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MSHA V. OLD BEN COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 29, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 80-399

OLD BEN COAL COMPANY

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. IV 1980), and involves the interpretation of 30 C.F.R. § 77.1700, which provides:

Communications in work areas.

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

The judge concluded that Old Ben Coal Company violated the standard in connection with a fatal accident which occurred when a bulldozer fell into a hole in a raw coal storage pile. 1/ For the reasons discussed below, we affirm.

The facts are basically undisputed. The coal pile on which the accident happened is located on the surface of the mine. The pile is cone-shaped and surrounds a vertical, 60-foot high stacking tube. Coal is brought from the mine by conveyors and discharged from the top of the stacker to form the storage pile. Bulldozer drivers, working on plateaus, or "benches," on the pile, push the coal away from the stacker toward four feeder holes located under the pile.

The feeder holes are not visible to the bulldozer operator from the surface of the pile, but if coal is feeding properly, indentations, or "bird's nests," appear on the surface directly above the holes.

By operating controls in the preparation plant, another employee, the preparation plant operator, opens and closes the feeder holes. Coal falls down through the holes on to an underground conveyor and is carried away to the processing plant.

1/ The judge's decision is reported at 3 FMSHRC 1886 (July 1981).

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When the weather is damp and the coal pile large, coal does not always feed evenly into the feeder holes and "bird's nests" might not appear. Instead, cavities, or "voids" form between compacted coal near the top of the pile and looser coal at the bottom going into the feeder holes. Bridged-over voids are not visible from the surface. Although a bulldozer may be able to run over a bridge for a time, it is not uncommon for a bulldozer at Old Ben's mine to collapse the bridge and fall into a void. When a driver suspects a void, he puts the blade down and drives forward; the blade collapses the bridge, preventing the bulldozer from going too deeply into the void. During the two-year period preceding the accident, the coal pile had become unusually large. The bench on which the bulldozer drivers were working was about 35-40 feet above the feeder holes. At the time of the accident on April 8, 1980, the weather was rainy and misty. Shortly before Robert Mitchell, the driver involved in the accident, started work on the midnight to 8:00 a.m. shift, another bulldozer fell into a void, but the driver was not injured and was able to pull his bulldozer out. However, he was visibly shaken, and requested a means of communication. Tr. 75, 83, 87, 107.

While Mitchell was working that night, the pile was illuminated by floodlights on the stacker and by his bulldozer headlights, but visibility was poor because of the weather. There was no radio, telephone or other means of communication in Mitchell's bulldozer. Three telephones were located about 200 yards away from the coal pile, and there was also a squawk box at some unspecified distance from the pile. Bulldozer operators were not required to use the telephones or squawk box at any set intervals, and communicated with the preparation plant on their own initiatives as the need arose. Mitchell's bulldozer was equipped with an operable back-up alarm that could be heard 300 yards away, and his bulldozer could have been seen at times during the shift when it was on certain parts of the coal pile. Old Ben conceded at oral argument before the Commission that, so far as the record shows, neither the preparation plant operator nor any other employee was required to observe or keep track of the bulldozer driver on the pile. Tr. Arg. 37-8. Mitchell used the telephones off the pile to contact the preparation plant employee twice during the first part of his shift. After Mitchell's last telephone call, about 2:30 a.m., no one had contact with him until his bulldozer, which had backed or fallen into a void and was buried in coal, was discovered about 6:00 a.m. Tr. 38-9, 199-200.

In concluding that Old Ben violated section 77.1700, the judge found that Mitchell was working alone in a hazardous area and was not "under observation" or in "sufficient communication with others to avoid a violation of the standard." 3 FMSHRC at 1891-92. On the

grounds articulated below, we agree. We turn first to the threshold questions of whether Mitchell was working "alone" in an "area where hazardous conditions exist[ed] that would endanger his safety." The term, "alone," which is not defined in the regulation, refers in common usage to being separated or isolated from others. Webster's Third New International Dictionary (Unabridged), at 60 (1971). In our ~1802

view, the standard is directed at situations where miners are effectively, or for practical purposes, working alone notwithstanding some occasional contact with others. Here, there is no dispute that Mitchell was working by himself on the coal pile. Old Ben argues that Mitchell was part of a "team," but the evidence shows that no one observed or had contact with him on a regular or continuing basis and Old Ben has conceded that no one was responsible for keeping in touch with him. Such interaction as Mitchell had with the preparation plant employee was sporadic and insubstantial. Under these circumstances, we conclude that Mitchell was working alone within the meaning of the standard.

In concluding that the coal pile was an "area where hazardous conditions exist," the judge held that the standard applies where hazardous conditions outside normal conditions in the mining industry are present. 3 FMSHRC at 1890-91. On review, Old Ben endorses the judge's definition of hazardous areas subject to the standard, but contends that the coal pile did not constitute an abnormal hazard. The Secretary advocates defining "hazard" in its ordinary sense, without reference to industry norms. On the facts of this case, we are satisfied that Old Ben's coal pile was a hazard under either definition or under any reasonable construction of the standard consistent with its protective purposes.

