

CCASE:
SOL (MSHA) V. FREEMAN UNITED COAL MINING
DDATE:
19800328
TTEXT:

Subsequent to the remand, the parties were accorded the opportunity to submit additional briefs in light of the change in the law occasioned by the Commission's decision in Old Ben Coal Company. The Mine Safety and Health Administration (MSHA) filed a brief on January 30, 1980. Freeman United Coal Mining Company (Freeman) did not file a brief subsequent to the remand.(FOOTNOTE 1)

The two basic issues presented are set forth in Part IV of the August 30, 1979, decision.

II. Violation Charged

Order No.	Date	30 C.F.R. Standard
1 LDC	January 12, 1977	75.400

III. Opinion and Findings of Fact

A. Occurrence of Violation

MSHA inspector Lonnie Conner conducted a regular health and safety inspection at Freeman's Orient No. 6 Mine on January 12, 1977 (Tr. 7). He walked the Main West North conveyor belt, arriving in the area at approximately 9:30 a.m. (Tr. 7). He issued the subject order of withdrawal at 11 a.m. (Tr. 6, Exh. M-1), citing Freeman for violating mandatory safety standard 30 C.F.R. 75.400 in that accumulations of combustible materials were observed along the Main West North conveyor belt (Tr. 8, Exh. M-1).

Two airlocks were located across the belt travel entry approximately five or six crosscuts from the point where the subject belt dumped onto the Main North belt (Tr. 8). The two airlocks were approximately 70 to 80 feet apart (Tr. 8). Along that 70- to 80-foot distance, the inspector observed float coal dust, coal dust and loose coal (Tr. 8). Immediately inby the first airlock, he observed large accumulations of coal dust and float coal dust (Tr. 8). The coal dust was 5 to 6 inches in depth where the air going through the airlock was blowing it off the belt (Tr. 9). The float coal dust was not only in the belt entry, but also in the intersecting crosscuts and in the entry immediately north of the belt line (Tr. 8). The inspector testified that the instability of float coal dust renders it difficult to measure (Tr. 10).

The inspector proceeded from the inby airlock, traveling west on the south side of the belt (Tr. 10). He observed accumulations of coal and coal dust 2 to 6 inches deep all along the south side of the belt and underneath the belt up to a point 70 feet outby the tailpiece, a distance of approximately 2,300 feet (Exh. M-1, Tr. 10). The 2,300 feet was determined by taking a measurement off the mine map (Tr. 11).

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Float coal dust was observed on rock-dusted surfaces along the belt entry and intersecting crosscuts from the inby airlock to the 1,150-foot mark (Tr. 12, Exh. M-1).

All depths were measured with a steel tape (Tr. 10, 11). All areas cited were dry, including the float coal dust (Tr. 12). The inspector testified that the belt was in operation and that the conditions were observed during a production shift (Tr. 7), but he did not recall whether coal was being loaded (Tr. 7).

The witnesses disagreed as to the extent of the combustible accumulations. The inspector described them as deep and continuous (Tr. 250), while the testimony of Mr. Peter Helmer, the mine superintendent, portrays a different picture. Mr. Helmer inspected the area cited in the subject order of withdrawal immediately after its issuance (Tr. 267). He testified that he observed intermittent piles containing loose coal, rock and coal dust along the south side of the belt. According to Mr. Helmer, it was not a continuous spillage (Tr. 267). He indicated that a problem existed in that area of the mine with rock falling from the roof and ribs, a condition that makes any accumulation appear more extensive than if it consists only of coal (Tr. 267). However, he did not mention specifically either the presence or the absence of float coal dust in the subject area, while the inspector indicated that the float coal dust was present for a length of 1,150 feet (Tr. 10, 12).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board held that the presence of a deposit or accumulation of coal dust or other combustible materials in the active workings of a coal mine is not, by itself, a violation of 30 C.F.R. 75.400. The Board held that MSHA must prove:

- (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
- (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
- (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

A petition for review of the Board's decision was subsequently filed with the United States Court of Appeals for the District of Columbia Circuit. On

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January 16, 1979, the Court, without deciding the merits, remanded the case to the Commission for further proceedings.

In its December 12, 1979, decision, cited supra, the Commission disagreed with the Board's interpretation of the standard and held that a violation of 30 C.F.R. 75.400 occurs when an accumulation of combustible materials exists in active workings. (FOOTNOTE 2)

Freeman, in its March 21, 1979, posthearing brief, argues that MSHA has failed to prove that an accumulation of combustible materials existed in the mine's active workings as described in the order of withdrawal (Exh. M-1) (Respondent's Posthearing Brief, p. 52). In support of its position, Freeman points to the testimony of Mr. Helmer, which indicates that some rock was intermixed with the accumulations, and argues that samples were not taken and analyzed to determine the combustibility of the accumulation. I disagree with Freeman's theory for two reasons: First, visual observations are sufficient to prove a violation of 30 C.F.R. 75.400. *Coal Processing Corporation*, 2 IBMA 336, 345-46, 80 I.D. 748, 1973-1974 OSHD par. 16,978 (1973). Second, the rebutting evidence adduced by Freeman is insufficient to establish that rock was present in sufficient quantities to render the accumulations inert. Accordingly, it is found that accumulations of combustible materials were present in the mine's active workings as described in the order of withdrawal (Exh. M-1). A violation of 30 C.F.R. 75.400 has been established by a preponderance of the evidence.

B. Negligence of the Operator

The inspector testified that he checked the preshift books, and that the belt had been recorded "dirty" for two shifts prior to his inspection (Tr. 13). Acceptance of the inspector's opinion would establish gross negligence on Freeman's part.

The only notations that the inspector took from the books were the approximate footage marks for the recorded accumulations (Tr. 13). According to the inspector, the belt was recorded dirty from the 790-foot mark to the 818-foot mark and, to the best of his recollection, from the 800-foot mark to the 880-foot mark (Tr. 13), which totaled approximately 107 feet (Tr. 14).

The inspector testified that, in his opinion, the coal and coal dust accumulated "over a period of time" (Tr. 13). Although he never expressed a firm opinion as to the approximate duration of the accumulations' existence, he did state on direct examination that the preshift books indicated that the condition had existed on two previous shifts (Tr. 14). He

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interpreted this as meaning in excess of 16 hours (Tr. 14). On redirect examination, the inspector testified as follows:

Q. Mr. Conner, did visual observations which you had before you have any bearing on your determination on how long the accumulations had been there?

A. Yes, sir, they did.

Q. Could you explain how?

A. The accumulations were deep and continuous. In one particular spot, there was more than three ton of coal in one particular spot along the belt that had got there from some kind of dumping. So, I assume, going along with the pre-shift examiners' books, it is my opinion that the accumulations had been there for some time.

(Tr. 249-250).

The inferences drawn from the above-quoted passage, coupled with the inspector's recollection as to the time periods covered in the relevant preshift reports, lead to the conclusion that the depth and extent of the accumulations were interpreted in conjunction with the preshift reports in reaching the conclusion that the coal and coal dust had been present for "some time." These factors evidently led to the conclusion that the accumulations had been present for two shifts, i.e., more than 16 hours.

However, the preshift reports do not support the inspector's time estimate. The report for the preshift examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. 0-6) recorded a spillage problem on the subject belt between "800" and "850," a distance of 50 feet (Tr. 259). The reports for the preshift examinations conducted between 8 p.m. and 12 midnight on January 11, 1977 (Exh. 0-7) and between 12 noon and 4 p.m. on January 11, 1977 (Exh. 0-8) reveal no accumulations problems along the subject belt (Tr. 260-261). Thus, a key factor in the inspector's equation has been proven in error, and no credible basis exists in the record to support a finding of gross negligence.

Three workmen and a foreman were assigned to clean the area at the beginning of the shift and were performing their assigned task when the inspector walked the belt (Tr. 37, 266).

In accordance with the ruling of the Commission in the Old Ben Coal Company case, action to eliminate the conditions should have taken place before the 8 a.m. shift began.

In view of the entries contained in Exhibit 0-6, the knowledge of the preshift examiner, and the presence of the foreman in the area, it is found that Freeman knew or should have known of the condition. Ordinary negligence has been established

by a preponderance of the evidence.

C. Gravity of the Violation

The extensive amount of accumulation is set forth earlier in the decision. The accumulations provided a potential fuel source for a fire. Friction from belt rollers and electricity from a belt drive were identified as possible ignition sources (Tr. 16).

The belt was composed of fire-resistant material (Tr. 274). The belt line was equipped with fire suppression devices and fire sensors (Tr. 273-274).

An explosion could have suspended the float coal dust in the air and thus could have intensified the explosion (Tr. 18, 24). An explosion would most likely occur in the face areas (Tr. 22), and the nearest face areas ranged from approximately 1,000 to 1,500 feet from the various accumulations (Tr. 284-286).

Any person working in the belt entry would have been exposed to physical danger if an ignition had occurred in the entry (Tr. 17-18).

In view of the foregoing, it is found that the violation was very serious.

D. Good Faith in Attempting Rapid Abatement

Additional men were immediately assigned to clean the cited area (Tr. 279). The order was terminated 24 hours after issuance (Exhs. M-1, M-2). Accordingly, it is found that Freeman demonstrated good faith in attempting rapid abatement.

E. History of Previous Violations

The history of previous violations at the Orient No. 6 Mine for which Freeman had paid assessments between January 13, 1975, and October 28, 1976, is set forth as follows:(FOOTNOTE 3)

30 C.F.R. Standard	Year 1 (12 months) 1/13/75 - 1/12/76	Year 2 (9.5 months) 1/13/76 - 10/28/76	Totals
All Sections	182	138	320
75.400	26	26	52

(Note: All figures are approximations.)

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F. Appropriateness of Penalty to Operator's Size

The parties stipulated that Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year and that the Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year.

G. Effect on Operator's Ability to Continue in Business

Counsel for Freeman conceded in his March 21, 1979, posthearing brief that assessment of the maximum penalty will have no effect on the operator's ability to continue in business (Respondent's Posthearing Brief, p. 56).

IV. Conclusions of Law

1. Freeman United Coal Mining Company and its Orient No. 6 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to this proceeding.

3. MSHA inspector Lonnie D. Conner was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the order of withdrawal which is the subject matter of this proceeding.

4. The violation charged in Order No. 1 LDC, January 12, 1977, 30 C.F.R. 75.400, is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part III, supra, are reaffirmed and incorporated herein.

V. Proposed Findings of Fact and Conclusions of Law

Freeman submitted a posthearing brief prior to the issuance of the August 30, 1979, decision. MSHA submitted a brief following the remand. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VI. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

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Order No.	Date	30 C.F.R. Standard	Penalty
1 LDC	1/12/77	75.400	\$2,750

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of \$2,750 assessed in this proceeding within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

Freeman filed a posthearing brief on March 21, 1979.

~FOOTNOTE 2

When the decision was written in the instant case, the undersigned Administrative Law Judge was required to follow the Board's decision in Old Ben Coal Company in accordance with section 301(c)(2) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. 961(c)(2) (1978).

~FOOTNOTE 3

See Exhibit 3 filed in Docket No. VINC 78-49-P.