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

BADGER COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 81-36-R
Order No. 631937; 9/22/80

Docket No. WEVA 81-37-R
Citation No. 631938; 9/22/80

Grand Badger No. 1 Mine

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

v.

BADGER COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 81-277
A.C. No. 46-04819-03010

Docket No. WEVA 81-285
A.C. No. 46-04819-03009 F

Grand Badger No. 1 Mine

DECISION

Appearances: David J. Romano, Esq., Young, Morgan, Cann &
Romano, Clarksburg, West Virginia, for
Contestant/Respondent;
Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent/Petitioner.

Before: Judge Steffey

An order was issued in this proceeding on December 19, 1980, consolidating for hearing and decision the issues raised by the filing of Badger Coal Company's application for review in Docket No. WEVA 81-36-R and its notice of contest filed in Docket No. WEVA 81-37-R. The order also consolidated for hearing and decision any civil penalty issues which would be raised when and if the Secretary of Labor should thereafter file one or more petitions for assessment of civil penalty with respect to the violations alleged in Order No. 631937 and Citation No. 631938.

A hearing was held in Elkins, West Virginia, on January 27, 1981, through January 29, 1981, at which time the parties introduced evidence with respect to the issues raised in both the notice of contest and civil penalty proceedings. Two petitions

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for assessment of civil penalty were subsequently filed in April 1981 in Docket Nos. WEVA 81-277 and WEVA 81-285. When counsel for Badger Coal Company filed his answer to the petitions for assessment of civil penalty, he appropriately requested that the civil penalty cases be forwarded to me so that the issues raised in those cases could be decided on the basis of the evidence which had already been submitted in this consolidated proceeding. Therefore, this decision will dispose of all issues raised in all of the cases listed in the caption of this decision.

Because of illness, the reporter was unable to prepare a transcript of the hearing. Therefore, on January 13, 1982, I submitted to the parties 31 proposed findings of fact and asked them to determine whether they could agree upon those findings for the purpose of deciding the issues in this proceeding. Although a considerable period of time was used by me and the parties in reviewing our respective notes and revising language so as to arrive at findings on which both parties could agree, I believe that the time utilized was justified because a second evidentiary hearing, involving expenditure of additional time and money and use of witnesses with eroded memories, was avoided.

Counsel for Badger Coal Company filed his brief on October 31, 1983, and counsel for the Secretary of Labor filed her reply brief on November 25, 1983. The issues discussed by both counsel are those normally raised in such proceedings: (1) Was Order No. 631937 validly issued under imminent-danger section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(a)? (2) Did the violations alleged in Order No. 631937 and Citation No. 631938 occur? (3) If violations did occur, what civil penalties should be assessed under section 110(i) of the Act?

STIPULATED FINDINGS OF FACT

The 31 findings of fact agreed upon by the parties are given below:

1. Badger Coal Company operates the Badger No. 1 Mine which is located in Upshur County, West Virginia. Badger's No. 1 Mine produces approximately 1,200 tons of coal daily. Badger is an affiliate of the Pittston Company Coal Group. Badger also owns and operates three other mines which produce about 3,500 tons of coal daily. Badger employs about 45 underground miners and 13 surface employees at the Badger No. 1 Mine and employs a total of 348 miners at all of its mines. It has been stipulated that Badger is subject to the provisions of the Federal Mine Safety and Health Act of 1977 and that the administrative law judge has jurisdiction to hear and to decide the issues raised by the filing on September 22, 1980, of Badger's application for review and notice of contest in Docket Nos. WEVA 81-36-R and WEVA 81-37-R, respectively.

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2. On Friday, September 19, 1980, Richard L. Lambert, a shift maintenance foreman, working on the 4-p.m.-to-11 p.m. shift, reported to Guy Steerman, the chief electrician, that the ground monitoring circuit for the 1 Left Panel Section would not trip the Line Power VCB-1 vacuum breaker switchhouse. It was agreed that Lambert would report to work on the day shift on Saturday for the purpose of repairing the defective vacuum breaker switchhouse. Lambert was certified by MSHA as a qualified underground electrician and, by September 20, 1980, he had 10 years and 8 months of mining experience, and had been a shift maintenance foreman for 3 years and 9 months.

3. Lambert came to the mine on Saturday, September 20, 1980. Before entering the mine, Lambert went into the fenced enclosure around the surface substation and shut off all power to underground equipment. He locked the gate on the fenced enclosure and placed the key behind a high-voltage warning sign. At about 8 a.m. Lambert entered the mine accompanied by two mechanics. They traveled to the A Panel vacuum switchhouse which was located about 4,800 feet from the surface substation.

