

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

December 11, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-4-M
v.	:	A.C. No. 13-00125-197511
	:	
LAFARGE NORTH AMERICA	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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. (2006) (“Mine Act” or “Act”). It involves four citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Lafarge North America for violations of 30 C.F.R. § 56.14100(c).¹ The subject of the alleged violations was the condition of ball joints in the steering linkages of trucks. All four citations were vacated by an Administrative Law Judge. 33 FMSHRC 1621, 1624 (July 2011) (ALJ). We granted the Secretary of Labor’s subsequent petition for discretionary review. For the reasons that follow, we vacate the Judge’s decision and remand the case for further proceedings.

¹ That standard provides that:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

I.

Factual and Procedural Background

MSHA Inspector Howard Wood, in the course of inspecting all of the mobile equipment at Lafarge's Portland cement facility in Davenport, Iowa, inspected five to eight haul trucks, seven to ten pickup and service trucks, and some other mobile equipment. 33 FMSHRC at 1622-23; Tr. 23, 63, 113. He issued a number of citations as a result of his inspection, including the four at issue here. They alleged excessive movement in one or more ball joints in the steering linkages of three of the pickup trucks and one of the haul trucks. 33 FMSHRC at 1622; Tr. 24-25; Gov't Exs. 2, 6, 9, 12. The operator was cited for significant and substantial ("S&S") violations of section 56.14100(c).² The citations were terminated when Lafarge replaced either the ball joints or tie-rod ends.

At the hearing, Inspector Wood and Ronald Medina, an MSHA Mechanical Engineer, testified on behalf of the Secretary. Lafarge's lone witness was Kenneth Oliver, a mobile equipment mechanic at its Davenport plant.

Hearing testimony indicated that, in a steering assembly, the steering wheel turns a shaft that goes into the steering gear box. Tr. 135-36. Different ball joints connect the steering box to a tie rod, which permits the tires to turn in controlled, coordinated movement, to the right and left and to move up and down through the suspension system. Tr. 30, 136. The ball is supposed to rotate or swivel within its socket but should not otherwise move within it. Tr. 32, 136-38. When the ball becomes loose inside its socket, the resulting movement can adversely affect the steering of the vehicle. Tr. 40, 138-39.

Inspector Wood testified that any movement greater than one-eighth inch indicated that a hazardous defect existed. Tr. 39. Wood estimated that the ball joint movement he observed had been approximately one-quarter inch in each instance. Tr. 31, 43, 52, 54-55. His estimates were obtained while he looked underneath each of the trucks, from a distance of about two feet from each ball joint. Tr. 42, 82. The estimates were based on the amount of movement he observed relative to the width of the ink pen he held up for contrast, which he estimated to be over one-quarter inch but less than three-eighths inch in width.³ Tr. 31, 45-46, 51, 80-81.

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 any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

³ Wood asked a Lafarge employee to get in the truck and turn the steering wheel back and forth, in order to "rock" it. Tr. 30, 45, 51, 84. In the case of the three pickup trucks, Wood held onto a tire as well and testified that he felt a "little bit of knocking" or "slapping" and heard a clicking noise he attributed to the ball moving in the socket. Tr. 30-32, 51, 79.

Lafarge mechanic Oliver admitted at the hearing that the movement of one-quarter inch in a steering linkage ball joint would be hazardous. Tr. 243; *see also* L. Br. at 16. In addition, Oliver agreed that observing movement in the ball joint while the steering wheel was being turned with the vehicle on the ground, as Inspector Wood had done, was one accepted method of determining how much a steering linkage ball joint was moving. Tr. 240.

However, Oliver stated that, in replacing the cited ball joints after the issuance of the citations, he looked for excessive movement. He reported that he and a fellow employee could see “very, very, very little movement, if any,” and that a couple of the ball joints did not move at all. Tr. 222.

In his decision, the Judge did not address the amount of movement in the ball joints, which goes to the issue of whether Lafarge violated the standard. Instead his sole focus was on the issue of whether the operator had adequate notice of what the standard required.

In his discussion of the adequate notice issue, the Judge recited Wood’s testimony that, in issuing the citations, he relied in part upon a standard in the Commercial Vehicle Safety Alliance (“CVSA”) manual as a reference point for establishing that movement of greater than one-eighth inch in a ball joint meant that there was a violation of section 56.14100(c). 33 FMSHRC at 1623 (citing Tr. 39; Gov’t Ex. 4, at 8). The Judge then found that the Secretary’s other witness, Medina, disavowed that the CVSA (and thus the one-eighth inch standard used by Wood) was applicable to vehicles as small as the four cited in this case. *Id.* (citing Tr. 171). According to the judge, Medina was unable to state any measurement or standard that would be considered objective or reasonable to test the ball joints. *Id.* (citing Tr. 194).

The Judge held that the Secretary “has the burden of demonstrating some consistent and objective measure of establishing a violation of the cited standard.” *Id.* at 1624. Accordingly, he concluded that the disagreement between the Secretary’s two witnesses on what constituted consistent and objective criteria resulted in a denial of fair notice and due process in this instance. *Id.* Consequently, the Judge vacated the four citations. *Id.* He thus did not make a finding as to how much movement occurred in the ball joints or whether any such movement was so excessive that it constituted a violation of the regulation.

II.

Disposition

The Secretary contends that the Judge erred in holding that the Secretary is obligated to establish an objective measure or reasonable standard which provides notice to operators that certain actions or inactions would result in non-compliance with section 56.14100(c). PDR at 6-8. The Secretary argues that the appropriate inquiry involves instead the Commission’s “reasonably prudent person test,” i.e., whether a reasonably prudent mine operator would have understood that a specific condition violated the regulation. *Id.* Lafarge essentially agrees that

the reasonably prudent person test is the appropriate test but contends that the Judge's ruling constituted application of that standard. L. Br. at 8-10.

