routes. As with the previous citation, Hanna did not show that
there was no reasonable possibility that a miner would use the aisle
as a means of access. Indeed, substantial evidence of record belies
Hanna's claim that the pile presented a natural barricade to travel.
The pile was chest high at its apex and became progressively lower.
Even if the center of the pile had a limited barricading effect due
to its size, the undisputed testimony was that the spill gradually

extended out some 15 to 18 feet, thus posing a tripping or slipping
hazard. Also, the judge's finding of violation was based in part on
the fact that pellets were still falling from the elevated walkway
above.
Thus, we affirm the judge's conclusion that the spill in the aisle
rendered the aisle an unsafe means of access.
CITATION 294696
This citation involves an alleged violation of mandatory standard
30 CFR $55.11-12, which states:
Openings above, below or near travelways through which
men or materials may fall shall be protected by railings,
barriers, or covers. Were it is impractical to install such
protective devices, adequate warning signals shall be installed.
The inspector observed three floor openings along the length of an
elevated walkway. One floor opening was bordered by a toeboard. The
other two were not. At the hearing all parties agreed that the
openings in the floor were small enough that a worker could not fall
completely through them to the floor below. However, the inspector
testified that the hazard he foresaw was that a worker's foot or lower
leg could fall into the openings. In the inspector's view, as a
result of the unprotected floor openings an accident could result
causing broken bones, sprains,
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lacerations and bruises. Further, the inspector testified that the
toeboard surrounding the one opening actually presented a stumbling
hazard since it was not used in conjunction with a railing.
The judge found that a person or materials could fall "into or
through such an opening" and that the toeboard as constructed did not
provide "sufficient protection" as contemplated by the standard.
Hanna contends that the judge erred in interpreting 30 CFR $55.11-12
as being violated when men or materials may fall "into" as well as
"through" an opening. Hanna further argues that the record does not
support a finding that men or materials could fall "through" the
openings in question.
We reject Hanna's arguments and affirm the judge's conclusions.
In the context of the cited standard we interpret the word "through"
as encompassing falling into, as well as completely through, a floor
opening. This construction is in accord with the well-established
rule that remedial legislation and its implementing regulations are to
be liberally construed as long as such an interpretation is reasonable
and promotes miner safety. E.g., Freeman Coal Mining Co. v. IBMOA,
504 F.2d 741, 744 (7th Cir. 1974). Accord, Cleveland Cliffs Iron Co.,
Inc., 3 FMSHRC 291, 293-94 (1981). 30 CFR $55.11-12 is concerned with
the hazard presented to miners by the presence of unprotected openings
on travelways. In this regard, a worker is exposed to the risk of

injury whether he falls completely through or only into unprotected openings. Furthermore, the reasonableness of this interpretation is well-founded in common usage. See Webster Third New International Dictionary, 2384 (1971); and 86 C.J.S. "Through" at 813. Accordingly, the judge's finding of a violation of 30 CFR $55.11-12 is affirmed.

CITATION 294654

This citation alleges a violation of 30 CFR $55.11-16, which states:

Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.

The inspector issued the citation based on his observation of a thin accumulation of ice on the bottom step of a metal open-grated stairway. The stairway led to the bottom area of the screen house and the inspector testified that maintenance people, electricians, mechanics, and others would be in that area. At the time of the inspection, however, there was no activity in the area, and the inspector could not determine how frequently the stairway was used, or how long the ice had been on the step. The inspector testified that the source of the ice was a leaking water pipe which sprayed down on the step. Ice formed because of extreme winter temperatures and the fact that there was a crack in the outside wall of the building adjacent to the stairway.

The judge upheld the violation finding that there was an accumulation of ice on the bottom stairway and that the stairway was a regularly used travelway. He acknowledged that it was not clear how long the condition had existed, but inferred that the accumulation had been there for some time in view of the source of the ice and the fact the inspector discovered the condition three hours after the work shift began. Therefore, he concluded that the ice was not removed "as soon as practicable" as required by the standard.

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Hanna argues that the judge erred in finding that the stairway was a regularly used travelway, that the ice was caused by water leaking from a pipe, and that the ice had not been removed as soon as practicable.

We reject each of Hanna's arguments. We affirm the judge's finding that the stairway was a regularly used travelway. The inspector's uncontradicted testimony was that in performing their duties maintenance and other workers would be in the bottom area of the screen house. We believe that it is reasonable to infer that the stairway would be used by these employees in their regular travel. We note that Hanna, the party in the best position to offer evidence respecting the use, or lack thereof, of the stairway did not do so.

We reject Hanna's assertion that the judge erred in accepting the inspector's testimony concerning the source of the water. The judge's

finding that the source was a drip or spray from a pipe above the stairway is supported by substantial evidence of record, namely the testimony of the inspector as well as Hanna's safety director. In any event, it is the presence of the ice that is important rather than its source.

Finally, Hanna's argument that the judge erred in finding that the ice was not removed as soon as practicable is also rejected. We agree with the judge that in view of the conditions at Hanna's workplace, i.e., the leaking pipe and the cracked exterior wall, and the fact that the inspector discovered the ice on the stairway three hours after the working shift had begun, the ice was not removed as soon as practicable. Therefore, the judge's finding of a violation is affirmed.

In sum, the decision of the administrative law judge is affirmed.

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