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SOL (MSHA) V. METTIKI COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

METTIKI COAL CORPORATION,
RESPONDENT

METTIKI COAL CORPORATION,
APPLICANT

v.

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

Civil Penalty Proceedings

Docket No. YORK 81-12
Docket No. YORK 81-18
Docket No. YORK 81-24
Docket No. YORK 81-25

Gobbler's Knob Mine

Contests of Citations and Order

Docket No. YORK 80-107-R
Docket No. YORK 80-109-R
Docket No. YORK 80-110-R
Docket No. YORK 80-113-R
Docket No. YORK 80-114-R
Docket No. YORK 80-115-R
Docket No. YORK 80-116-R

Gobbler's Knob Mine

DECISION

Appearances: Michael Bolden, Esq., John H. O'Donnell, Esq., and
Leo J. McGinn, Esq., Office of the Solicitor,
U. S. Department of Labor
Ralph M. Burnett, for Mettiki Coal Corporation

Before: Judge William Fauver

These civil penalty and review proceedings were consolidated and heard under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Both parties were represented by counsel and have submitted proposed findings, conclusions, and briefs.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Mettiki Coal Corporation, operated the Gobbler's Knob Mine in Garrett County, Maryland, which produced coal for sales or use in or substantially affecting interstate commerce.

Docket Nos. YORK 80-107-R, 80-109-R, and 81-18

Order of Withdrawal No. 632705 and Citation No. 632707

2. At the time of an inspection on June 5, 1980, Mettiki was constructing an overcast in the track haulage supply entry. The overcast was to split the air so the belt entry would be isolated. A cavity had been blasted with explosives and two walls were under construction on either side of the cavity. The cavity was about 20 feet in diagonal, with brows, including overhangs averaging 3 to 6 feet, and it extended 6 to 8 feet above the coal seam. The haulage ways were frequently used and miners traveled this area on foot. There was no wire screen mesh installed over the cavity. Mettiki's plan was, at some point, to cover the cavity with a canopy of concrete block. A canopy is routinely placed in such an overcast construction. At the time of the inspection the cavity was not canopied and it was not actually in the process of being canopied (although plans called for a canopy later), and the cavity had so existed for up to 10 days with miners passing under it. Installing the wire mesh would not have interfered with the later installation of the canopy or the completion of the overcast.

Paragraph 23, page 11, of Mettiki's approved roof control plan provided:

Where falls occur and roof is to be supported by roof bolting, wire screen will be bolted to the entire cavity in a mobile haulage entry (track, belt, supply and active shuttle-car entries). Wire screen will not be required in the fall cavity top when the top is massive sandstone, however, wire screen shall be bolted to the fall cavity sides. The use of wire screen is not necessary if the cavity is canopied.

3. Inspector Evanoff was inspecting the cavity 10 days after the blast. Inspector Evanoff did not prod the overhang brows for fear of causing a fall. He observed that the sides of the cavity were not supported with wire mesh screen and that the brows were not adequately supported. The arch of the cavity ceiling was bolted and plated on 4-foot centers.

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4. He then issued a Withdrawal Order No. 632705 for a violation of 30 CFR 75.200. (FOOTNOTE 1) The order reads in part:

The approved roof control plan is not being complied at the 39th break of the No. 5 entry over the slope track haulage. A cavity was created over the track haulway that is approximately 6 to 8 feet above the coal seam, and overhanging brows that are not adequately supported are protruding out towards the center of the cavity, at a distance of approximately 3 to 6 feet and they extend around the complete cavity. Wire screen was required to be bolted to the cavity areas and wire screen was not installed. This track haulage was examined by a preshift examiner.

5. The condition was abated by June 18, 1980, by installing additional supporting roof bolts and installing a wire screen at the top of the cavity and bringing it around the overhanging brows.

6. On June 5, 1980, the inspector also issued Citation No. 632707, citing 30 CFR 75.303, (FOOTNOTE 2) because the area had been preshifted a number of times but the condition in the cavity with the overhanging brows had never been described

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in a preshift report. The parties, at the hearing, stipulated that if a violation of 30 CFR 75.200 was proven as stated in Order of Withdrawal No. 0632705, then there is a violation of 30 CFR 75.303 for not reporting the condition in the preshift report; otherwise both the order of withdrawal and the citation must fall together.

7. About two months after the order and citation, at the direction of MSHA, the roof-control plan was revised to require wire screening over overcasts created by shooting or blasting. The new paragraph provided:

When an overcast is being developed over a track, belt or supply entry, planks or straps will be used with bolts for roof support if the overcast is cut with a continuous miner; wire screen will be used if the overcast is created by shooting.

