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MSHA V. IDEAL CEMENT
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 18, 1991

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

v. Docket No. WEST 88-202-M

IDEAL CEMENT COMPANY

BEFORE; Backley, 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"), is before the Commission a second time. This case involves a dispute between the Secretary of Labor and Ideal Cement Company ("Ideal") concerning 30 C.F.R. 56.9002 (1988), a former mandatory safety standard applicable to surface metal and nonmetal mines, requiring that "[e]quipment defects affecting safety shall be corrected before equipment is used." The Secretary cited Ideal under section 56.9002 for operating a front-end loader without side screens. In his original decision in this matter, Commission Administrative Law Judge John J. Morris vacated the citation on the basis that section 56.9002 did not give Ideal adequate notice that the absence of side screens constituted an "equipment defect affecting safety." 11 FMSHRC 1776 (September 1989)(ALJ).

The Commission granted the Secretary's petition for discretionary review of the judge's original decision. In its earlier decision, the Commission had determined that the absence of the side screens amounted to an "equipment defect" within the meaning of the standard and reversed the judge's conclusion to the contrary. With respect to whether the absence of side screens "affect[ed] safety," the Commission determined

that the judge had incorrectly analyzed whether the standard provided adequate notice under the circumstances of the conduct prohibited. The Commission remanded the case so that the judge could resolve the issue pursuant to the reasonably prudent person test." *Ideal Cement Co.*, 12 FMSHRC at 409 (November) (1990) ("Ideal I"). In his decision on remand, the judge, upon application of the reasonably prudent person test, determined that the standard did apply to the circumstances in issue and that the Secretary had established a violation of the standard. 13 FMSHRC 359 (March 1991)(ALJ). We granted Ideal's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

Factual Background and Procedural History

The facts in this matter have been amply set forth in *Ideal I* (12 FMSHRC at 2409-12), and are summarized here. On October 20, 1987, Tom Bertagnolli, an employee of Ideal, was involved in a fatal accident inside a kiln while operating a modified front-end loader without side screens. The uni-loader had been modified for certain tasks, including kiln work, in the following respects: (1) the bucket was replaced by a jack hammer attachment; (2) the side screens were removed; (3) the standard wheels were replaced by high pressure, narrow wheels; (4) the Rollover Protective Structure ("ROPS") was lowered; and (5) a screen and a plywood shield were placed in the front of the uni-loader. At the time of the accident, Mr. Bertagnolli was using the jack hammer attachment on the uni-loader to remove worn brick from the kiln's ceiling.

An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Darrel Woodbeck, and an inspector for the State of Montana, Robert Stinson, investigated the accident. They concluded that Bertagnolli had been crushed between the uni-loader's side arms and the ROPS, that the uni-loader must have been running at the time of the accident for the arms to have raised, and that Bertagnolli must not have been wearing his seatbelt. Tr. 357, 375-76. Inspectors Woodbeck and Stinson stated their belief that if the side screens had been in place on the vehicle, it would have been impossible for Bertagnolli to place himself in a position to be so injured. Tr. 257, 357. Inspector Woodbeck issued a citation to Ideal pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging a violation of section 56.9002. The inspector noted that the citation was terminated when the side screens were subsequently replaced on the uni-loader.

The Secretary thereafter filed a proposed assessment of civil penalty in the amount of \$10,000 against Ideal for the alleged violation. Following an evidentiary hearing, Judge Morris vacated the citation because he concluded that section 56.9002 did not give Ideal adequate notice that the absence of side screens constituted an "equipment defect affecting safety." 11 FMSHRC at 1783, 1786-88. The judge acknowledged that equipment defects within the scope of the standard are not limited to components affixed to the equipment but also may take the form of missing components. The judge determined, however, that a defect affecting safety must impair the actual functioning or operation of the equipment. 11 FMSHRC at 1785. He found that the missing side screens did not constitute such a defect. *Id.*

The Commission granted the Secretary's petition for discretionary

review of Judge Morris' original decision. On review, the Commission determined that the judge erred in construing the standard to support a finding of violation only when a defective or missing component effectively impairs the operation of the equipment. 12 FMSHRC at 2414-15. The Commission held that a missing piece of safety equipment may be as much a "defect" as a malfunctioning operational component, and thereby satisfy the first element of a two-pronged analysis of whether a condition constitutes an "equipment defect" that

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"affect[s] safety." 13 FMSHRC at 2415. The Commission concluded that the absence of the side screens amounted to an equipment defect within the meaning of the standard and reversed the judge's decision to the contrary. Id.

