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MSHA V. BLACK DIAMOND COAL
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FMSHRC-WDC

AUG 5, 1985

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

v. Docket No. SE 82-48

BLACK DIAMOND COAL MINING
COMPANY

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et se . (1982) (the "Mine Act") and raises two issues: (1) Whether Black Diamond Coal Mining Company ("Black Diamond") violated 30 C.F.R. $ 75.400, a mandatory safety standard prohibiting accumulations of combustible materials 1/, and (2) whether Black Diamond improperly was denied an opportunity in this proceeding to challenge the inspector's finding that the above violation and an admitted violation of 30 C.F.R. $ 75.200 were caused by its unwarrantable failure to comply with the standards. A Commission administrative law judge concluded that Black Diamond violated the standards and refused to permit it to challenge the inspector's unwarrantable failure findings. 5 FMSHRC 764 (April 1983)(ALJ). For the reasons set forth below, we affirm.

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1/ 30 C.F.R. $ 75.400, which is identical to section 304(a) of the Mine Act, 30 U.S.C. $ 864(a), 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.

On November 12 and 16, 1981, during a regular inspection of Black Diamond's Shannon Mine, Milton Zimmerman, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued two orders of withdrawal pursuant to section 104(d)(1) of the Mine Act. 2/ The order issued on November 12 alleged a violation of section 75.400 due to an accumulation of loose coal, coal dust and float coal dust. The order issued on November 16 alleged a violation of 30 C.F.R. $ 75.200 in that Black Diamond failed to comply with its approved roof control plan. 3/ In his order the inspector found, pursuant to section 104(d)(1), that the violations could "significantly and substantially

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2/ Section 104(d)(1), 30 U.S.C. $ 814(d)(1), states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

3/ 30 C.F.R. $ 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. $ 862(a), states in part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways,

travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of support and spacing approved by the Secretary. ...

contribute to the cause and effect of a coal ... mine safety or health hazard" and that each of the violations was caused by "an unwarrantable failure of [Black Diamond] to comply with [the cited] mandatory ... safety standards."

Black Diamond did not contest the validity of the withdrawal orders within 30 days of their receipt. 4/ Subsequently, MSHA notified Black Diamond of the penalties that it proposed for the violations: $750 for the violation of 30 C.F.R. $ 75.400 and $500 for the violation of 30 C.F.R. $ 75.200. Black Diamond filed a notice of contest and the Secretary petitioned the Commission to assess the proposed penalties. On August 2, 1982, Black Diamond answered the Secretary's petition stating, "The proposed assessment is an error as a matter of fact ... the proposed fine [does] not follow the statutory guideline for assessment. The Secretary filed additional documents to supplement the penalty petition and new penalties of $1,000 for each violation were proposed. Black Diamond amended its answer to "request[] that a hearing be held on the ... proposal for assessment of civil penalty."

At the hearing Black Diamond did not dispute that it violated 30 C.F.R. $ 75.200, but argued that the proposed penalty was too high. However, it did contest the violation of 30 C.F.R. $ 75.400. Inspector Zimmerman testified regarding the violation of section 75.400 that he observed loose coal, which appeared to him to have accumulated over four to five production shifts, extending the entire length of the 400 foot beltline. According to the Inspector, the loose coal was from one foot to four feet nine inches deep, and four to ten feet wide. In addition, the inspector observed accumulations of float coal dust along the belt-line that were 1/16th of an inch deep. The inspector also stated that at the point where the accumulated material was deepest, the bottom belt rollers were running in the accumulations. The inspector believed the material to be combustible despite the fact that the coal accumulations were damp.

Black Diamond's underground foreman, Paul Province, at first testified that the cited materials under the belt were either rock, fire clay, or coal mixed with rock and fire clay. 5/ Mr. Province also testified that 80% of the accumulated material was rock and that the remaining 20% was coal.

4/ Section 105(d) of the Mine Act, 30 U.S.C. $ 815(d), states in part:

> If, within 30 days of receipt thereof, an operator ...

> notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104 ... the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order ... affirming, modifying or vacating the ... order.

5/ "Fire clay" is defined as, "[A]lmost any soft non-bedded clay immediately underlying a coal bed." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining Mineral and Related Terms 429 (1968).

Mr. Province described the material touching the belt rollers as "muck." He said it was so wet that when he grabbed a handful of the material and squeezed it, it ran through his fingers. He acknowledged, however, that the inspector's observations regarding the float coal and coal dust accumulations were accurate.

The judge found a violation of 30 C.F.R. $ 75.400 based upon the existence of accumulations of loose coal, coal dust and float coal dust. 5 FMSHRC at 778. Regarding the accumulations of coal dust and float coal dust, the judge noted that the Secretary established by credible evidence the existence of the accumulations and that Black Diamond did not dispute their existence as cited by the inspector. The judge concluded that this alone was enough to sustain the violation. 5 FMSHRC at 778. The judge also found that the Secretary established, through the inspector's testimony, the presence of the accumulations of loose coal. 5 FMSHRC at 778-79.

Black Diamond challenges the judge's conclusion that it violated section 75.400 on two grounds. Black Diamond argues there was no accumulation of coal dust or float coal dust, and it contends that the accumulations of loose coal were not combustible. We reject both arguments.