YORK 80-113-R and 81-25
Withdrawal Order No. 629316

YORK 80-114-R and 81-12
Citation No. 629317

8. At 8 p.m. on June 5, 1980, Inspector Hunt observed coal and dust spillage estimated to be 35 to 50 tons, around the feeder in the No. 5 Entry, No. 52 Break. The accumulations of loose coal and coal dust were about 5 feet deep and 10 feet long. In the shuttle car roadway outby the feeder, he observed accumulations of loose coal in drifts 4 inches to 3 feet deep for a distance of about 30 feet. Over the entire 16-foot width in the No. 7 and No. 8 Entries between the Nos. 53 and 44 crosscuts, he observed accumulations of loose coal and coal dust 2 inches deep extending for about 800 feet. He also observed accumulations of loose coal and coal dust up to 6 inches deep at various locations.

9. The inspector issued Order of Withdrawal No. 629316, citing the accumulations observed as a violation of 30 CFR 75.400, which 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.

10. When he later inspected the preshift books, he found no entries concerning coal spillage around the feeder or in the entries. He then issued Citation No. 629317 alleging a violation of 30 CFR 75.303 (see footnote 2). This citation reads in part:

An inadequate preshift examination was performed of the right mains section because of the conditions stated on Order No. 629316 dated 6-5-80 were not reported or

recorded. The last examination was made by Michael Fulmer between 1:45 p.m. and 2:30 p.m. on 6-5-80.

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11. A witness for Mettiki testified that a layer of coal, about 2 or 2 1/2 feet, is used as the mine floor in the Gobbler's Knob Mine because the underlying material is "fireclay" which is slippery when wet. The vehicles' tires grind up the coal and create accumulations that may appear to be spillage. Respondent also presented evidence that design defects in the feeder in the Right Mains Section produce a considerable amount of spillage. The ramp operator is charged with cleaning up the spillage around the feeder at the end of his shift. On June 5, 1980, 2:15 p.m., the preshift examiner for the afternoon shift helped scoop up the accumulations around the feeder after it had processed 488 tons of coal. After inspecting the feeder area, he walked the shuttle car roadway, found no accumulations of coal and reported no accumulations or spillage in the preshift book. This was the last entry the inspector found in this area.

YORK 80-115-R and 81-12
Citation No. 629318

12. The inspection was resumed on June 9, 1980, when Inspector Hunt observed a miner repairing a scoop with a hand-held drill. The drill was equipped with a locking device that allowed the drill to be operated without constant hand or finger pressure. The miner had not activated the locking device and was using constant finger pressure to operate the drill.

13. Locking devices had been removed or deactivated on all of Mettikis' other hand-held drills, but not this one.

14. Inspector Hunt issued Citation No. 629318 for a violation of 30 CFR 77.402. The citation reads in part: "The three-eighths-inch, hand-held electric drill being operated on the surface in front of the bathhouse was not equipped with controls requiring constant hand or finger pressure. There was a locking device on the control." (FOOTNOTE 3) The cited condition was abated by removing the automatic locking device from the drill.

YORK 80-110-R and 81-24
Withdrawal Order No. 632708

15. On June 9, 1980, Inspector Evanoff observed, and reported in Withdrawal Order No. 632708, unstable roof conditions in the stope track haulage "at a point beginning approximately 21 inby the No. 20 break and extending inby for approximately 20 feet." The roof was severely cracked on the left side of the entry and cracks extended to the center of the entry. Wooden crossbars installed there were bowed down from overhead pressure and the uncracked part of the roof was "drummy" when tested (meaning that the roof was under heavy pressure). This roof area had been reported in the preshift examination book (6:00 a.m. -- 6:40 a.m.) with a notation that a barset was needed. At the time of inspection, 1:30 p.m., no work had been performed to correct the roof condition and this area had not been dangered off. Personnel were subject to walk under the cited roof area. The foreman had a list of preshift-reported conditions and planned to correct the various conditions as he came to them.

Docket No. YORK 81-24
Withdrawal Order No. 805331

16. On June 1, 1980, about 3:00 p.m., Inspector Spencer Shriver observed, and reported in Withdrawal Order No. 805331, that the daily examination book did not record unsafe conditions of the hoisting equipment, i.e., spots of wear, corrosion, lack of lubrication, accumulation of dirt and conditions stated in Order No. 629278, which had been issued on May 29, 1980.

17. Mettiki does not deny the violation charged in Order No. 629278, but defends the charge in Order No. 805331 on the grounds that:

1. The hoist was shut down, except for necessary repair personnel, by Order No. 629278, and had not been reopened.
2. Order No. 805331 included the same conditions already covered by Order No. 629278.
- 3 Mettiki has paid the penalty assessed for Order No. 629278, and should not be subject to another penalty for the same conduct.

