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SOL (MSHA) V. DOLESE BROTHERS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. CENT 92-110-M
DOLESE BROTHERS COMPANY :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

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)("Mine Act" or "Act"), presents the issue of whether Dolese Brothers Co. ("Dolese") violated 30 C.F.R. 56.14211(d)(Footnote 2) and, if so, whether the judge assessed an appropriate

1 Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

2 Section 56.14211, entitled "Blocking equipment in a raised position," provides, in pertinent part:

(a) Persons shall not work on top of, under, or work from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally.

(b) Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. The equipment must also be blocked or secured to prevent rolling.

(c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

by: (1) attaching the manbasket directly to the boom, if it was equipped with a device to prevent accidental descent of the boom; or (2) attaching the manbasket to the load line, if the crane was equipped with an anti-two-block device that would prevent the load line from breaking. Id. He further found that Dolese had actual or constructive knowledge of the requirements of the Crane PPL. Id. at 1596. The judge held that Dolese violated section 56.14211 "by suspending the manbasket solely from the load line without providing a safety device to prevent the line from breaking in a 'two block' situation." Id. at 1594. The judge assessed a civil penalty of \$8,000, rather than the \$5,000 penalty proposed by the Secretary. The Commission granted Dolese's petition for discretionary review.

II.

Disposition of Issues

A. Requirements of the Safety Standard

Dolese argues that the judge's finding that it violated section 56.14211(d) is contrary to law. It contends that the manbasket was not a "constituent part" of the crane and, thus, did not fall within the standard's coverage of raised components. Dolese maintains that, in any event, it complied with the standard because both the boom and the winch on the crane were protected against uncontrolled descent. It argues that the Crane PPL did not prohibit Dolese from suspending a manbasket from the boom using the load line. Dolese also argues that section 56.14211(d) is unconstitutionally vague and does not give notice to a person of reasonable intelligence that a work platform suspended from a mobile crane is considered to be a raised component of the crane or that an anti-two-block device is required for such a platform.

The Secretary argues that the judge's findings are supported by substantial evidence and accord with law. He maintains that the manbasket was a raised component of the crane and the standard was therefore applicable. He contends that section 56.14211(d) and the Crane PPL require an anti-two-block device where a manbasket is attached to the load line of a crane. He argues that the safety standard provided Dolese with sufficient notice of its requirements.

We reject Dolese's assertion that the manbasket was not a raised component of the crane and that it did not have notice to that effect. The manbasket was attached to the hook on the load block at the end of the load line. Thus, as the crane was being used, each part was in fact, a constituent element, or component, of the mobile equipment. The load block and manbasket were in a raised position and, thus, were raised components of the crane at the time of the accident.

Sections 56.14211(a) through (c) provide that a raised component of mobile equipment must be blocked or mechanically secured to prevent accidental lowering when persons are working on top of, under or from the raised component, or are working on or around mobile equipment and are exposed to the accidental lowering of the component. Section 56.14211(d) provides that the raised component is considered to be blocked or mechanically secured if it is

provided with "a functional load-locking device or a device which prevents free and uncontrolled descent." Thus, although it describes how the requirements of subsections (a) through (c) must be implemented, subsection (d) does not expressly require the use of an anti-two-block or similar device.(Footnote 3)

Dolese contends that it was complying with the standard because both the boom and the winch were protected by check valves and flow restrictors to prevent uncontrolled descent of the boom and load line. These devices would have prevented the free fall of the manbasket in the event of a failure in the crane's hydraulic systems. It is undisputed, however, that these devices offered no protection in the event of a two-block situation.

Because the standard does not set forth the precise requirements relating to the use of the load line to support a work platform, we review the Secretary's interpretative materials. We are mindful that the Commission and the courts are obliged to give weight to the Secretary's interpretation of his regulations. S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. 49, Legislative History of the Federal Mine Safety and Health Act of 1977, at 637 (1978).

MSHA's Program Policy Manual ("Manual") provides clarification of the standard. The Manual states, in pertinent part:

Standards 56/57.14211 prohibit persons from working on, under, or from raised portions of mobile equipment or a component of mobile equipment until the equipment has been blocked or mechanically secured. The standards specifically require blocking of raised components to prevent a "free and uncontrolled descent" in the event of a sudden failure of the system holding up the raised component. Hydraulic telescoping boom cranes with flow restrictions or check valves in the hydraulic system will prevent a free and uncontrolled descent of the boom and attached work platform.

Compliance with 56/57.14211 can also be achieved by mine operators if the following ... safety features are implemented when hoisting personnel with cranes:

3 Dolese argues that the judge erred in finding that it "violated 30 C.F.R. 56.14211(a), as qualified by 56.14211(d)," because MSHA did not charge Dolese with a violation of subsection (a). D. Br. at 3, quoting 15 FMSHRC at 1597. Dolese's argument is misplaced. Subsection (d) of section 56.14211 does not stand alone but, rather, relates back to the previous subsections. As the judge noted, subsection (d) explains the requirements "provided in subsection 56.14211(a) and other parts of 56.14211." 15 FMSHRC at 1592.

1. use of an anti-two-block device with automatic shutdown capabilities that will prevent breaking of the load or whip line in the event of a two-block condition (a horn or light warning in lieu of automatic shutdown is not sufficient);

Manual Volume IV, Part 56/57, p. 55e (emphasis added).(Footnote 4)

The Manual thus provides that, if a work platform is attached directly to the boom of a crane, flow restrictors or check valves in the hydraulic system will fulfill the standard's requirements because the work platform would be protected against an uncontrolled descent. The alternative compliance method is applicable if, as in this case, the work platform is not attached to the boom, but is, instead, attached to the load line by the hook on the load block. The Manual explains that, under these circumstances, the standard requires the use of an anti-two-block device. The language in the Manual is taken directly from and is identical to the Crane PPL.

