CCASE:
MSHA V. HOMESTAKE MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 16, 1982

SECRETARY OF LABOR,	Docket Nos. CENT 79-27-M
MINE SAFETY AND HEALTH	CENT 79-28-M
ADMINISTRATION (MSHA)	CENT 79-206-M
	CENT 79-207-M
v.	CENT 79-208-M
	CENT 79-332-M
HOMESTAKE MINING COMPANY	CENT 80-167-M

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979), and involves alleged violations of mandatory safety standards. The administrative law judge found that the operator had not violated 30 C.F.R. $ 57.12-82 and vacated the underlying citations. However, he found violations of other safety standards and assessed penalties. 1/ The Secretary of Labor and Homestake Mining Company filed petitions for discretionary review which we granted. For the reasons that follow, we affirm the judge.

I.

The first series of citations alleges violations of 30 C.F.R. $ 57.12-82. That standard provides:

Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines.

1/ The judge's decision is reported at 2 FMSHRC 2295 (1980).

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The parties stipulated that the power cables at issue were hung from the back or ribs and were directly in contact with air or water or telephone lines. They also agreed that there was no insulation between the outer jacket of the cables and the metal lines. Three types of power cables are involved here: one has three conductors individually insulated with polyethylene, wrapped in filler and covered with polyvinyl chloride jacketing; another has three conductors individually insulated with polyvinyl chloride, filler and polyvinyl chloride jacketing; and the third has two conductors individually insulated with polyvinyl chloride and one bare ground wire, all separated from one another and suspended in polyvinyl chloride which forms the jacketing. All the cables are rated by the manufacturer at 600 volts, but normally carry only 110 volts at

Homestake. 2/

The judge offered alternative reasons for holding the standard had not been violated. He first found that these insulated and jacketed power cables are not "powerlines" under the standard. That term, the judge held, refers to single conductor wires, which are usually exposed (such as trolley wires). The judge then found that, even if these power cables are "powerlines" subject to 30 C.F.R. $ 57.12-82, they are insulated in compliance with that standard. The judge looked to the definition of insulated in section 57.2 and found the cables were "insulated in a manner suitable for the conditions to which they were subjected." 2 FMSHRC 2306. He stated that the polyvinyl chloride insulation protects the cables from physical abuse, as does the jacketing of the same substance on all three cables. Id. He noted that all the cables are insulated by the manufacturer to "withstand ... more than three times the voltage that actually passes through them" and that the jacketing is "tough". Id. The judge also concluded, "[T]he plain language of the standard does not require Respondent to provide additional insulation." 2 FMSHRC 2307.

The parties argue extensively about the precise definition of "powerlines." Expert testimony in this case reveals that the term "powerline" is not commonly used as a term of art by those trained in electricity, and does not have a modern technical meaning. Nor does either party convincingly demonstrate a common usage of the term. 3/ We believe this case can be resolved, however, by focusing on the purpose of the standard without an exhaustive analysis of the meaning of the term "powerlines". The cables in this mine contain conductors that transmit electricity, and thus can be considered powerlines; therefore, the standard applies to them.

2/ The manufacturer's insulation rating is the amount of current a manufacturer guarantees can be run through a cable without damage to the cable.

3/ Further, as another administrative law judge has stated, "Trying to ascertain [the meaning of the term "powerlines"] by analyzing other standards in which it appears is not helpful since words are not used with much precision in the regulations." White Pine Copper, 3 FMSHRC 481, 484 (1981).

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From its wording, it is apparent that the regulation's purpose is to assure that conductors of electricity are either "well separated or insulated" to prevent the energizing of air or water pipelines, or telephone lines. It follows that the standard seeks to protect miners from the hazard of electrical shock and electrocution resulting from contact with an energized air or water pipe, or telephone line. The question in this case, then, is whether the power cables involved, which transmit electric current, were so insulated as to prevent the

energizing of potentially electrically conductive metal pipes, air or telephone lines.

The standard at 30 C.F.R. $ 57.2 provides:

"Insulated" means separated from other conducting surfaces by a dielectric substance permanently offering a high resistance to the passage of current and to disruptive discharge through the substance. When any substance is said to be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected. Otherwise, it is, within the purpose of this definition, uninsulated. Insulating covering is one means for making the conductor insulated.

In arguing that these power cables are not sufficiently insulated, the Secretary relies on an interpretive memo concerning section 57.12-82 issued on February 21, 1975, by the then Assistant Administrator for Metal and Nonmetal Mine Health and Safety. This memo stated in part:

Jacketing as provided on a powerline by the manufacturer is not adequate for the insulating purposes of Federal mandatory standard 55, 56, 57.12-82. Additional insulation or separation must be provided.

* * * * * *

Additional insulation means that insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum applied voltage on the conductor. [4/]

The amount of additional insulation that would be required by this memo is not only minimal but, in terms of the power transmitted and dielectric resistance, essentially meaningless. The power cables involved in this case would be required to have additional polyvinyl chloride insulation approximately 1/3 mil (1/3000 inch) thick. 5/ Moreover, the interpretive memorandum imposes a blanket requirement that additional insulation be placed between power cables and metal pipelines, regardless of the cable's existing insulation, dielectric strength, the conditions under which the cable is to be used, or the composition or design of the cable and its insulation. We recognize

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4/ The dielectric strength or resistance of a substance is the ability of that substance to resist the passage of electricity through it. Dielectric strength is measured in volts per mil.