DISCUSSION WITH FURTHER FINDINGS

Order of Withdrawal No. 632705 and Citation No. 632707

In charging a violation of Mettiki's roof-control plan, the Secretary contends that the provision "where falls occur * * * wire screen will be bolted to the entire cavity" applies to both intentional and unintentional roof falls. He argues that the effects of an intentional fall are even more dangerous than those of an unintentional fall, because intentional falls loosen rock that would not otherwise be loosened, so that wire screening is all the more necessary in intentional falls. He also argues that the addition of a new paragraph to Mettiki's revised roofcontrol plan, Paragraph 24, shows that MSHA never accepted Mettiki's interpretation of the screening requirement. The Secretary proposes a penalty of \$2,000.

The parties stipulated that, if a violation of the roof-control plan is found, Respondent would admit a violation of the preshift examination standard. The Secretary proposes a penalty of \$240 for that citation.

Mettiki argues that it had been its practice since 1977 not to use wire screen over cavities where canopies were under construction and that previous inspectors had not taken exception to this practice. It contends that the term "falls" in its original roof-control plan was an ambiguity apparent to MSHA in the past and that Mettiki should not be held liable for reliance on one interpretation of an ambiguous term. Finally, it argues that the brows and cavity extensions were not hazardous.

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I find, based upon the inspector's testimony, that the condition of the cavity was dangerous. He observed that the overhangs were loose, cracked, and just short of being an imminent danger. Additional support should have been provided.

I find that the words "where falls occur" in Paragraph 23 of the roof-control plan reasonably mean intentional falls as well as unintentional falls. The cavity was therefore required to be supported by wire screening. The fact that Mettiki had not screened cavities on four prior occasions without being cited for a roof-control plan violation reduces, but does not eliminate, its negligence. There was an unwarrantable failure to comply. Based upon the parties' stipulation, Respondent is also deemed to have violated 30 CFR 75.303.

Withdrawal Order No. 629316

Metticki admits a violation of 30 CFR 75.400 as to the accumulation of coal and coal dust observed along the sides of the feeder, but contends that other accumulations, observed in the entries and crosscuts, were not violations. Its argument includes the following main points:

1. Because of a wet, fire-clay underlayment, MSHA permitted Mettiki to leave a coal base for roadways. Wheeled equipment running on the coal base would create a "fine powder" of 2 to 6 inches during a normal shift. MSHA was aware of and approved Mettiki's clean-up program, which called for cleaning and rockdusting the face area at the end of each shift and to clean and dust outby areas once each week.

2. Beginning at No. 53 break and extending to No. 44 break, there was a coal base of about 2 inches in the entries, but this area was not being used by the mine and "was not effectively part of the mine workings." Mettiki also contends, "MSHA recognizes and it is the clear standard of practice that these entries would not be part of MSHA inspections," Mettiki Br. (July 9, 1982), p. 3.

As to Point 1, MSHA did not present contrary evidence, and the proof does not preponderate to establish a violation as to the accumulations in the shuttle car roadway outby the feeder.

As to Point 2, the evidence shows that the 800-foot area between crosscuts 44 and 53, described in the inspector's order, was being used to haul timber. This supports the inspector's contention that the area was an active working subject to 30 CFR 75.400.

The facts as to the accumulation around the feeder establish a most serious violation, allowing an accumulation of 35 to 50 tons of coal and coal dust in a single shift. Operating with a known defective feeder and allowing such large accumulations constituted gross negligence. It also created a serious hazard of propagating a mine fire or explosion. There was an unwarrantable failure to comply.

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Citation No. 629317

The parties have stipulated that the inspector observed impermissible accumulations of coal in violation of 30 CFR 75.400 when he issued this citation, which was for an improper preshift examination. Mettiki argues that the spillage observed by the inspector had accumulated after the 2:15 p.m. preshift examination and that the preshift report book was accurate. It offers several explanations for the volume of spillage observed by the inspector.

First, the feeder processed 488 tons of coal per shift, making extensive accumulations possible. Second, the feeder was broken and operating slower than normal so that when man cars dumped their loads of coal quickly, as they usually did, more than the normal amount of spillage resulted. This condition is characterized by Mettiki as a "design defect." Third, the other accumulations observed by the inspector were simply part of the haulage road surface covering the fireclay. Mettiki moved for summary judgment at the hearing with respect to this citation based on these arguments, stating that the Secretary had failed to establish a prima facie violation.