4. Lambert found a loose connection on the shunt trip coil and believed that was the cause of the malfunction. In order to test the performance of the coil, Lambert called Steerman on the surface at about 9 a.m. and asked Steerman to go to the surface substation and unlock the gate with the key behind the high-voltage sign so as to energize the main power circuit which is a high-voltage system transporting 12,470 volts. Steerman complied with Lambert's request and Lambert called Steerman again and reported that the vacuum breaker was still malfunctioning and that Lambert was returning to the surface to attend a foremen's meeting which had previously been scheduled. The two mechanics were sent to the West Mains Section to work on a continuous-mining machine. Lambert met Roger Davis, a section foreman, at the entrance to A Panel and they traveled to the surface together.

5. After the foremen's meeting, Lambert and Steerman discussed the vacuum switchhouse and concluded that the shunt trip circuit was causing the malfunction. Lambert asked Steerman to remain on the surface after Lambert went back underground so that Steerman could turn the power on and off as needed while Lambert sought to determine the cause of the malfunction of the vacuum breaker.

6. Lambert and Davis returned to the A Panel vacuum switchhouse. Davis stayed with Lambert to assist him and because he did not want to leave him alone while Lambert was working on the vacuum circuit breaker. Lambert and Davis removed the cover from the breaker compartment. Removal of the

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cover caused the tripping of interlock switches which turned off all power to the compartment. Lambert visually examined the interior of the compartment and Davis left the scene for about 10 minutes in order to check on the progress of Davis' crew members who were plastering stoppings and working on the track rails in A Panel. When Davis returned to the switchhouse, Lambert told Davis that Steerman had asked Lambert to check the terminal board located on the inside of the open compartment. Lambert taped the interlock switches in closed position so that they could not prevent power from entering the compartment while the cover was removed. Lambert called Steerman to reenergize the switchhouse. Lambert thereafter instructed Davis to hold in the capacitor trip switch button while Lambert measured the low voltage on the terminal board.

7. About 1 p.m. Lambert and Davis heard someone being paged on the mine telephone located about one block outby the switchhouse. Davis left to answer the phone and had just picked up the receiver when Davis heard a loud buzzing noise and a moan from Lambert. Davis dropped the phone and ran to the switchhouse where he found Lambert slumped over the switchhouse with his upper body and both arms inside the compartment.

8. Although the power had been cut off, Davis opened an emergency disconnect on the back of the switchhouse. As Davis was pulling Lambert from the compartment, Davis noticed that Lambert's left hand was grasping an unshielded insulated wire in the open compartment. Davis left Lambert on the mine floor and telephoned outside for help and thereafter administered first aid with assistance of other miners while Lambert was transported to the surface. An ambulance took Lambert to the hospital where he was pronounced dead at about 2:15 p.m.

9. Badger notified MSHA of Lambert's death and at about 8:30 p.m. five MSHA employees came to the Grand Badger No. 1 Mine to initiate an investigation of the fatality. The five persons were: Richard Vasicek, chief of special enforcement program; Jim McCray, supervisory coal mine inspector; Jim Cross, coal mine electrical inspector; Paul Moore, mining engineer; and Robert Wilmoth, coal mine inspector. The investigators used their time Saturday night to interview Badger's employees. Most of the questions were asked by Vasicek and a West Virginia state inspector whose name was Grant King.

10. The investigation was not completed on Saturday. On Monday, September 22, 1980, three employees--Paul Moore, mining engineer; John Phillips, coal mine electrical inspector; and Paul Hall, chief of MSHA's electrical section--from MSHA's Morgantown, West Virginia, office went to the mine to continue the investigation. Moore was the only MSHA employee at the mine on Monday who had also been to the mine on Saturday night. Hall,

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Phillips, and Moore, along with some Badger employees, went underground and determined, after about 3 hours of trouble shooting, with the vacuum circuit breaker deenergized, that the malfunction reported by Lambert was caused by open circuits in the auxiliary breaker switch. The open circuits prevented the tripping circuit from deenergizing the circuit breaker. The malfunction was traced to the auxiliary breaker switch after various checks and deductions had been made to eliminate four other possible causes of the problem, namely, a circuit breaker, a capacitor trip device, some relays, and the shunt trip coil, all of which are shown in a diagram on Exhibit 2.

11. After Hall, Phillips, and Moore had participated in isolating the defective components in the vacuum circuit breaker on 1 Left A Panel, the three MSHA employees discussed and evaluated all of the information which they had gathered on September 22, 1980, as well as the summaries of the interviews which had been obtained through the interviews of Badger's employees on Saturday night. Hall, Phillips, and Moore decided to cite Badger for three different violations of the mandatory safety standards.

