

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

June 18, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
v. : Docket Nos. WEVA 93-165-R
 : WEVA 94-117
BLUESTONE COAL CORPORATION :

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@), involves alleged significant and substantial (AS&S@) violations by Bluestone Coal Corporation (ABluestone@) of 30 C.F.R. ' 77.1600(b),¹ for failure to standardize and post traffic signs warning of a steep downgrade on its haulage road, and 30 C.F.R. ' 77.1607(c),² for failure to ensure that a truck was operated at a speed that is prudent and consistent with the haulage road conditions. Administrative Law Judge David Barbour concluded that Bluestone did not violate section 77.1600(b), but that it did violate section 77.1607(c) and that the violation was S&S. 16 FMSHRC 2500, 2511-19 (December 1994) (ALJ). The Commission granted cross-petitions for discretionary review filed by the Secretary challenging the judge's conclusion that there was no violation of section 77.1600(b), and by Bluestone challenging the judge's conclusion that it

¹ Section 77.1600(b) states:

Traffic rules, signals, and warning signs shall be standardized at each mine and posted.

² Section 77.1607(c) states:

Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used.

committed an S&S violation of section 77.1607(c). For the reasons that follow, we reverse in part, affirm in part, and remand.

I.

Factual and Procedural Background

Bluestone operates the Keystone No. 6 Strip Mine in McDowell County, West Virginia. 16 FMSHRC at 2500, 2509; Gov't Ex. 2, at 3. It contracted with Blackstone Coal Company (Blackstone®) and other independent contractors to develop and operate underground coal mines on the property. 16 FMSHRC at 2502, 2509-10. Blackstone, in turn, subcontracted with Mullins Trucking Company (Mullins®) to transport coal to the Keystone No. 1 Preparation Plant. *Id.* at 2510; Gov't Ex. 2, at 3.

On January 11, 1993, Theodore Payne, a truck driver for Mullins, was driving a haulage truck loaded with coal from the Blackstone No. 39 Mine to the preparation plant, a distance of about 7.3 miles. 16 FMSHRC at 2502; Gov't Ex. 2, at 3, 5. The haulage road consists of various state, county, and private roads. 16 FMSHRC at 2502. It has several curves and the final mile before the preparation plant has a steep downgrade ranging up to 16 percent. *Id.* at 2503, 2505, 2516; Tr. I 50; Jt. Ex. 1; *see also* Gov't Ex. 2, at 5-6.³ In addition to miners, members of the public use the haulage road. 16 FMSHRC at 2503. As Payne descended the final grade of the haulage road, he lost control of his truck's speed. *Id.* at 2502-03, 2516-17. He called on his C.B. radio to warn other drivers that the truck was out of control. *Id.* at 2507. After traveling about 200 feet past the turn for the access road to the preparation plant, Payne jumped from the truck and rolled 56 feet to his death. *Id.* at 2502, 2505; Gov't Ex. 2, at 2. Shortly thereafter, the truck struck an embankment at a curve in the haulage road and overturned. 16 FMSHRC at 2502-03; Gov't Ex. 2, at 5.

³ The hearing was conducted on July 26 and 27, 1994. ATr. I® refers to the July 26 hearing; ATr. II® refers to the July 27 hearing.

Although MSHA's investigation of the accident failed to reveal what caused Payne to lose control of the truck, MSHA personnel suspected that the truck might have lost its brakes, the transmission might have gone out of gear, or parts might have dropped off the truck. 16 FMSHRC at 2516; Tr. I 122, 151-52, 187, 240-41; Tr. II 17. MSHA accident investigator Jerry Sumpter issued Bluestone Citation No. 2723400,⁴ pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 77.1600(b) for insufficient traffic signs warning of the steep downgrade. 16 FMSHRC at 2504-05; Gov't Ex. 4. In addition, Sumpter issued Bluestone Citation No. 2723974,⁵ pursuant to section 104(a), alleging an S&S violation of section 77.1607(c) because the truck exceeded an operating speed consistent with road conditions. 16 FMSHRC at 2507; Gov't Ex. 5. The Secretary subsequently proposed civil penalty assessments of \$6,000 for each of these alleged violations and Bluestone challenged the proposed assessments. The alleged violations were abated by installing warning signs and re-instructing truck drivers to be aware of conditions of the haulage road and to operate trucks in a manner specified by the truck manufacturers regarding payload weight limits. 16 FMSHRC at 2506-07; Gov't Exs. 4 & 5. In addition, four speed berms and three escape ramps were installed. 16 FMSHRC at 2505, 2517; Gov't Ex. 5.

