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MSHA V. AMERICAN MATERIALS
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 16, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. LAKE 79-9-M

v.

AMERICAN MATERIALS
CORPORATION

DECISION

This case involves the interpretation of 30 C.F.R. § 56.20-11, a mandatory standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). That standard provides:

Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required.

The administrative law judge held that a violation of the standard occurred because American Materials failed to post or barricade an area over which high voltage powerlines passed. 1/ For the reasons that follow, we affirm his decision.

American Materials extracts and stockpiles sand and gravel at its Harrison Pit and Plant. On April 26, 1978, during a fatal accident investigation at the Harrison operation, a notice of violation of section 56.11-20 was issued to American Materials. 3 FMSHRC 1527. The accident occurred the previous day when a driver for a customer of American Materials raised his truck bed near high voltage powerlines and was electrocuted. 3 FMSHRC 1528.

Prior to April 25, 1978, between fifty and one hundred and fifty customer trucks came onto the Harrison plant each day. Tr. 52. Of these, some forty to fifty hauled coal before entering the plant. Tr. 122-25. Some of these truck drivers cleaned coal residue from their truck beds by raising the truck bed and releasing the tail gate to dump the coal. 3 FMSHRC 1527. American Materials tried to prevent drivers from doing this to avoid contamination of its materials. Id. Company

1/ The judge's decision is reported at 3 FMSHRC 1524 (1981).

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employees instructed drivers observed cleaning their beds to do so off the Harrison plant property. Id. Arrangements had not been made, however, to inform drivers at the entrance to the plant that they could not clean their truck beds on the premises. 2/ Id. Although not determinative as to whether or not there was a violation of the standard, the record reflects certain circumstances concerning the death of the truck driver, Mr. Meyer. Meyer was found by the judge below to have entered the Harrison facility on April 25, 1978, to pick up some fill sand for the RBS Trucking Company, a customer of American Materials. 3 FMSHRC 1527-28; Tr. 162. Fill sand is unwashed sand used primarily to manufacture asphalt. Tr. 162. Meyer was not an employee of American Materials; rather, he either owned a truck and drove for RBS, or was an employee of RBS; in either case he was on American Materials' premises to haul sand and/or gravel from American's mine to RBS. 3 FMSHRC 1527. American Materials' records indicate that Meyer had been on the property before the date of the accident to pick up sand and gravel. Tr. 150-51. On April 25, Meyer was driving west on a haulage road marked one-way east, when he pulled off the hard-surfaced road on his left side. 3 FMSHRC 1527-28. Powerlines carrying 4,160 volts run parallel to this road, approximately 28-1/2 feet above the ground. Id. The day was wet and windy, and Meyer parked on muddy and unstable ground. Id.; Tr. 37. Meyer raised the bed of his tractor-trailer to its full height of 28-1/2 feet, and left the cab of his tractor. 3 FMSHRC 1528. As he stood on the frame of the tractor to pull the tailgate release, a powerline energized the raised trailer bed, and electrocuted Meyer. Id.

I.

The standard requires the posting of warning signs or the barricading of approaches to areas containing hazards that are not "immediately obvious to employees." 3/ Meyer was not employed by American Materials Thus, the first question is whether under section 56.20-11, Meyer was an "employee." To determine the meaning of "employee" we examine that term in the context of the statute under which section 56.20-11 was promulgated, regulations which implemented that statute, and the successor statute under which the standard is currently enforced.

We note, as did the judge, that the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq (1976)(repealed 1977), used a variety of words when it referred to those persons for whom protection was intended, including "workers in such mines", "employees of the mine", "mine workers", and "employees." See sections 7(a), 8(a)(3), 10(c), 15, and 19(b) and (c) of the Metal-Nonmetallic Act. None of these terms was defined in the Metal-Nonmetallic Act; nor did

2/ After the accident, and before the hearing in August 1980, American Materials provided a waste area where truck beds could be cleaned.
3 FMSHRC 1535.

3/ The duty to comply with the standard is the operator's. The operator must barricade or post the hazardous areas. American Materials was charged with the violation based on its failure to act, not on Meyer's conduct.

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that Act's legislative history refer to them. The Secretary of Interior promulgated Part 56, which contains § 56.20-11, to implement the Metal-Nonmetallic Act. Part 56 contains health and safety standards for sand, gravel, and crushed stone operations. In these regulations the Secretary also used a variety of words to indicate to whom a standard applies, e.g., "men," "persons" and "employees." 30 C.F.R. §§ 56.3-5, 56.6-90, 56.9-20. The Secretary defined the term "employee" as "a person who works for wages or salary in the service of an employer." 30 C.F.R. § 56.2.

Neither the term "employees" in the Metal-Nonmetallic Act nor the term "employee" as defined in Part 56 expressly limits protection to employees of the mine operator or to any particular type of "employee." The Secretary of Interior was required, however, to "develop ... and promulgate health and safety standards for the purpose of the protection of life, the promotion of health and safety, and the prevention of accidents in mines which are subject to this Act." 30 U.S.C. § 725(a) (1976)(repealed 1977). This reflects a broad intent to protect those working in mines regardless of the details of their employment contracts. Thus, even under the Metal-Nonmetallic Act, Meyer might well be an "employee" protected by the standard. We need not decide this because, as the judge noted, the Metal-Nonmetallic Act was repealed in 1977 and was replaced by the Mine Act.

Under the Mine Act, mandatory standards previously promulgated under the Metal-Nonmetallic Act:

remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines ... under the Federal Mine Safety and Health Act of 1977 until such time as the Secretary of Labor shall issue new or revised health or safety standards.