12. Two of the alleged violations were cited in imminent-danger Withdrawal Order No. 631937 dated September 22, 1980, issued under sections 107(a) and 104(a) of the Act. The condition or practice stated in the order is as follows:

Work was being performed on energized electrical equipment, the 1 Left Panel vacuum circuit breaker, when it was not necessary for the circuit to be energized during testing and trouble shooting (75.509). A lock installed by Richard Lambert shift maintenance foreman to lock out a set of disconnects, was removed by Guy Steerman, Chief Electrician, after Lambert had completed some minor repairs to the 1 Left A Panel vacuum circuit breaker. Lambert was available underground and had asked Steerman by telephone to remove the lock and reenergize the main circuit breaker supplying power underground (75.511). These conditions were determined during an investigation of an accident resulting in the electrocution of Richard Lambert, shift maintenance foreman. Mine management shall insure that all qualified electricians will be prevented from working on energized electrical equipment except when it is absolutely necessary to have the power on to trouble-shoot or test. Otherwise trouble shooting and testing shall be done with the electrical circuits deenergized. Also, locks and tags shall only be removed by persons who installed them when they are available at the mine.

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A subsequent action sheet was issued on September 24, 1980, stating:

Order No. 631937 is hereby modified so that the following statement is added. Richard Lambert was not wearing protective apparel while he was troubleshooting and testing the low voltage control circuit of the Line Power 12,470 VAC vacuum breaker S.N. 4986. Lambert was exposed to and contacted internal high voltage components which were energized.

Phillips signed Order No. 631937 but its issuance was with the full concurrence of Hall and Moore.

13. Order No. 631937 is comprised of Exhibits 4 and 4A in this proceeding. Exhibit 4 has two lines after the words "Area or Equipment" for entry of the designated area covered by the withdrawal order. Exhibit 4 shows that something was described on the first of those two lines, but those words have been scratched out. Exhibit O in this proceeding is a copy of Withdrawal Order No. 631937 which was attached to Badger's application for review filed in Docket No. WEVA 81-36-R. On Exhibit O, after the words "Area or Equipment", there appears an entry reading "The 1 Left vacuum circuit breaker serial No. 4986".

14. The pink and yellow copies of Order No. 631937 were handed to Badger's safety director, Larry Fortney, by Phillips. Fortney testified that the yellow copy was placed on Badger's bulletin board and is no longer available as no effort is made by Badger to preserve the copy placed on the bulletin board. The pink copy of Order No. 631937 was introduced in evidence as Exhibit B and the pink copy also has after the words "Area or Equipment" the same entry that appears on Exhibit O, namely, "The 1 Left vacuum circuit breaker serial No. 4986". Although the entry on the pink copy contains the same words as those which appear on the Xerox copy, which was attached to Badger's application for review, the Xerox copy, or Exhibit O, is not a true Xerox copy of the original order because a secretary who works for Badger rewrote Exhibit O to obtain a clear copy for use as an exhibit to accompany the application for review.

15. When Phillips was cross-examined during his first appearance as a witness, he stated that he might have scratched out the entry on Order No. 631937 after the words "Area or Equipment" but that he could not specifically recall having done so.

16. Phillips testified, when called as an adverse witness by Badger's counsel, that his handwriting appears on Order No. 631937 and that he simply wrote on the official form the language which he, Hall, and Moore had drafted. Phillips also stated that after he wrote the order, he tore the white, pink, and yellow copies out of his book of forms and placed them in

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front of him. Then Phillips, Hall, and Moore decided that the order dealt with a "practice" instead of a "condition" and it was concluded that the language appearing after the words "Area or Equipment" should be obliterated from the order. Phillips stated that the original white copy which is now in MSHA's file in the Morgantown office shows obliteration of the entry after "Area or Equipment". The only explanation Phillips could give for the fact that the pink copy presented in evidence as Exhibit B by Badger's counsel showed that the entry after the words "Area or Equipment" had not been obliterated was that he placed the copies back in his book to scratch out the entry after "Area or Equipment" and he thinks that he may have placed the pink copy under his green copy which does not contain on its back the substance which acts like carbon paper.

17. Phillips' green copy of Order No. 631937 was introduced in evidence as Exhibit C. A careful comparison of the pink copy of Order No. 631937, or Exhibit B, with the green copy shows that the handwriting on the green and pink copies is identical and that the only difference between them, besides their color, is the fact that the green copy has had the entry after the words "Area or Equipment" scratched out, whereas the pink copy still shows an entry after the words "Area or Equipment".