Following an evidentiary hearing, the judge concluded that Bluestone did not violate section 77.1600(b). 16 FMSHRC at 2515. He determined that the language of the standard does not specify which rules, signals or warning signs are required to be exhibited at certain

⁴ Citation No. 2723400 states:

Management did not have traffic rules, signals or warning signs standardize[d] on the steep mountain incline, to provide the coal haulage equipment a warning of the steep incline on [B]urke

[M]ountain road to the preparation plant. This was revealed after a fatal truck haulage accident.

Gov't Ex. 4.

⁵ Citation No. 2723974 states:

Based on evidence obtained during a fatal accident investigation, it was determined that the 1979 DM 600 Mac coal haulage truck was being operated at a speed that was not consistent with the conditions of the roadway, grades, visibility, and traffic while descending the Burk[e] Mountain coal haulage road with a full load of coal. An accident occurred on 01/11/93 about 1:55 p.m. when the truck ran away and turned over at the switchback.

Gov't Ex. 5.

places. Rather, it mandates that *if* they are exhibited they be uniform in appearance and location and they be posted, that is, placed where they may be observed and read.@ *Id.* at 2513. The judge found that ABluestone was not cited because its rules, signals and signs lacked uniformity or were exhibited improperly. Rather, it was cited because it did not have certain specific signs in the places MSHA believed they should have been and because it did not include among its rules and regulations those MSHA thought necessary.@ *Id.* at 2513. He found that the Secretary lacks standards that require operators to install warning signs at hazardous areas or that specify the content of traffic rules. *Id.* at 2514-15. Accordingly, he vacated the citation. *Id.* at 2521.

However, the judge concluded that Bluestone violated section 77.1607(c). 16 FMSHRC 2517. He based his determination on his finding that Payne failed to retain control of the truck. *Id.* at 2516. The judge determined that the truck was traveling too fast to negotiate a curve in the haulage road and that, therefore, its speed was neither prudent nor consistent with the grade, curve, and condition of the truck=s brakes. *Id.* at 2517. The judge specifically rejected Bluestone=s challenge to the Secretary=s alleged requirement that it abate the hazard by installing speed berms and escape ramps and limiting haulage truck payload weight. *Id.* at 2517-18. He reasoned that, since Bluestone had not objected to the abatement measures by refusing to comply and then contesting any resulting section 104(b) withdrawal order, it had waived its right to challenge the abatement measures. *Id.* In addition, the judge concluded that the violation was S&S because the speed of the truck contributed to Payne=s death. *Id.* at 2519. He assessed a civil penalty of \$500. *Id.* at 2521.

II.

Disposition

A. Section 77.1600(b)

The Secretary requests that the Commission accord deference to her interpretation of section 77.1600(b). S. Br. at 3-6. She argues that the judge ignored the purpose of the standard, which is Ato ensure that mine operators post adequate and appropriate traffic requirements.@ *Id.* at 4-5. The Secretary contends that the judge misinterpreted section 77.1600(b) to require operators to post traffic Arequirements@if they have them, but not if they do not have them. *Id.* at 5. She argues that the judge=s interpretation of the standard would render it unenforceable and would produce an absurd result. *Id.*

Bluestone responds that no deference is due because the Secretary has not consistently interpreted the standard to require the posting of particular types of signs, referring to an interpretation offered by Investigator Sumpter. B. Resp. Br. at 4-7. The company argues that the standard fails to provide notice of the types of signs required to be posted or the particular hazards to be addressed. *Id.* at 2-3, 7-9. Bluestone also argues that it was in compliance with the standard because it had written traffic rules for the haulage road that were standardized and posted. *Id.* at 3.

The Commission has long recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996) (citations omitted). It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Since we find that the meaning of section 77.1600(b) is clear and unambiguous, we do not address the Secretary's argument that her interpretation of the standard is entitled to deference.

In the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). The prescriptive wording of section 77.1600(b) that "[t]raffic . . . warning signs shall be standardized at each mine and posted clearly and unambiguously requires mine operators to post warning signs at their mines. The term "warning," in turn, refers to hazardous, dangerous conditions. "Warning" is defined as "announcing something imminent or impending or the presence of danger." *Webster's Third New International Dictionary (Unabridged)* 2577 (1986). It is also defined more succinctly as "[a] pointing out of danger." *Black's Law Dictionary* 1584 (6th ed. 1990). Additionally, the term "post" means "to publish, announce, or advertise by or as if by the use of a placard" and "to make (a person) familiar with a subject." *Webster's* at 1771. These definitions indicate that the term "traffic warning sign" means a sign that points out or announces a road hazard which, to be effective, must be posted at some location before a driver encounters the hazard. Thus, we conclude that section 77.1600(b) required Bluestone to post a sign or signs warning of the steep, 16-percent downgrade, the obvious danger of which was never disputed by Bluestone.

