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MSHA V. MAGNA COPPER
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FMSHRC-WDC
MAY 13, 1986

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

v. Docket No. WEST 83-17-M

MAGMA COPPER COMPANY

BEFORE: Backley, Doyle, Lastowka and Nelson, 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. (1982) ("the Mine Act"). The issue is whether Magma Copper Company (Magma") violated 30 C.F.R. § 57.19-128(a)(1982), a mandatory safety standard for metal and non-metallic underground mines. The standard, which has since been revised, provided:

Mandatory. Ropes shall not be used for hoisting when they have:

- (a) More than six broken wires in any lay;
- (b) Crown wires worn to less than 65 percent of the original diameter;
- (c) A marked amount of corrosion or distortion; and
- (d) A combination of similar factors individually less severe than those above but which in aggregate might create an unsafe condition. [1/]

1/ The standard was revised and redesignated in 1983 as 30 C.F.R. § 57.19a-24, 48 Fed. Reg. 53228, 53231-32 (November 25, 1983), and

was recodified in 1985 as 30 C.F.R. § 57.19024. 50 Fed. Reg. 4082, 4119 (January 29, 1985).

Although Magma was cited for a violation of subsection (d) of the standard, former Commission Administrative Law Judge Virgil E. Vail, following a hearing on the merits, found a violation of subsection (a) and assessed a civil penalty of \$100. (The judge found that subsection (d) was too vague to be enforced.) 6 FMSHRC 1522, 1525 (June 1984)(ALJ). We granted Magma's petition for discretionary review and granted the American Mining Congress' request to participate as an amicus curiae. For the reasons that follow, we reverse.

On June 10, 1982, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection at Magma's Superior Mine, a copper mine and mill located near Superior, Arizona. The hoist in the mine's No. 9 shaft was used to lower and raise miners into and out of the mine. During an inspection of the hoist the inspector observed broken and distorted wires in different lays of the wire rope attached to the counterweight of the hoist mechanism. 2/ Based on his visual inspection of the rope the inspector believed that there were 64 broken wires within a distance of 100 feet and that there were as many as four broken wires in one lay length. 3/ Based on his observations, the inspector determined that the wire rope was in an unsafe condition and issued the citation alleging a violation of section 57.19-128(d). Magma abated the alleged violation by installing a new wire rope.

On June 15, 1982, at Magma's behest, Robert Donner, a wire rope engineer for Bethlehem Wire Rope Company ("Bethlehem"), examined the "worst section containing the worst rope lay." Donner testified that at that time he found three breaks in the lay. At the hearing Donner again examined the rope and testified that this time he observed six broken wires. Approximately one month after the citation was issued, Magma had a 12-foot piece of the rope which it considered to be the "worst section" cut off and sent to Bethlehem. An examination of the section revealed no signs of corrosion or rust and showed that the rope maintained a breaking strength of 350,000 pounds. (The catalogue strength of the rope was 358,000 pounds.)

In February 1983, eight months after the issuance of the citation, Roy L. Jameson, an MSHA health and safety specialist, examined the wire rope. After conducting an initial examination of the rope at the mine, Jameson instituted a more extensive analysis at an MSHA laboratory in Denver. The laboratory procedures involved ultrasonic cleaning of the rope and a viewing of the rope with magnification and special lighting. Based on that laboratory analysis, Jameson concluded that the rope was unsafe. Jameson

stated that he found 12 broken wires in one lay

2/ The wire rope was composed of six wire strands. Each wire strand was composed of 25 individual wires. The six wire strands surrounded a fiber core.

3/ A lay length is defined as "the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms, 629 (1968).

length, that the rope had been "peened" and had a dry core, and that the lay length of the wire rope had been extended. 4/

In finding that Magma violated section 57.128(a), the judge noted the argument of Magma's counsel that subsection (d) was too vague to be enforced and counsel's concession that subsections (a), (b) and (c) set forth objective enforceable requirements. The judge agreed that sub-section (d) was impermissibly vague, and stated that had he not found a violation of subsection (a) of section 57.128 he would have vacated the citation. The judge noted that subsection (a) clearly requires the non-use and replacement of wire ropes with more than six broken wires in one lay. The judge found Jameson's testimony that he observed 12 broken wires in one lay of wire rope to be more persuasive than that of Donner, who at the hearing testified that he could see only six broken wires. The judge therefore concluded that "a violation of subsection (a) ... was established as the most credible evidence shows there were more than six broken wires in one lay of the cited wire rope on the counterweight." 6 FMSHRC at 1526.

