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FMSHRC-WDC
AUG 7, 1986

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

v. Docket No. WEST 84-26-M

COTTER CORPORATION

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge John A. Carlson concluded that Cotter Corporation ("Cotter") violated 30 C.F.R. § 57.18-25 (1984), a mandatory metal-nonmetal underground safety standard providing:

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

7 FMSHRC 360 (March 1985)(ALJ). 1/ For the following reasons, we reverse.

Cotter's Schwartzwald Mine is an underground uranium mining operation located in Jefferson County, Colorado. On October 6, 1984, Pete Redmond, a Cotter shift boss, assigned three miners to work in stopes 17-3 and 17-4 of the mine. (Stopes are excavated areas from which ore is mined in a series of steps.) The work crew consisted of

Romolo Lopez, Paul Herrera and Bobby Varela. Because Lopez's partner had not reported for work that day, Redmond instructed Herrera to "bounce back and forth" between Lopez and Varela. Lopez was assigned to stope 17-3 and Varela was assigned to stope 17-4. The distance between stopes 17-3 and 17-4 was approximately 50-60 feet. In order to move from one stope to another, it was necessary to climb down a ladderway, walk 50-60 feet and then climb up another ladderway.

1/ Following the Secretary of Labor's revision of the metal-nonmetal standards in January 1985, this standard now is found unchanged at 30 C.F.R. § 57.18025 (1985).

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Lopez was assigned to drill three boreholes with a jackleg drill. (A jackleg drill, sometimes referred to as a "jackdrill," is an air-operated rock drill that has a single support leg or "jackleg"). The shift had begun at 8:00 a.m. and Lopez reached his work area at around 8:30 a.m. After completing some preparatory work not involving drilling, Lopez was ready to drill at about 8:40 a.m. Herrera checked on Lopez at around 9:00 a.m. and stayed with him for approximately 15 minutes. As Herrera left stope 17-3 to go back to stope 17-4, he met Redmond, the shift boss, at the manway leading into stope 17-3. Redmond also was on his way to check on Lopez. Redmond stayed with Lopez for approximately 15 minutes, during which time Lopez was operating the drill. As Redmond left the work area, he met an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Richard Coon, and one of Cotter's safety and training specialists at the bottom of the manway leading into stope 17-3.

Inspector Coon entered stope 17-3 at approximately 10:00 a.m. and observed Lopez operating the jackleg drill by himself. Coon asked Lopez where his partner was and Lopez informed him that there was no one working with him directly, but that the other two members of the crew, who were in stope 17-4, checked on him periodically. Inspector Coon asked to speak to the other two crew members and sent Lopez to find them. On his way down the ladderway, Lopez met Herrera, who was coming up to stope 17-3 to check on him. Inspector Coon thereafter issued an imminent danger withdrawal order and citation alleging a violation of 30 C.F.R. § 57.18-25. 2/

In his decision, Judge Carlson concluded that Cotter had violated section 57.18-25. Relying on statistical reports concerning accidents involving rock drilling and on testimony from Inspector Coon, he found that an area in which jackleg drilling takes place is one where "hazardous conditions" exist within the meaning of section 57.18-25. 7 FMSHRC at 361-62. The judge applied the reasoning in *Old Ben Coal Co.*, 4 FMSHRC 1800 (October 1982), in which, analyzing a comparable "working alone" standard (30 C.F.R. § 77.1700), the Commission held:

[T]he standard requires [that where miners are working alone where hazardous conditions exist, there must be] communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation.

4 FMSHRC at 1803. The judge found that the contact that Lopez had with other Cotter employees was insufficient to meet the Old Ben test.

7 FMSHRC at 365-68. He ultimately held that Lopez was allowed to work alone in an area where hazardous conditions existed without sufficient contact with other miners. 7 FMSHRC at 368.

2/ The withdrawal order was not at issue in the proceedings before Judge Carlson.

We granted Cotter's petition for review. The American Mining Congress ("AMC") filed an amicus brief and we heard oral argument in this matter. Cotter and the AMC contend that jackleg drilling is not a per se hazardous mining activity. Cotter also asserts that there is no evidence to support the conclusion that Lopez was working in an area where specific hazardous conditions existed. Cotter argues that, even assuming hazardous conditions were present, the contact that Lopez had with other Cotter personnel was sufficient to meet the Commission's Old Ben test.

We conclude that the evidence presented by the Secretary on the present record fails to demonstrate that jackleg drilling is per se hazardous within the meaning of section 57.18-25. We further conclude that even had hazardous conditions existed in connection with Lopez's drilling, the level of contact that he had with others satisfied the requirements of the cited standard as a matter of law.

At the outset, we must dispel misconceptions as to the general meaning of this "working alone" standard. Section 57.18-25 does not prohibit employees from working alone. 3/ Contrary to some of the testimony in this case (Tr. 14-15), this standard also does not contemplate that merely because an employee is working alone, "hazardous conditions automatically exist. If that were the intended meaning of the regulation, its reference to "hazardous conditions" would be surplusage. Rather, under section 57.18-25, an employee assigned a task alone must have sufficient contact with others (i.e., must be able to be heard or seen) if, and only if, hazardous conditions within the meaning of the regulation are associated with that task. It is equally clear that the standard does not require constant contact in such circumstances. Cf. Old Ben, supra, 4 FMSHRC at 1803-04. Thus, the real question in cases arising under section 57.18-25 where hazardous conditions are shown to exist is whether the employee's contact with others, which need not be continual, was sufficient to satisfy the protective purposes of the standard.

