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SOL (MSHA) V. OLD BEN 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

v.

OLD BEN COAL COMPANY,
RESPONDENT

Civil Penalty Proceedings

Docket No. VINC 75-180-P

A/O No. 2607-89

Docket No. VINC 75-181-P

A/O No. 2607-93

No. 21 Mine

Docket No. VINC 75-183-P

A/O No. 2604-95

No. 24 Mine

Docket No. VINC 75-185-P

A/O No. 2617-85

Docket No. VINC 75-186-P

A/O No. 2617-87

No. 26 Mine

DECISION

On June 10, 1976, I issued a decision in the above cases which disposed of 47 allegations of violations of the health and safety standards.(FOOTNOTE 1) A total penalty of \$5,925 was assessed for those violations I found to have occurred.

On October 24, 1980, the Federal Mine Safety and Health Review Commission issued a decision in which it set aside my ruling as to six of the notices of violation that I had vacated. I will assume therefore that my prior decision still stands except for the six notices of violation mentioned in the Commission's decision. It is noted that, according to a document filed with the Commission on April 15, 1980, by Old Ben Coal Company, the penalties which I assessed were paid by Old Ben as of June 30, 1976.

The Commission did not identify the notices by initials and dates but inasmuch as I vacated only two notices of violation involving 30 C.F.R. 75.400, the notices remanded to me by the Commission must have been 3 MK dated January 15, 1974, and 2 MK dated February 28, 1974.

~3303

Also, inasmuch as I vacated four notices involving 30 C.F.R. 75.403, the Commission must have remanded to me Notices of Violation 1 MK dated February 25, 1974, 1 DLG dated November 26, 1973, 1 NEN dated December 19, 1973, and 1 NEN dated January 10, 1974. This is also confirmed by the Secretary's appeal brief. Old Ben did not file a brief.

Notices of Violation 3 MK dated January 15, 1974, and 2 MK dated February 28, 1974, both involve accumulations of combustible material on a piece of mining equipment.(FOOTNOTE 2) While I find only a moderate degree of hazard in the absence of testimony regarding the dimensions of the accumulations, Respondent was nonetheless negligent in allowing the accumulations to exist. All of the other required criteria were considered in the original opinion. As I read the Commission's decision I have no choice but to find that the violations did occur and I accordingly assess a penalty of \$100 for each of these notices.

As to the other four notices of violation involved, I vacated the notices because the band sample method was used to collect the material, which was analyzed and found to have less than the required percentage of non-combustible material. The Commission has approved the band sample method so the violations were accordingly established. I find a low order of negligence but the existence of hazardous conditions with respect to each notice of violation. A penalty of \$100 for each notice is assessed.

~3304

ORDER

IT IS THEREFORE ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty in the total amount of \$600.

Charles C. Moore, Jr.
Administrative Law Judge

~FOOTNOTE_ONE

1 Fourteen of these alleged violations were in Docket No. VINC 75-184-P which was not appealed.

~FOOTNOTE_TWO

2 In my original opinion, for some reason that I cannot recall, I cited K & L Coal Company 6 IBMA 130 (1976) as the basis of my decision vacating the two citations when North American Coal Corp. 3 IBMA 93 (1974) would have been a more appropriate citation. The Commission recognized that I had relied on and followed North American but nevertheless stated that I erred in doing so. Most of the judges with whom I have discussed the effect of the Interior Board's decisions consider that under Section 301 of the transfer provisions of the amending act, the Commission Judges are bound to follow Board decisions until they are reversed by the Commission. Under this view it would be error for a judge to refuse to follow a Board decision that he disagreed with. But if it is error to follow a Board decision which the Commission later disagrees with then it would not be error for a Commission Judge to ignore a Board decision if the Commission later determined that the Board was wrong. The precedential value of a Board decision would thus depend on whether the judge thinks the Commission will agree with the Board decision. That amounts to Board decisions having little or no precedential value, and I question whether that was the Commission's intent.