We are unpersuaded by the judge's comparison of section 77.1600(b) with 30 C.F.R. ' 56.9100(b), entitled "Traffic control," by which he intended to demonstrate that section 77.1600(b) fails to require that operators "install warning signs at hazardous areas." 16 FMSHRC at 2514. Section 56.9100(b) requires that "[s]igns or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine." The only significant difference between this requirement and section 77.1600(b) is that section 56.9100(b) explicitly states that signs warn of "hazardous conditions" and "be placed at appropriate locations," both of which are implicit elements of section 77.1600(b) as explained above. More significantly, both standards unambiguously require operators to post traffic warning signs. The judge's contrary conclusion with respect to section 77.1600(b) is at odds with the clear language of the standard.

We are also unpersuaded by Bluestone's argument that section 77.1600(b) fails to provide notice of the types of signs required to be posted or the particular hazards required to be addressed. B. Resp. Br. at 2-3, 7-9. From our conclusion that section 77.1600(b) clearly requires that signs warning of traffic hazards must be posted at hazardous locations, it follows that the standard provided Bluestone with notice that it was obligated to post a warning sign at the steep downgrade. We also find unavailing Bluestone's argument that it was in compliance with the

standard because it had written traffic rules that were standardized and posted at the mine. *Id.* at 3. Although the record indicates that Bluestone had provided written traffic rules for the haulage road to its contractors (Tr. II 189-90; B. Ex. 1), the fact remains that no sign was posted on the haulage road warning truck drivers of the steep downgrade. We thus conclude that the record supports no other conclusion than that Bluestone violated the standard.

Based on the foregoing, we conclude that the judge erred in determining that Bluestone did not violate section 77.1600(b). Accordingly, we reverse the judge's determination and remand for a determination of whether the violation was S&S and assessment of an appropriate civil penalty.

B. Section 77.1607(c)

Bluestone argues that the Secretary's interpretation of section 77.1607(c) is unreasonable. B. PDR at 4-8; B. Reply Br. at 2-4. Bluestone asserts that it should not have been cited for the violation because the standard only applies to drivers of mobile equipment who have demonstrated lack of prudence in operating such equipment. B. PDR at 4-5; B. Reply Br. at 2-4. Bluestone further maintains that the citation is invalid because it is based on a failure to fulfill requirements, i.e., installation of speed berms and escape ramps, not contemplated by the standard, and that the judge erred in concluding that Bluestone must object to such requirements by refusing to abate and then seeking review of any resulting section 104(b) withdrawal order. B. PDR at 5-11. Bluestone explains that it is not objecting to the propriety of the abatement measures but that such measures indicate the unreasonableness of the Secretary's interpretation of the standard. B. Reply Br. at 2-4.

The Secretary responds that the plain language of section 77.1607(c) supports the judge's determination that Bluestone violated the standard. S. Resp. Br. at 3-4. He asserts that the proposed method of abatement has no effect on the issue of violation. *Id.* at 5-6. Further, the Secretary argues that under the Mine Act, Bluestone is liable without fault for its contractor's violative action. *Id.* at 6-7.

1. Violation

The clear language of section 77.1607(c) supports the judge's determination that the standard requires that mobile equipment be operated at speeds that are prudent and consistent with the conditions of the road and equipment. 16 FMSHRC at 2516-17. We agree with the Secretary that the abatement requirements are irrelevant to the issue of whether the operating speed of Payne's truck violated the standard. The citation indicates that it is based on the truck's unsafe operating speed, not on the lack of speed berms, escape ramps, and a payload weight limit.⁶ Gov't Ex. 5.

⁶ The judge believed that Bluestone was attacking the abatement requirements and he specifically rejected this challenge in his decision. 16 FMSHRC at 2517-18. In its petition for discretionary review, designated as its opening brief, Bluestone contends that the judge erred in

At issue is whether section 77.1607(c) gives an operator fair notice that speeding trucks are prohibited, not whether speed berms and escape ramps are required to be installed. From our conclusion that section 77.1607(c) is clear, it follows that the standard provides fair notice to operators that unsafe speed is prohibited.

concluding that it must raise objections to these requirements by refusing to abate and then seeking review of any resulting section 104(b) withdrawal order. B. PDR at 10-11. Moreover, the Secretary interpreted Bluestone's petition as challenging the abatement requirements. S. Resp. Br. at 5-6. However, in its reply brief, Bluestone denies that it is challenging the requirements for abatement, explaining that it refers to the abatement requirements only to cast doubt on the Secretary's interpretation of the standard. B. Reply Br. at 2-4. Accordingly, we do not address the propriety of the abatement requirements or whether Bluestone could have appropriately challenged the requirements at the hearing.

