

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

APR 25 2018

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

v.

Docket No. SE 2015-315-M

SIMS CRANE

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY: Jordan, Young, and Cohen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Sims Crane (“Sims”). The citation alleges that Sims violated 30 C.F.R. § 56.16009¹ by allowing miners to work under a suspended spreader bar.² Sims contested the citation and the Secretary’s proposed civil penalty of \$100.

After a hearing on the merits, an Administrative Law Judge affirmed the citation and assessed a penalty of \$300 because he found that the operator’s negligence was greater than the Secretary had alleged. 38 FMSHRC 1008 (May 2016) (ALJ). Sims filed a petition for discretionary review challenging the Judge’s definition of what constitutes a “suspended load” for purposes of the standard.³

¹ Section 56.16009 provides that “[p]ersons shall stay clear of suspended loads.”

² A spreader bar is a lifting device located below the hook of a crane. It assists crane operators in balancing heavy objects by allowing the crane to attach to an object at multiple points. Tr. 29, 134-35. A spreader bar distributes the load across more than one point, thereby increasing stability during lifting. 38 FMSHRC at 1013.

³ Sims is joined in its opening brief by the following amicus curiae: Texas Crane Owners Association; Barnhart Crane and Rigging Co.; Chellino Crane, Inc.; Olori Crane Service, Inc.; L.W. Connelly and Son, Inc.; the International Union of Operating Engineers; Nabholz Industrial Services; Allegiance Crane and Equipment; Fagioli, Inc.; H.K.B., Inc.; Blackhawk Mining, LLC; and Revelation Energy, LLC. Additionally, the Specialized Carriers and Rigging Association, Crane Owners Association, and Mobile Crane Operators Group received leave of the

For the reasons that follow, we affirm in result the Judge's conclusion that Sims violated section 56.16009 when an employee walked under the suspended spreader bar.

I.

Factual and Procedural Background

During an MSHA inspection of the S.D.I. Quarry, a rock and sand mine in Florida, the inspector noticed a crane operating with a spreader bar attached to its hoist hook. He observed William Assad, a crane helper, standing under the spreader bar while the crane was scoping out⁴ its boom in preparation for dismantling and removing a shaker unit. Tr. 111.

The spreader bar at issue is a 625-pound cylindrical steel bar measuring between 10 and 14 feet long and 6 to 8 inches in diameter. The spreader bar was attached to the crane's hoist hook by means of two cables extending from opposite ends of the bar. These cables were secured to the spreader bar by u-shaped shackles which could only be detached by removing steel safety pins. At the time of the inspection, the bar was lifted approximately 25 to 35 feet in the air.

The inspector approached Assad and issued an oral imminent danger order requiring him to move out from under the spreader bar. 38 FMSHRC at 1014. While the inspector and Assad were talking, the crane operator, Milton Minchener, left the crane's cab and walked under the spreader bar to join the conversation. The inspector informed Minchener that he considered the spreader bar to be a "suspended load" and that MSHA regulations prohibited miners from working in a suspended load's fall zone. After Minchener expressed his disagreement with that interpretation, the inspector requested that Minchener provide his training papers for inspection. Minchener then turned around and walked under the spreader bar, back towards the crane's cab.

Afterwards, the inspector determined that the situation did not warrant an imminent danger order, and thus did not commit his oral order to writing. Instead, he issued a citation alleging a violation of 30 C.F.R. § 56.16009 for failing to stay clear of a suspended load. The violation was designated as non-S&S⁵ and unlikely to cause fatal injuries. The citation attributed moderate negligence to the operator. The Secretary proposed a penalty of \$100.

Commission to file a separate joint amicus brief after the completion of the normal briefing period.

⁴ "Scoping out" means extending the boom in order to position it above the object to be lifted.

⁵ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

In his decision, the Judge applied a literal definition of what constitutes a “suspended load.” Relying on a dictionary definition, the Judge found that, because the ordinary meaning of a “load” is so broad as to include anything having weight or mass, the spreader bar fit within the plain meaning of the standard. The Judge further found that the Occupational Safety and Health Administration (“OSHA”) regulations addressing cranes are not dispositive for determining whether the spreader bar was a “load” under the MSHA standard. 38 FMSHRC at 1015-1016.

