CCASE:
MSHA V. OLD BEN COAL
DDATE:
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 24, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. VINC 75-83-P
Petitioner VINC 75-230-P

v.

OLD BEN COAL COMPANY,
Respondent IBMA No. 76-86

DECISION

This penalty proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801-960 (1976) (amended 1977) (the Act). After an evidentiary hearing, the administrative law judge dismissed the petition for assessment with regard to four section 104(c)(2) orders of withdrawal,l/ vacated four notices of violation and dismissed their related penalty proceedings.2/ The Mining Enforcement and Safety Administration (MESA) appealed.3/ For the reasons that follow, we affirm in part and reverse and remand in part.4/

Penalty Proceedings Related to Withdrawal Order

Respondent Old Ben Coal Company moved and MESA agreed to continue the penalty proceedings related to four orders of withdrawal because Old Ben's contest of those orders had been heard by another judge in review proceedings and decisions in those cases were expected. The judge reasoned, however, that there could be a considerable time before final decision of the orders on review. Therefore, he dismissed the penalty proceedings without prejudice to MESA's right to refile if ultimately successful in the review proceedings.

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1/Order No. 1-HG, dated February 5, 1974.
Order No. 1-HG, dated February 6, 1974.
Order No. 2 HG, dated February 6, 1974.
Order No. 1-HG, dated February 13, 1974.
2/Notice No. 1 HG, dated February 6, 1974.
Notice No. 1-HG, dated February 7, 1974.
Notice No. 1-JWD, dated December 12, 1972.
Notice No. 1 BP, dated December 19, 1972.

3/On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. $ 961 (Supp.III 1979). MESA's enforcement responsibilities were transferred to the Department of Labor's Mine Safety and Health Administration (MSHA), and MSHA is substituted as the petitioner in this appeal.

4/Because of common questions of law and fact, the appeals as to the orders of withdrawal are treated jointly. The notices are treated separately.

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This Commission has previously considered the advantages and disadvantages of a stay of proceedings rather than a dismissal.5/ We hold that as a matter of policy a stay in the instant circumstances would be more appropriate. A stay would relieve the parties of the task of refiling and would eliminate any potential problems attendant to refiling caused by the passage of time necessary to resolve the appeal of the underlying order. We believe that any benefit gained by the judge in removing the penalty proceedings from his docket does not outweigh these considerations. Accordingly, the judge's decision is reversed. The petition for assessment of penalties related to the four subject orders of withdrawal is reinstated and remanded for further proceedings.

Notice No. 1-HG, 2/6/74

This notice alleged that float coal dust was deposited on rock-dusted surfaces in return air courses for approximately 2,500 feet in violation of 30 CFR 75.400. Respondent defended by contending the cited area was not an "active working" required by 30 CFR 75.400 6/ and defined by section 318(g)(4) of the Act.7/ The judge assumed that no miners worked in the area and vacated the notice because MESA failed to carry the burden of showing that this accumulation occurred in an "active working."

Without determining whether or not the function alone of a particular area in a mine qualifies the area as an active working, the record shows that the cited area was required to be inspected at least once a week, was traveled as an escape route, and was rock-dusted periodically. We find that these uses meet the work and travel requirements of an active working under the standard. Kaiser Steel Corp., 3 IBMA 489, 510 (1974); Mid-Continent Coal & Coke Co., 1 IBMA 250, 257 (1972). Accordingly, the judge's decision is reversed, and remanded for further proceedings.

Notice No. 1-HG, 2/7/74

This notice alleged that eight open top 5-gallon cans of hydraulic fluid were stored in a crosscut off a track entry in violation of

30 CFR 75.1104.8/ This standard requires that lubricating oil and grease be kept in closed metal containers or other no less effective containers. Since no evidence was presented that hydraulic fluid was a lubricating oil, the judge vacated the notice.

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5/Eastern Associated Coal Corp., 2 FMSHRC 2774, 2777 (October 9, 1980).

6/30 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." [Emphasis added].

7/Section 318(g)(4) of the Act provided: "'Active working' means any place in a coal mine where miners are normally required to work or travel."

8/30 CFR 75.1104 provides: "Underground storage places for lubricating oil and grease shall be of fireproof construction. Except for specially prepared materials approved by the Secretary, lubricating oil and grease kept in all underground areas in a coal mine shall be in fireproof closed metal containers or other no less effective containers approved by the Secretary." [Emphasis supplied].

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MESA contends the judge should have taken notice that hydraulic fluid was a lubricating oil. However, we find that MESA should have presented such evidence to the judge during trial. To allow MESA's request of judicial notice first made on appeal would deny Respondent an opportunity to rebut whatever probative value such notice afforded. Also at the time of the hearing in this matter, MESA itself was on notice of an unresolved issued as to whether hydraulic fluid falls within the purview of the cited standard. Valley Camp Coal Co., 3 IBMA 176, 183-4 (1974). In finding the vacation of notice proper, we are holding only that, in this case, MESA failed in its burden of proof. The judge's decision is affirmed.

Notice No. 1-JWD, 12/12/72

MESA alleged that Respondent violated 30 CFR 75.316 by failing to comply with its ventilation plan. However, the plan itself was not available as evidence. Finding that the Respondent refused to stipulate the requirements of the plan, the judge vacated this notice. While the plan was not available and Respondent would not stipulate as to its contents, the MESA inspector, having read and remembered the plan, testified as to what the plan provided in relation to the alleged non-compliance. His testimony was supported by area practice, and was not contradicted by Respondent. Under these defined circumstances, MESA was not obligated to produce the relevant part of the plan to support this notice. Accordingly. the judge's decision as to this notice is reversed, and remanded for further proceedings.

Notice No. 1 BP, 12/19/72
This notice alleged a violation of 30 CFR 75.323 9/ in that neither the mine superintendent nor the assistant superintendent had countersigned the daily reports of the preshift examiner and the assistant mine foreman. The judge, finding that the subject regulation placed no time limit for the countersigning by the superintendent or his assistant, interpreted the regulation to provide a reasonable time for such signing. The judge then found that MESA presented no evidence that the time involved here was unreasonable and vacated the notice.

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9/30 CFR 75.323 provides: "The mine foreman shall read and countersign promptly the daily reports of the preshift examiner and assistant mine foreman, and he shall read and countersign promptly the weekly report covering the examinations for hazardous conditions. Where such reports disclose hazardous conditions, they shall be corrected promptly. If such conditions create an imminent danger, the operator shall withdraw all persons from, or prevent any person from entering, as the case may bc, the area affected by such conditions, except those person referred to in section 104(d) of the Act, until such danger is abated. The mine superintendent or assistant superintendent of the mine shall also read and countersign the daily and weekly reports of such persons."

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On appeal, MESA contends that the countersigning requirement is for the purpose of bringing the reports in question to the superintendent's attention with reasonable dispatch and that a reasonable time for such countersigning would be the superintendent's next working shift following the execution of the reports. While such may be the desire of MESA, the regulation provides no time period for countersigning. In fact, this same regulation does expressly require all other signing to be done promptly.

While neither this regulation nor its supporting statutory provision 10/ provides a time certain for the countersigning required, both provide that all reported hazardous conditions be corrected promptly without reliance upon the mine superintendent's or his assistant's reading or signing. Accordingly, without sacrificing prompt safety and health corrective action, we accept the judge's interpretation allowing a reasonable period for such signing and, in the absence of any evidence that the period involved here was unreasonable, we affirm the judge. In so doing, we are not condoning indifferent or dilatory practices in the reading and signing of these reports.

In summary, the judge's decision is affirmed with respect to Notices No. 1-HG, 2/7/74 and No. 1-BP, 12/19/72. With respect to

Notices No. 1-HG, 2/6/74 and No. 1-JWD, 12/12/72, the judge's decision is reversed, the notices reinstated and remanded for further proceedings consistent with this opinion. With respect to the penalty proceedings related to the four withdrawal orders, the judge's decision is reversed, the petition for assessment of penalties is reinstated, and the case is remanded for further proceedings.

Richard V. Backley,
Chairman
Frank F. Jestrab,
Commissioner
A. E. Lawson,
Commissioner
Marian Pearlman
Nease, Commissioner

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10/30 U.S.C. $ 863(v).

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