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MSHA V. C.C.C.-POMPEY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
June 12, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket No. PIKE 79-125-P

C.C.C.-POMPEY COAL COMPANY, INC.

DECISION

A Mine Safety and Health Administration inspector cited C.C.C. Pompey Coal Company, Inc. ("Pompey") for an accumulation of combustible materials on the electrical components of a scoop. The citation alleged the accumulation constituted a violation of 30 CFR $75.400. 1/ The Secretary sought a penalty under section 110 of the Act for the alleged violation. The administrative law judge ruled the Secretary had not proved the violation and dismissed his petition for assessment of a civil penalty.

On September 27, 1979, at the conclusion of the evidentiary hearing, the judge issued an oral bench decision in favor of Pompey. The judge found that an accumulation of combustible materials did exist and that Pompey knew or should have known of its existence. He held, however, that the Secretary failed to establish a violation of section 75.400 because the MSHA inspector did not know how long the accumulation had been on the machine and thus could not establish that the operator

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1/ Section 75.400 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.

failed to clean it up within a reasonable time. 2/ On January 28, 1980. the judge's bench decision was reduced to writing and was issued in written form by the Commission's Executive Director. For the reasons discussed below, we reverse and remand.

On December 12, 1979, in the interim between the judge's oral and written decisions, we reversed the Board's decision in Old Ben and rejected its reasoning with regard to the elements of proof necessary to establish a violation of section 75.400. Old Ben Coal Co., 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD %24,084 (1979). 3/ We held that "[t]he language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exists." 1 FMSHRC at 1956. We stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." Id. at 1957. Nevertheless, in his written decision of January 28, 1980, the judge stated that because his bench decision of September 27, 1979, was "final insofar as the parties were concerned". He did not believe that he should amend his bench decision to conform to our intervening decision in Old Ben. In the judge's view, the Board's Old Ben decision was the "applicable law" at the time that his bench decision was rendered.

2/ The judge based his holding on a decision by the former Interior Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). In that case, the Board had set out three elements of proof necessary to establish a violation of 30 CFR $75.400. Those elements of proof were: 1) that an accumulation of combustible materials existed; 2) that the operator knew or should have known of the existence of the accumulation; 3) that the operator failed to clean up, or to undertake to clean up the accumulation within a reasonable time after the accumulation was discovered or should have been discovered by the operator. With respect to this case, because the inspector did not know the length of time that the accumulation existed, the judge concluded that the Secretary did not satisfy the Board's third criterion and, as a result, failed to establish a violation of section 75.400.

3/ The Board's decision in Old Ben Coal Co., 8 IBMA 98 (1977), was before the Commission upon remand from the D.C. Circuit. See Old Ben Coal Co., 1 FMSHRC at 1955.

We hold that a judge's decision is not final insofar as the parties are concerned until it is issued in writing by the Commission's Executive Director. Rule 65, 29 CFR $2700.65. 4/ Thus, the judge's decision in this case was not final until it was issued on January 28, 1980. Because a judge is bound to follow prior Commission precedent, the judge here erred in not applying the principles set forth in our decision in Old Ben Coal Co., 1 FMSHRC 1954 (1979). 5/

Accordingly, the judge's decision is reversed and remanded for further proceedings consistent with this opinion. 6/

Richard V. Backley,

Commissioner

Frank F. Jestrab

A. E. Lawson,

Commissioner

Marian Pearlman

Nease, Commissioner

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4/ Rule 65 in part provides:

(a) Form and content of the decision. The Judge shall make a decision that constitutes his disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript. An order by a Judge approving a settlement proposal is a decision of a Judge.

(b) Procedure for issuance. The Judge shall transmit to the Executive Director his decision, the record (including the transcript), and as many copies of his decision as there are parties plus seven. The Executive Director shall then promptly issue to each party and each Commissioner a copy of the decision.

(c) Termination of the Judge's jurisdiction; correction of clerical errors. The jurisdiction of the Judge terminates when his decision has been issued by the Executive Director....

5/ We continue to look favorably upon the practice of issuing bench decisions. We hold only that a bench decision is not a final decision of a judge.

6/ On remand, the judge may, if he deems it appropriate, allow the parties to comment upon the effect of our decision in Old Ben Coal Co. on the merits of this case.

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