

CCASE:
MSHA V. US STEEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 27, 1983
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. KENT 81-136

UNITED STATES STEEL
CORPORATION

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of the surface coal standard, 30 C.F.R. § 77.1605(k). The standard states that "[b]erms or guards shall be provided on the outer bank of elevated roadways." 1/ In granting summary decision for United States Steel Corporation, the administrative law judge concluded that the standard was unconstitutionally vague and, therefore, unenforceable. 2/ For the reasons discussed below, we reverse and remand for further proceedings.

Following an inspection of U.S. Steel's No. 32 Mine in Lynch, Kentucky, an MSHA inspector issued a citation alleging that the company violated section 77.1605(k) by failing to install appropriate berms or guards at three areas along a mine roadway. At one location, the inspector observed a guard dislodged for a distance of 29 feet. At one of the other two cited locations there was a berm 6 to 8 inches high and 22 feet long, and at the remaining location there was a berm 16 inches high and 29 feet long. The inspector noted on the citation that the height of these berms was less than 22 inches, the axle height of what the inspector believed was the largest vehicle using the roadway, a Pettibone tractor. The relevant MSHA inspector's manual contains a policy providing that under section 77.1605(k) berms "shall be at

1/ "Berm" is defined in 30 C.F.R. § 77.2(d) as "a pile or mount of material capable of restraining a vehicle."

2/ The judge's decision is reported at 4 FMSHRC 563 (April 1982)(ALJ).

least as high as the mid-axle height of the largest vehicle using the roadway." 3/

At the hearing before the administrative law judge, the parties filed a joint stipulation in which they agreed that the citation stated that there were berms along the roadway except where the guard was dislodged. U.S. Steel claimed in the stipulation that it was replacing the guard when the citation was issued. The parties filed cross motions for summary decision.

The judge concluded that "the language of section 77.1605(k) ... is so vague and ambiguous as to render [the standard] unenforceable." 4 FMSHRC at 571. The judge also held that the Surface Manual guideline on mid-axle height, which he found formed the basis of the citation, was not part of the standard and could not be applied as though it were. 4 FMSHRC at 570-71. The judge accordingly vacated the citation. We directed review sua sponte. 30 U.S.C. § 813(d)(2)(B). The issues before us are the constitutional validity of the standard and the judge's treatment of the MSHA Surface Manual guidelines. We first address the question of whether section 77.1605(k) is unconstitutionally vague. 4/ This standard is not detailed but, as we have observed previously in a similar context, "[m]any standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" *Alabama By-Products Corp.*, *infra*, slip op. at 3, quoting from *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). Nevertheless, such broad standards must afford reasonable notice of what is required or proscribed. As we stated in *Alabama By-Products*, *supra*:

In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning

3/ MSHA, *Coal Mine Health and Safety Inspection Manual For Surface Coal Mines and Surface Work Areas of Underground Coal Mines*, at III-338 (1978) ("the Surface Manual"). The Surface Manual is Chapter III of MSHA's *Mine Inspection and Investigation Manual*, Federal Mine Safety and Health Act of 1977 (1978) ("the Inspection Manual"). The "Introduction," at vii, states that the primary purpose of the *Inspection Manual* is to provide MSHA inspection personnel with "definite guidelines" to aid them in their official duties.

4/ We reject the Secretary's contention that the Commission is without authority to pass upon the constitutional soundness of this standard. The standard was promulgated under the 1969 Coal Act, and we have held previously that challenges to the validity of a Coal Act standard, including a vagueness challenge, can be raised and decided in an adjudication before the Commission. *Alabama By-Products Corp.*, FMSHRC

Docket No. BARB 76-153, slip op. at 2 (December 9, 1982); Sewell Coal Company, 3 FMSHRC 1402, 1403-05 (June 1981).

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and differ as to its application." *Connolly v. Gerald Constr. Co.*, 269 U.S. 385, 391 (1926). Rather, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

Slip op. at 2. We resolved a vagueness challenge in *Alabama By-Products* by interpreting the standard at issue in light of a "reasonably prudent person" test (slip op. at 2-3), and we adopt the same approach in the present case.

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See *Alabama By-Products*, *supra*. See also *Voegelé Company, Inc. v. OSHRC*, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). 5/ The definition of berm in section 77.2(d) makes clear that the standard's protective purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." 6/

Under our interpretation of the standard, the adequacy of an operator's berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. When alleging a violation of the standard, the Secretary is required to present evidence showing that the operator's berms or guards do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadway's elevation and angle of incline, and the amount, type, and size of traffic using the roadway. In sum, we hold that section 77.1605(k), as construed herein, is not unconstitutionally vague and that it is therefore an enforceable standard. 7/

5/ On review the Secretary now proposes a similar test for judging the adequacy of a berm or guard. Brief for Sec'y at 14-16.

6/ "Restraining a vehicle" does not mean, as U.S. Steel suggests, absolute prevention of overtravel by all vehicles under all

circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

7/ The Secretary is privileged under the Mine Act to write a more specific berm standard setting forth more detailed specifications for construction of safe berms and guards.

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We agree with the judge that the citation in this case was issued and litigated by the Secretary largely, if not solely, on the basis of the Surface Manual's mid-axle "policy guideline." Although the citation makes no reference to the Surface Manual, previously we have cautioned the Secretary that informal materials like the Inspection Manual are not binding on the Commission and do not control over the language of standards. See *Alabama By-Products*, supra, slip op. at 5; *King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1419-23 (June 1981); *Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (October 1980). Reliance on the mid-axle guideline, without more, does not necessarily establish the berm or guard that a reasonably prudent person would have constructed under the circumstances. If the Secretary believes that a berm of mid-axle height is indeed what a reasonable person would provide in a particular case, the Secretary must prove that by a preponderance of credible evidence. We thus approve in result the judge's determination that the Secretary was not entitled to summary decision on the basis of his internal guideline alone.

Under our rules, a motion for summary decision may be granted only if the entire record shows no genuine issue of material fact and the moving party is entitled to a decision as a matter of law. 29 C.F.R. § 2700.64(b). Having found the standard invalid, the judge did not determine all factual issues necessary to a decision in this case.

We have concluded above that the standard is valid, and our review of the record indicates to us that material factual issues remain to be decided before it can be determined whether a violation occurred. To prove the allegation of "inadequate" berms requires evidence as to what type of berm or guard a reasonably prudent person would install under the circumstances. With respect to the area where the guard was dislodged, a prima facie case of violation may have been established, but the judge must make findings as to whether the guard was actually missing and whether U.S. Steel established a valid defense in its claim that the guard was being replaced. 8/ Without this kind of evidence and such findings, the entry of summary decision was inappropriate. Accordingly, we remand this proceeding in order to afford the parties the opportunity to present any additional evidence and argument with respect to the alleged violation in accordance with the principles set forth above.

8/ We express no view at this time on the viability of U.S. Steel's asserted defense to this aspect of the citation.

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For the foregoing reasons, the judge's decision is reversed and the proceeding is remanded for proceedings consistent with this decision.

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Distribution

Louise Q. Symons, Esq.

U.S. Steel Corporation

600 Grant Street, Rm. 1580

Pittsburgh, Pennsylvania 15230

Michael McCord, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Administrative Law Judge George Koutras

Fed. Mine Safety & Health Rev. Commission

5203 Leesburg Pike, 10th Floor

Falls Church, Virginia 22041