In determining an appropriate penalty, the Judge took into account that Minchener had walked under the spreader bar after Peters informed him that doing so was a violation of a mandatory safety standard. Accordingly, the Judge determined that the violative conduct was the result of high negligence and increased the civil penalty to \$300. *Id.* at 1017.

II.

Disposition

A. Interpretation of Section 56.16009

The issue before the Commission is whether the necessary presence of a miner in the fall zone of a spreader bar while rigging it for use violates section 56.16009. Sims contends that MSHA and OSHA regulations and industry standards distinguish a crane’s load from load-attaching equipment, i.e., spreader bars, slings, hooks, load blocks, etc., which, it asserts, are actually raised components of the crane. Further, Sims argues that, by including load-attaching equipment in the definition of “suspended load,” the Secretary’s construction of the standard would preclude certain tasks in the rigging process that require miners to work within the fall zone of load-attaching equipment.

The Secretary contends that the presence of a miner within the fall zone of a spreader bar for any purpose violates section 56.16009. During the briefing period, however, MSHA issued a Program Policy Letter (“PPL”) recognizing that “it is occasionally necessary for miners, including riggers, to stand near load attaching equipment in order to attach and detach this equipment to the object or materials being hoisted.” No. P17-IV-01 (Feb. 6, 2017). Although the Secretary continues to assert that any presence within the fall zone is a violation, the PPL assures operators that MSHA will not issue a citation if two conditions are met: (1) the miner must be “involved in the attachment of objects or materials to the load-attaching equipment or are detaching the load” and (2) “adequate measures are in place to protect miners from hazards associated with load-attaching equipment during these processes.” *Id.*

Absent some contrary indication, “words of statutes or regulations must be given their ‘ordinary, contemporary, common meaning.’” *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009) (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). It is also axiomatic that regulatory language cannot be construed in a vacuum and must instead be read in its context and with a view to its place in the overall regulatory scheme. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

Similarly, statutes and regulations should not be construed to produce an absurd result. *Cf. Haggard Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”). As recognized by the Secretary, miners going into the fall zone may be necessary for the rigging of load-attaching equipment on a crane. *See* PPL quoted *supra*; Oral Arg. Tr. 58-63. An interpretation that section 56.16009 prohibits an activity that is required for safe and efficacious lifting and that may be performed safely is unreasonable.

A central goal of MSHA’s regulatory scheme is to protect miners from falling or swinging objects. To this end, MSHA has promulgated several standards to achieve this goal for the safe operation of equipment at mines. The general rule guiding miners’ interactions with objects suspended from cranes is set forth in 30 C.F.R. § 56.16009, which requires that miners “stay clear of suspended loads.” It does not cover specific uses of spreader bars or suspended loads. Other MSHA regulations are more precise and explicitly allow miners to work within a fall zone of suspended loads or objects in specific circumstances. Under 30 C.F.R. § 56.14211, miners may perform work on top of, under, or from a raised component of mobile equipment once the component has been adequately blocked or mechanically secured to prevent accidental lowering.⁶ This allows miners to work within the fall zone of the spreader bar while rigging a load, if the standard’s conditions are met. Applied literally, section 56.16009 would disapprove conduct that section 56.14211 expressly permits under the prescribed conditions.

Our interpretation of the general mandate in section 56.16009 must take into account the more precise language of section 56.14211. *See Harry C. Crooker & Sons, Inc. v. OSHRC*, 537 F.3d 79, 84 (1st Cir. 2008) (“It is a conventional canon of legal interpretation that specific provisions trump more general ones”); *Edmond v. United States*, 520 U.S. 651, 657 (1997) (“Ordinarily, where a specific provision conflicts with a general one, the specific governs.”) (citation omitted).

