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MSHA V. OLD BEN COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 12, 1979

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

v. Docket No. VINC 74-11
IBMA 75-52
OLD BEN COAL COMPANY

DECISION

This proceeding arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(amended 1977) ["the 1969 Act"], and involves the interpretation of sections 304(a) and 104(c)(2) of that Act. For the reasons discussed below, we hold that a violation of section 304(a) occurs when an accumulation of combustible materials exists in active workings, and that Old Ben unwarrantably failed to comply with the standard in this case.

On July 13, 1973, a Mining Enforcement and Safety Administration (MESA) inspector issued a withdrawal order pursuant to section 104(c)(2) for an alleged violation of 30 CFR $75.400. That regulation, which is identical to section 304(a) of the 1969 Act, provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings or on electric equipment therein. 1/

The withdrawal order alleged in part:

> Accumulations of loose coal and coal dust were observed from the 8 south belt drive to 20 feet outby the 710 survey

mark, a distance of approximately 925 feet. The accumulations of loose coal and coal dust ranged in depth of from 2 to 14 inches on the east side of the belt and from 2 to 6 inches on the west side. 2/

The order was terminated on July 16, 1973, after the conditions cited were abated.

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1/ Section 304(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. $801 et seq. (1978) ["the 1977 Act"], is identical.

2/ The order also stated that "the violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard," and that the cited violation "is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 1 M.C. on October 26, 1972, and no inspection of the mine has been made since such date which disclosed no similar violation."

Old Ben filed an application for review of the withdrawal order. In his decision of March 19, 1975, Administrative Law Judge Rampton vacated the order. He held that: (1) MESA failed to prove all of the elements of a violation of 30 CFR $75.400; (2) the "conditions upon which the Order is premised were not such as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard"; and (3) there was no unwarrantable failure to comply with the standard. MESA appealed the judge's decision to the Interior Department's Board of Mine Operations Appeals, contesting all three of these holdings.

On August 17, 1977, the Board affirmed the judge's decision. 8 IBMA 98. It held that the elements of a violation of 30 CFR $75.400 are: (1) an accumulation of combustible materials, (2) the operator's knowledge, actual or constructive, that such accumulations existed, and (3) the failure of the operator to clean up or undertake to clean up such accumulations "within a reasonable time after discovery, or, within a reasonable time after discovery should have been made." Id. at 114-115. It held, as had the judge, that MESA had proven only the first of these three elements. Therefore, it affirmed the judge's vacation of the order because MESA had not established the underlying violation. The Board did not reach the "significant and substantial" or unwarrantable failure issues because "disposition of the first issue obviates the necessity of reaching the other ... issues...." Id. at 106-107. The Board denied MESA's motion for reconsideration. 8 IBMA 196 (1977).

On September 20, 1977, the United Mine Workers of America filed a petition for review of the Board's decision with the Court of Appeals for the District of Columbia Circuit (No. 77-1840). On November 9, 1977, Congress passed the 1977 Act. It transferred enforcement functions from the Secretary of Interior to the Secretary of Labor effective March 9, 1978. The Secretary of Labor then successfully moved to substitute himself for the Secretary of Interior as respondent, and filed a brief urging reversal of the Board's decision and remand to the Commission. Old Ben did not file a brief. In an order issued on January 16, 1979, the Court observed that no party supported the Board's decision. Without deciding the merits, it remanded the case to the Commission "for further proceedings."

The issues before us are:

(1) What are the elements of a violation of 30 CFR $75.400?

(2) Did Old Ben violate the standard?

(3) If Old Ben violated the standard, was the violation "caused by an unwarrantable failure" to comply with such standard?

(4) If Old Ben violated the standard, is a finding that the violation was "of such a nature as could significantly and substantially contribute to the cause or effect of a mine safety or health hazard" required to issue a withdrawal order under section 104(c)(2) of the 1969 Act?

The elements of a violation of 30 CFR $75.400

The Board concluded that the standard was intended "to minimize, rather than eliminate, accumulations of combustible materials so that they would simply be less likely to present a safety hazard source." 8 IBMA at 108-109. The "presence or existence of an accumulation of combustible materials in active workings is [not] sufficient by itself, to establish a violation," because "the crux of he violation" is the operator's "failure to clean up, or undertake to clean up, an accumulation of combustible material which is already in existence." Id. at 112. The Board held, therefore, that there were three elements necessary to prove a violation of 30 CFR $75.400: (1) an accumulation of combustible materials; (2) the operator's actual or constructive knowledge of the accumulations; and (3) the operator's failure to undertake cleanup within a reasonable time. Id. at 114-115.

