

CCASE:
MSHA V. FORD CONSTRUCTION
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December 2, 1992

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 90-346-M
	:	
FORD CONSTRUCTION COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), and involves the validity of two citations issued by the Secretary of Labor to Ford Construction Company ("Ford") for alleged violations of 30 C.F.R.

56.14130(g),(Footnote 1) which requires the wearing of seat belts Commission Administrative Law Judge John J. Morris vacated the two citations. 14 FMSHRC 373. (February 1992)(ALJ). The Secretary filed a timely petition for discretionary review. For the reasons set forth below, we reverse the judge's decision.

I.

Factual and Procedural Background

Ford provides earth moving and construction contract services to mining companies. In this case, Ford was in the process of preparing a settling pond for Meridian Gold Company. During an inspection, Jaime Alvarez, an inspector with the Secretary of Labor's Mine Safety and Health Administration ("MSHA"), observed the operator of a large piece of earth moving equipment, a 637D Caterpillar scraper, operating the equipment without wearing the seat belt installed in the equipment. He issued a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging a violation of 30 C.F.R.

1 Section 56.14130(g) provides:

Wearing Seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.

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56.14130(g), and designated it as being of a significant and substantia nature ("S&S").(Footnote 2) That citation provided:

The operator of the CAT-637-D (Co. No. 8-7) scraper was observed driving this vehicle on steep up and down grades on a bumpy roadway which would easily cause him to be knocked or bumped out of the driver's seat because he was not wearing his seat belt as required.

During that same inspection, Inspector Alvarez observed the operator of a D8H Caterpillar bulldozer operating the equipment without wearing the seat belt. Accordingly, he issued another citation pursuant to section 104(a) of the Mine Act alleging a second violation of 30 C.F.R. 56.14130(g). Inspector Alvarez did not designate this citation as being S&S.

The judge vacated the scraper citation based on his determination that section 56.14130(a) did not require seat belts to be installed in the cited equipment.(Footnote 3) 14 FMSHRC at 378-80. The judge appeared to compare the terminology used in the standard with the definition of "scraper" in the Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Minerals and Related Terms at 971 (1968) ("DMMRT"). Id. The judge determined that, although it "may well be that the term `scraper' fits within one of the six paragraphs enumerated in section 56.14130(a)," the record is "silent on that issue" and he concluded that the citation should be vacated. 14 FMSHRC at 380.

The judge, similarly, vacated the bulldozer citation based on his determination that the seat belt standard did not apply to the cited equipment. 14 FMSHRC at 382-83. The judge stated that "section 56.14130(a) is equipment specific as to what pieces and types of equipment are subject to the requirements" and that "[d]ozers are not included in the specific list of types of equipment covered by the seat belt requirements." 14 FMSHRC at 383.

2 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

3 Section 56.14130(a) provides:

Equipment included. Roll-over protective structures (ROPS) and seat belts shall be installed on--

- (1) Crawler tractors and crawler loaders;
- (2) Graders;
- (3) Wheel loaders and wheel tractors;
- (4) The tractor portion of semi-mounted scrapers, dumpers, water wagons, bottom-dump wagons, rear-dump wagons, and towed fifth wheel attachments;
- (5) Skid-steer loaders; and
- (6) Agricultural tractors.

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The judge concluded that, because the standard did not require the installation of seat belts on either piece of equipment, the citations issued for the failure to wear seat belts could not stand.

The Commission granted review of the Secretary's petition for discretionary review, which challenges the judge's factual conclusions that the scraper and dozer were not covered by the requirements of 30 C.F.R.

56.14130, as being without substantial evidence in the record. She also asserts that the plain language of the standard includes the scraper and dozer within its coverage and that the preamble to the standard supports her position.

II.

Disposition of Issues

The judge correctly determined that subsection (g) of section 56.14130, requiring that equipment operators wear seat belts, is only applicable if subsection (a) of the standard requires the installation of seat belts on the particular type of equipment being operated. Thus, in order to establish a violation of subsection (g), the Secretary must show both that a seat belt was required to be installed on the equipment and that the operator was not wearing the seat belt.

A. The Scraper

The judge stated in his decision that Ford may have been required to install seat belts on the scraper. Nonetheless, he vacated the citation based on his determination that the record did not adequately demonstrate that the term "scraper" was included within one of the categories set forth in section 56.14130(a), requiring the installation of seat belts. The judge reasoned that because the cited equipment was not expressly listed in subsection (a), the standard requiring the wearing of seat belts was not applicable. We agree with the Secretary that the judge misconstrued the meaning and scope of the standard.

Subsection (a)(4) of section 56.14130 provides that seat belts shall be installed on the "tractor portion of semi-mounted scrapers...." A tractor is defined as a "self-propelled vehicle which may be mounted on crawler tracks, on wheels with large pneumatic tires, or on a mixture of both." DMMRT at 1156. A "scraper" is defined as a:

steel tractor-driven surface vehicle, 6 to 12 cubic yard capacity, mounted on large rubber-tired wheels. The bottom is fitted with a cutting blade which, when lowered, is dragged through the soil. When full, the scraper is transported to the dumping point ...