We conclude that sections 56.16009 and 56.14211 may be read harmoniously to arrive at a reasonable result—a result that is consistent with the requirements for both mine safety and necessary work on load-attaching equipment. *See Morton Salt*, 18 FMSHRC 533, 536 (Apr. 1996) (It is well-established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions). Hence, if miners rig a spreader bar under the conditions prescribed by section 56.14211, there is no violation of section 56.16009. However, section 56.16009 prohibits miners from being in a fall zone when they are not engaged in rigging work. This interpretation is consistent with MSHA’s general approach as expressed in the PPL.

⁶ In addition, 30 C.F.R. § 56.14210 permits operators of self-propelled mobile equipment to work under “suspended loads” as long as the equipment is designed to protect the operator from falling objects. Also, miners are generally prohibited from riding on suspended loads or hoist hooks, 30 C.F.R. § 56.16011, and must use tag lines for loads that may require steadying or guidance while suspended. 30 C.F.R. § 56.16007.

It would be unreasonable to find that the Secretary adopted a standard, the effect of which is to make operators unable to perform necessary mining tasks, when such necessary tasks may be performed safely. See *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (regulations must be read to harmonize, not conflict, with the objectives of the Mine Act); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557-58 (Aug. 1993) (rejecting a literal reading of a standard derived from dictionary definition because it would lead to an absurd result).

B. Application of Interpretation to this Case

Our rejection of the Judge's interpretation of section 56.16009 does not fully resolve this case.⁷ The record shows three distinct instances of miners standing or walking under the spreader bar, possibly in violation of section 56.16009. The first instance was when Assad was under the spreader bar while the crane was scoping out its boom. The second instance was when Minchener walked under the spreader bar to talk to the inspector. The third instance was when Minchener walked under the spreader bar towards the crane's cab to retrieve his training papers.

We affirm the Judge in result based on the actions of Minchener, specifically the second time he went under the spreader bar.⁸ Minchener's second trip under the spreader bar, which was the basis of the Judge's increase in the degree of negligence and the penalty, occurred after the inspector stated that doing so would be a violative act, and was not work in furtherance of rigging the crane.⁹ Thus, Minchener's second trip under the spreader bar cannot be construed as "work" under section 56.14211 and is clearly a violative act.

⁷ MSHA did not cite the operator for violating section 56.14211.

⁸ Because we have found Minchener's second trip under the spreader bar to be a violation of section 56.16009, it is not necessary to determine whether Assad violated the regulation or whether Minchener violated it the first time he went under the spreader bar.

⁹ We decline to define the full scope of what types of work are part of the rigging process, as such a finding is not necessary to our conclusion that the standard was violated by Minchener's second trip under the spreader bar. At that point, Minchener had left the cab of the crane with the spreader bar suspended. After the inspector told Minchener that passing beneath the bar was a violation, he walked directly under it without any demonstrated need for doing so as part of the rigging process. Our colleague disagrees that there is a distinction between Minchener's two trips beneath the bar, but the Judge properly found that he had been told that doing so would be a violation. The inspector's theory of the violation was incorrect, but that doesn't change the fact that Minchener's second passage was unnecessary to the rigging process, and that he was given notice that this would be a violation before deciding to walk under the spreader bar a second time.

III.

Conclusion


For the reasons set forth herein, we affirm in result the Judge's determination that Sims violated section 56.16009.



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Acting Chairman Althen, concurring and dissenting:


I join in my colleagues' analysis and interpretation of the mandatory safety standard. I disagree only with their finding of a violation.

The inspector interrupted an ongoing lawful rigging process to declare a mistaken imminent danger. The miner left the cab and walked to the inspector to find the basis for the interruption just as he would if there were some other interruption in the midst of the process. My colleagues do not find his path to the inspector to be a violation.

Once the miner reached the inspector, the inspector ordered the miner to get his training papers from the cab. Obtaining those papers was as important to, or even more so, the continuation of ongoing rigging as the initial walk to the inspector. Clearly, the return to the cab was necessary for continuation of occurring lawful rigging tasks. The miner's disobedience of the inspector's prior instruction, although clearly improper,¹ is irrelevant to whether obtaining the demanded papers related to the ongoing rigging process.

