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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
July 1, 1980

PEABODY COAL COMPANY Docket No. BARB 76-117

v. IBMA 77-4

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

DECISION

This is a penalty proceeding arising under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. 801 et seq. (1976 and Supp. I 1977). An appeal was pending before the Interior Department Board of Mine Operations Appeals on March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C. 961 (1978). Peabody is appealing a decision of an administrative law judge that found the company in violation of 30 CFR 77.404(a) and assessed a penalty of $3,500 for that violation.

The case arose out of a fatality that occurred at Peabody Coal Company's Ken Strip Mine in Kentucky on May 8, 1974. Ellis O. Crick, a welder in the truck repair shop at the mine, was killed when an overhead chain hoist fell and struck him in the head.

An examination of the hoist after the accident showed that a flange on the hoist's assembly had been bent outward. This bend caused the rollers to lose contact with the overhead beam and fall. No one at the Ken Mine was aware of the damage to the flange prior to the accident.

The judge held that the evidence established that Peabody failed to maintain equipment in safe operating condition as required by 30 CFR 77.404(a). That regulation 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 pointed out that the Board of Mine Operation Appeals, in a case involving a similarly worded regulation, 1/ held that proof of an unsafe condition in equipment establishes a prima facie case of failure to properly maintain that equipment. He held that an operator must conduct sufficient inspections of potentially dangerous types of equipment such as the hoist in order to satisfy the maintenance requirement in the regulation and that Peabody had failed to fulfill that requirement because no particular inspections of the hoist were being conducted.

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1/ Eastern Associated Coal Corporation, 5 IBMA 185, 200(1975).

On appeal, Peabody admits that the evidence established that an unsafe condition existed at its mine at the time of the accident. Peabody argues, however, that the judge erred in concluding that the evidence established a violation of the regulation. Peabody contends that there are two permissible interpretations of the regulation: (1) that the regulation is violated only if the operator knows that equipment is unsafe and fails to remove it from service once the unsafe condition is known, or (2) that the regulation is violated if an operator does not know of the unsafe condition and fails to exercise reasonable care to discover the existence of the unsafe condition.

We reject these arguments. In Peabody Coal Company, 1 FMSHRC 1494 (1979), the Commission held that 30 CFR 77.404(a) imposes two duties on an operator -- a duty to maintain machinery and equipment in safe operating condition, and a duty to remove unsafe equipment from service. The Commission said that an operator violates the portion of the regulation requiring operators to maintain equipment in "safe operating condition" whenever the existence of an unsafe condition is proved. We rejected the argument that a violation of the requirement to maintain equipment in safe operating condition is not established unless the evidence shows that an operator knew or should have known of the existence of the unsafe condition. We said:

> The regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability on 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. [1 FMSHRC at 1495].

Accordingly, because it is undisputed that the hoist was in an unsafe condition, a violation of the regulation has been established.

We turn now to the issue of the appropriateness of the penalty assessed by the judge. In arguing for a reduction of the penalty, Peabody does not dispute the findings of the judge relating to the penalty criteria set forth in section 109 of the 1969 Act. Peabody maintains, however, that those findings do not support the assessment of a $3,500 penalty.

The Commission has declined to disturb penalty amounts assessed by a judge where the record reflects his full consideration of the six statutory criteria. See, e.g., Peabody Coal Co., 1 FMSHRC 1494

(1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Ruston Mining Co., 1 FMSHRC 794 (1979). Peabody does not object to the judge's failure to full consider the six statutory factors. It argues only that the finding of the judge on those factors warrant a lower penalty. Our independent review convinces us that the judge did not err in assessing the penalty.

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The judge's decision is affirmed.

Richard V. Backley, Chairman

Marian Pearlman Nease, Commissioner