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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
October 24, 1980

SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. VINC 75-180-P VINC 75-181-P VINC 75-183-P
v.	VINC 75-185-P VINC 75-186-P
OLD BEN COAL COMPANY	IBMA 76-102

DECISION

This is a penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(amended 1977) [the 1969 Coal Act], in which the Mining Enforcement and Safety Administration (MESA) appealed portions of a June 10, 1976 administrative law judge decision. The 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 (Supp. III 1979). The issues are: 1) whether the judge properly vacated two notices alleging violations of 30 CFR $75.400; and 2) whether the judge properly vacated four notices alleging violations of 30 CFR 75.403.

I.

We hold that it was error for the judge to vacate the notices alleging violations of 30 CFR $75.400. 1/

On January 15, 1974, and February.28, 1974, a MESA inspector issued notices to the Old Ben Coal Company for violations of 30 CFR $75.400. One notice alleged that loose coal and coal dust saturated with oil were allowed to accumulate on the pump motor and in the transmission compartment of a shuttle car; the other alleged that fine coal and coal dust saturated with oil and grease were allowed to accumulate on the controls, jacks and underneath the conveyor area of a continuous miner. The administrative law judge vacated both notices of violation, basing

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1/ 30 CFR $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.

The regulation is identical to section 304(a) of the 1969 Coal Act and to section 304(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979)[the 1977 Mine Act].
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his decision on the inspector's failure to measure either the depth or extent of the coal accumulations, and, in the case of the shuttle car, to even estimate the depth. The judge's decision was based upon the Board of Mine Operation Appeals decision in North American Coal Corp., 3 IBMA 93 (1974). 2/ In North American, the Board held that to establish a violation of 30 CFR $75.400, "[a]s a minimum evidence of depth and extent must appear in the record; otherwise, a finding of violation is unjustified." The Board found such evidence necessary for the judge to make an independent appraisal of whether the mass of combustible material was of such dangerous size as to constitute an "accumulation." North American, supra at 104. We believe the requirement of evidence of depth and extent as a prerequisite to finding a violation of 30 CFR $75.400 is erroneous. It is too restrictive and does not further congressional intent.

We have previously noted that section 304(a) of the 1969 Coal Act, which section 75.400 restates, is one of the mandatory standards aimed at the elimination of fuel sources for explosions and fires, 3/ and that through its requirements Congress hoped to achieve one of the prime purposes of the Act--the prevention of loss of life and serious injury arising from explosions and fires in mines. A requirement that evidence of depth and extent be a prerequisite in establishing the fact of violation does not further that purpose. It may often be dangerous or even impossible to obtain evidence of depth or extent or even to estimate it, 4/ but that in no way diminishes the danger of fire or explosion posed by the presence of dangerous quantities of combustible materials. Thus, we hold that in establishing the fact of violation, the absence of evidence of depth and extent of the combustible materials will not, in and of itself, be cause for vacating a citation alleging a violation of 30 CFR $75.400. 5/

2/ In his decision, the judge cited the Board's summary affirmance of K&L Coal Co., 6 IBMA 130 (1976). In the underlying K&L decision (HOPE 75-149-P, January 19, 1976), the judge, citing North American, had vacated a notice of violation of $75.400 because the notice failed to indicate the depth and extent of the alleged accumulations, and because other evidence of record also failed to indicate such.

3/ See our discussion of the genesis of the standard in Old Ben Coal Corp., 1 FMSHRC 1954 (1979).

4/ We note, for example, the inspector's undisputed testimony that measuring the alleged combustible materials on the shuttle car would involve putting his hand into a hot area and that measuring the

alleged combustible materials under the conveyor area of the continuous miner would be dangerous unless the tail piece of the miner was properly blocked.

5/ We do not advocate an end to consideration of testimony as to the depth and extent of materials which allegedly violate the standard. In fact, the opposite is true, for such testimony may be highly relevant in determining the existence of combustible materials. We only seek to end the rule that evidence of depth and extent is a necessary prerequisite to establishing a violation of 30 CFR $75.400.

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We have recognized that some spillage of combustible materials may be inevitable in mining operations. 6/ However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, 7/ it likely could cause or propagate a fire or explosion if an ignition source were present. 8/

Therefore, we reinstate the notices of violation of 30 CFR $75.400 vacated by the judge and remand for further proceedings consistent with the above discussion.