In applying the standard it had fashioned to the facts of this case, the Board concluded that:

> [t]he evidence ... conclusively established that although most of the combustible materials did exist in the subject mine as alleged in the order ..., as soon as the operator became aware of the cited conditions, enough employees were promptly dispatched to abate the conditions within a reasonable time. The evidence further clearly established that the operator was following a regular procedure reasonably calculated to alert its personnel to the hazards posed by accumulations of combustible materials. Consequently, there was no permitting of an accumulation by the operator and no violation of the subject standard. [Id. at 119.]

We disagree with the Board's interpretation of the standard. The language of the standard, its legislative history, and the general purposes of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exists.

One of the primary purposes of Congress in passing the Act was to prevent the loss of life and serious injuries arising from explosions and fires in underground mines. A precipitating factor in consideration and passage of the 1969 Act was the tragic mine explosion at Farmington, West Virginia on November 20, 1968, that killed 78 miners. 3/ Congress

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3/ S. Rep. 91-411, 91st Cong., 1st Sess., 6-7, 8 (1969), and H. Rep. 91-563, 91st Cong., 1st Sess., 1-2, 6 (1969), reprinted in Senate Sub-committee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I, at 132-133, 134, 1031-1032, 1036 (1975) ["Legis. Hist."].

recognized that "ignitions and explosions have been among the major causes of death and injury to coal miners." 4/ To achieve its goal, Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. Section 304(a) is one of those standards.

Section 304(a) of the 1969 Act adopted the language of section 304(a) of H.R. 13950. 5/ The House Report stated that the standard

> requires that coal dust, float coal dust, loose coal, and other materials be cleaned up so that it will not accumulate in active underground workings or on electric equipment. [H. Rep. 91-563, 91st Cong., 1st Sess., 65; Legis. Hist. at 1077 (emphasis added).]

The Conference Committee agreed to the language in the House bill. H. Rep. 91-761, 91st Cong., 1st Sess., 32 (1969); Legis. Hist. at 1476. The legislative history demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated. 6/

The language of section 304(a) also furnishes no support for the Board's view that accumulations of combustible materials may be tolerated for a "reasonable time." Rather, the language of the standard makes accumulations impermissible. Even if, however, the Board's interpretation were arguably consistent with the language of the standard, it was hardly compelled by it. Inasmuch as our interpretation of section 304(a) is also consistent with its language, and would further the congressional purpose of preventing coal mine explosions and fires, we adopt it here. "Should a conflict develop between a statutory interpretation that would

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4/ S. Rep. 91-411, 25; Legis. Hist. at 151.

5/ H.R. 13950, 91st Cong., 1st Sess., 70-71 (1969); Legis. Hist. at 983-984.

6/ The forerunner of the House language for section 304(a), as adopted, was section 205(a) of S. 2917, which provided in part:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall permitted to accumulate in active underground workings or on electric equipment therein. S. 2917, 91st Cong., 1st Sess., 47 (1969); Legis. Hist. at 49.

The Senate Report stated:

> Tests, as well as experience, have proved that

> inadequately inerted coal dust, float coal dust, loose coal, or any combustible material when placed in suspension will enter into and propagate an explosion. The presence of such coal dust and loose coal must be kept to a minimum through a regular program of cleaning up such dust and coal. S. Rep. 91-411, 65; Legis. Hist. at 191 (emphasis added).

The report does not state, as the Board apparently read it, that "accumulations ... must be kept to a minimum...." Fairly read, this language can be interpreted to mean that if the presence of loose coal and coal dust is kept to a minimum, accumulations will not occur.

promote safety and an interpretation that would serve another purpose at a possible compromise to safety the first should be preferred." UMWA v. Kleppe, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

We hold that a violation of section 304(a) and 30 CFR $75.400 occurs when an accumulation of combustible materials exists. 7/

Did Old Ben violate the standard in this case?