DMMRT at 971 (Emphasis added). As the definition makes clear, scrapers are tractor-driven. Considering these definitions, it is clear that the language of subsection (a)(4) describes a scraper, as that term is ordinarily used. The designation "semi-mounted scraper" does not denote a unique classification

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of "scraper" but simply describes the ordinary configuration of a scraper, i.e. two components, tractor and bowl.(Footnote 4) Thus, scrapers, more particularly the tractor portion where the operator sits, are required to have seat belts.

The regulatory history of this standard provides added support for the Secretary's position. The predecessor to the current seat belt standard described scrapers as "self-propelled scrapers." In 1988, MSHA issued new standards for machinery and equipment at surface metal and nonmetal mines. Department of Labor, Mine Safety and Health Administration, "Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines," 53 Fed. Reg. 32496 (August 25, 1988). The preamble to the new standards expressed a clear intent to include scrapers within its coverage.(Footnote 5) It stated that the different terminology used in the new standard did not narrow the breadth of the standard and that "the final standard retain[ed] the existing standard's scope." 53 Fed. Reg. at 32511. A table was included which provided, in relevant part, that the term "tractor portion of semi-mounted scrapers" in the new regulation was to have the same meaning as did the term "self-propelled scrapers" used in the prior regulation. Id. It is undisputed that the cited scraper was self-propelled. Thus, while new terms were employed to describe a scraper, it remained within the standard's coverage.

The record in this case contains sufficient evidence to establish that the cited equipment fits within section 56.14130(a)(4). The inspector's testimony concerning the size of the cited equipment, its function and its ability to articulate describes the type of equipment covered by the standard. Tr. 12-16. Thus, the judge failed to properly construe the scope and meaning of the standard and, therefore, erred in failing to recognize the cited equipment as being within the list of equipment requiring seat belts. The judge's finding that seat belts were not required in the scraper is not supported by substantial evidence. Since there is no dispute that the operator of the cited scraper was not wearing his seat belt, we reverse the judge's decision to vacate the citation.(Footnote 6)

4 The bowl, often called the pan, scrapes the ground and scoops up overburden or other material. See Missouri Rock, 11 FMSHRC 136 (February 1989).

5 It would have been helpful to the judge for the Secretary to have placed in the record the relevant portions of the preamble to the Federal Register notice since that information is not reprinted in the Code of Federal Regulations.

6 Concern for safety alone should have resulted in use of the seat belt.

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B. The Bulldozer

The judge based his decision to vacate the second citation on the ground that the record did not adequately demonstrate that the term "dozer" was included within one of the categories set forth in subsection (a) of the cited standard. 14 FMSHRC at 383. He reasoned that, because the cited equipment did not require seat belt installation, there was no requirement to wear seat belts. We believe, as in the case of the scraper, that the judge misconstrued the meaning and scope of the standard.

Although the language of the standard itself does not include the specific term "dozer" or "bulldozer" in the six categories of equipment requiring the installation of seat belts, subsection (a)(1) provides that seat belts shall be installed on "crawler tractors and crawler loaders." A "bulldozer" is defined as a "tractor on the front end of which is mounted a vertically curved steel blade" DMMRT at 150. A "crawler" is defined as:

One of a pair of an endless chain of plates driven by sprockets and used instead of wheels, by certain power shovels, tractors, bulldozers, drilling machines, etc., as a means of propulsion. Also any machine mounted on such tracks.

DMMRT at 275 (emphasis added). It is clear that bulldozers are "crawler tractors" and are within the scope of the standard requiring the installation of seat belts.

The Secretary's position is again further supported by reference to the regulatory history. The preamble to the standard stated that the new terminology used in subsection (a) did not limit the breadth of the standard but rather retained "the existing standard's scope." 53 Fed. Reg. 32511 (1988). As in the case of the scraper, a table in the preamble provided that the terms crawler tractors and crawler loaders in the new standard were to have the same meaning as the terms used in the prior standard, which specifically included the term "dozer." Id. Thus, while new terms were employed to describe a dozer, such equipment clearly remained within the standard's coverage.

The record contains sufficient evidence to establish that the cited dozer was adequately described to place it within the coverage of the standard. The inspector's testimony concerning the equipment's size and its function together with his testimony as to its common names, "caterpillar," and "dozer," provide a sufficiently specific description to place it within the scope of the standard. Tr. 12-13, 48-50. Thus, the judge failed to properly construe the scope and meaning of the standard and, therefore, erred in failing to recognize the cited equipment as being within the list of equipment requiring seat belts. The judge's finding that dozers are not included in the categories of equipment that require seat belts is not supported by substantial evidence. Since it is undisputed that the operator of the cited dozer was not wearing his seat belt, we reverse the judge's decision to vacate the citation.

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III.

Conclusion

For the foregoing reasons, we reverse that part of the judge's decision vacating citation Nos. 3458357 and 3458425, issued because equipment operators failed to wear seat belts. We remand this proceeding to the judge to determine whether the scraper citation was properly designated as being S&S and to assess civil penalties for both citations.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner