CCASE:
MSHA V. LANHAM COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 3, 1991

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

v. Docket No. KENT 89-186

LANHAM COAL COMPANY, INC.

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) (the "Mine Act" or "Act"), involves the issues of whether 30 C.F.R. 77.1710(g) provides adequate notice of its applicability to the circumstances at issue and, consequently, whether the judge erred in concluding that the Secretary of Labor established a violation of the standard, and whether the Secretary abused her discretion by citing Lanham Coal Company, Inc. ("Lanham") for a violation of section 77.1710(g) allegedly committed by its independent contractor, Caney Creek Trucking Company ("Caney"). 1/ Commission Administrative Law Judge James A. Broderick determined that a violation of the standard had occurred, and that the Secretary had not abused her discretion by citing Lanham. 12 FMSHRC 879, 882-83 (April 1990) (ALJ). The Commission granted Lanham's petition for discretionary review of the issue of whether the Secretary abused her discretion by citing Lanham and granted sua sponte review of the issues of whether Lanham had received adequate notice of the standard's applicability and

1/ 30 C.F.R. 77.1710, entitled "Protective clothing; requirements," provides in pertinent part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

whether a violation had been established. For the reasons that follow, we vacate the judge's decision and remand this case to the judge for further consideration.

I.

The essential facts are undisputed. Lanham owns and operates Lanham No. 1, a surface coal mine located in Daviess County, Kentucky. On January 23, 1989, Gazi Bokkon, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), and MSHA inspector and accident investigator Harold Utley investigated an accident that had occurred at the mine. They interviewed Tony Lanham, then acting as a foreman for Lanham, and Gregory Weinstein, an employee of Lanham, regarding the circumstances surrounding the accident.

Mr. Weinstein told the inspectors that while he was driving a load of spoil to a dump area on December 29, 1988, he saw Charles Daugherty, the owner of Caney and also a truck driver for Caney, standing on his truck and unrolling a tarp. The truck was parked in a section of the mine set aside for "tarping trucks." After he dumped his load of spoil, Weinstein drove back by the truck but did not see Daugherty. Weinstein told the inspectors that because "something just didn't feel right," he stopped his truck, and leaned out to see if he could find Daugherty. Tr. 31.32. Weinstein saw Daugherty lying on the ground. Weinstein contacted Tony Lanham by radio, and Daugherty was subsequently taken to the hospital. On January 22, 1989, the day prior to the investigation, Daugherty died. Lanham and the Secretary acknowledged in their briefs that Daugherty died for reasons unrelated to his fall from his truck. S. Br. at 2; L. Br. at 3.

As part of their investigation, Inspectors Bokkon and Utley examined the area of the mine set aside for tarping trucks. The area was level and located approximately two to three hundred feet away from the pit from which the coal was extracted. The area also was used at night to park other equipment. The inspectors did not observe any structures that indicated that safety lines or other means could be used by the truck drivers for tarping trucks. Tr. 33.

The inspectors determined that "[a]s [Daugherty] was unrolling the tarpaulin toward the rear of the trailer, he apparently slipped and fell to the ground, a distance of approximately 10 feet." G. Exh. 3. They concluded that Daugherty was not wearing a safety belt or line at the time of his fall. Tr. 9.10. Based upon their investigative findings, the inspectors issued a citation to Lanham pursuant to section 104(a) of the Mine Act alleging a violation of section 77.1710(g), which citation

states that, [a] contractor (truck driver) was working in an elevated area and was not wearing a safety belt and lines where there was a danger of falling." G. Exh. 2. The inspectors also found the violation to be significant and substantial. Id. The citation was terminated on February 14, 1989, because trucks were being tarped at another location rather than on mine property. Tr. 20. No citation was issued to Caney.

At the evidentiary hearing Lanham challenged the violation and the Secretary's decision to cite it rather than Caney. The judge determined that

the Secretary had not abused her discretion by citing Lanham, citing Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986), and concluded that in cases in which independent contractors commit violations of mandatory safety standards, the Secretary has discretion "to cite production operators as [s]he sees fit." 12 FMSHRC at 882. The judge found that a coal truck driver is in danger of falling when fastening a tarp to a truck while standing on a load of coal. 12 FMSHRC at 883. The judge concluded that because Daugherty was not wearing a safety belt or line while he was tarping his truck, a violation of the standard had been established. The judge also found that the violation did not result from Lanham's negligence, stating:

> Until MSHA was notified of the contractor truck driver's death, neither Lanham nor the inspector considered the standard applicable to the tarping of trucks. The inspector never observed safety belts or lines used in such situations in more than 40 years of mining experience. MSHA had no standards or guidelines concerning this practice. Lanham had no specific notice that the practice violated the standard. It would be absurd under these circumstances to conclude that the violation resulted from Lanham's negligence.

12 FMSHRC at 883. The judge assessed a civil penalty in the amount of $250 against Lanham, rather than the penalty of $2,500 proposed by the Secretary. Id. The Commission subsequently granted Lanham's petition for discretionary review challenging the judge's finding that the Secretary had not abused her discretion by citing Lanham and granted sua sponte review on the issues of "whether 30 C.F.R. 77.1710(g) provides adequate notice of its applicability to the circumstances at issue and whether the judge erred in concluding that the Secretary established a violation of the cited standard."

II.

Section 77.1710(g) is not detailed but rather is of the type made "simple and brief in order to be broadly adaptable to myriad circumstances." See Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981); Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982). Nevertheless, such a broad standard must afford reasonable notice of what is required or proscribed. U.S. Steel Corp., 5 FMSHRC 3, 4 (January 1983). The safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108.109 (1972);

see also Phelps Dodge v. FMSHRC, 681 F.2d 1189, 1192 (9th Cir. 1982).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "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 Co., 12 FMSHRC 2409, 2416 (November 1990). "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.'" Id. quoting Alabama By-Products Corp., 4 FMSHRC at 2129 (citations omitted).

Although the judge considered the question of prior notice when determining Lanham's degree of negligence, it appears that he did not apply the reasonably prudent person test when determining whether Lanham had notice of the specific requirements of section 77.1710(g). 12 FMSHRC at 883. Accordingly, we are remanding this proceeding to the judge so that he may determine, through application of the reasonably prudent person test, whether Lanham had fair notice that section 77.1710(g) required the use of safety belts or lines under the circumstances of this case. We do not reach the other issues raised in this case.

For the foregoing reasons, we vacate the judge's decision and remand this proceeding for further consideration by the judge.

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