The judge found that an area in which jackleg drilling occurs is one where "hazardous conditions" exist within the meaning of section 57.18-25. 7 FMSHRC at 261-62. The Secretary's position concerning this point is not clear. In his reply brief counsel for the Secretary disclaimed the view that jackleg drilling is per se hazardous, yet during oral argument seemed to agree with the judge's finding in that regard. Tr. Oral Arg. 35-38, 42. In any event, we conclude that the judge's finding is not supported by substantial evidence.

3/ If the Secretary wishes to prohibit certain tasks from being performed alone, he may promulgate standards that expressly accomplish that end. Such a standard is not involved here.

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The judge relied primarily on MSHA computer-generated summaries of drilling accidents in underground metal-nonmetal mines during the years 1981-1984. Exhs. P-2 through P-5. These summaries cover a wide range of different drilling operations and it is impossible to determine from the brief descriptions in many of the summaries whether jackleg drilling was specifically involved in a given accident. Moreover, some of the accidents appear to have stemmed from incidents that may not have involved drilling at all. See e.g., Exh. P-4, Items 1, 3, 4, 5, 6 & 7. On the basis of evidence so lacking in substantive explanation, we cannot endorse the judge's virtual legislative determination that jackleg drilling is per se hazardous within the intentment of section 57.18-25. 4/

Returning to our examination of the standard in light of the facts surrounding Lopez's drilling, we agree in result with the judge that Lopez was working "alone" as that term is used in section 57.18-25. 7 FMSHRC at 364-65. As discussed above, the three-man crew that included Lopez was divided between two worksites, stopes 17-3 and 17-4. Lopez was working in stope 17-3 while the other two members of the crew, Herrera and Varela, were assigned to stope 17-4. The distance between the stopes was approximately 50-60 feet, and travel between the stopes required climbing up one ladderway and down another. Under these circumstances, we conclude that "for practical purposes" Lopez was working alone in the particular work area to which he was assigned. See Old Ben, 4 FMSHRC at 1802. (As previously noted, such an assignment is not forbidden by the standard and does not, by itself, imply any violation of the standard.)

For purposes of this decision only, we will assume that specific hazardous conditions existed in connection with Lopez's work and turn to the crucial issue of whether Lopez had sufficient contact with other miners. In establishing in Old Ben a test under which such contact issues could be resolved, the Commission rejected approaches either

4/ The judge also relied upon the testimony of the inspector who issued the citation. Without detracting from the inspector's qualifications as a general expert in mine health and safety, we note his statement that he had never operated a jackleg drill (Tr. 60), his candid admission that he was not an expert on drilling (Tr. 61), and his apparent misconceptions as to the general meaning of the cited regulation. Tr. 14-16. We further note that because of its age, the judge expressed some doubt as to the weight to be accorded Exh. P-1, a 1975 report on jackleg drilling prepared by MSHA's predecessor agency, MESA, based on data for the years 1973-74.

7 FMSHRC at 362. The judge assigned weight to the report largely on the basis of the subsequently prepared MSHA computer summaries but, for the reasons discussed above, we cannot conclude that these summaries lend weight to the older MESA report. Finally, some evidence was presented that the practice of Cotter and the industry is to have miners operate jackleg drills in pairs. However, the evidence in this record falls short of establishing that any such industry norm exists or whether any such practice is founded primarily on safety or production considerations.

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requiring constant contact under all conditions or allowing any minimum level of contact to satisfy the standard. The standard involved in Old Ben, 30 C.F.R. § 77.1700, provides that no employee shall be required to "work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen." The Commission held that this standard requires:

communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication or contact increases.

4 FMSHRC at 1803. 5/

Thus, the precise issue presented is whether the contact Lopez had with the other Cotter employees was (1) of a regular and dependable nature, and (2) commensurate with the hazard presented. The judge answered the first question in the affirmative and we agree. 7 FMSHRC at 367. Herrera, who had been assigned by the shift boss, Redmond, to assist Lopez, was aware that he was to check on Lopez on a periodic basis. He did check on Lopez around 9:00 a.m., staying with him approximately 15 minutes. He also attempted to check on Lopez a second time shortly after 10:00 a.m.; however, the citation had already been issued. In between these two visits, Redmond also checked on Lopez, staying with him for approximately 15 minutes. Under these circumstances, we affirm the judge's finding that the presence of Herrera and Redmond "was in general accord with a plan to provide periodic contact with Lopez on a regularized basis." 7 FMSHRC at 367.

The actual amount of time that other miners spent with Lopez is particularly compelling. The judge found, and the evidence shows, that Lopez was in contact with other miners for a total of approximately 30 of the 80 minutes before being observed by the inspector. 7 FMSHRC at 366-67. This is nearly 40% of the time during which he was engaged in drilling-related activities in stope 17-3. Moreover, the actual drilling consumed only about 30 minutes of the 8:40-10:00 a.m. time period involved. Also during this period Varela twice walked down towards the entrance to stope 17-3 to check on Lopez. From the sound of the drill, Varela could hear that the drilling was proceeding normally. We conclude that, as a matter of law, such a substantial level of contact is sufficient to satisfy the requirements of the standard during the drilling operation at issue. Lopez was an experienced

5/ Section 57.18-25 refers to being heard or seen but, unlike section 77.1700, does not refer to "communication" with others. Like the judge (7 FMSHRC at 365-66), we do not view this difference in wording as important in this specific case, although we recognize that different issues may arise under each standard. We use the term "contact" here as a convenient summary term for being heard or seen apart from any notions of interactive "communication."

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miner (Tr. 108), his drilling assignment appears to have been routine, and the record does not reflect that any unusual mining conditions were present. We emphasize that the facts here differ significantly from the nearly total lack of contact involved in Old Ben. See 4 FMSHRC at 1801-02. Therefore, on the facts involved in the present case, the judge erred in concluding that a violation of the standard occurred.

For the foregoing reasons, the decision of the administrative law judge is reversed and the civil penalty assessed by the judge is vacated.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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