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SOL (MSHA) V. PEABODY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. LAKE 80-247 A.C. No. 33-01069-02027V
v.		Sunnyhill No. 9 North Underground Mine
PEABODY COAL COMPANY,	RESPONDENT	
PEABODY COAL COMPANY,	APPLICANT	Application for Review
v.		Docket No. VINC 77-91 Order No. 1 WS January 27, 1977
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	RESPONDENT	Sunnyhill No. 9 North Underground Mine

DECISION

Before: Judge Charles C. Moore, Jr.

On May 5, 1978, I issued a decision in Docket No. VINC 77-91 in which I ruled that MSHA had failed to prove a violation of 30 C.F.R. 75.400. I based that ruling principally upon the decision of the Interior Department's Board of Mine Operations Appeals in Old Ben Coal Company, 8 IBMA 98 (1977). On December 12, 1979, the Federal Mine Safety and Health Review Commission reversed the Board's Old Ben decision (Commission Docket No. VINC 74-11) and on the same date reversed my decision in Peabody and remanded it for further proceedings consistent with the Commission's Old Ben decision. Thereafter, on April 4, 1980, the Secretary of Labor filed the penalty proceeding which has been assigned Docket No. LAKE 80-247.

The Secretary has moved for summary decision in both cases and Respondent has opposed this motion and moved to dismiss the penalty case. For the reasons set forth below, I grant Peabody's motion to dismiss the civil penalty case and grant the Secretary's motion for a decision affirming the unwarrantable failure order which was the basis of both cases.

As to the affirmance of the withdrawal order, I rely on my decision of May 5, 1978. On page 3 of that decision I stated that but for the Board's Old Ben decision "I would probably have found the aforementioned coal dust accumulations to have constituted an "unwarrantable failure' violation * * *." The word "probably" caused the above to be an understatement. The record clearly shows the existence of the accumulations and the inspector estimated that because of the extent of the accumulations the operator should have been aware of them for at least a week prior to the inspection. That is enough to support a finding of unwarrantability. This estimation was not rebutted and, as noted in the opinion, even Old Ben's witness thought that a notice of violation would have been justified if the accumulation had not been cleaned up. The fact that the inspector did not find any notation of an accumulation when he examined the preshift inspection reports does not rebut his estimate that the accumulations had existed for at least a week. There is no need for further evidence or for further briefing. The order of withdrawal is affirmed.

As to Docket No. LAKE 80-247, an earlier civil penalty petition, Docket No. VINC 78-320-P, sought civil penalties for the same alleged violation involved in Docket Nos. LAKE 80-247 and VINC 77-91. After my May 5, 1978, decision in Docket No. VINC 77-91, Peabody moved to dismiss Docket No. VINC 78-320-P because I had already ruled that no violation had been established. The motion to dismiss was filed on July 10, 1978, and MSHA did not oppose the motion. I granted the motion to dismiss on August 2, 1978, and MSHA did not seek review. */

Respondent's motion to dismiss the first civil penalty proceedings prayed for dismissal with prejudice (see Exhibit "D" of petition for assessment of civil penalty in Docket No. LAKE 80-247). The August 2, 1978, ruling granted dismissal for the reasons set forth in the motion (vacation of the underlying order) and for the Secretary's failure to oppose the motion. The question is how to construe an involuntary dismissal which does not indicate on its face whether it was granted with or without prejudice after the moving party requested dismissal with prejudice.

Rule 2700.1(b) of our Rules of Procedure states that where "any procedural question [is] not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act, the Commission or any Judge, shall be guided so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure." Neither the Act nor the Procedural Rules nor the Administrative Procedure Act contain provisions governing the construction of an order of dismissal. Rule 41 of the Federal Rules of Civil Procedure, however, entitled "Dismissal of Actions," states in paragraph (b) pertaining to involuntary dismissals: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule [exceptions that are not applicable], * * * operates as an adjudication upon the merits." As I read this rule, with certain exceptions that are not pertinent, any involuntary dismissal, that is, where one party asks for the dismissal of the other party's case, if granted, is with prejudice unless the court states otherwise in its dismissal order. That was also my understanding at the time the dismissal order was issued. My dismissal of the case was therefore with prejudice and the doctrine of res judicata applies.

The statement in footnote 1 on page 2 of the Secretary's second petition for civil penalty implies that there was some duty on the part of Peabody to serve its motion to dismiss in the first penalty case on counsel who were representing the Department of Labor in Docket No. VINC 77-91. Of course there was no such duty on Peabody, but there was a duty upon the Secretary to oppose the motion to dismiss if he disagreed with the motion and to seek review of the order of dismissal if he disagreed with that order. The Secretary did neither and cannot now be heard to complain because counsel involved with one docket number were not served with papers in a different docket number.

Charles C. Moore, Jr.
Administrative Law Judge

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In the interim between remand of Docket No. VINC 77-91 to me on December 12, 1979, and the filing of the second civil penalty case, Docket No. LAKE 80-247 on April 4, 1980 (I actually had some advance notice that the penalty suit would be filed but I do not recall when that notice was received), the parties had been negotiating a settlement of the review proceeding. I gathered that the Government felt that it had won its principal point in the Old Ben case and that since the penalty case in Peabody had already been dismissed there would be little point in devoting much effort toward the remand. I was led to believe that Peabody felt the same way and that the matter would be resolved but I did not know whether the parties intended that Peabody withdraw its petition for review or that the Government withdraw its opposition to that petition. In any event those negotiations broke down and the second penalty suit was filed.