The inspector observed and precisely described the presence of coal dust and float coal dust in the middle of the track and on the belt structure. He also described the depth of the float coal dust. Black Diamond's foreman conceded the inspector was not wrong in his description of the coal dust and float coal dust accumulation. Although he later testified that the float coal dust was "showing a good white color" where rock dust had been applied, he did not retract his previous statement that the inspector had not erred in his description of the dust accumulations. The judge found the inspector to be a credible witness. 5 FMSHRC at 779. We find no controverting evidence warranting reversal of this finding and the conclusions based upon it. Cf. Richard E. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1419 (June 1984). We therefore conclude that substantial evidence supports the judge's finding that the accumulations of coal dust and float coal dust existed as described by the inspector and in violation of the standard.

Black Diamond's second argument, that the accumulation of loose coal was not combustible in that it was composed mainly of rock and was too wet to burn requires us to address the meaning of 30 C.F.R. $ 75.400. We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to

miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated "[i]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Even if, as Black Diamond asserts, the accumulation was damp or wet, it was still combustible. For example, in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire. Furthermore, even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite. Also, coal mixed with rock and fire clay can nevertheless burn. A construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist.

Black Diamond does not dispute the fact that loose coal was present We conclude that substantial evidence supports the judge's finding that the accumulation of loose coal violated the standard.

Because both of the violations at issue were contained in section 104(d) withdrawal orders, MSHA processed them pursuant to its special penalty assessment procedures. 6/ At the hearing Black Diamond unsuccessfully sought to challenge the validity of the special assessments on the ground that they were based on erroneous "unwarrantable failure" determinations. Black Diamond asserts that the inspector made erroneous unwarrantable failure findings with regard to both violations and that the judge's "failure to consider the issue allowed MSHA to propose a special assessment in violation of 30 C.F.R. $ 100.5 and the failure requires reversal of the ... judge's decision." Moreover, Black Diamond contends that the judge's refusal to hear evidence regarding unwarrantable failure denied it due process because, "it precluded Black Diamond from contesting the only basis enumerated in 30 C.F.R. $ 100.5 that allegedly existed to justify the proposed special assessments." Thus, Black Diamond's attempt to challenge the unwarrantable failure findings in this proceeding is based solely on the impact of those findings upon the penalties proposed by the Secretary for the violations.

It has repeatedly been held that the Mine Act requires in all contested civil penalty cases that the Commission make an independent penalty determination and assessment, based solely upon the statutory criteria of section 110(i) of the Act. See e.g., Secretary of Labor on behalf of Milton Bailey v. Arkansas-Carbona Co. 5 FMSHRC 2042, 2044-46 (December 1983); Sellersburg Stone Co., 5 FMSHRC 287, 291 (March 1983),

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6/ 30 C.F.R. $ 100.5 provides in part:

MSHA may elect to waive the regular assessment formula ($ 100.3) or the single assessment provision ($ 100.4) if the agency determines that conditions surrounding the violation warrant a special assessment. ... [T]he following categories will be individually reviewed to determine whether a special assessment is appropriate: ... Unwarrantable failure to comply with mandatory health and safety standards.

aff'd 736 F.2d 1147 (7th Cir. 1984); Knox County Stone Co., Inc., 3 FMSHRC 1895, 1896-98 (August 1981); Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd 652 F.2d 59 (6th Cir. 1981). The separate procedures by which penalty assessments are proposed by the Secretary of Labor are not material to a penalty assessment by the Commission. We have stated "The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary ... has chosen to implement his statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary ... was processed under $ 100.3, $ 100.4 or $ 100.5 of the Secretary's regulations." United States Steel Mining Co., Inc., 6 FMSHRC 1148, 1150 (May 1984) (emphasis deleted).

The terms "unwarrantable failure" and "negligence" are not used synonomously in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. $ 814(d). Negligence on the other hand, is one of the criteria that the Commission must consider in assessing a civil penalty for a violation of the Act or of a mandatory health or safety standard. 30 U.S.C. $ 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the issues are distinct. At the hearing and in his decision the judge carefully distinguished the issue of unwarrantable failure from negligence. The judge properly declined to address the issue of unwarrantable failure in the context of penalty assessments. Rather, the judge made required findings regarding each of the statutory penalty criteria. With respect to the negligence criterion, he concluded that the violations resulted from Black Diamond's "ordinary negligence" in that Black Diamond failed to exercise reasonable care to insure that the cited accumulations were cleaned up and that it likewise failed to exercise reasonable care to comply with its roof control plan. 5 FMSHRC at 780, 781. The judge afforded Black Diamond the requisite opportunity to present evidence with regard to negligence as well as the other statutory penalty criteria. This is what the Mine Act requires. 7/

7/ The issue Black Diamond raises -- the impact of special findings in a withdrawal order upon a civil penalty proposed by the Secretary for the violation alleged in the order -- is different than the issue of whether the merits of such special findings may be challenged in a civil penalty proceeding when the operator has not sought review of the order pursuant to section 105(d). We leave consideration of the

latter issue to a case in which it is squarely presented.

Based on the foregoing reasons, we affirm the decision of the judge. 8/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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