Rigging is a short-term, continual process. Walking a route to the inspector was OK, but walking the same route to comply with the inspector's demand for records was not? If during the rigging process, a miner pauses, and briefly passes under the spreader bar to get his water bottle, he still is engaged in the process of rigging. If a miner briefly leaves one side of the spreader bar to answer a supervisor's question and walks beneath the spreader bar in returning to his station, he still is engaged in the process of rigging. I do not find reason to carve each movement during such an integrated process into second-to-second, moment-to-moment, violation/non-violation, metaphysical decision-making.

Because the miner's contumacy is irrelevant, I see no basis to differentiate his walk to the inspector to see what was occurring from his return to the cab to comply with the inspector's demand and permit continuation of the process. I would find the miner's return to the cab was incidental to continuation of an active and ongoing lawful rigging process and was not a violation of section 56.16009.



William I. Althen, Acting Chairman

¹ I do not in any way excuse the miner's mistake in disobeying the inspector's demand to stay clear from the spreader bar. Apparently having heard the inspector's instruction, the miner needed to obey that instruction.

Distribution

F. Bryant Blevins, Esq.
Butler Weihmuller Katz Craig LLP
400 North Ashley Drive, Suite 2300
Tampa, FL 33602
bblevins@butler.legal

Andrea G. Woods
Nabholz Construction Corporation
612 Garland, P.O. Box 2090
Conway, AR 72033
Andrea.woods@nabholz.com

Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705
Safetylawyer@aol.com

W. Ben Hart, CMSP
W. Ben Hart & Associates
2916 East Park Avenue
Tallahassee, FL 32301
wbernhart@gmail.com

Timothy W. Wiseman
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY
10 West Market Street, Suite 1400
Indianapolis, IN 46204-2968
twiseman@scopelitis.com

Joseph A. Siciliano
Attorneys for L.W. Connelly & Sons, Inc.
d/b/a Connelly Crane Rental Corp.
40850 Woodward Ave., Suite 350
Bloomfield Hills, MI 48304
Jsiciliano@smv-law.com

Dan Peters, Esq.
Herzog Crebs LLP
100 North Broadway, 14th Floor
St. Louis, MO 63102-2728
dsp@herzodcrebs.com

M. Thi Tran
925 South Loop West
Houston, Texas 77054
ttran@tntrane.com

Sage Andrew Linn, Esq.
Impact Law Group, PLLC
1325 Fourth Avenue, Suite 1400
Seattle, WA 98101
sage@impactlawgroup.com

David L. O'Daniel
H.K.B., Inc. dba Southwest Industrial Rigging
111 W. Monroe St. Suite 1600
Phoenix, Arizona 85003
dodaniel@gordonrees.com

Steven D. Sandbrook, CMSP
President/Owner
Eagle Mine Safety
P.O. Box 412
Nazareth, PA 18064
steve@eagleminesafety.com

Jay Russell Sever, Esq.
Phelps Dunbar LLP
365 Canal Street, Suite 2000
New Orleans, LA 70130
Jay.Sever@phelps.com

Kevin P. O'Malley, Esq
Kevin P. O'Malley, P.C.
155 Washington Street, POB7
Tappan, NY 10983
komlaw@komalleylaw.us

Billy R. Shelton, Esq.
Jones, Walters, Turner & Shelton PLLC
2452 Sir Barton Way, Suite 101
Lexington, KY 40509
Billys1@jwtslaw.com

Brian A. Powers
International Union of Operating Engineers
1125 17th Street, NW
Washington, DC 20036
bpowers@iuoe.org

Daniel R. McIntyre
Office of the Solicitor
US Department of Labor
Cesar E. Chavez Memorial Building
1244 Speer Boulevard, Suite 216
Denver, CO 80204
McIntyre.daniel.R.@dol.gov

Christine D. Han, Esq.
U.S. Department of Labor
201 12th Street South- Suite 401
Arlington, VA 22202-5450
Han.christine.d@dol.gov

Ali A. Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge Thomas P. McCarthy
Federal Mine and Safety and Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710