30 U.S.C. § 961(a). This transfer section, as well as general principles of statutory construction, require, as the judge stated, that one read 30 C.F.R. § 56.20-11 in harmony with the Mine Act. 4/ In addition, the legislative history of the Mine Act clearly shows congressional desire to strengthen health and safety protection for metal and nonmetallic workers: "[T]he Metal Act does not provide effective protection for miners from health and safety hazards."

Legis. Hist., at 596. See also Legis. Hist., at 597. Thus, we hold that "employee" as used in section 56.11-20 should be interpreted in conjunction with "miner" under the 1977 Mine Act. 5/ As the judge held, the protections afforded an

4/ See 1A Sutherland, Statutory Construction, § 23.34, at 196 (4th ed. 1973). We reject American Materials' argument that the transfer provision could be read to indicate that regulations promulgated under the Metal-Nonmetallic Act are to be interpreted as if that Act were yet extant. Rather, we believe the legislative history amply supports the conclusion that the provision was intended to prevent the wholesale application of coal mine regulations to non-coal mines. H. Rep. No. 95-312, 95th Cong., 1st Sess. 10, 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 366, 370 (1978)("Legis. Hist.").

5/ "[M]iner means any individual working in a coal or other mine." 30 U.S.C. § 802(g)(Supp. III 1979).

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employee under the standard extend to those working in mines.

3 FMSHRC 1533-34. This interpretation accords with the protective purposes of Part 56 as expressed in section 56.1, which mirrors the statement of purpose in the Metal-Nonmetallic Act quoted above. 6/ We reject American Materials' arguments to the contrary.

The judge determined that Meyer was a "miner" entitled to the protection of section 56.20-11. The evidence supports this finding. Meyer had been on the Harrison facility previously to pick up and haul materials. He was driving for RBS Trucking, a customer of American Materials. He was on a haulage road that leads to a stockpile of fill sand. American argues, however, that the Secretary presented no evidence of Meyer's purpose on the property. Although there may be no direct evidence such as a purchase agreement between Meyer and RBS or between RBS and American Materials, the circumstantial evidence summarized amply supports the judge's finding that Meyer was on the Harrison property to obtain materials. Indeed, at the hearing before the judge, counsel for American Materials acknowledged that Meyer was not a trespasser, but was "doing business" at the facility.

Tr. 171-72.

American also argues that Meyer was not engaged in activities that can be considered mining functions. Meyer, however, was driving a tractor-trailer, which was used to pick up and haul away mine products. In our view, such haulage activity is an integral part of this mining operation and we, therefore, affirm the judge's finding that Meyer was working in a ... mine." See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 37 (1981).

II.

The remaining question is whether the hazard presented by the provision was "not immediately obvious." 7/ American Materials asserts that the powerlines were "very much in plain sight." Tr. 72. The judge acknowledged that the powerlines were "readily observable" but held that the hazard was not obvious:

The fact that the powerlines themselves were readily observable under normal conditions is not dispositive of the question presented. The powerlines were sufficiently high above the ground that the hazard posed by raising a truck bed or operating other equipment in the area was not immediately obvious. The truck operator had raised the bed of the trailer from inside the truck cab. It was raining; the winds were gusting; and the operator of the truck, upon getting out of the truck, was engaged in operating

6/ Section 56.1 provides in part:

The regulations in this part are promulgated pursuant to section 6 of the [Metal-Nonmetallic Act] and prescribe health and safety standards for the purpose of the protection of life, the promotion of health and safety, and the prevention of accidents in sand ..., gravel and crushed stone operations.

7/ American Materials does not argue that no hazard existed; rather it asserts that the hazard was obvious and, therefore, that the standard did not apply.

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the tailgate. There is no way to know @sic] whether operators of trucks in the area would know about the high voltage of the wires in question. In view of all of these factors, I conclude that this was an area where a safety hazard existed which was not immediately obvious to a miner such as the subject truck driver and that neither barricades nor warning signs were posted at all the approaches.

3 FMSHRC 1535. We agree.

Approximately forty to fifty of the drivers who entered the Harrison pit and plant each day had "double hauls" they delivered coal one way and sand the other. Tr. 122-25. Some of these drivers cleaned coal residue from their truck beds by raising the truck bed and releasing the tail gate to dump the coal. 3 FMSHRC 1527; Tr. 52. "Evidence was found in the area after the accident indicating that other truck drivers had cleaned coal residue from their truck beds in the area where the accident occurred." 3 FMSHRC 1532. Substantial evidence supports the judge's finding that a driver might not notice whether these were powerlines, or if he did, could not determine what voltage they transmitted. The facts of this case clearly indicate how this hazard endangers health and safety when truck drivers raise and

lower their beds in the vicinity of the powerlines. In short, although high voltage powerlines may be an ubiquitous feature of the mining landscape, the deadly hazards associated with them are not always evident. Such was the case at the Harrison operation. Accordingly, we hold that Meyer was protected by the standard and that American's failure to post or barricade the unmarked powerlines violated the standard. 8/ The decision of the administrative law judge is affirmed.

A. E. Lawson, Commissioner

8/ To the extent American Materials may be arguing it is not liable for the violation because Meyer's conduct was unauthorized and aberrational, the Mine Act's imposition of liability regardless of fault, requires us to reject its contention. *Allied Products, Co. v. FMSHRC*, ___ F.2d ___, No. 80-7934, 5th Cir. Unit B, Feb. 1, 1982.

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Distribution

Linda Leasure, Esq.

Michael McCord, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

David Wm. T. Carroll, Esq.

Smith & Schnacke

100 East Broad Street

Columbus, Ohio 43215