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MSHA V. IDEAL CEMENT
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 27, 1990

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

v. Docket No. WEST 88-202-M

IDEAL CEMENT COMPANY

BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

DECISION

BY: Backley, Acting Chairman; Doyle and Nelson, Commissioners

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), involves an issuance of a citation to Ideal Cement Company ("Ideal") pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), as a result of an investigation conducted after an accident in which a miner was fatally injured. The citation alleges a violation of 30 C.F.R. 56.9002 (1987), a former mandatory safety standard applicable to surface metal and nonmetal mines, which provided: "Equipment defects affecting safety shall be corrected before the equipment is used." Following an evidentiary hearing, Commission Administration Law Judge John J. Morris vacated the citation. 11 FMSHRC 1776 (September 1989) (ALJ). For the reasons that follow, we reverse in part and remand this matter to the judge for further consideration.

I.

Ideal operates the Trident Plant and Quarry, a cement

1/ 30 C.F.R. 56.9002 (1987) was revised as of July 1, 1988, and transferred along with 30 C.F.R. 57.9002, 56/57.9001, and 56/57.9073 to 30 C.F.R. 56.14100 and 57.14100. 53 Fed. Reg. 32497, 32504 (August 1988). Sections 56.14100 and 57.14100 became effective on October 24, 1988. 53 Fed. Reg. 32496 (August 1988). Therefore, at the time of the inspection on October 20-21, 1987, former section 56.9002 was still in

effect.

manufacturing facility located in Trident, Montana. In its cement manufacturing process, Ideal uses a tubular kiln that is approximately 300 feet long, 12 feet wide, and lined with 4 by 8 inch brick. Ideal produces "clinker" in he kiln by heating raw materials to approximately 3000 degrees. When the brick lining of the kiln wears out, the kiln is shut down in order to remove the worn brick.

For a time, Ideal removed the brick by hand and then began using a modified 1835 Case Uni-loader. A uni-loader (sometimes referred to in the transcript as a "bobcat") is a piece of equipment that is typically used to scoop up, transport, and dump loose materials. Ideal modified the uni-loader by removing the bucket attachment and substituting in its place a jackhammer attachment, removing the side screens of the operator's compartment, replacing the uni-loader's standard wheels with high-pressure, narrow tires, lowering the Rollover Protective Structure ("ROPS"), and placing a screen and a plywood shield in the front of the operator's compartment. Ideal left it within the operator's discretion to remove or install the uni-loader's side screens, as the operator deemed appropriate. Tr. 88, 103.

The modified uni-loader was operated by raising the jackhammer, which was attached to the sidearms, and using it to chip off the worn brick lining of the kiln ceiling. The jackhammer attachment was then replaced by a bucket attachment, which was used to scoop up the broken brick. Because the kiln was too narrow for an employee to turn the uni-loader around, the uni-loader was then backed out of the kiln and the kiln was rotated so that the section of the kiln that had been the ceiling became the floor. Finally, the uni-loader was driven into the kiln in order to repeat the chipping and cleaning process.

On October 21, 1987, at approximately 2:30 a.m., Tom Bertagnolli, an Ideal employee, was involved in a fatal accident while operating the uni-loader, without side screens, inside the kiln. Although there were no eyewitnesses to the accident, two Ideal employees, Steve Livingood and Stanley Veltkamp, prepared written statements, shortly after the accident, setting forth their recollection of events that had occurred. In his statement, Mr. Veltkamp stated:

> When I first saw Tom he was leaning out the right side of the bobcat. He was over ... the arms and the cylinder. He then moved back into the seat,

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2/ Clinker is the product that results when clay and limestone are fused together as the first stage in the manufacture of cement. Webster's Third New International Dictionary (Unabridged) 361 (1986).

> shut off the air to the jackhammer. Then he crawled out of the left side of the bobcat. The machine was idling. The arms were down. Tom started walking down the kiln. He staggered and fell to his right. When I saw him fall I ran to him and asked him if something was wrong. He said yes he had been crushed....

Exh. P-21 (emphasis added). 3 Bertagnolli was subsequently transferred to a stretcher and transported to the hospital, where he was later pronounced dead.

On October 20, 1987, Arlene Sherman, then acting as Ideal's Safety and Personnel Supervisor, completed an MSHA accident report form and a workers compensation form regarding the accident. She had spoken with employees who had been present at the time of the accident and had viewed the accident site. At the time that she completed the forms, however, her investigation had not yet been completed. On each form, Ms. Sherman stated that Bertagnolli was removing brick from the kiln when he leaned out of the right side of the uni-loader cab with the hydraulic arms raised. She stated that the right uni-loader arm had dropped and crushed him against the frame. Exhs. P-23, P-28.

MSHA Inspector Darrel Woodbeck and a state of Montana inspector, Robert Stinson, investigated the accident. The inspectors concluded that Bertagnolli must have been standing up or leaning over the side arms, that he had been crushed between the lifting arms of the bucket and the ROPS, that the uni-loader must have been running for the arms to raise, and that Bertagnoli must not have been wearing his seat belt. Tr. 357, 375-76. Stinson and Woodbeck also stated that, if the side

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3/ Veltkamp's written statement differed from his testimony at trial and from the content of an affidavit that he gave on August 25, 1988, some ten months after the accident. In the written affidavit, Veltkamp stated that he did not see Mr. Bertagnolli lean out of the uni-loader. Exh. R-1. At trial, Veltkamp testified that he could not remember if Bertagnolli leaned out of the uni-loader. Tr. 182-86. The judge credited the content of the written statement that Veltkamp prepared soon after the accident. 11 FMSHRC at 1779, n.4.

4/ The inspectors' investigation resulted in, among other things, the following findings and opinions: (1) the written specifications for a Case 1835-B Uni-Loader, published in 1984, depicted attachment of the side screens on the uni-loader (Tr. 324- 326; Exh. P-25); (2) the formal method of ingress-egress to and from the uni-loader had been blocked by the plywood and screen barrier placed in the front of the uni-loader, although the inspectors did not test the degree of effort required to remove the

screens had been in place, it would not have been possible for Bertagnolli to have placed himself in a position to be so injured. Tr. 257, 357.

On October 22, 1987, Inspector Woodbeck issued Ideal a citation, alleging a violation of section 56.9002:

> On October 20, 1987 at approximately 0230 the Case Uni-Loader model 1835, manufactured in 1982 was involved in an accident that resulted in a fatality. The side shields (guards) that prevent the operator from leaning out over the bucket were removed. This allowed the operator to lean out over the top of the bucket lifting arms and get crushed between the top of the (ROPS) and the bucket lifting arms. This was also, being used as the primary access to the operator s compartment because the front access had been blocked off by a piece of plywood and a section of wire mesh screen.

The inspector further found that the violation was of a significant and substantial nature, because he believed that the absence of the side screens substantially contributed to the likelihood of an accident and the severity of any such accident. Woodbeck also concluded that Ideal was negligent in allowing the condition to exist. Woodbeck told Bill Springman, the plant manager, to replace the side screens before the uni-loader was put back into operation. On October 22, when Woodbeck served the citation on Ideal, he observed that the side screens had been replaced and he abated the citation.

In his decision, Judge Morris vacated the citation issued to Ideal because, in essence, he found that section 56.9002 did not give Ideal adequate notice that the absence of side screens would constitute an "equipment defect affecting safety." 11 FMSHRC at 1788. Citing Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649-50 (5th Cir. 1976), the judge stated:

> The law is clear that a safety regulation that imposes civil penalties for its violation must give an employer fair warning of the conduct it prohibits or requires and must further provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

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barrier (Tr. 250, 371, 464-65); and (3) when the sidearms of the uni-loader were raised with the jackhammer in place, the backing plate to which the jackhammer was attached prevented the operator from seeing the drilling point of the jackhammer. (Tr. 254-55.)

11 FMSHRC at 1783. The judge concluded that Ideal could not have anticipated in advance that MSHA required, side screens on the equipment. He rejected the Secretary's reliance on such evidence as that "relating to the lowered ROPS, the make shift plywood screen, the probability that Bertagnolli leaned out and was crushed by the arms, the improvised jackhammer, and, in general, the restricted work area" as putting Ideal on notice of such a requirement. 11 FMSHRC at, 1786-87. The judge also dismissed as hindsight the inspectors views, that the absence of the side screens caused Bertagnolli s death. 11 FMSHRC at 1787.

Citing Allied Chemical Corp., 6 FMSHRC 1854 (August 1984), the judge also determined that the missing side screens did not fall within the coverage of section 56.9002. Although acknowledging that equipment defects within the scope of the standard are not limited solely to those in components affixed to the equipment and may take the form of missing components, the judge maintained that Allied Chemical, supra, stood for the proposition that a defect affecting safety must adversely affect actual functioning or operation of the equipment. 11 FMSHRC at 1785. The judge distinguished the present case from Allied Chemical on the grounds that there was no evidence in this case that the side screens themselves were defective or that "the lack of side screens adversely affected the operation of the uni-loader, rendered it defective, inadequate, or presented functional problems in its operation as a loader." Id.

II.

On review, the Secretary contends that the judge erred in vacating the citation because, according to her interpretation of the standard, the absence of the side screens from the uni-loader constituted a defect affecting safety. The Secretary maintains that the judge misconstrued the standard when he held that it is violated only when a "safety component present on the machine [is] in a defective state," or when "a safety component related to the successful operation of the machine in its assigned purpose" is missing. S. Br. at 5. The Secretary contends that the standard is aimed "not only at safety defects which may also affect the operational, ability of the equipment in question," but at "any defect which affects safety, whether or not that defect also affects operational ability." Id. The Secretary asserts that her interpretation of the standard is consistent with the broad purpose of the standard and is reasonable and, therefore, is entitled to deference. S. Br. at 5-6.

The Secretary further maintains that her interpretation of section 56.9002 and its application to the uni-loader do not deprive Ideal of adequate notice. S. Br. at 7. The Secretary urges application of the test of "what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the

protection of the standard," and argues that, in this case, it is clear that a reasonable person would have recognized that the removal of the side screens would adversely affect safety. S. Br. at 7. The Secretary relies upon evidence that the screens were provided by the manufacturer as a safety component, that Ideal's personnel understood that the side screens were designed to keep the uni-loader operator's body within the uni-loader, and that Ideal's safety manual provides that guards shall not be removed from equipment except when making repairs. S. Br. at 8.

We first examine the question of whether the absence of the side screens constituted an equipment defect. We agree with the Secretary that the judge erred in construing the standard to support a finding of a violation only when a component related to the operation of the equipment is defective or missing. In Allied Chemical, construing identical regulatory language in a parallel standard, the Commission stated, that "in both ordinary and mining industry usage, a defect is a fault, a deficiency, or a condition impairing the usefulness of an object, or a part." Allied Chemical, 6 FMSHRC at 1857, citing, Webster's Third New International Dictionary (Unabridged) 591 (1971); Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 307 (1968). Allied Chemical held, in part, that missing bolts in longwall roof support units were "equipment defects" (6 FMSHRC at 1857), and made clear that, in appropriate contexts, a missing component, as well as a defective one, could constitute an "equipment defect" within the meaning of section 56.9002. Although Allied Chemical focused on a relatively common type of equipment defect--one affecting the functioning of the equipment--we have no difficulty in concluding that the term "equipment defect" can also extend to a defective or missing component that does not affect the operation of the equipment.

Section 56.9002 must be construed in light of its underlying purpose --the protection of miners operating the equipment or exposed to the equipment's use. That purpose was plainly set forth in the Secretary's statement of purpose and scope of the Part 56 standards, which provided: "The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." 30 U.S.C. 56.1 (1987). (Section 56.1 has been carried forward unchanged in the Secretary's present Part 56 regulations.) Any overly narrow or restrictive reading of the scope of section 56.9002 cannot be reconciled with that statement of purpose or with the fundamental protective ends of the Mine Act itself, as set forth in section 2 of the Mine Act. See 30 U.S.C. 801(a), (d), & (e)

Thus, section 56.9002, which relates to the performance of equipment used in mines, must be interpreted and applied in a manner fostering the basic aim of protecting the health and safety of miners. The integrity of a machine is not defined

solely by its proper functional performance but must also be related to the protection of miners health and safety. If section 56.9002 were interpreted solely to emphasize the functional performance of equipment, it would, in effect, derogate from the importance of protecting the safety of miners and thereby disregard the fundamental mandate of the Mine Act. Such a construction would run counter to the underlying purposes of the Part 56 standards. In short, the proper focus of section 56.9002 encompasses the safety of miners, not merely the proper performance of equipment.