Prior to the issuance of the Crane PPL, the Secretary had required that all work platforms be attached directly to the boom of hydraulic telescoping cranes and had prohibited operators from suspending work platforms from load lines. See Program Policy Letter No. P90-IV-2 (June 4, 1990). The Crane PPL gave operators the option of attaching a work platform to the load line of a crane, so long as an anti-two-block device was provided and the other requirements set forth in the Crane PPL were met.

The Secretary's interpretation of the standard is reasonable and furthers the safety objectives of the Mine Act.(Footnote 5) A safety standard "must be interpreted so as to harmonize with and further ... the objectives of" the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Thus, we reject Dolese's assertion that it complied with the standard.

Dolese also argues that section 56.14211(d) does not provide clear and sufficient notice that use of an anti-two-block device is required when a manbasket is suspended from the load line. Some standards are "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee*

4 The Commission considers the Manual as evidence of MSHA's policies and practices. See, e.g., *Mettiki Coal Corp.*, 13 FMSHRC 760, 766-67 & nn.6 & 7 (May 1991). The U.S. Court of Appeals for the D.C. Circuit has stated that, although the Manual is not binding on the Secretary, it is "an accurate guide to current MSHA policies and practices." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989).

5 We note that the Occupational Safety and Health Administration ("OSHA") requires the use of anti-two-block devices in similar circumstances. 29 C.F.R. 1926.550(g)(3)(ii)(C). Further, OSHA prohibits the use of cranes to hoist personnel except where there is no safe alternative. 29 C.F.R. 1926.550(g)(2)

Corp., 3 FMSHRC 2496, 2497 (November 1981); Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982). "[I]n interpreting and applying broadly worded standards, the appropriate test is not whether an operator had explicit prior notice of the 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 Co. 12 FMSHRC 2409, 2416 (November 1990). Because section 56.14211(d) does not specifically require the use of an anti-two-block device when the load line of a crane is used to hoist miners, it is appropriate to apply the objective standard of the reasonably prudent person test in this instance.

We agree with the judge's conclusion that the Crane PPL is clear as to the requirement that an anti-two-block device with automatic shutdown capabilities must be used when a work platform is attached to the load line of a crane rather than to the boom. Thus, a reasonably prudent person familiar with the mining industry would have recognized the requirement of the standard. Consequently, we reject Dolese's notice argument.

B. Assessed Penalty

Dolese contends that the judge failed to base his penalty assessment on the Secretary's civil penalty regulations set forth in 30 C.F.R. Part 100. Specifically, it argues that the accident did not qualify for a special assessment under 30 C.F.R. 100.5.

The Commission has consistently held that, in assessing penalties based on the record developed in adjudicatory proceedings, the Commission is not bound by the Secretary's Part 100 regulations. Those regulations are intended to assist the Secretary in proposing penalties. Sellersburg Stone Co., 5 FMSHRC 287, 291 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678 (April 1987).

Dolese also argues that the judge did not adequately consider and apply the six statutory criteria set forth in section 110(i) of the Act. (Footnote 6) The

6 Section 110(i) provides:

The Commission shall have authority to assess all civil penalties provided in this [Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve

judge determined that the gravity of the violation was high. 15 FMSHRC at 1597. He found that the miner in the manbasket was seriously injured and that the violation could have resulted in death or permanent disabling injuries. Id. at 1596. Contrary to the assertion of Dolese, the judge's consideration of the potential for death or serious injury posed by the violation is appropriate in applying the gravity criterion.

The judge considered factors indicative of negligence. He found that two-blocking predicaments are foreseeable and mechanically preventable. 15 FMSHRC at 1597. He also found that Dolese had actual or constructive knowledge of the anti-two-block requirement and that Dolese's failure to install an anti-two-block device "reflects a serious disregard for employee safety." Id. at 1596-97. However, we cannot determine from the decision whether he specifically applied the negligence criterion in assessing the penalty.

Moreover, the judge did not discuss the history of previous violations, the size of the business, Dolese's ability to continue in business or Dolese's good faith abatement. In addition, it appears that the judge considered a factor that is not applicable under the Mine Act. He stated that "mental anguish should be considered when an employee is jerked by a manbasket, hears threatening sounds, looks up, and sees his one support (the cable) snap in two, and then immediately crashes to the ground." 15 FMSHRC at 1596. Congress did not include mental anguish as a factor to be considered in assessing civil penalties.

The Commission has held that, when an operator contests the Secretary's proposed penalties, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory criteria must be made by the judge. Sellersburg Stone, 5 FMSHRC at 292. In Pyro Mining Co. v. FMSHRC, 3 Mine Safety & Health Cas.(BNA) 2057, 2059, O.S.H. Dec.(CCH) 27,599, 785 F.2d 310 (Table)(6th Cir. 1986),(Footnote 7) the court remanded a proceeding to the Commission because the judge articulated findings of fact on only four of the criteria. The court held that "[n]ot only must the Commission consider [the] criteria, it is our opinion that the Commission must provide in its order findings of fact on each of the statutory criteria." Id. Findings are critical if the judge is assessing a penalty that differs significantly from that proposed by the Secretary. Here the judge increased the penalty by 60%.

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rapid compliance after notification of a violation. In proposing civil penalties under this [Act], the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. 820(i).

7 The Sixth Circuit's decision in Pyro Mining was not selected for full-text publication by the court.

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We remand this proceeding to the judge for consideration of the statutory penalty criteria. The judge shall enter findings for each criterion and, based on his findings, assess an appropriate penalty.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Dolese violated 30 C.F.R. 56.14211(d). We vacate that portion of the judge's decision discussing the assessment of a civil penalty and remand for reconsideration on this record consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissionert