CCASE:
MSHA V. ALABAMA BY-PRODUCTS
DDATE:
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 9, 1982
SECRETARY OF LABOR,
MINE SAFETY OF HEALTH
ADMINISTRATION (MSHA)

Docket No. BARB 76-153
v. IBMA 76-114

ALABAMA BY-PRODUCTS
CORPORATION

DECISION

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976)(amended 1977)("the Coal Act"). 1/ Alabama By-Products Corporation and the Secretary filed cross-appeals with the Department of Interior's Board of Mine Operations Appeals from a decision of an administrative law judge affirming in part and vacating in part a notice of violation alleging a violation of 30 C.F.R. • 75.1725(a). 2/ The cited standard 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.

For the reasons that follow we modify the judge's decision and find a violation of the cited standard based on the totality of the circumstances at issue.

The notice described the alleged violation of 30 C.F.R. □ 75.1725(a) as follows

The no. 1 belt conveyor ... was not being maintained in safe operating condition in that there were 13 defective bottom rollers also the conveyor belt was cutting into numerous bottom belt structures. The no. 1 belt conveyor ... was removed from service.

1/ In this case, review was sought of an abated notice of violation. For the reasons stated in our decision in Eastern Associated Coal Corp., 4 FMSHRC 835 (May 1982), we will review the merits of the notice at this time. For this reason, we need not address the arguments of the parties concerning whether the judge correctly concluded that the notice at issue could be reviewed because it was

tantamount to a withdrawal order.
2/ On March 8, 1978, this case was pending on appeal before the Board of Mine Operations Appeals. According[y, it is before the Commission for disposition. 30 U.S.C. $ 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration.
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The conditions were cited and corrected and the citation terminated on that same day. The issues before the Commission are: whether the cited standard is enforceable; whether the judge correctly interpreted the duties imposed by the standard; whether the judge's findings of fact concerning the conditions of the stuck rollers and belt are supported by the evidence; and whether the judge erred by holding that the notice was valid despite the inspector's failure to follow an internal MESA memorandum concerning the enforcement of section 1725.
On appeal, as it did before the judge, Alabama challenges the validity of 30 C.F.R. $ 75.1725 on two grounds. First, it argues that the standard is so ambiguously drafted and applied that it is invalid under the Coal Act. Second, it argues that the standard is unconstitutionally vague. The judge found that he lacked authority to entertain statutory or constitutional challenges to the validity of standards and therefore declined to pass upon Alabama's arguments. The Commission has held "that a challenge to the validity of a standard adopted under the 1969 Coal Act can be raised and decided in an adjudication before the Commission." Sewell Coal Co., 3 FMSHRC 1402, 1405 (June 1981). The Commission has also held that it has the power to determine the constitutionality of the provisions of the mine safety statute itself. Kenny Richardson, 3 FMSHRC 8, 17-21 (January 1981), aff'd on other grounds, 689 F.2d 632 (6th Cir. 1982). In light of these conclusions, and for similar reasons, we conclude that the Commission has the authority to decide the challenges to the validity of the standard raised in this case.
We first address the argument that the standard is unconstitutionally vague. Alabama argues that 30 C.F.R. $ 75.1725 "offers no definite standard of conduct possible of ascertainment with certainty or clarity" and that it "fails to give fair notice of the nature of possible violations." The cited standard requires that machinery or equipment be maintained in "safe operating condition" and that such machinery immediately be removed from service if it is in an "unsafe condition." In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws [must] give the person of ordinary intelligence a reasonable

opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972).

Therefore, under 30 C.F.R. $ 75.1725(a) in deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. See, e.g., Voegele Co., Inc. v. OSHRC, 625 F.2d 1075 (3d Cir. 1980). Through application of this test to the facts of a particular case, due process problems stemming from an operator's asserted lack of notice are avoided. Thus, we reject Alabama's argument that 30 C.F.R. $ 75.1725(a) is unconstitutionally

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vague on its face. As discussed further infra, applying the above standard to the facts presented in the case before us, we find no merit in the operator's contention that it lacked fair notice of the nature of the violation with which it was charged.

We likewise reject the argument that the standard is so ambiguous and overbroad that it is void under the statute. Broadness is not always a fatal defect in a safety and health standard. Many standards must be "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). See Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974). We conclude that the operator has not established that the Secretary exceeded his rulemaking authority under the Coal Act in adopting the general standard at issue requiring that machinery and equipment be maintained in "safe" condition.

The next issue is whether the judge correctly interpreted the duties imposed by 30 C.F.R. $ 75.1725(a). The judge held the standard imposes three separate duties: (1) a duty to maintain the equipment in safe operating condition; (2) a duty to remove unsafe equipment immediately; and (3) a duty to repair the equipment if the operator intends to continue to use the equipment. In Peabody Coal Co., 1 FMSHRC 1494 (October 1979), we construed an identical standard, 30 C.F.R. $ 77.404(a), as having two requirements. We stated:

The regulation imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation.

1 FMSHRC at 1495. We now hold that the terms of the cited standard do not impose a duty requiring that unsafe machinery or equipment removed from service be repaired before abatement is accomplished. Rather, once unsafe equipment is removed from service abatement is completed. If such equipment is returned to service without repair, an additional, separate violation of the standard would occur. Accordingly, we hold the judge erred by imposing a separate duty to repair the equipment as a condition precedent to abatement.

We now turn to an examination of the judge's findings concerning whether a violation occurred. The notice of violation issued by the inspector stated that the "belt conveyor ... was not being maintained in safe operating condition in that there were 13 defective bottom rollers also the conveyer belt was cutting into numerous bottom belt structures." The judge found a violation based upon the latter condition, but not the former. In our view, in the circumstances of this case, the judge erred in treating the situation described as constituting discrete violative conditions. Rather, based upon the wording of the notice of violation and our review of the entire record, including the inspector's testimony at the hearing, we conclude that the allegation of the unsafe condition in this case was based on the combination of the

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frozen rollers and the belt running out of train cutting into belt support structures. 3/

We further conclude that the conditions described in the record establish a violation of 30 C.F.R. $ 75.1725. The operator does not dispute that the 13 bottom rollers were frozen and that the belt running out of train was cutting into numerous belt structures. Thus, the central issue is whether an unsafe condition existed. The inspector testified that a belt running over a frozen roller will produce friction, leading to a heat source. He also believed that coal residue on the belts could rub on and accumulate around a frozen roller. He further testified that friction and heat would be caused by the belt cutting into the belt structures. The judge found, and we agree, that the belt running out of train could cause coal to fall off and accumulate. The inspector's testimony regarding the friction sources and attendant heat buildup was not effectively rebutted by the operator.

We conclude that a reasonably prudent person familiar with the factual circumstances surrounding the hazardous condition alleged here, including any facts peculiar to the mining industry, would recognize that the cited equipment was in an unsafe condition. The danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious. Where such dangers are present due to defects in the

operating condition of equipment, that equipment cannot be considered in safe operating condition. In light of the nature of the danger, the evidence relied upon by the operator concerning other conditions in the area, i.e., that the belt was wet and fire-resistant, the area was adequately rock-dusted and ventilated, and coal accumulations were not then present, is not controlling as to whether an unsafe condition existed. Rather, these factors are appropriately considered in determining the "gravity" of the violation when a penalty is assessed. 30 U.S.C. $ 820(i). As the Tenth Circuit has observed in a decision upholding a violation of the identical standard at issue here: "It is clear that Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing." Mid Continent Coal & Coke Co. v. FMSHRC, No. 792271, lOth Cir., Sept. 24, 1981; 2 BNA MSHC 1450. In the present case, upon observing the defective equipment at issue, it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action.

The final issue in this case involves an internal MESA memorandum concerning the enforcement of 30 C.F.R. $ 75.1725. That memorandum stated:

3/ Both parties agree with this view of the case. In its brief to us, the operator states that the "belt allegedly running out of train was simply a condition which resulted from the frozen rollers." Br. at 15. The operator further states that "[t]here was no evidence ... that the frozen rollers caused the belt to run out of train simply because it was obvious that this had occurred." Br. at 14 n. 15. Similarly, in its brief MSHA states that "the condition of the thirteen defective belt rollers, coupled with the belt running out of train and cutting into numerous belt structures, is unsafe according to a proper construction of 30 C.F.R. $ 75.1725." Br. at 16 (emphasis added).

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... When an operator is made aware that equipment or machinery is in an unsafe operating condition, by any person, the action of the operator immediately following notification determines whether or not a violation occurs. If the faulty equipment is immediately removed, there is no violation. If the operator continues to use the faulty equipment, he is in violation. 4/ (Emphasis added.)

The operator notes that the Secretary acknowledges that the directive was not followed in the present case. Had the memorandum been followed, the notice of violation would not have been issued since the operator immediately removed the belt conveyor from service.

We agree with the judge's holding that the memorandum's interpretation of the standard is contrary to the plain language of the standard. We hold that the legal effect of the memorandum is similar to that of the Secretary's enforcement manuals discussed in King Knob Coal Co., 3 FMSHRC 1417 (1981):

> Regarding the Manual's general legal status, we have previously indicated that the Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission]." Old Ben Coal Company, 2 FMSHRC 2806, 2809 (1980). In general, the express language of a statute or regulation "unquestionably controls" over material like a field manual. See H.B. Zachry v. OSHRC, 638 F.2d 812, 817 (5th Cir. 1981).... This does not mean that the Manual's specific contents can never be accorded significance in appropriate situations. Cases may arise where the Manual or a similar MSHA document reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect. This case, however, does not present that situation.

3 FMSHRC at 1420 (emphasis added). Accordingly, we accord no legal effect to the memorandum and affirm the judge's holding that the failure to follow it does not invalidate the notice.

4/ Internal agency directive from John Crawford, then Assistant Administrator for the Coal Mine Health and Safety Division of MESA (July 14, 1975).

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For the foregoing reasons, the judge's decision is modified and the notice alleging a violation of 30 F.R. $ 75.1725(a) is affirmed.

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