We accept that some spillage of combustible materials may be inevitable in mining operations. Whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount. There is no doubt, however, that an accumulation of combustible materials was present here. The Board found that "most of the combustible materials did exist in the ... mine as alleged in the order...." 8 IBMA at 119. Indeed, the Board noted that "witnesses for the operator did not dispute the testimony of the inspector pertaining to the existence of accumulations of loose coal and coal dust along the 8 south beltline for a distance of approximately 925 feet." 8 IBMA at 116 (emphasis in original). We need not precisely define an accumulation in this case, for we agree with the Board's finding that here the vast spillage cited by the inspector clearly constituted an accumulation. 8/ Therefore, we conclude that Old Ben violated 30 CFR $75.400.

Was the violation "caused by an unwarrantable failure to comply with such standard"?

The judge held that there was no unwarrantable failure by Old Ben to comply with a mandatory standard. In Zeigler Coal Co., 6 IBMA 182 (1976), the Board stated that "a section 104(c)(2) order must ... be based on a violation of a mandatory health or safety standard caused by an operator's unwarrantable failure to comply" with the standard. 6 IBMA at 190. 9/ We need not examine this question here, for we hold that the judge erred and that the violation was caused by an unwarrantable failure to comply.

7/ The matters referred to in the second and third elements of the Board's interpretation are, we believe, appropriately considered in determining an appropriate penalty, not in determining whether a violation of this standard occurred.

8/ We note that the Secretary does not contend "that the merest deposit of combustible material constitutes a violation of the standard."

9/ As we have noted, the judge held that Old Ben had not violated

30 CFR $75.400. His additional holding of no unwarrantable failure was apparently made to provide an alternative basis for.vacating the withdrawal order. Although the Board did not reach this issue, it did accept the judge's findings on this issue when it discussed its third element of proof for establishing a violation of the standard. 8 IBMA at 118, 119.

The judge found that the accumulations had occurred mostly during the latter part of the previous shift; that the operator "could not reasonably have been expected to know of the presence of the materials until the beginning of the second shift, when the second-shift mine manager should review the midnight shift examiner's report (based on inspections between 4:00 a.m. and 7:00 a.m.)..." 10/ and that the operator "first gained actual knowledge of the materials when the mine manager and [section foreman] reviewed the mine examiner's report and when [the section foreman] walked the belt when he arrived at the section shortly before the inspection began." The judge concluded that there was no unwarrantable failure to comply with the standard "because as soon as the operator became aware of the cited conditions enough employees were promptly assigned to abate the conditions within a reasonable time," and because Old Ben "was following established procedures reasonably calculated to alert [it] to hazardous conditions within a reasonable period of time."

We disagree with the judge's conclusion. He found as a fact that the accumulations were reported in the midnight shift examiner's report, made between 4 a.m. and 7 a.m. Sections 303(d)(1) and 303(e) of the Act required the examination made by the midnight shift examiner. Such examinations must be made by "certified persons designated by the operator." Section 303(e) required in addition that any "hazardous conditions ... shall be corrected immediately." We impute to Old Ben the midnight shift examiner's knowledge that the accumulations existed sometime during the midnight shift. Cf. Pocahontas Fuel Company v. Andrus, 590 F.2d 95 (4th Cir. 1979). Compliance did not begin, however, until after the 8 a.m. shift began. Thus, contrary to the judge's holding, the operator did not promptly begin to eliminate the conditions "as soon as [he] became aware of the cited conditions." This constituted an unwarrantable failure on the part of Old Ben under the facts of this case. 11/

Is a "significant and substantial" finding required for the issuance of a section 104(c)(2) order?

Finally, the judge concluded, as a third basis for vacating the order, that the "conditions upon which the Order is premised were not such as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." 12/ It is unnecessary for us to review this conclusion because, after the judge's decision, the Board held that a "significant and substantial" finding (see section 104(c)(1)) is not required for the issuance of a withdrawal order under section 104(c)(2). Zeigler Coal Co., supra., 6 IBMA at 189-190. See also, UMWA v. Kleppe, supra, 532 F.2d at 1407. We

concur in this interpretation of section 104(c)(2). Consequently, the judge's finding that the "significant and substantial" criterion was not met here was immaterial.

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10/ The judge found that the second shift began at 8 a.m.

11/ We need not consider in this case whether the "operator" is chargeable with knowledge, if any, gained by other persons at an even earlier time. Nor need we determine in this case under what circumstances constructive knowledge is deemed to exist, nor to what extent knowledge, actual or constructive, is necessary to a finding of unwarrantable failure.

12/ The Board found it unnecessary to decide this issue. See note 5, supra.

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Accordingly, we reverse the decision of the judge and reinstate the withdrawal order.

Commissioner Backley did not participate in the decision of this case.