II.

We hold that the judge also erred in vacating the notices of violation of 30 CFR $75.403. 9/

Old Ben was issued four notices of violation of 30 CFR $75.403. All of the notices charged that Old Ben had failed to maintain sufficient incombustible content as required by the standard. The samples upon which the alleged violations were based were collected by the "band sample method." The judge noted that MESA's inspectors' manuals state

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6/ Old Ben Coal Corp., 1 FMSHRC at 1958.

7/ The validity of that judgment is, of course, subject to challenge before the administrative law judge.

8/ The actual or probable presence of an ignition source is not, however, an element of the violation. As we have noted, in seeking to prevent mine fires and explosions, Congress sought to eliminate both accumulations of combustible materials (fuel) and ignition sources.

9/ 30 CFR $75.403 provides:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less

than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

The regulation is identical to section 304(d) of the 1969 Coal Act. Section 304(d) of the 1977 Mine Act is also identical to the regulation.

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that the band sample method is not to be used when collecting samples of dust to substantiate a violation of 30 CFR $75.403. 10/ The judge vacated these notices of violation solely because the band sample method of collection was used. This was error. Not following directives contained in instructional manuals is not, on its own, a sufficient basis to vacate a notice of violation. Such instructions are not officially promulgated and do not prescribe rules of law binding upon an agency. Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 38 (3rd Cir. 1976); Brennan v. Ace Hardware Corp, 495 F.2d 368, 376 (8th Cir. 1974); FMC Corp., 5 OSHC 1707, 1977-78 OSHD •22,060 (1977). There is no evidence in the record to establish what effect, if any, use of the band sample method has on the reliability of the sample results. We do not know if the inspector's manuals proscribed that method because it could lead to results distorted unfairly against the operator, in favor of the operator, or for some other reason unrelated to sample reliability. The record simply contains no evidence on the matter. Thus, the judge erred in vacating the notices of violation solely the band method of collecting samples was used. 11/ Therefore, because we reinstate the notices of violation of 30 CFR $75.403 vacated by the judge.

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10/ The judge stated:

All of the inspector's manuals (these are not paginated so citations cannot be given) state that in collecting samples of the mixtures of rock dust and coal dust for the purpose of substantiating a violation of 30 CFR 75.403, the band or perimeter method of collecting the samples shall not be used. [Dec. 6-7.]

11/ The judge also vacated one of the four notices of violation of 30 CFR $75.403 because of the procedure used to store the collected samples. The judge questioned MESA's inspector concerning the storage procedures. His questions revealed the inspector had tied a knot around the bags containing the samples and had set them on his desk in an enclosed box. Thirty-two days after collecting the samples he sent them to the laboratory for analysis. The judge ruled that the "respondent, by the regulations is entitled to have any moisture in

the mixture counted as part of the incombustible content. Merely tying a string around the cellophane bag in which the sample is collected without some further action such as sealing it or establishing that the analysis was made before any significant moisture could evaporate, does not assure a respondent of the benefit of the possible moisture content of the mixture. The notice of violation is accordingly vacated." Dec. 6-7. However, we find no testimony in the record as to the effect on the sample's moisture content of tying or knotting the sample bags and of retaining the bags for 32 days before sending them for analysis. The conclusion of the judge that these procedures do "not assure a respondent of the benefit of the possible moisture content of the mixture" is apparently based solely upon the judge's belief that the possibility of evaporation is sufficient to cast reasonable doubt on the sample results. We may share his doubts. However, since there is no testimony as to the effect of these procedures upon the moisture content, there is not substantial evidence in the record to support the judge's supposition. The vacation of the notice of violation on this basis was also error.
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Accordingly, this case is remanded to the administrative law judge for further proceedings consistent with this decision. 12/
Richard V. Backley, Chairman
Frank E. Jestrab, Commissioner
A. E. Lawson, Commissioner
Marian Pearlman Nease, Commissioner

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12/ The judge dismissed without prejudice one alleged violation of 30 CFR $75.400, upon finding that the validity of the withdrawal order in which the alleged violation had been cited was pending on review before the Board. We find under the circumstances no error in the dismissal without prejudice.
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