

CCASE:

MSHA V. MATHIES COAL

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

March 24, 1983

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

Docket Nos. PENN 80-260-R

PENN 81-35

v.

MATHIES COAL COMPANY

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The judge held that Mathies Coal Company violated 30 C.F.R. § 75.1722(a) and assessed a \$750 penalty. 3 FMSHRC 1998 (August 1981)(ALJ). For the reasons that follow we reverse.

Section 75.1722(a) provides:

Gears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

On May 16, 1980, Mathies received a citation alleging a violation of section 75.1722(a) stating:

It was revealed during a fatal accident investigation that the automatic elevator and associated parts ... was [sic] not guarded adequately to keep persons from coming in contact with the elevator as it was moving in the shaft along the stairways at the first and second landings.

The elevator shaft and the adjacent stairway mentioned in the citation extend from the surface to the mine floor 273 feet below. The first landing of the stairway is above the surface and the second landing is approximately level with the surface. Two doors provide ingress and egress to the stairwell; one at the first landing above ground level and one at the mine floor. From the mine floor up to approximately 24 to 32 inches above the floor of the second landing, the elevator and stairwell are separated by corrugated metal. Parallel to and level with the top of the corrugated metal is an 1-

beam. At the
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time of the citation, above the I-beam, the elevator shaft was separated from the first and second landings and the first flight of stairs only by handrails. Thus, above and below the handrails no separation between the landings and stairs and the elevator shaft existed, except for the first 24 to 32 inches from the second landing. It was this lack of separation between the elevator shaft and the stairwell that the Secretary alleged constituted a violation of the cited standard. 1/

The citation was issued during an investigation of a fatal accident that occurred at the mine. On May 16, 1980, a miner who apparently intended to leave work early, walked up the stairs to the top of the stairwell, opened the door and stepped outside. He saw his foreman and, to avoid being seen, went back down the stairs to the second landing. There, he stepped onto the I-beam to gain access to a loose metal grate on one side of the elevator shaft from which he could exit to the surface. The elevator descended however, and a retiring cam 2/ affixed to the cage apparently struck the miner causing him to fall to the shaft bottom. 3/

The judge concluded that the "elevator cage together with its retiring cam constituted moving parts of a machine ..." within the meaning of the standard. 3 FMSHRC at 2001. On review, the Secretary argues that the purpose of section 75.1722(a) is to "protect miners from injury caused by moving machinery," and that the elevator cage is subject to the standard "because it is an 'exposed, moving machine part which may be contacted by persons and which may cause injury.'" Sec. br. at 5. He, like the judge, interprets the standard to cover not only the listed machine parts but all machine parts that are exposed and moving. Sec. br. at 5-6. We disagree. We find that such an interpretation ignores the grammar of the standard and makes the list of items covered surplusage.

1/ The judge stated that the area that the Secretary sought to have guarded included only a 26" by 54" space on the second landing. Our review of the citation and the testimony and arguments presented at the hearing convinces us that the alleged violative condition encompassed all the open area between the elevator shaft and the stairway and landings at the first and second levels.

2/ The retiring cam is a metal bar attached to and protruding from one side of the elevator cage. When the cage reaches the top or bottom landing of the shaft, the cam hits a switch on the side of the shaft, and causes the elevator door to open.

3/ As the parties and the judge agreed, the fatality is not determinative as to whether a violation of the standard occurred. The

violation was alleged because the elevator cage and its parts were not guarded to prevent a person from contacting them and being injured. These circumstances existed regardless of the specifics of the accident.

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"Similar," "exposed," and "moving" are all adjectives modifying "machine parts" in the standard at issue. Thus, the standard as written applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed. The pivotal inquiry, therefore, is whether the elevator cage and its associated parts, including the retiring cam, constitute moving machine parts "similar" to those listed. We think not. "Similar" is defined as:

1. having characteristics in common; very much alike ... 2. alike in substance or essentials ... 3a. having the same shape: differing only in size and position

Webster's Third New International Dictionary 2120 (unabridged 1971).