There is no dispute that, at some point, movement in steering linkage ball joints can rise to the level of a hazardous defect under section 56.14100(c). The issue presented by the four citations is whether there was movement in the cited ball joints that constituted a hazardous defect requiring corrective action.

However, as noted above, the Judge made no factual findings on the amount of movement in the ball joints, if any, and whether such movement was so excessive that it constituted a defect in any of the four cited instances. For example, he failed to address in any respect the inspector's testimony that the ball joint movement was approximately one-quarter inch in each instance. Instead, he immediately looked to whether the Secretary had carried a burden imposed by the Judge of "demonstrating some consistent and objective measure of establishing a violation of the cited standard." 33 FMSHRC at 1624. The Judge focused only on whether Lafarge had been provided adequate notice of the minimum amount of movement in the cited ball joints that MSHA considered to constitute a hazardous "defect" under the standard.

Before a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which "fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). In this case, the interpretation of the regulation involves the amount of ball joint movement that constitutes a "defect" under the standard. The Commission, however, has never held that adequate notice can only be established upon a showing by the Secretary of the exact criteria for noncompliance with the standard, as the Judge appears to have required in this instance.

First, the notice requirement is considered satisfied when a party has received actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the party. See *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); see also *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated party). In this case the Judge made no finding regarding whether the operator had actual notice that the movement in the ball joints was sufficient to constitute a violation. However, Lafarge's witness testified that a ball joint would be hazardously defective if it moves more than one-quarter inch. Therefore, the operator did have actual notice that at some point the movement of a ball joint makes a piece of equipment defective.

Second, in the absence of sufficient evidence of actual notice, the Commission applies the "reasonably prudent person" test for adequate notice. The test is particularly appropriate to determine if a condition or practice violates a broadly worded mine safety standard, such as the

“hazardous defect” prohibition at issue here.⁴ See *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Under the reasonably prudent person test, “the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with *the factual circumstances surrounding the allegedly hazardous condition*, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (emphasis added); see also *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement*, “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 protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed in that “particular factual setting[.]” 12 FMSHRC at 2415-16. Therefore, with respect to a broadly worded safety standard, if a reasonable person with knowledge of the particular facts, including facts peculiar to the mining industry, would recognize the existence of a defect constituting a hazard requiring corrective action within the purview of the applicable regulation, the operator has sufficient notice of the standard.

Although the Judge focused solely on “a consistent and objective measure,” here the “reasonably prudent person test” must be applied to determine whether or not a reasonable person would have recognized a defect requiring corrective action. *Alabama By-Products*, 4 FMSHRC at 2131. Because the Judge did not make the necessary factual findings regarding the “circumstances surrounding the allegedly hazardous condition” in the first instance, it is not possible to apply the reasonably prudent person test. As an initial matter, there is the critical question of the amount of movement in the cited ball joints. The Judge made no finding regarding the conflicting testimony of Inspector Wood and Lafarge’s mechanic Oliver regarding how much, if any, movement there was in the ball joints. Without findings on this question, the Commission cannot perform its review function. See *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1675-76 (Dec. 2010) (remanding for Judge to make finding on key factual predicate of citation).⁵

⁴ “[C]ourts have recognized that . . . ‘specific regulations cannot begin to cover all of the infinite variety of . . . conditions which employees must face.’” *Freeman United Coal Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) (quoting *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 730 (6th Cir. 1980)). At the same time, we have acknowledged that “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.’” *Ideal Cement*, 12 FMSHRC at 2416 (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

⁵ Commission Procedural Rule 69(a) requires that a Commission Judge’s decision “shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record.” 29 C.F.R. § 2700.69(a). Without findings of fact and some justification for the conclusions reached by a Judge, the

Consequently, we are remanding this case to a Judge to apply the reasonably prudent person test on the basis of findings that are necessarily antecedent to the ultimate question of whether a reasonably prudent person familiar with the hazards of movement in a ball joint and the use of surface equipment in the mining industry would have recognized a defect requiring corrective action with the purview of 30 C.F.R. § 56.14100(c).⁶

If the Judge finds that there was movement in the ball joints of one-quarter inch, as the citations allege, a violation has been established by Lafarge's concession that such movement in the ball joint constitutes a hazard. Tr. 243. That concession would also obviate any need to address whether Lafarge had adequate notice that MSHA considered a ball joint in such condition to constitute a violation of section 56.14100(c). The Judge would need only to determine whether the Secretary had established that the violations were S&S and to assess penalties.

If the Judge credits Oliver's testimony and finds that for some of the ball joints there was no movement, he would vacate those citations.

If the Judge finds that there was some movement in the ball joints, but that the amount was something less than the one-quarter inch that Wood estimated (if, for instance, he credited Oliver's testimony that he could see little, if any, movement), a different analysis would be necessary. The Judge would have to consider the different views of the witnesses regarding the amount of movement that existed and the amount of movement that constitutes a defect making continued operation hazardous. The Judge must apply the reasonably prudent person test to determine whether this amount of movement violated the regulation. The judge's application of the reasonably prudent person test in the context of determining the existence of a violation obviates the need for the judge to apply that test again to determine whether Lafarge had adequate notice of what the standard required.

Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981).

⁶ Similarly, in *Ideal Cement*, which involved the allegation that the operator violated a standard requiring the correction of "equipment defects affecting safety," the case was remanded "[b]ecause the Judge did not make the requisite findings of fact with regard to the issue of whether the absence of the side screens affected safety." 12 FMSHRC at 2409, 2416.

III.

Conclusion

For the reasons set forth above, we hereby vacate the decision below and remand this matter to the Chief Administrative Law Judge for further proceedings consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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