

CCASE:
MSHA V. ARCH OF KENTUCKY

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

May 7, 1991
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. KENT 89-161-R
KENT 89-163-R
KENT 90-39

v.

ARCH OF KENTUCKY, INC.

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

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. •801 et seq. (1977) "Mine Act"), the issues are whether Commission Administrative Law Judge William Fauver erred in finding that Arch of Kentucky ("Arch") violated two mandatory underground coal mine safety standards: 30 C.F.R. □75.1725(c) requiring that repairs on machinery not be performed until the power is off, except where machinery motion is needed to make adjustments 1/ and 30 C.F.R. •75.1722(c), mandating that guards be in place when operating machinery, except when testing the machinery.2/ 12 FMSHRC 536 (March 1990)(ALJ) The Commission granted Arch's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

1/ 30 C.F.R. •75.1725(c) provides:
(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

2/ 30 C.F.R. •75.1722(c) provides:
(c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

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This case arises out of a fatal accident that occurred on April 18, 1989, at Arch's High Splint No. 2 Mine in Harlan County, Kentucky. The accident occurred when a tram chain on a continuous miner broke, throwing

a connecting link approximately 12 feet through the air. The chain link hit David Funk, the maintenance foreman, in the throat and severed an artery, resulting in his death. An investigation of that accident gave rise to the two citations at issue in this proceeding.

At the time of the accident, the continuous mining machine was being repaired under the direction of Mr. Funk. He and his crew of five miners were attempting to repair the right side planetary gear box on the continuous miner. In order to remove the gear box, the planetary (pinion) shaft, which extends through the gear box had to be removed. The planetary shaft extends through a planetary sprocket which turns the chain that propels the continuous miner. When the machine is in operation, the tram chain is normally covered by a guard but, at the time of the accident, the guard was open in order to provide access to the shaft and sprocket.

To allow repairs, the continuous miner was taken out of production, deenergized, jacked up, and properly blocked. The crew was unable to remove the planetary gear box, however, because the splices ^{3/} of the planetary shaft were stuck on the planetary sprocket. An attempt to remove the shaft was first made by inserting a roof bolt into the end of the shaft and hitting the roof bolt with a sledge hammer to knock out the shaft. This procedure was unsuccessful. Funk then decided to try to shear the splices off the shaft by rotating the shaft back and forth using the tram motor with the sprockets and tram chain attached. He instructed the crew to stand away from the continuous miner, for what apparently he believed to be a safe distance. Funk himself stood approximately 12 feet away from the chain. In order to permit observation of the shaft, the guard was not put back in place. Funk told the continuous miner operator to tram the motor back and forth (i.e., in forward and reverse). After approximately 15 or 20 times, the tram chain broke. A connecting link from the chain was thrown, hitting Funk's neck and severing his neck artery, causing death.

Following an investigation of the accident, the Mine Safety and Health Administration ("MSHA") issued citations to Arch charging violation of sections 75.1725(c) and 75.1722(c). The first citation alleged that repair work was performed on the continuous miner while the power was on, when the right tram motor was run in forward and reverse to strip the teeth off of the pinion shaft. The second citation alleged that the continuous miner was operated without a guard thereby exposing moving parts, the tram chain and

^{3/} A splice is a groove or rib on a shaft. Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms, 1056 (1968).

sprockets.

Before the judge, Arch argued that it did not violate section 85.1725(c) because the regulation allows machinery motion when such motion is necessary to make adjustments to the machinery. Similarly, Arch argued that the guarding provision at section 75.1722(c) contains an exception to the guarding requirement when there is a need to observe and test the effectiveness of adjustments. Arch further argued that to deny the applicability of either of the above exceptions would deprive it of adequate notice of the meaning of the exceptions and thus would be violative of due process protections and would defeat the rulemaking requirements of the Mine Act. The Secretary argued that neither the adjustments nor the testing exception applied. She contended that Funk used an unsafe method in trying to strip the planetary shaft and that this procedure had nothing to do with "making adjustments" or "testing" equipment.

Judge Fauver sustained the violations alleged in the citations.

12 FMSHRC at 539. Specifically, the judge stated:

The facts indicate that Mr. Funk tried to take a shortcut "which proved to be completely unsafe" (Stipulation No. 13). He chose a dangerous practice that is not sanctioned either as making machine "adjustment" or as "testing" machinery within the meaning of •75.1725(c) or •75.1722(c). A continuous miner is not designed to shear the splices from the planetary shaft by using the torque of the tram motors. Attempting to use it for such purpose did not qualify as an "adjustment" or "testing" exception to the cited safety standards.

Id. The judge also found that Funk was "highly negligent in endangering himself and his crew by using an unsafe and highly dangerous practice."

Id.

On review, Arch urges that the judge erred in finding a violation of section 75.1725(c), on grounds that the "adjustments" exception in the regulation is applicable to the facts of this case. Arch argues that Funk was using machinery motion to adjust the shaft.

Arch also argues that the judge erred in finding a violation of section 75.1722(c), because the "testing" exception in the regulation is applicable. Arch argues that its efforts to dislodge the shaft from the planetary gear was a matter of testing to see if the shaft could be dislodged in this fashion and that Funk felt it was necessary to observe the action of machine power on the shaft. Arch additionally argues that section 75.1722(c) is inapplicable because the hazard here (a part unexpectedly breaking from, and flying out of, equipment) is not the hazard that the regulation was designed to prevent, i.e.,

persons getting so close that they may contact moving machinery. Arch further argues that the judge erred in deciding that the "adjustments" and "testing" exceptions were inapplicable on the basis of an

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after-the-fact determination that the procedure "proved to be completely unsafe." Arch finally argues that to deny the applicability of the "adjustments" and "testing" exceptions would violate its right to due process and defeat the rulemaking requirements of the Mine Act. Arch thus takes the position that it did not have advance notice of any prohibited conduct.

I.

We first examine whether the "adjustment" exception in section 75.1725(c) applies to the facts of this case. We hold that the procedure being used by Arch was not an "adjustment" under section 75.1725(c). Accordingly, we find that the judge properly determined that Arch violated the regulation.

We agree with the judge that Funk's attempted use of the torque of the tram motor to shear the splices of the planetary shaft did not qualify as an "adjustment" under the regulation. "Adjustment" is defined as a "a means ... by which things are adjusted one to another." Webster's Third New International Dictionary (Unabridged) at 27 (1986) ("Webster's"). Arch was not engaged in the activity of adjusting parts to one another. We agree with the Secretary that Funk was attempting to destroy the planetary shaft by stripping its splices and removing it altogether from the continuous miner. Even Arch does not dispute that a continuous miner is not designed to shear the splices from the planetary shaft by using the torque of the tram motor. Arch's argument that Funk's procedure was "mak[ing] adjustments" under section 75.1725(c) must be rejected.

The purpose of section 75.1725(c) is to "prevent, to the greatest extent possible, accidents in the use of [mechanical] equipment." See 30 Fed Reg. 4976, 4977 (February 23, 1973). A safety standard should be construed to effectuate its purpose. See, e.g., Homestake Mining Co., 4 FMSHRC 146, 147-49 (February 1982). The manifest intent of the regulation is to restrict repair of machinery while the power is on. Although the power may be on "where machinery motion is necessary to make adjustment," Arch's attempted application of the exception to the facts of this case does not comport with the fundamental protective goals of the standard or of the Mine Act itself. Indeed, there is substantial evidence in the record to support the judge's finding that the procedure being used was unsafe. See MSHA's Accident Report at 5. 4/ We therefore agree with the Secretary's reasonable interpretation and application of the "adjustment" exception.

We next address whether the safety standard, including the adjustment

exception, provided Arch with fair notice of the conduct required. It is well settled that to afford fair notice, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common

4/ The parties agreed that MSHA's Accident Report correctly stated the facts of the case. Stip. 5. The Accident Report states that the accident occurred because maintenance was being performed on the continuous miner in an unsafe manner. Accident Report at 5.

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intelligence must necessarily guess at its meaning and differ as to its application." *Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990),

citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted). This Commission has held:

[I]n 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.

Ideal Cement Company, 12 FMSHRC at 2416. See also *Alabama By-Products Corp.*, 4 FMSHRC at 2129, citing *Voegele Co., Inc. v. OSHRC*, 625 F.2d 1075 (3rd Cir. 1980). 5/ Applying this test to the facts of this case, we conclude that the reasonably prudent person familiar with the mining industry would have recognized that the contemplated procedure was prohibited by section 75.1725(c). Thus, we see no due process problems stemming from Arch's asserted lack of notice. See *Alabama By-Products Corp.*, 4 FMSHRC at 2129.

II.

We next address whether the "testing" exception in section 75.1722(c) applies to the facts of this case. We hold that the procedure being used by Arch was not "testing" as contemplated by the standard. Accordingly, we find that the judge properly determined that Arch violated section 75.1722(c).

We agree with the judge that Mr. Funk's attempts to shear the splices from the planetary shaft did not qualify as testing under section 75.1722(c). Webster's defines "test" (in its verb form) as "to examine for ... physical defect." Webster's at 2362. Arch was not examining the continuous miner for physical defects or attempting to determine if the continuous miner or its components were functioning safely. Funk knew that the planetary gear box was malfunctioning and in need of repair, and that, in order to repair it, the gear box had to be removed. He had determined that the shaft had to be removed in order to remove the gear box and that the splices of the

planetary shaft were stuck on the planetary sprocket. Arch's characterization of its tramming of the motor back and forth in an effort to shear the splices and dislodge the shaft as a "test" of whether

5/ Cf. *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974); *Cane & Vineyard Division of the New Bedford Gas and Edison Electric Light Co. v OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *American Airlines v. Secretary of Labor*, 578 F.2d 38, 41 (2nd Cir. 1978) (adopting similar reasonably prudent person test under the Occupational Safety and Health Act of 1970, 29 U.S.C. •651 et seq.).

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this procedure would work does not comport with the meaning of the word "test" as used in the standard. Therefore Arch's argument that Funk was "testing" must be rejected.

The purpose of section 75.1722(c) is to prevent accidents in the use of equipment. See 38 Fed. Reg., supra, at 4977. The clear language of the regulation manifests an intent to require guards to be in place while machinery is being operated. Although a guard may be open when "testing," Arch's attempt to fit the procedure being used here into that exception does not comport with the fundamental protective ends of the standard. We therefore agree with the Secretary's reasonable interpretation and application of the "testing" exception.

We next address Arch's argument that guarding standards are designed to prevent the hazard that can result when a miner gets so close to exposed moving machine parts that he may contact a moving part. Arch argues that there is no requirement designed to prevent injury resulting from a part flying out of the machine. We reject Arch's argument.

Section 75.1722(a) states that "[g]ears; sprockets; chains; ... shafts; ... and similar exposed moving machine parts which may be contacted by persons. and which may cause injury to persons shall be guarded" (emphasis added.) Arch argues that this highlighted language limits application of section 75.1722(c) to situations where "persons get so close that they may contact moving machinery." Brief at 10. Arch thus contends that there was no violation of section 75.1722(c) because in this case there was no miner-initiated contact with moving machinery parts. We disagree. Since there were chains, sprockets and other moving parts that could be contacted by persons and cause injury, the machine parts involved here required a guard pursuant to section 75.1722(a). Because a guard was required by subsection (a), that guard was required by subsection (c) to be in place whenever the machine was in operation except when the machine was being tested. The fact that the injury was not caused by a miner initiating contact with the moving part is irrelevant.

Finally, we reject Arch's argument that the safety standard did not provide Arch with fair notice of the conduct required. The reasonably prudent person familiar with the mining industry and the protective purpose

of the standard would have recognized the requirement of the standard.
Thus, we conclude that Arch has not been deprived of due process under
the Mine Act.

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III.

Accordingly, the judge's decision is affirmed.

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