We find reasonable the Secretary's interpretation that "the gravamen of the provision [is] safety of persons," and that a missing equipment component may be as much a "defect" as a malfunctioning operational component because, in either case, the miners are deprived of the enhanced safety that the component is designed to provide. S. Br. at 5-6. In this regard, we note that the United States Court of Appeals for the District of Columbia has accorded special weight to the Secretary s reasonable interpretations of her own regulations. E.g., Secretary on behalf of Bushnell v. Cannelton Indus., Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989). we therefore hold that, under section 56.9002, missing as well as defective components may constitute "equipment defects" and thereby satisfy the first element of the two-pronged analysis of whether a condition constitutes an "equipment defect" that "affect[s] safety." In the present case, it is undisputed that the side screens were absent from the uni-loader at the time of the accident and, hence, were missing equipment components. We thus conclude that the absence of the side screens amounted to an equipment defect, within the meaning of section 56.9002 and we reverse the judge's conclusion to the contrary.

We next address whether the absence of the side screens affected safety. We note preliminarily that the language "affecting safety" has a wide reach and that "the safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." Allied Chemical, 6 FMSHRC at 1858. In addition, given the broad wording of this standard intended to be applied to myriad factual contexts, we agree with the Secretary that it is appropriate to evaluate the evidence in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." See, e.g., Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Quinland Coal, Inc., 9 FMSHRC 1614, 1617-18 (September 1987). Although the judge properly recognized that adequate notice of the conduct prohibited by section 56.9002 must be afforded an operator, he did not apply the "reasonable person test" set forth above, which is the analytical approach that the Commission has approved in order to evaluate the fairness of application of broad standards to particular factual settings.

Apparently, the judge found that Ideal did not have adequate notice of the conduct prohibited by section 56.9002 because Ideal had not received explicit prior notice that the standard required attachment of the side screens to the uni-loader. Although the judge noted evidence bearing on the safety effects of the missing side screens, he summarily disposed of it, apparently because he believed that it fell short of demonstrating explicit notice to Ideal that side screens were required by MSHA for conformance with the standard. We fully appreciate that in order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982) (citations omitted). However, in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

Because the judge did not make the requisite findings of fact with regard to the issue of whether the absence of the side screens affected safety, we therefore remand this matter to the judge. He shall consider whether a reasonably prudent person, familiar with the mining industry and the protective purpose of section 56.9002, would have recognized that the missing side screens on the uni-loader "affect[ed] safety" within the meaning of the regulation and, accordingly, would have remedied that defect prior to any further use of the equipment.

The judge should examine the evidence in the context of the modified condition in which the uni-loader was being used at the time of the accident. The judge should examine and set forth findings and conclusions based on the evidence of record including, but not limited to: (1) the testimony of the Ideal employees and the inspectors regarding whether operating the uni-loader in the kiln without side screens affected safety, taking into account the proximity of the side arms to the operator's cab; (2) any evidence regarding whether the presence of the side screens impeded the equipment operator's vision with respect to the work area; (3) any evidence regarding whether Ideal's safety policies prohibited removal of the screens; and (4) any evidence of industry or manufacturer's policy regarding the removal of the side screens and the circumstances, if any, under which the side screens could be removed without impairing safety. We express no views as to the findings to be made or the conclusions to be drawn by the judge.

III.

Accordingly, we vacate that portion of the judge's decision dealing with the issues of whether the missing side screens were an equipment defect that affected safety and remand this matter to the judge for further consideration of the issues raised above.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.

Commissioner Holen assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision of the case. Under the circumstances, she elected not to participate in the disposition of this case. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action.