Moreover, substantial evidence supports the judge's determination that Bluestone violated section 77.1607(c).⁷ 16 FMSHRC at 2517. The record indicates that the loaded coal truck sped past the turn to the preparation plant near the bottom of the 1-mile-long, steep downgrade on the haulage road, at which point the driver attempted to abandon his rig by jumping clear. Tr. I 33, 37-38, 163-64, 170-71, Tr. II 185; Jt. Ex. 1; Gov't Ex. 2, at 3-5. Unfortunately, he died in the attempt to escape. Tr. I 163-64. Moments before the accident, Payne was heard on the C.B. radio exclaiming that his truck was out of control. Tr. I 189; Gov't Ex. 2, at 4. Although Inspector Murdock testified that no one knows exactly where Payne lost control of his truck or what caused it to happen (Tr. I 79), Investigator Sumpter and MSHA Inspector John Cheetham testified that the truck's brakes were badly worn and that they were out of adjustment. Tr. I 108-09, 148. In view of this evidence, we conclude that the judge correctly inferred that the truck was not operated at a speed consistent with the steep downgrade and curve of the haulage road and the condition of the truck's brakes. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (November 1989) (a violation can be proven by inference).

We also disagree with Bluestone's argument that the standard applies only in instances where a driver demonstrates a lack of prudence in operating mobile equipment. Section 77.1607(c) requires that equipment operating speeds be both prudent and consistent with the conditions of the road and equipment. Thus, the absence of one of these requirements violates the standard. In this case, the record supports the judge's finding that the truck's speed was not consistent with the conditions of the road and the truck's brakes. 16 FMSHRC at 2517. Therefore, we conclude that the standard was violated regardless of whether Payne exercised prudence in operating the truck.

2. Liability of Bluestone

⁷ The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

We reject Bluestone's argument that it should not have been cited for the violation because the standard applies only to drivers of mobile equipment. B. PDR at 4-5; B. Reply Br. at 2-4. We perceive Bluestone's argument as two-fold: (1) that Bluestone is not liable because it had no ability to control the operating speed of the haulage truck, and (2) that the Secretary abused his discretion in citing Bluestone.

Operators are liable without regard to fault for violations of the Mine Act and its standards. *E.g.*, *Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Asarco, Inc. - Northwestern Mining Dept.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195, 1198 (10th Cir. 1989). As the mine operator, Bluestone is strictly liable for all violations of the Act that occur at its mine, including those committed by its contractors=employees. *See Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991) (The Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents, and contractors@); *see also Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (mine operators are Astrictly liable for the actions of independent contractor violations@).

Further, the Commission has recognized that the Secretary has wide discretion to prosecute an operator for violations of the Mine Act or its standards, whether committed by the operator's own employees or the employees of its contractors. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 (February 1997), *appeal docketed*, No. 97-1392 (4th Cir. March 25, 1997); *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994); *Bulk Transportation Services*, 13 FMSHRC at 1359-60; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-39 (D.C. Cir. 1986). Although the Commission has determined that Aits review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion@(W-P, 16 FMSHRC at 1411), the facts of this case support the Secretary's decision to cite Bluestone. Bluestone was responsible for maintaining the haulage road and provided written traffic rules for the haulage road to its contractors. Tr. II 158-60, 181-82, 189-90; B. Ex. 1; Gov't Ex. 2, at 5. In addition, the unsafe operating speed of the truck created a hazard that endangered not only Payne, but everyone who used the haulage road, including members of the public, employees of other contractors,⁸ and Bluestone's 13 employees. 16 FMSHRC at 2519; Tr. II 150-51, 171. Where, as here, a contractor's violation affects the safety of the operator's employees, the Commission has upheld the Secretary's exercise of discretion to cite the operator. *Mingo Logan*, 19 FMSHRC at 250. Therefore, we conclude that the Secretary was justified in proceeding against Bluestone for this violation.

3. Significant and Substantial

⁸ At the time of the accident, there were 12 to 15 mines on the property operated by independent contractors. Tr. II 154-55.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Clearly, the truck's runaway speed caused Payne to jump from the truck in an effort to save himself from the impending accident. Thus, we conclude that it was a significant contributing cause to his death and that substantial evidence supports the judge's conclusion that the violation was S&S. Accordingly, we affirm the judge's determination.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Bluestone did not violate section 77.1600(b) and remand for a determination of whether the violation was S&S and penalty assessment, and we affirm the judge's determination that Bluestone committed an S&S violation of section 77.1607(c).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner