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MSHA V. MISSOURI GRAVEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 4, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 80-83-M

MISSOURI GRAVEL COMPANY

DECISION

This civil penalty proceeding arises under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979). The administrative law judge, in a summary decision, concluded that the "undisputed" facts of record did not establish violations of 30 CFR $56.14 1 as alleged by the Secretary of Labor. 1/ For the reasons set forth below, we find the judge erred.

Five citations, each of which alleged a failure to guard a tail or drive pulley, were issued to Missouri Gravel. After the Secretary filed a penalty proposal for the violations, Missouri Gravel answered, denying that the conditions for which the citations were issued violated the standard. The administrative law judge issued a pretrial order, that among other things, required Missouri Gravel to submit a specific statement as to why it contested each alleged violation. Missouri Gravel responded asserting that the pulleys were in compliance with the standard in that two were guarded by reason of their location, three were guarded by various barriers (e.g., chain, pipe or angle iron), and that access to the pulleys was restricted in varying degrees. Moreover, it argued that no employee would normally be exposed to the pulleys except, in some instances, for maintenance work at which time the pulleys would not be operating. The judge issued an order reciting Missouri Gravel's defenses and ordering the Secretary to provide a detailed factual statement as to his agreement or disagreement. The Secretary responded with respect to each citation. In general he asserted that the pulleys were not guarded by their location or by the barriers because, in each instance, employees traveled or worked in the vicinity of the pulleys and could be caught and injured !n them, although the allegations concerning the details of employee exposure and the likelihood of injury varied with respect to each citation.

1/ 30 C.F.R. $56.14-1 provides:
Mandatory. Gears; sprockets; chains; drive, head, tail,and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.
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A document styled "Tentative Decision" was then issued by the judge in which he stated that, based upon "an independent evaluation and de novo review of the parties' prehearing submissions", he found "no genuine dispute as to any of the material facts." He further found that none of the charged violations presented "any reasonably recognizable hazard of injury to any normally prudent employee exercising reasonable care in the performance of assigned duties." He ordered the parties to show cause why the "tentative decision" should not be adopted as a final decision. In response, the Secretary asserted that the cited conditions constituted violations of section 56.14-1 because the equipment was unguarded and miners were exposed to unguarded moving parts. The Secretary further stated that the frequency of the exposure relates to the gravity of the violation for penalty purposes, rather than to the question of whether a violation exists.
On July 8, 1980, the judge issued a final decision "adopting and confirming" his "tentative decision". The judge stated that the Secretary had "failed to contest my tentative finding that there was no genuine dispute as to any of the facts material to the five failure to guard violations." Therefore, he concluded, an evidentiary hearing was not necessary and summary decision should be entered. The judge stated "the undisputed facts show each of the locations cited is so inaccessible, it is highly improbable that in the course of his work duties any normally prudent employee is likely to come into contact with these moving machine parts." He then dismissed the Secretary's proposal for a penalty.
Summary decision is an extraordinary procedure. If used improperly itdenies litigants their right to be heard. Under our rules, a party must move for summary decision 2/ and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law. 29 C.F.R. $2700.64(a), (b). The judge found no genuine dispute as to any material fact. We disagree. The standard requires guarding of moving machine parts "which may be contacted by persons, and which may cause injury to persons." As the following recitation of the parties' pretrial submissions makes clear, a genuine dispute as to the potential for contact and injury exists.
Citation No. 362881 alleged the oversized belt conveyor tail pulley was not guarded on its west side. Missouri Gravel asserted the pulley

was guarded by its very location in that the pinch point was located at the bottom of the pulley and was accessible only by crawling on hands and knees. It stated that this had to be done only for maintenance purposes at which time the conveyor would not be operating. It asserted no worker was generally stationed in the area and that the pulley was not in a regularly traveled way. The Secretary disagreed with Missouri Gravel's assertion that the pulley was not in a regularly traveled way. Moreover, the Secretary asserted the pulley was not guarded by reason of its location because it had "points with exposed ends which could be reached by persons close to the tail pulley by only moving their feet and touching the points." The Secretary also stated the pulley could catch the clothes of persons standing close to it." He alleged that the operator of the equipment, with the help of labor personnel, cleaned

2/ Here neither party moved for summary decision. The judge invoked the procedure on his own. While there is some authority in the federal courts that the analogous federal rule of civil procedure permits summary decision without a specific motion, we believe that in our proceedings. except in the most exceptional circumstances, it should not occur. See 6 Moore's Federal Practice $56.12 (2d ed. 1976)(Supp. 1980-81). As this case illustrates, it can all too easily lead to an arbitrary and erroneous decision.

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the equipment and "regularly walked and stood sufficiently close to the pinch point to be subject to injuries." The Secretary listed several other functions which caused the operator of the equipment and other labor personnel to stand "regularly close to the pinch point," and he asserted the functions are "usually performed while the equipment is in operation."

Citation No. 362882 alleged that a self cleaning tail pulley on a log washer belt conveyor was not guarded. Missouri Gravel stated the pulley was guarded by its very location in that it was not located on a regular travelway. It asserted the pulley was not in an area where workmen would be stationed during normal operations and that the pulley was several feet above the ground. The Secretary did not agree that the pulley was properly guarded by reason of its very location. He also disagreed it was not on or near a normal travelway. He asserted that the operator of the equipment and labor personnel were required to regularly move under and regularly stand under the pulley to oil it, to put antifreeze on it, to check its alignment and to work under it with shovels. These persons, he asserted, "could be injured by moving their hands or heads close to the pulley."

Citation No. 362887 alleged the ballast conveyor drive pulley was not guarded. Missouri Gravel asserted that a chain barrier, which was located approximately 2 feet from the pulley, and a warning sign properly guarded the pulley. It stated that the only time a person

would be in the area would be for maintenance purposes and that the conveyor would not then be operating. The Secretary responded that a person could be caught in the pulley by reaching a hand over the chain barrier or by walking under or over the chain. He stated that "[t]he operator of the equipment, labor personnel working with him and maintenance personnel regularly moved or stood close to the pinch point." He asserted these personnel could go sufficiently close to the pulley to be injured for several reasons and that when they did go that close "the conveyor usually was in operation."

Citation No. 362889 alleged that a dewatering screen drive pulley was not guarded. Missouri Gravel asserted the pulley was "adequately guarded" by a pipe barrier which had to be turned or lifted to reach the pulley area. It also asserted that only maintenance personnel would go into that area for maintenance purposes or to check the oil gauge and at those times the conveyor drive would not be operating. The Secretary asserted the pipe was not a guard because "it could be removed by any body walking in the area." He also asserted that the operator of the equipment, labor personnel working with the operator and maintenance personnel "were in the area and walked close to the pinch point for several reasons."

Citation No. 367379 alleged the drive pulley for the main incline belt was not guarded and that a start switch for the belt was 1 1/2 feet from the bottom of the pulley. Missouri Gravel asserted the pulley was guarded by an angle iron barrier and that the pinch point of the pulley was 3 feet 9 inches from the barrier. It also assorted the pulley was

"not located in a normal travel way area and that the only reason for access to the area would be for maintenance of the pulley, at which time the conveyor would not be operating." The Secretary asserted the operator of the equipment, labor personnel working with the operator or maintenance personnel "walked or stood close to the pinch point." He also stated that "a person could [be] caught in the pinch point by leaning over the barrier to shut off the power."

In light of the above, we conclude that the record establishes unresolved disputes concerning whether persons may contact these moving machine parts and be injured thereby. We find these disputes to be material. In entering summary decision for Missouri Gravel, the judge was trying issues of fact through the summary decision procedure. This he cannot do. Accordingly, summary decision was improperly entered. 3/ We reverse and remand for further proceedings consistent with this opinion.

3/ In view of our determination that the judge erred in finding there were no material facts in dispute, at this time we do not reach the issue of whether, as a matter of law, the judge properly interpreted

and applied the standard.
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