Given this definition we find it unnecessary to resort to a detailed, technical analysis of the nature of the listed moving machine parts as compared to an elevator cage. Although an elevator cage has a common characteristic with the enumerated items, i.e., motion, it is not "very much alike", "alike in substance or essentials" or of the "same shape" as the others. Quite simply, in our view, it does not even remotely resemble, in form or function, those machine parts specifically listed in the standard.

The observation of the Fifth Circuit in a case arising under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq (1976) is particularly appropriate here:

The [Secretary] contend[s] that the regulation should be liberally construed to give broad coverage because of the intent of Congress to provide safe and healthful working conditions for employees. An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.... A regulation should be construed to give effect to the natural and plain meaning of its words....

If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency

intended but did not adequately express.... We recognize that OSHA was enacted by Congress for the purpose stated by [the Secretary]. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.

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Diamond Roofing Co. v. OSHRC & Secretary of Labor, 528 F.2d 645, 649 (1976)(citations omitted). Accord, Phelps Dodge Corp. v. FMSHRC & Secretary of Labor, 681 F.2d 1189, 1193 (9th Cir. 1982).

As we have previously acknowledged, "Many standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances". Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982), quoting Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). However, even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard. Alabama By-Products Corp., supra; U.S. Steel Corp., FMSHRC Docket No. KENT 81-136 (January 27, 1983). We find this to be the case here. 4/

We emphasize that this conclusion does not mean that miners must be left at risk against dangers posed by unguarded elevators. 5/ The Secretary has adopted detailed regulations specifically applicable to hoisting equipment, including elevators. 30 C.F.R. Part 75, Subpart 0, § 75.1400 et seq. The Secretary is free to adopt an improved standard expressly requiring that elevators be guarded, thereby generally giving operators adequate notice of what is required. More pertinent to the circumstances of the present case, however, the Secretary had available a specific statutory avenue authorizing him to require "other safeguards adequate ... to minimize hazards with respect to transportation of men and materials...."

30 U.S.C. § 874(b); 30 C.F.R. § 75.1403. Through application of this provision in the first instance the Secretary could have accomplished abatement of the hazardous condition while at the same time avoiding the due process problems posed by seeking a civil penalty for a violation of a standard that did not provide adequate notice to the operator. 6/

Accordingly, the decision of the administrative law judge is reversed and the citation and penalty assessed are vacated.

Rosemary M. Collyer, Chairman
Richard V. Backley, Commissioner
L. Clair Nelson, Commissioner

4/ As the administrative law judge so aptly stated at the hearing: you start taking these words like a rubber band and stretching

[them], pretty soon you end up with some really fantastic results."
Tr. 95.

5/ In fact, the alleged hazardous condition at this mine was promptly abated by the operator through installation of a wire mesh grate, similar to cyclone fencing.

6/ At the hearing, counsel for the operator suggested the appropriateness of the Secretary's recourse to a safeguard notice requiring the installation of an appropriate guard. Tr. 81.

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Jestrab, Commissioner, dissenting:

I most respectfully dissent.

The facts as stated by my learned colleagues are not in dispute.

The investigation by MSHA concluded that the unguarded retiring cam probably caught the victim on a tool pouch which was attached to his belt. (T-48) According to the evidence, the retiring cam "...is a bar that protrudes, sticks out from the elevator that controls a switch that will either let the doors open or remain shut." (T-36, and see Operator's exhibits 10 and 21 and Gov't exhibit 6.) It thus appears that the cam was properly described and was designed to perform the usual mechanical function of a cam, that is to say, was employed to actuate nonuniform or rectilinear movement of the elevator doors. 1/ The regulation described in the citation is section

75.1722(a) which reads as follows:

Gears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; sawblades; fans inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

If the unguarded cam in this case had been in the form of a gear or sprocket or other form of wheel, it could not be doubted that the cam would fall within the express language of the regulation. To exclude this exposed moving machine part from coverage because it is not attached to a wheel is to exalt form over function.

Finally, the witness described the cam as a bar. Bar is synonymous with shaft. 2/

I would sustain the Administrative Law Judge.