5/ The cables carry 110 volts, thus insulation with a dielectric resistance of 110 volts would be required under the 1975 interpretive memo. Unrefuted testimony indicates that polyvinyl chloride has a dielectric resistance of 375 volts per mil. Polyvinyl chloride insulation that is one third mil thick (1/3000 inch) presumably has a dielectric resistance of 125 volts per mil.

that enforcement of the standard would be simpler if an inspector merely has to visually determine whether extra insulation has been added where power cables and pipelines meet. We fail to see, however, how this superficial examination bears any relationship to the purpose of the standard. Rather, in order to make a bona fide determination that insulation adequate to prevent the transmission of current to adjacent pipelines is present, the adequacy of the added insulation must be evaluated, and this determination must be based on the objectively determinable character of the powerline and the existing insulation. In order to achieve the purpose of the standard, enforcement should not turn on the subjective evaluation of an inspector, without the objective evaluation of whether a hazard is or may be present. Further, section 57.12-82 does not state that "additional insulation" must be placed between "powerlines" and pipelines; it merely requires separation or insulation. 6/

Thus, we reject the Secretary's interpretive memorandum. The regulation does not require "additional" insulation, the amount of additional insulation required by the interpretive memorandum is, as we have noted, so minimal as to be not only essentially meaningless, but such as to engender a false and possibly hazardous sense of security. The purpose of the standard, as written, can more accurately be achieved by an examination of the suitability of the insulation that is present at crossover points where water, telephone or air lines are in proximity to powerlines.

Accordingly, the insulation on the cables here involved at the points where they contacted pipelines must be examined to determine whether section 57.12-82 has been violated. The definition of "insulated" in section 57.2 includes a requirement that the insulation be "suitable for the conditions to which it is subjected." The judge noted the cables in this case are insulated to withstand more than three times the voltage that passes through them. In addition, he noted that the jacketing, which also has insulating qualities, is "tough" and that unchallenged manufacturer's specifications sheets "contain impressive claims of resistance to abuse." 2 FMSHRC 2306. The Secretary did not rebut Homestake's evidence. The judge concluded, "The insulation and the jacket are sufficient to protect the cables against normal hazards in the Homestake Mine." Id. The judge's findings are supported by substantial evidence and are therefore affirmed.

6/ If the Secretary intended to require that a particular kind of amount of insulation be added to that supplied by the manufacturer, he has that authority and could have so stated in the regulation, and can do so now through rulemaking. Indeed, we strongly suggest that he do so--and promptly.

II

This portion of Homestake involves three violations of mandatory safety standards. The administrative law judge found that Homestake violated these standards. For the reasons that follow, we affirm the judge.

Citation No. 328789

On November 15, 1978, an MSHA inspector cited Homestake for an alleged violation of 30 C.F.R. $ 57.3-22. This mandatory standard provides in part:

> Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter.... Loose ground shall be taken down or adequately supported before any other work is done....

The facts underlying this citation are disputed. The inspector testified that he noticed two miners slushing or preparing to slush muck on a slusher machine located outside and immediately opposite the entrance to the stope. The inspector also testified that he observed two miners inside the stope. Homestake admitted the existence of the loose rock. However, Homestake asserted in defense that the presence of a muck pile at the entrance to the stope created a more dangerous situation. It argued that the miners would have had to climb onto the dangerous muck pile in order to bar down the rock. It asserted also that its miners did not go inside the stope.

The judge rejected Homestake's defense. The judge noted that in MSHA v. Asarco, 2 FMSHRC 920, 924 (1980), another administrative law judge held that "miners are not required to bar down while standing on a muck pile." The judge found that the facts in Asarco were distinguishable from the facts here. He held that Homestake's failure to establish the size and location of the muck pile failed to bring the facts within the Asarco decision. Accordingly, the judge found that Homestake had violated the standard and assessed a penalty.

Before us, Homestake again argues that compliance is not required where checking for loose rock would itself create a hazard, and also that the judge erred in finding that the muck pile did not create a hazard. We reject both arguments. Assuming that Asarco establishes a permissible defense to the violation at issue, we concur with the judge's finding that Homestake failed to prove the defense. We note that the testimony of Homestake's witness was ambiguous; he did not expressly state that barring down loose rock required him to climb on top of a dangerous muck pile. By contrast, the inspector explicitly denied that he saw a muck pile constituting a hazard; nor had other miners mentioned the presence of dangerous conditions. The judge credited the inspector's testimony over that of the operator, a credibility determination we see no reason to overturn. Thus, we

hold that substantial evidence supports the judge's conclusion that Homestake violated the. standard. 7/

Citation No. 328928

On November 8, 1978, an MSHA inspector issued a citation alleging a violation of 30 C.F.R. $ 57.11-1, because Homestake failed to provide a safe means of access inside a manway. There was only a 13-inch clearance between the manway ladder and the timers of the manway for a distance of six vertical feet. The cited standard provides:

Safe means of access shall be provided and maintained to all working places.

The judge found that the stope was a working place within the meaning of 30 C.F.R. $ 57.2, because one or more miners were working there. 8/ He also found that the manway was the only access to and from the stope. The judge held that Homestake violated the standard - because it permitted men to work in a stope that had no safe means of access.

On review, Homestake asserts that the constricted manway led to a stope which was not a working place; the only work underway was repair of the binline which, together with the manway, constitutes the chimney. Therefore, it contends, the stope was not used as a means of access to a working place. The inspector testified that miners worked only part-time at repairing the binline, when they had no work to do in the stope. Homestake's supervisor testified that a miner was slushing in the stope above the stope nearest to the constricted portion of the manway. Tr. 525-530. In this regard, although he stated that he did not believe it was necessary for the miner to use the constricted manway, he could not say whether the miner had in fact used it. Id. Thus, in our view, substantial evidence supports the judge's finding that the manway was used as a means of access to a working place.

Homestake next argues that the judge erred in finding that the manway was the only access to and from the stope. This error, if any, is immaterial. In Hanna Mining Co., 3 FMSHRC 2045, 2046 (1981), we considered an identically worded standard, and held that "the standard requires that each 'means of access' to a working place be safe." (Emphasis added.) An operator may demonstrate that a cited area is not a means of access by proving that no "reasonable possibility" exists that a miner would use it to enter or leave a working place. Id. Here Homestake failed to establish that the manway was not used as a means of access to the working place; for example, it presented no evidence that the manway had been dangered-off to prevent employees, other than those engaged in repair, from using the constricted manway. Accordingly, we affirm the judge's finding of a violation.

7/ Homestake's argument that its miners did not actually enter the stope and consequently were not exposed to the hazard is without merit.

The standard requires that miners examine the working place for loose ground before commencing work. The judge found that the stope was a working place. Homestake admits the existence of the loose rock. The presence of the loose rock in the working place establishes the violation regardless of whether the miners were actually exposed to the danger posed by the rock.

8/ 30 C.F.R. $ 57.2 provides in part: "'Working place' means any place in or about a mine where "work is being performed. "

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Citation No. 328953

On March 1, 1979, an MSHA inspector cited Homestake for an alleged violation of 30 C.F.R. $ 57.17-1. That mandatory standard provides in part:

Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures....

The citation stated:

Illumination was not sufficient for safe working conditions in servicing the sheave wheel ... and motor components of the Otis elevator located at the floor level on top of the elevator compartment. Light emitted from the warehouse windows located below the elevator floor made a blinding effect to observe the floor and equipment mounted on the compartment floor.

The shaft of the Otis elevator was contained in a separate box-like structure located above the top floor level and below the warehouse ceiling. The sheave wheel, which powered the elevator, was on top of the box-like structure.

The judge found that, although a flashlight or auxiliary light was needed to repair the sheave wheel, additional light was also necessary; improper lighting could have caused injury. He concluded that Homestake violated the standard.

Homestake argues on review that the standard was satisfied by using portable or auxiliary lighting. The operator also asserts that the Secretary did not meet his burden of proof because he relied solely on the inspector's subjective opinion as to the sufficiency of the illumination.

In Capitol Aggregates, Inc., 3 FMSHRC 1388, 1389 (1981), pet. for review filed, No. 91-4278 (5th Cir., July 22, 1981), we held that flashlights and auxiliary lights alone could satisfy the standard "where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances." In our view, Homestake has failed to establish that flashlights or auxiliary lights provided adequate illumination here. Nor did it show that auxiliary lighting was always used, in addition to

flashlights, during maintenance and repairs. The judge's finding that the portable or auxiliary lighting was inadequate is supported by substantial evidence. Moreover, the judge properly credited the inspector's subjective opinion as to the sufficiency of the illumination in these circumstances. Capitol Aggregates, 3 FMSHRC at 1390. 9/ Therefore, we affirm the judge's finding of a violation.

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9/ See also Clinchfield Coal Co., 1 BNA MSHC 2027 (1979) aff'd sub nom., Clinchfield Coal Co. v. Secretary of Labor, No. 79-1306 (4th Cir., April 8, 1980) (unpublished), and J.P. Burroughs and Son, Inc., 2 FMSHRC 3266, 3269 (1980).

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In sum, we affirm the judge's decision as to each of the citations.

Richard V. Backley,
Commissioner

Frank F. Jestrab,
Commissioner

A.E. Lawson,
Commissioner

Rosemary M. Collyer, Chairman, Concurring:

I did not participate in the consideration or disposition of Part I of this case because of prior representation of the Climax Molybdenum Company at a time when the Climax cases dealing with identical issues and decided by the Commission today, 4 FMSHRC --- (DENV 78-553-M et al. February 1982) were being tried and argued on appeal. I concur in the disposition of the citations in Part II.

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