

CCASE:

MSHA V. KEER-McGEE

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

November 6, 1981

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

v.

Docket No. CENT 79-156-M

KERR-McGEE CORPORATION

#### DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et. seq. (Supp. III 1979). The administrative law judge concluded that Kerr-McGee Corporation had violated 30 CFR §57.15-5, a mandatory safety standard, and assessed a penalty. 1/ The major issue before us is whether the judge erred in his interpretation of section 57.15-5, which provides in relevant part:

Safety belts and lines shall be worn when men work where there is danger of falling....

For the reasons that follow, we affirm the judge's decision.

The citation was issued following an investigation of a fatal fall accident at Kerr-McGee's uranium mine near Gallup, New Mexico. The accident occurred in a partially completed vertical shaft that was 1,471 feet deep and 14 feet in diameter. Kerr-McGee intended to use the shaft for hoisting muck and supplies. In the floor of the shaft was a borehole approximately 3 feet in diameter and extending 54 feet below the shaft floor to a slusher passageway underneath. The borehole's opening in the floor was blocked by a plug. When miners working in the shaft needed to remove the muck that typically accumulated on the shaft floor, they raised the plug and swept the muck down the borehole. The plug was raised and powered by attaching it to the sinking bucket used to transport the men and materials.

On the day of the accident, two miners were installing wire mesh on the shaft ribs near the bottom of the shaft. At one point, they needed to sweep out some muck on the shaft floor. The lead miner climbed into the bucket in order to hoist the borehole plug. He tossed a 20-foot long cable to the other miner, the victim. The victim fastened one end of the cable to the mesh on the shaft ribs, and attached the other end of the cable to the D-ring of his safety

belt. He intended to use the

1/ The judge's decision is reported at 2 FMSHRC 3190 (1980).

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cable as a safety line while he stood on the floor of the shaft and swept the muck down the borehole. 2/

While the victim was standing on the floor next to the rib, the plug was raised approximately two feet. Because the borehole was located off-center in the shaft floor, the plug swung when it was raised, causing the lead miner to lose sight of the victim.

Subsequently, the lead miner peered over the side of the bucket and observed the victim's safety line hanging in the borehole. Neither the wire mesh nor the cable had broken, but the D-ring of the victim's safety belt had torn loose and remained attached to the end of the cable. The cable extended 9.5 feet into the borehole. The victim's body was recovered in the slusher passageway 54 feet beneath the shaft floor.

The judge found that the operator had supplied the victim with a safety belt and line, but upheld the citation because the victim had not used the equipment in a manner that would have prevented the 9.5-foot fall down the borehole. 2 FMSHRC at 3191-92. The judge indicated that the proper way to use a long safety line is to tie it off to a shorter length. *Id.* at 3192. In essence, the judge concluded that section 57.15-5 requires that safety belts and lines be used in a safe manner. Kerr-McGee argues on review that the standard literally requires operators only to supply miners with safety belts and lines. It apparently concedes, however, that the belts and lines supplied must be defect-free. Reply br. 5. Kerr-McGee contends that it complied with the standard's mandate by supplying the victim with a defect-free belt and line. We do not agree.

We first construe the general meaning of section 57.15-5. As contrasted with more detailed regulations, it is the kind made simple and brief in order to be broadly adaptable to myriad circumstances. From an operator's standpoint, one benefit of this flexible regulatory approach is that it affords considerable leeway in adapting safety requirements to the variable and unique conditions encountered in different mines. Although a literal reading of the standard might suggest that compliance is achieved whenever a miner wears any kind of line in any manner, such an interpretation is inconsistent with the purposes of the Part 57 regulations and this standard in particular. 30 CFR §57.1 describes the purpose of the Part 57 regulations as "the protection of life, the promotion of health and safety, and the prevention of accidents..." Consistent with that general aim, the specific purpose of section 57.15-5 is the prevention of dangerous falls. Dangerous falls will not be prevented if defective belts and lines are worn or if even good equipment is used in an unsafe manner.

For example, common sense suggests that a well constructed 15 foot 2/ Kerr-McGee constructed this cable as well as the other cables and safety lines used at its mine. The standard length for cables that Kerr-McGee identified as "safety lines" was 10 to 15 feet. The cable involved here, however, was 20 feet in length and had been used to tie down bundles of wire mesh and transport equipment up and down the shaft. Kerr McGee's cables were all made of the same material, were the same color, and were not specifically labeled to distinguish the safety lines.

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safety line is not going to supply adequate protection for a miner working above a 10-foot dropoff. Therefore, we hold that the "shall be worn" language of the standard necessarily means worn safely and properly.

There is no dispute that the victim was wearing an approved safety belt and a 20-foot cable he intended to use as a safety line. Therefore, the primary question is the manner in which he used the equipment. We begin our analysis by examining whether, given the language of the standard, there was a "danger of falling".