The pile was exceptionally large. As the coal pile grew and its surface became packed down because of moisture and the pressure of the bulldozers, voids were more likely to occur. Tr. 73-4, 84-5. It is undisputed that collapsing bridges over voids were fairly frequent occurrences at Old Ben's mine. The fact that these conditions had existed for some time without having been the subject of a previous citation by the Secretary does not, as Old Ben suggests, prove they were not hazardous. Further, on the night of the accident, these general risks would appear to have been aggravated. The weather was rainy and misty and visibility was poor. Another bulldozer operator had fallen into a void shortly before Mitchell's shift, and had requested better communication for bulldozer operators working on the pile. This incident alone placed, or should have placed, the operator on notice of the hazards. Under these circumstances, we are persuaded that substantial evidence supports the judge's conclusion that on the night of the accident conditions atop the coal pile were hazardous

within the meaning of the standard. We emphasize that our conclusion is based on the facts of this case. We do not mean to intimate that every coal storage pile would come within the standard because it is inherently "hazardous." Such determinations must be made on a case-by-case basis. We next consider the central issue of whether Mitchell was in sufficient communication or contact with others.
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The standard's requirements that a miner be able to communicate, or be heard, or be seen are stated in the disjunctive, and an affirmative finding with respect to any of the three would preclude a determination of violation. The standard neither specifies its purpose nor the requisite level of communication or contact and, before analyzing the facts, we address these two subjects.

The judge assumed the standard was directed more towards rescuing miners after an accident than towards preventing accidents. However, nothing in the standard suggests that prevention is not a concern. Thus, we adopt the Secretary's position, because it is more consistent with the purposes of the Mine Act and the plain language of the standard: The standard has a dual purpose, to prevent accidents by timely warning when possible and to expedite rescue and minimize injury when an accident does occur.

While the individual terms used in the standard, "communicate," "be heard," or "be seen," are ordinary words, they take on a more complex meaning in the context of prevention and rescue. Obviously, they embrace the physical acts of communicating, hearing, or seeing. Of necessity, they also include equipment intended for such purposes as well as procedures for their use. In construing these terms, we reject either an approach requiring constant communication or contact under all conditions, or an approach allowing any minimum level of communication or contact to satisfy the standard. Rather, we hold that the standard requires communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication or contact increases. We now apply this test to each requirement of the standard.

We disagree with Old Ben that the telephones located off the coal pile satisfied the communication requirement. The telephones were not actually available if, as here, an emergency arose on the coal pile. As a practical matter, driving off the pile frequently to use a telephone would interfere with the bulldozer driver's responsibilities, and he would be reluctant to do so. Tr. 27, 82, 99, 201. Both the preparation plant employee and another bulldozer driver testified that no procedures had been established for communicating by telephone; they used the phones solely on their own initiatives. Tr. 73, 111-12. Moreover, we note that Old Ben was on notice as to

the inadequacies of this telephone system. The preparation plant employee (who was also a bulldozer driver) and the driver who had fallen into a void the previous shift testified, without effective rebuttal by Old Ben, that they had requested communication for the coal pile several times before. Tr. 75, 83, 87, 143, 161; see also Pet. Exh. 14. Thus, substantial evidence supports the judge's conclusion that the operator failed to provide communication of a regular or dependable nature commensurate with the risk involved. 3/

3/ Old Ben mistakenly asserts that the judge held that the standard that required constant two-way radio communication. The judge held only the communication available was insufficient. He specifically stated that two-way communication, while "a much safer way to operate the raw coal storage pile," was not required by the standard. 3 FMSHRC at 1892. These statements were dicta and we need not decide whether two-way radios would be in excess of the standard.

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Evidence that Mitchell could be heard and seen at certain times and under certain circumstances also fails to satisfy the standard. The sound of the bulldozer back-up alarm was not a call for help, but merely a signal that the machine was in reverse. Of course, a back-up alarm offers no protection if trouble arises while a vehicle is going forward. In any event, because no one was responsible for listening for Mitchell, it is unlikely that anyone would have responded to the back-up alarm or have heard a call for help. Tr. 176-77. Similarly, although Mitchell could be seen at times by the preparation plant employee, the gob truck driver, and other employees, there was a considerable discrepancy between what miners theoretically could see and what they actually saw. In our view, it is highly significant that the last known contact with Mitchell was about 2:30 a.m., and that the accident was not discovered until about 6:00 a.m. Mitchell was completely out of sight and hearing for about 3-1/2 hours. Therefore, substantial evidence supports the judge's conclusion that Mitchell was not "under observation."

In sum, we conclude that during a time when this employee was working alone on a hazardous coal pile, he could not communicate with others nor could he be heard or seen on a regular or dependable basis commensurate with the risk involved. 4/ Accordingly, we affirm the judge's conclusion that Old Ben violated the standard.

4/ Old Ben argues that the judge erred because he imposed liability even though he found no nexus between the fatal accident and the alleged violation. As we have repeatedly emphasized in our decisions, the fact of an accident or injury does not by itself necessarily prove or disprove the existence of a violation. See, for example, Lone Star

Industries, Inc., 3 FMSHRC 2526, 2529-30 (November 1981). A violation may occur absent an accident, and an injury or death does not ipso facto make out a violation. As here, however, an accident may sometimes shed light on an unsafe situation that had escaped previous notice or citation. Our holding means that the standard would have been violated under the circumstances present on the night of the accident regardless of whether Mitchell had fallen into a hole and been hurt, escaped injury, or avoided an accident altogether.

5/ Commissioner Nelson assumed office after this case had been considered by the other Commissioners. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Nelson's assumption of office, and participation by Commissioner Nelson would therefore not affect the outcome. Accordingly, in the interest of efficient decision-making, Commissioner Nelson elects not to participate in this case.

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