I deny the motion. The pure volume of spillage in this case raises a significant question of fact as to how long the accumulations had existed. However, Mettiki presented the testimony of the preshift examiner, who testified that there were no accumulations of coal and coal dust when he made the preshift examination, and this testimony was undisputed. The testimony of the government's sole witness on this charge establishes only that the coal accumulations existed 6-1/2 hours after the preshift examination. When asked, "how long this accumulation had lasted before [he] got there," the government inspector responded, "I'm not exactly sure." The government did not meet its burden of proving that violative accumulations existed when the preshift examination was conducted.

Citation No. 629318

A Mettiki employee was repairing a scoop in front of the bathhouse, using a 3/8th inch hand-held drill that had a locking device that would permit the drill to operate without constant finger pressure. The drill operator did not have the locking device on at the time of the inspection, but the locking device could be pushed into position accidentally or deliberately so that constant finger pressure would no longer be required to keep the drill running.

Mettiki's Foreman stated that management knew of the requirement and had removed the locking device from other drills on the mine property. For some unexplained reason, Mettiki had failed to remove the locking device from the drill in question.

The locking device is a violation of the safety standard in 30 CFR 77.402. This is a serious violation. If a drill in a locked position goes out of control it could injure the operator

or sever the electric cord and cause an electric shock or fire hazard.

Withdrawal Order No. 632708

A violation of 30 CFR 75.200 occurred as alleged. The roof was not adequately supported to protect miners from falls of roof or ribs. The area cited, for a distance of 20 feet, was severely cracked in parts and drummy and the wooden crossbars were bowed from overhead pressure. Mettiki showed gross negligence in failing either to correct this condition or to danger off the area promptly after the preshift report. There was an unwarrantable failure to comply.

Withdrawal Order No. 805331

This violation was proved. The order involves a different standard (daily examinations) from the standard involved in Order No. 629708 (preshift examinations), and does not constitute a double charge for the same condition.

However, considering that there was a previous order on the hoisting equipment when Order No. 805331 was issued, the failure to report unsafe conditions as to the hoisting equipment was not a serious violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of these proceedings.
2. Mettiki violated 30 CFR 75.200 as charged in Withdrawal Order No. 632705. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$500 for this violation.
3. Mettiki violated 30 CFR 75.303 as charged in Citation No. 632707. Based on the statutory criteria for assessing civil penalties, Mettiki is assessed a penalty of \$60 for this violation.
4. Mettiki violated 30 CFR 75.400 as charged in Withdrawal Order No. 629316 with the exception of the allegation of accumulations in the shuttle car roadway outby the feeder. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$1,500 for this violation.
5. The government failed to meet its burden of proving a violation as charged in Citation No. 639317.
6. Mettiki violated 30 CFR 77.402 as charged in Citation No. 629318. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$300 for this violation.
7. Mettiki violated 30 CFR 75.200 as charged in Withdrawal Order No. 632708. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$1,200 for this violation.

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8. Mettiki violated 30 CFR 75.1400-3(f) as charged in Withdrawal Order No. 805331. Based on the statutory criteria for assessing penalties, Mettiki is assessed a penalty of \$25 for this violation.

Proposed findings and conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED:

1. Mettiki shall pay the Secretary the above penalties, in the total amount of \$3,585.00, within 30 days from the date of this Decision.

2. The withdrawal orders and citations cited in the Conclusions of Law, above, are AFFIRMED with the following exceptions:

a. Withdrawal Order No. 629316 is MODIFIED to delete, from the description of "Condition or Practice," the allegation of accumulations of coal and coal dust in the shuttle car roads. As MODIFIED, it is hereby AFFIRMED.

b. Citation No. 639317 is VACATED.

3. In accordance with the Order Granting Motion to Withdraw Notice of Contest in Docket Nos. 80-112-R, 80-117-R, and 80-111-R, concerning Citations Nos. 0632761, 0629320, and 0632709, respectively, the charges based upon those citations in

Docket No. 81-12 are hereby DISMISSED.

4. On motion of the parties at the hearing (Tr. 227, April 26, 1982), Docket No. 80-116-R is DISMISSED on the ground that the proposed penalty has been paid.

WILLIAM FAUVER
JUDGE

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~FOOTNOTE ONE

1 Section 75.200 provides:

"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 on or before May 29, 1970. The plan shall show the type of

support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall be proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives."

~FOOTNOTE_TWO

2 Section 75.303 provides, in part:

"Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative."

~FOOTNOTE_THREE

3 Section 77.402 provides:

"Hand-held power tools shall be equipped with controls requiring constant hand or finger pressure to operate the tools or shall be equipped with friction or other equivalent safety devices."