With respect to whether the operator had sufficient notice that the absence of the side screens affected safety, the Commission determined that the judge erred when he applied a test that required Ideal to have received explicit prior notice that the standard required attachment of the side screens. 12 FMSHRC at 2415-16. The Commission concluded that the issue was properly addressed through application of the reasonably prudent person test. Id. Accordingly, the Commission remanded the case to the judge to 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 would have remedied that defect prior to any further use of the equipment." 12 FMSHRC at 2416. The Commission provided the following guidelines for such analysis.

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 inspiring safety....

In his decision on remand, the judge concluded that a violation had been established. The judge determined that, under the circumstances presented, a reasonably prudent person would have recognized that the absence of the side screens affected safety within the meaning of the standard. The judge found that safety would be affected in the context of the kiln work in two ways: bricks could fall through the area of the

missing side screens onto the uni-loader operator and the operator could be pinched by the uni-loader's sidearms. 13 FMSHRC at 364.

In reaching the conclusion that a violation had occurred, the judge considered each of the four factors suggested by the Commission in *Ideal I. supra*. With respect to the first factor the judge found that: (1) the

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inspectors had concluded that the side screens were designed to prevent contact with the lifting arms and that Bertagnolli would not have been able to place himself in a position to be crushed if the side screens had been in place; (2) there was evidence that the purpose of the side screens is to "keep your arms out from underneath the loader while you are operating it" and to prevent brick from falling on the uni-loader operators lap (Tr. 404); (3) evidence indicated that when an operator sits in the uni-loader "everything is pretty close" (Tr. 171), and photographs "confirm[ed]" this testimony; and (4) the total distance between the sidearms at mid-point was 45.4 inches. 13 FMSHRC at 360, 362-63.

With respect to the second factor listed by the Commission .. whether the presence of the side screens impeded vision .. the judge noted evidence that the screens had a tendency to impede side vision when the uni-loader was backed down a ramp and out of the kiln, and that some employees attached the side screens while others did not. 13 FMSHRC at 361, 363. The judge determined that the vision impediment existed only when the uni-loader was being backed out of the kiln and that such a problem could be rectified by using a wider ramp. The judge further found that, in any event, Bertagnolli was not engaged in backing up the uni-loader at the time when he was crushed. 13 FMSHRC at 363-64.

With respect to the third factor .. whether Ideal's safety policies prohibited removal of the screens .. the judge noted that Ideal's supervisors did not require or prevent the use of the side screens, that Ideal's safety policies did not prevent the removal of the side screens, but that Ideal's safety manual contains a provision stating, in part, that "[g]uards shall not be removed except for making repairs, cleaning, dressing, oiling or adjusting and then only by authorized persons when machines are stopped...." 13 FMSHRC at 361.63.

Concerning the fourth factor .. industry practices .. the judge stated that the record contained "no evidence of any industry or manufacturer's policy regarding the removal of the side screens and the circumstances under which the side screens could be removed without impairing safety." 13 FMSHRC at 367.

The judge thus concluded that inasmuch as the Commission had determined that the missing side screens constituted an equipment defect and, in light of his new determination that their absence affected safety, a violation of the standard had been established. He assessed a civil penalty of \$8,000. 13 FMSHRC at 365.

II.

Disposition of Issues

The essential issue presented on review is whether substantial evidence of record supports the judge's conclusion in this case that, upon application of the reasonably prudent person test, the missing side screens affected

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safety within the meaning of section 56.9002. 1/ Ideal contends that the evidence reveals: that the presence of the side screens would not have prevented the uni-loader operator from being hit with bricks falling through the front of the loader; that had Bertagnolli been wearing his seat belt, as allegedly required by Ideal's safety policies, he would not have been able to lean out of the uni-loader; that MSHA inspectors had previously observed the uni-loader being operated without side screens but had not issued any citations; and, that Ideal's employees did not consider it unsafe to operate the uni-loader without side screens because, if they had, they could have red-tagged the uni-loader and removed it from service or installed the side screens. I. Br. at 9, 14, 16 n. 11.

The phrase "affecting safety" in the standard has a wide reach and the "safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." Ideal I. 12 FMSHRC at 2415, citing Allied Chemical Corp., 6 FMSHRC 1854, 1858 (August 1984). The first safety effect found by the judge was the danger of falling brick. Although brick could have fallen through the front of the uni-loader, as pointed out by Ideal, Ideal's employees acknowledged that the side screens were used to keep

1/ Ideal argues that the judge's conclusion of violation is not supported by a "preponderance" of the evidence. Section 113(d)(2)(A)(ii)(I) of the Mine Act provides that the Commission's review is based on whether the judge's findings are supported by substantial evidence. See, e.g., Secretary v. Michael Brunson, 10 FMSHRC 594, 598 (May 1988).

Ideal has raised additional arguments. Ideal argues that the absence of the side screens does not constitute an "equipment defect" and maintains that the Commission retroactively determined that the absence of the side screens was a "per se violation of this broadly worded standard." I. Br. at 5. The Commission did not hold that the absent side screens constituted a "per se violation" of the standard but determined that the first element of the two-pronged analysis had been established. The Commission remanded the remaining safety.effect issue to the judge. 12 FMSHRC at 2415. We choose not to re-examine this issue further.

Ideal also contends that the judge improperly relied upon uncorroborated hearsay and speculation to reach his conclusion that "the absence of the side screens resulted in the accident." I. Br. at 15. The Commission has determined that hearsay evidence is admissible in its hearings, so long as it is material and relevant. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135 (May 1984). However, even if we were to conclude that the judge's finding that the "absence of the side screens resulted in the accident" was not supported by substantial evidence, it would not be determinative of whether a violation of the standard occurred. Lone Star Industries, Inc., 3 FMSHRC 2526, 2529 (November 1981). The judge did not

find a violation because the "absence of the side-screens resulted in an accident." Rather, he found that a violation was established because the missing screens affected safety in that they allowed the uni-loader operator to lean out of the cab or get his arms caught or pinched by the lifting arms, or allowed bricks to fall into the operator's lap. 13 FMSHRC at 364.

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brick from falling on the uni-loader operator. Stephen Carey, an Ideal heavy equipment operator, testified:

I came out on a B shift, and the side screens were off at that time, and I knew the machine, and, when you're knocking brick out, you always had a chance of catching a brick coming into your lap or whatnot, and I knew the machine, I think, a lot better than most people did, and so I went down ... and got the screens and ... put them on myself....

Tr. 88. Mr. Carey also stated that the purpose of the side screens was to prevent brick from falling onto the uni-loader operator's lap. Tr. 115. Bert Todd, an Ideal yard foreman, testified that the purpose of the side screens was to prevent "falling rock [from] coming down when you are loading" and "to keep your arms out from underneath the loader while you are operating it. Tr. 404.

The judge also found that the absence of side screens could allow a uni-loader operator to be pinched or crushed by the side arms. The judge noted that Stanley Veltkamp, an Ideal employee, testified that "everything is pretty close" inside the uni-loader (Tr. 171). Such testimony is corroborated by the photographs of the uni-loader. E.g., Exhs. R-2, P-6, 8-12, 16.18. Inspector Stinson testified that the purpose of the side screens was to prevent the uni-loader from contacting the uni-loader sidearms. Tr. 253-54. Inspector Woodbeck testified that Bertagnolli had been crushed between the sidearms of the uni-loader and the ROPS. Tr. 357. He explained that, if the side screens had been present on the uni-loader, it would not have been physically possible for Bertanolli to place his body over the sidearms. Id.

The foregoing testimony and other evidence constitutes substantial evidence to support the judge's conclusion that a reasonably prudent person, familiar with the mining industry and the protective purpose of section 56.9002, would have recognized that under the circumstances in which the uni-loader was being used, the missing side screen affected safety within the meaning of the standard.

We reject Ideal's argument that it is not liable for any violation in this case because of Bertagnolli's failure to wear a seat belt (as allegedly required by Ideal), which would have prevented him from leaning out of the uni-loader. Under the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct. See, e.g., Asarco, Inc. -

Northwestern Mining Dept. v. FMSHRC and AMC, 868 F.2d 1195, 1197-98 (10th Cir. 1988), and authorities cited. Moreover, this case does not involve a seatbelt violation, but rather, whether the missing side screens affected safety. 2/

2/ We note that the importance of seatbelts, which are required to be worn under current Mine Act regulations. See, e.g., 30 C.F.R. 56.14130(g) (Present mandatory safety standard for surface metal and nonmetal mines).

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We find similarly unpersuasive Ideal's argument that it did not receive adequate prior notice of the standard's requirements because MSHA had not previously cited Ideal for operating the uni-loader without side screens. Relying on settled Commission precedent, we reject Ideal's assertion that equitable estoppel should be applied against the Secretary. See. *King Knob Coal Company, Inc.*, 3 FMSHRC 1417, 1421-22 (June 1981).

For the foregoing reasons, we affirm the judge's decision. 3/

Richard V. Backley, Commissioner

Arlene Holen, Commissioner

3/ Chairman Ford did not participate in the consideration or disposition of this matter.

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