Frank F. Jestrab,
Commissioner

1/ Oxford English Dictionary, Oxford 1933. Cam - ...A projecting part of a wheel or other revolving piece of machinery, adapted to impart an alternating or variable motion of any kind to another piece pressing against it, by sliding or rolling contact. Much used in machines in which a uniform revolving motion is employed to actuate any kind of a

non-uniform, alternating elliptical, or rectilinear movement. The original method by cogs or teeth fixed or cut at certain points in the circumference or disc of a wheel, but the name has been extended to any kind of eccentric, heartshaped, or spiral disc, or other appliance that serves a similar purpose.

2/ The Century Dictionary and Encyclopedia, The Century Co., New York (1899). Shaft - (e) In mach: (1) ...connected bars serving to convey force which is generated in an engine or other prime mover to the different working machines...

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Commissioner Lawson, dissenting:

Although I am not in disagreement with my colleague

Commissioner Jestrab, I would offer further explication of my reasons for dissenting from the views of the majority.

The majority interprets too narrowly a broad standard whose clear purpose is to protect miners from injury caused by contact with exposed moving machine parts, including the elevator cage and retiring cam in this case. The standard in question states:

Gears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

Mathies received a citation for failing to guard "the automatic elevator and associated parts ... adequately to keep persons from coming in contact with the elevator as it was moving in the shaft along the stairway." The majority does not disagree with the finding of the judge that an elevator cage with its retiring cam is a "machine part", nor do I, and that conclusion is supported by the operator's own witness. He testified that the elevator cage moves up and down the shaft, receives power from an external source, and the hoist equipment includes the cage, and a motor and pulleys. Tr. 117, 120, 123. Thus, the elevator cage is clearly a "machine part." The majority also concludes that the elevator cage with its cam is not "similar" to the items listed in the standard, and, therefore is beyond its reach. That determination is not supported by the evidence in this case.

First, the machine parts enumerated in section 75.1722(a) are quite dissimilar, and, when considered together, comprise a broad spectrum of parts that must be guarded. What they have in common, as the majority notes, is motion and the elevator cage shares this characteristic. Slip. op. at 3. The majority states, "Quite simply, in our view, [the elevator cage] does not even remotely resemble, in form or function, those machine parts specifically listed in the

standard." *Id.* The majority fails, however, to examine the parts listed and deduce their "form and function," and then consider whether the elevator cage with its retiring cam is "similar." Clearly, sawblades, which come in various configurations, and fan inlets, neither resemble nor function in the same manner as gears and sprockets. Attempts to classify the parts enumerated in the standard fail because the parts have little in common. Mathies suggested in its brief that the listed parts are all the "inner workings" of machinery, and are unlike the elevator cage because the movement "is the product of the parts which transmit the power." Mathies br. at 11. This theory is deficient, however, because

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sawblades actually perform the function of the saw, and "fan inlets" describes an area on one side of a fan, thus, both are certainly not within the "inner workings" of a machine. The Secretary deliberately included a wide range of items in the standard to give notice that the standard applies to a variety of machine parts in mines. Nothing in the standard limits its coverage to particular types of machine parts; rather, by its very nature, section 75.1722(a) encompasses many exposed moving machine parts. It is one of the many standards made "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). See also *Capitol Aggregates, Inc.*, 4 FMSHRC 846 (May 1982). Thus, the broad phrase "and similar exposed moving machine parts" must be read inclusively to apply to moving machine parts, such as the elevator cage, which may be contacted and may cause injury. Second, the purpose of the standard is obvious--it is to protect miners from hazards caused by exposed moving machinery. Therefore, focusing on those hazards will provide additional information on the scope of the standard. Some of the listed parts, for example, gears, sprockets, flywheels, and pulleys, could catch the limbs or clothing or a person and cause injury by pulling the object caught into the moving machinery. This concept of a "pinch point" has been used many times by our judges to describe a hazard to be avoided by this standard. See, e.g., *Missouri Gravel Co.*, 3 FMSHRC 1465 (June 1981)(ALJ)(interpreting identical standard, 30 C.F.R. § 56.14-1); *N.Y. State Dep't of Transportation*, 2 FMSHRC 1749 (July 1980)(ALJ)(interpreting 30 C.F.R. § 56-14-1); *FMC Corp.*, 2 FMSHRC 1315, 1319-22 (June 1980)(ALJ)(interpreting identical standard 30 C.F.R. § 57.14-1). The elevator cage as it ascends and descends in the shaft also creates such a "pinch point," both on the stairs with the railing, and on the landing with the I-beam. Thus, the hazard presented by the elevator with its retiring cam is similar to that presented by many items enumerated in section 75.1722(a). The moving elevator cage in this case could catch the arm of a person who tripped