After reviewing the record as a whole, we find that the judge's finding of a violation of subsection (a) is not supported by substantial evidence.

The judge's finding of a violation rests on the testimony of Jameson. While Jameson's testimony that during his post-inspection laboratory analysis he found 12 broken wires in one lay length was unchallenged, the judge apparently failed to take into account other undisputed, relevant evidence. The record as a whole clearly militates against a conclusion that the Secretary proved that on June 10, 1982, there were more than six broken wires in any one lay of the wire rope.

First, we note that the inspector testified without contradiction that on June 10, 1982, he observed a maximum of only four broken wires in any one lay. The judge did not make reference to this testimony. The judge likewise did not make reference to the testimony of Donner that, when he examined the worst rope lay five days after the citation was issued and the violation was cited, he was able to find only three broken wires.

Second, the judge also did not discuss testimony concerning the possible change in the condition of the wire rope between the date of the citation and the time the rope was examined by Jameson, eight months later. There is no dispute that, following the citation, the wire rope was removed from the hoist and stored on a reel in an

uncovered outdoor storage area. During this period, it was exposed to the elements, unwound twice from the reel and dragged along the ground. Thus, during the eight-month interval between the issuance of the citation and Jameson's examination of the rope, it was exposed to abnormal conditions and additional stresses. The judge erred in not evaluating the possible

4/ "Peening" is a process whereby the metal in the wire rope flattens and the flattened metal extrudes beyond the outer edge of the rope. The extruded metal breaks off and the wire becomes brittle. 6 FMSHRC at 1525, n.2.

impact of these conditions and stresses in determining the weight to be given Jameson's testimony. The weight given to evidence of an object's subsequent condition is dependent upon the time that has elapsed between the initial event and the date referenced in the testimony, as well as upon the likelihood of change during the interval. See, e.g., *Manning v. New York Telephone Co.*, 388 F.2d 910, 912 (2d Cir. 1968).

Further, the techniques of laboratory analysis employed by Jameson to detect breaks in the wire rope were not those imposed by the MSHA standards governing inspection and maintenance of hoists. See 30 C.F.R. § 57.19-120 et seq (1982). Those standards contemplated regular visual inspection with further field testing when potential problems were indicated or at scheduled intervals. The record indicates that Magma's wire rope examination procedures met or exceeded applicable MSHA requirements. There is no credible evidence that under the examination procedures imposed by the MSHA standards that the inspector found, or Magma could have found, a violation of section 57.19-128(a) on the date of the citation's issuance. 5/

For all of the above reasons, we conclude that the judge's finding of a violation of 30 C.F.R. § 57.19-128(a) is not supported by substantial evidence. 6/

Finally, we address the judge's finding that section 57.19-128(d) is unenforceably vague. The judge stated that section 57.19-128(d) was too vague to convey the standard of conduct required of the mine operator. 6 FMSHRC 1525-26. The judge was in error. We reiterate that the fact that a standard is drafted in general terms does not mean that it is void for vagueness. Many standards must be drafted broadly in order to be adaptable to the myriad of circumstances in a mine. *Kerr McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). Such a standard, like section 57.19-128(d), is not unenforceably vague when a reasonably prudent person,

5/ We are aware that the record does indicate that prior to the subject citation being issued, replacement of the cable was under consideration. However, there is no indication that the reason for such replacement was because of noncompliance with the instant regulation.

6/ On review Magma also challenges the judge's post hearing sua sponte amendment of the Secretary's complaint to assert a violation of subsection (a). Magma argues that it was prejudiced by the amendment

in that it had not been given the opportunity to fully litigate the issue. In light of our conclusion that the judge's finding of a violation of subsection (a) is not supported by substantial evidence, it is unnecessary to reach this assignment of error. We note in passing, however, the importance of compliance with Rule 15(b) of the Federal Rules of Civil Procedure when considering such amendments and that rule's emphasis upon the parties understanding that the unpleaded claim is, in fact, being litigated.

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familiar with the mining industry and the protective purpose of the standard, would recognize the hazardous condition that the standard seeks to prevent. Ozark-Mahoning Co., 8 FMSHRC 190, 191 (February 1986), U.S. Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982).

Accordingly, the decision of the administrative law judge is reversed and the citation is vacated. 7/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

7/ Chairman Ford did not participate in the consideration or disposition of this case.

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