CCASE:
PEABOY COAL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 31, 1979

PEABODY COAL COMPANY Docket Nos. VINC 77-12-P
VINC 77-13-P

v.

IBMA No. 77-57

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

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C. $961 (1978). Peabody is appealing the decision of an administrative law judge finding that it violated two mandatory standards of the Act, 30 CFR 77.404(a) and 30 CFR 77.1713(a). 1/

The two notices of violation were issued following a fatal accident at Peabody's Lynneville Mine. On June 18, 1975, the foreman assigned two mechanics to change a flat tire on a coal haulage truck. After the mechanics removed the tire from the truck, it was transported with a forklift to a storage area. They then lifted the new 2,500 pound tire unto one of the tines of the forklift and transported it back to the truck to install it. When the mechanics began to put the new tire on the truck they realized that two of the studs on the wheel were broken. They backed the forklift away from the hub of the wheel and parked it. One of the mechanics went to advise the foreman, who had left the vicinity, that a nut had to be welded on a stud before the tire could be replaced. The victim came and welded a nut to the stud. While the weld cooled, the victim and the mechanics took a coffee break. The foreman returned to the area while the men were on their break. He observed the parked forklift and saw the tire suspended 18 inches from the ground. When the men returned from their break, one of the mechanics noticed the forklift tines had descended so that the bottom of the tire was resting on its treads on the ground. As the mechanics and the victim approached the forklift the tire fell on its side, striking the victim and fatally injuring him.

The accident investigation revealed that during the time the tire was on the forklift its tines were slowly descending toward the ground

due to hydraulic leakage. The leak was internal and not visible. It caused the tines to descend at a rate of approximately one inch per minute.

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1/ Two additional alleged violations of 30 CFR 77.1708 and 30 CFR 77.208 were dismissed by the judge and are not at issue in this appeal.

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In August 1973, a similar fatal accident at occurred at Peabody's Scarlett Mine. During a tire changing operation a tire toppled off the tines of a forklift fatally injuring a mechanic. 2/ The foreman knew of the prior fatality.

The judge held that Peabody violated 30 CFR 77.404(a), which provides: 'Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." He found "the operator was in violation of the section because of the internal hydraulic leakage" and assessed a penalty of $6,000 for the violation.

We affirm the judge's finding of a violation of 30 CFR 77.404(a). The regulation imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. The company admitted the presence of the hydraulic leak. In doing so, it admitted the forklift was not maintained in "safe operating condition." The existence of the violation was established. The company argues it could not violate the regulation without knowledge of the leak, and it would have us condition liability upon prior knowledge. This we cannot do. The regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability upon an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred.

The judge also determined that Peabody violated 30 CFR 77.171.3(a). 3/ The judge acknowledged that the foreman did not know of the leak, but based on his knowledge of the past fatality, and the proximity of the tire and forklift to the truck, the foreman "should have realized that the lives and safety of the miners were dependent upon the integrity of the hydraulic system of the forklift truck." A penalty of $6,000 was assessed by the judge.

We also affirm the judge's holding that the company violated 30 CFR 77.1713(a). The regulation is broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by the operator. In this

instance the foreman assigned the miners the task of changing the tire. He observed the unsecured tire hanging from the forklift in a working area. The

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2/ See MESA v. Peabody Coal Company, VINC 74-927-P (May 3, 1976).

3/ Section 77.1713(a) provides:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

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foreman knew of the prior accident. He should have known that the practice of changing tires with a forklift was potentially hazardous. The failure to correct the hazard by, for example, insuring that the hydraulic system was functioning properly, or by securing the tire, or by removing it from the working area constituted a violation of the regulation.

Finally, Peabody's contention that the judge erred in assessing penalties of $6,000 for each of the violations is without merit. The penalties assessed are appropriate and will not be disturbed.

Accordingly, the judge's decision is affirmed.

Frank F. Jestrab,
Commissioner

A.E. Lawson,
Commissioner

Marian Pearlman
Nease, Commissioner

Waldie, Chairman, and Backley, Commissioner,concurring in part and dissenting in part:

While we concur with the majority in affirming the administrative law judge's finding of a violation of 30 CFR $77.404(a), we must dissent from their conclusion regarding the violation of 30 CFR $77.1713(a). We do so because the findings of the judge as set out on page 6 of his decision do not support a violation of that regulation, 1/ the key to which is the "examination for hazardous conditions" and the reporting thereof.

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1/ The Administrative Procedures Act requires the decision to include such support. 5 U.S.C. 557(c) reads, in pertinent part:

"All decisions ... are part of the record and shall include a statement of--

(A) findings and conclusions, and the

reasons or basis therefor, on all the
material issues of fact, law, or discretion
presented on the record; ..."
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Either the majority has misinterpreted the findings of the judge or has rewritten them to conform to the record so as to support a violation of the regulation in question. Regarding the "hazardous condition" requirement of the standard, the judge found that the "lives and safety of the miners were dependent upon the integrity of the hydraulic system" (emphasis added). He went on to hold that, although the foreman had no personal knowledge of this hazard, such knowledge could be imputed to the operator. Evidently, the judge imputes this knowledge from the recognized fact that "hydraulic systems do occasionally leak" and the operator's past experience with a similar fatality." However, the "similar fatality" to which he refers did not result from a hydraulic leak, the basis of the judge's findings, but involved similar tire changing procedures which produced the unfortunate results to which the judge refers. Accordingly, we find it difficult to impute knowledge of a hydraulic leak where there is no basis for such imputation in the record.

If the judge had made the findings attributed to him by the majority, we would have little problem in affirming him. However, such is not the case. The judge based his finding solely on imputed knowledge of the hydraulic leak, the fact of which, the record discloses, the foreman was unaware. The judge found no breach of the duty to inspect the forklift nor did he find any breach of the duty to report the hazardous conditions as to the latter. The judge specifically found that the foreman "did not know it [the forklift] was hazardous because he did not know of the hydraulic leak." Having said that, he then imputes knowledge of such leak based, in part at least, on a faulty premise--the operator's past experience with a similar fatality which did not involve a hydraulic leak. 2/ We do not believe such imputation is contemplated, permitted or warranted under the cited standard, yet alone the facts.

Furthermore, the majority opinion fails to address a major argument of the applicant. Counsel's brief argues that under the findings of the judge, a violation of $77.1713(a) is duplicative of a violation of $77.404(a) and the imposition of a penalty for each constitutes an unreasonable multiplication of violations and assessments. The judge found a violation of $77.404(a) on the basis that the hydraulic leak demonstrated that the operator failed to properly maintain the forklift and failed to remove it from service when it became unsafe. The judge then imputes to the operator the knowledge that maintenance and inspection

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2/ It is far from clear as to the finding of a violation of $77.1713(a) is concerned, what role, if any, "common knowledge that hydraulic systems do occasionally leak" played. The opinion, as written, does not refer to this "fact" in support of the violation in question, but to the violation of $77.404(a).

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of the forklift was not taking place and finds a violation of $77.1713(a) for failure of the operator to discover and correct the condition of the forklift in the course of the on-shift examination.

In summary, the appellant has argued that an operator should not be sanctioned twice for what, in essence, is the same conduct--failure to discover the condition of the forklift. We agree. The majority refuses to disassociate itself from the finding of the judge that the "hazardous condition" necessary for a violation of $77.1713(a) consisted of the leaking hydraulic system on the forklift. In so doing, today s decision fails to cure what appears to us to be duplicative findings of the judge.

One final comment is in order. We do not believe that Congress intended our role as a reviewing body to include the authority to substitute our findings for that of the trial judge unless such findings are unsupported by substantial evidence of record. Section 113(d)(2)(A)(ii), Federal Mine Safety and Health Act of 1977. The majority opinion provides no analysis as to whether the judge's findings upon which he bases his conclusion that $77.1713(a) was violated are supported by substantial evidence of the record. On the contrary, in order to support the violation, the majority provides supposition and example, none of which are part of the findings. Accordingly, we would reverse the judge as to his conclusion that a violation of $77.1713(a) is supported by the findings of record.