while going up or down the first flight of stairs, as the judge noted. 3 FMSHRC at 2002. In addition, the retiring cam could catch on a person's clothing and pull him or her down the shaft, as happened in this case, resulting in a fatality.

Third, even if one limits the standard, as the majority does, to very specific machine parts "having characteristics in common" or "alike in substance or essentials," the cage and retiring cam fall within the standard. Slip op. at 3, quoting Webster's Third New International Dictionary. The retiring cam, which is affixed to the cage and moves with it, has the same function as gears, sprockets and couplings, all of which transfer power or motion. The function of the retiring cam is to allow the cage door to open when the cage reaches the top or bottom of the mine shaft. The retiring cam meets a roller, causing the roller to revolve and operate the switch which opens the doors. Tr. 42, Operator's Exhibit 1. Thus, the retiring cam transfers its linear motion to rotary motion to operate the switch, as Commissioner Jestrab has stated so well. This function is "alike in substance or essentials" to that of gears, sprockets and couplings, and thus brings the retiring cam within the reach of section 75.1722(a).

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Accordingly, whether one accepts a more liberal interpretation of the standard, or that espoused by the majority, the elevator cage and retiring cam fall within the category of "similar exposed moving machine parts."

The remaining question is whether the cage with its cam "may be contacted by persons... and may cause injury..." 1/ The judge correctly found that the elevator cage with its retiring cam "may be contacted" and "may cause injury to persons. He stated:

[I]t is clear that an individual while performing his regular routine work duties in a prudent manner might lose his footing and trip and fall on the second landing thereby putting part of his body into the unguarded space and coming into contact with the elevator and its retiring cam if the elevator were descending at that time. Also, the arm of an individual descending the stairs from the top to the second landing could come in contact with a descending elevator cage.

3 FMSHRC at 2001-02. In this case, as the judge found, weekly examinations of the entire stairwell were required, and the stairs could be used to enter and leave the mine, as "a few miners" including the decedent were doing in this case. Tr. 47. The elevator is used daily. Thus, in this case the elevator cage "may be contacted"

1/ Mathies also presents two procedural issues, but its arguments are not persuasive. Mathies first asserts that the judge erred in failing to rule at the hearing on its motion for a directed verdict. Initially, in a case tried without a jury the appropriate motion is one for involuntary dismissal under Federal Rule of Civil Procedure 41(b). A trial court's reservation of ruling on such a motion is, in effect, a denial of the motion. 5 Moore's Federal Practice ¶41.13[1] at 41-176 to 41-178 & n.31 (1982 & 1982-83 Supp.) Mathies had the choice of proceeding or standing on its motion. By presenting evidence, Mathies waived its right to appeal from the judge's "denial" of its motion.

Mathies' other claim of procedural error is that the judge "permitted MSHA to change its theory of prosecution after MSHA had rested its case." Mathies br. at 6. Mathies made no objection on this ground at the hearing and thus has waived any objection.

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within the meaning of that phrase in section 75.1722(a). 2/ The possibility of injury from such contact is apparent, and need not be described in detail, for example, a person or one's clothing or limb could be caught between the elevator cage and the stair railing on the first flight of stairs, or between the I-beam and the elevator on the second landing.

I therefore dissent and would affirm the judge.

2/ It is not necessary to decide in this case whether or not a particular "degree of probability" of contact should be read into section 75.1722(a). 3 FMSHRC at 2002. Whatever the precise contours of the phrase "may be contacted," they are satisfied in this case.

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