When the victim tied off the cable on the ribs of the shaft, he was working on the shaft floor which was covered with muck. He was preparing to sweep muck down the borehole in the shaft floor. Once the blocking plug was hoisted from the borehole, he would be working in proximity to the open borehole. Under these circumstances, we find that the "danger of falling" he faced was slipping or otherwise losing his balance in the muck and falling down the open 54-foot long borehole. This danger is underscored by the facts that the borehole was kept plugged, obviously in part to prevent falls down the hole, and that the victim tied himself off just prior to the raising of the plug.

Since the miner's actual accident does not ipso facto prove a violation, our focus regarding safe use is on the adequacy of what the miner did when faced with this danger of falling. The victim tied himself off in a manner that permitted a possible 9.5 foot fall into the borehole. The uncontroverted evidence in this case establishes that long falls subject the person involved, the safety line and belt, and all attachment or anchorage points to great stress, and that a 9.5 foot fall was too long to be considered safe. 2 FMSHRC at 3191-2; Tr. 26, 31, 34-6, 61, 95 5, 103. For example, this evidence specifically showed that the victim's safety belt had been designed and laboratory tested to withstand three successive drops of a 250 pound rigid weight free falling a distance of 6 feet. 2 FMSHRC at 3192; Tr. 34-6. When the miner tied himself off in a manner that permitted a possible 9.5 foot fall into the borehole, he created a situation in which such a fall would produce a stress virtually meeting, if not exceeding, the performance standards of the safety belt. 3/ We therefore agree with

the judge that the equipment was not used safely because the line was not shortened sufficiently by tying off to prevent a hazardously long fall. 4/

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3/ Kerr-McGee presented mathematical calculations that since the victim weighed 155 pounds, the belt should have been able to withstand a free fall of 9.68 feet. 2 FMSHRC at 3192. As the judge pointed out, following this mathematical approach to its logical conclusion, the victim's tying off in such a manner that a 9.5 fall was possible would leave him a theoretical safety margin of .18 of a foot, i.e., 2.16 inches, under laboratory conditions. *Id.* Assuming the accuracy of these calculations, we observe, however, that the calculations overlook the additional stress created by the weight of his clothing, equipment, and, indeed, the safety line itself. We further note that mines are not laboratories and miners are not experimental "rigid weights." A .18-foot theoretical "safety margin" is probably non-existent under conditions of actual use, where the hazards of mine work militate against subjecting such equipment to its absolute laboratory limits.

4/ We note that Kerr McGee's general mine foreman at the mine where the accident occurred testified that the failure to shorten the cable (Footnote continued)

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Kerr-McGee argues that even if the miner used the equipment unsafely, it was not responsible for his actions and therefore should not be held liable for any violation. However, the Mine Act, like the 1969 Coal Act, provides for the imposition of liability without regard to fault. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-9 (1981). Therefore, the judge correctly pointed out that fault is properly a matter for the penalty assessment stage of proceedings under the Mine Act. *Cf. Nacco Mining Co.*, 3 FMSHRC 848, 849-51 (1981) and authorities cited (holding, in a 1969 Coal Act case, that a foreman's aberrant conduct, while imputable to operator for liability purposes, may be considered in weighing the operator's "negligence"). In any event, Kerr-McGee is not entirely blameless with regard to the miner's unsafe use of the equipment. The cables used by Kerr-McGee for hoisting materials or tying down bundles of mesh were identical in appearance to the cables used as safety lines, differing only in their length. Thus, it is not surprising that, as happened here, a hoisting cable exceeding the 10 to 15 foot designated length for safety lines was used as a safety line. 5/

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fn. 4/ continue

was unsafe use:

Q. Mr. Eroh, is it your opinion that the fashion in which [the victim] used the 20-foot cable sling was improper?

A. Yes.

Q. So if he would have doubled it and made it 10 feet long that, in your opinion, would be proper?

A. For that particular cable.

Tr. 121 (recross-examination by the Secretary).

5/ We further note that the judge's statement regarding the tying off of long lines is not necessarily a panacea. The standards of the American National Standards Institute indicate that a knot in a rope reduces the rope's strength by 50%. Tr. 34. Repeated tying off of long lines may also result in structural damage to the lines.

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For the foregoing reasons, we affirm the decision of the judge. 6/  
Frank F. Jestrab, Commissioner

6/ Kerr-McGee raises substantial evidence objections on the liability issue that are beside the point given our analysis. Kerr-McGee argues that the Secretary failed to establish the causes of the miner's fall and of the failure of the belt. It contends that the central conclusions relating to the fall are mere speculations since no one actually witnessed the accident. Kerr-McGee hypothesizes that the broken attachment ring on the belt could have been caused by impact against sharp rocks in the borehole or shaft. The immediate causes of the fall and belt failure do not go to the essence of the violation that the line was not sufficiently and safely tied off to prevent a dangerous fall into the borehole. Thus, the judge's and our decisions mean that a violation occurred once the line was improperly tied off, regardless of whether the miner actually proceeded to fall into the borehole.

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