18. Order No. 631937 was terminated by James Cross on October 2, 1980, as shown in Exhibit 4B. Cross testified that Badger did not request that the order be vacated. Cross had gone to the mine for other purposes and, while there, asked to see a list of miners who had signed a sheet indicating that they would not trouble shoot while equipment is energized unless absolutely necessary and would have the same person who locks and tags power out of the mine to remove the lock and tag and restore the power. All miners had signed sheets, which comprise Exhibit 6 in this proceeding, to show that they would comply with the aforementioned procedures. Although all electricians or miners had signed the sheets by September 24, 1980, the order was not terminated until October 2, 1980.

19. The third violation, referred to in Finding No. 11 above, for which Phillips, Moore, and Hall determined to cite Badger was a violation of section 75.803 which was alleged in Citation No. 631938 issued September 22, 1980. That citation is Exhibit 5 in this proceeding and the condition described in the citation is:

The ground check circuit provided to monitor the continuity of the grounding circuit from the A Panel vacuum breaker to the A panel power center was inoperative in that the auxiliary breaker switch would not properly operate to allow the tripping circuit to energize the shunt trip coil

which deenergizes the circuit breaker. This condition was determined during an investigation of a fatal electrical accident. Mine management was aware of this condition and was in the process of repairing the ground wire monitoring system when the accident occurred.

Citation No. 631938 was terminated on September 23, 1980, by a subsequent action sheet which is Exhibit 5A in this proceeding and which states:

The ground check circuit provided to continuously monitor the continuity of the grounding circuit from the A Panel Vacuum Breaker to the A Panel power center was made operative by providing another vacuum breaker and transporting the defective breaker to the surface.

20. Hall, Phillips, and Moore testified in support of the issuance of Order No. 631937. They claimed that an imminent danger was involved in the death of Lambert because there was a practice at Badger's No. 1 Mine which was a continuing imminent danger in that the electrician who turned off high voltage was allowing another electrician to reenergize the equipment for purposes of trouble shooting and testing. Hall said that the imminent danger existed while Lambert was trouble shooting with the power on, but that the imminent danger did not exist when he checked the equipment on Monday, September 22, 1980, because the vacuum breaker had been deenergized. Hall said that MSHA can issue an imminent danger order when an inspector finds that a practice is causing an imminent danger even though it may take days, as it did in this instance, to determine whether the imminent danger has been abated. Hall also said that the imminent danger in this instance continued to exist while the list (Exh. 6) was circulated in order for the miners to sign their names to the list to show that they would not have another person to reenergize high voltage equipment if a different person had shut off the power and tagged or locked out the disconnects involved.

21. In support of MSHA's citing of a violation of section 75.509, MSHA's witnesses stated that section 75.509 permits a person to trouble shoot or test electrical equipment while it is energized only when such trouble shooting is necessary and they claimed that trouble shooting and testing with the power on was not necessary for Lambert to determine why the vacuum breaker would not cut off the power in the 1 Left A Panel. MSHA's witnesses primarily supported their contention that it was unnecessary for Lambert to trouble shoot with the power on by stating that the team of men who examined the vacuum breaker on September 22, 1980, determined the cause of the malfunction

while the power was off. The names of the people who participated in the examination were: Wayne Myers, Badger's chief electrical engineer; Blaine Yeager, Badger's maintenance superintendent; Guy Steerman, Badger's chief electrician at the No. 1 Mine; Mike Hall, chief of MSHA's Electrical Section; Jim Cross, an MSHA electrical inspector; John Paul Phillips, an MSHA inspector and certified electrician; and Benny Comer, a West Virginia electrical inspector. Those seven men studied a printout of the vacuum breaker before going underground and determined the manner in which they would check all of the various circuits and components to determine the problem. They worked 3 1/2 hours and finally decided that the auxiliary switch was at fault because of excessive mechanical wear. Although the trip counter showed only 230 operations, the switch should have worked thousands of times without becoming defective as a result of mechanical wear. MSHA's witnesses stressed the fact that voltage potential can be checked with an ohmmeter which is equipped with a battery to provide its own power. MSHA's witnesses said that checking with a voltmeter, which requires energization of equipment, is unnecessary for locating defective components.

22. MSHA's witnesses supported their citing of a violation of section 75.511 by stating that Lambert had violated that section when he asked Steerman to reenergize the equipment which Lambert had deenergized at the substation and locked out. Moore testified that only the electrician who deenergizes equipment before working on it may remove the locks or tags and reenergize the equipment. Hall testified that Steerman's reenergizing the vacuum breaker was a contributing factor to Lambert's electrocution even though Lambert knew that the vacuum breaker was energized at the time he came into contact with the high-voltage circuits. Hall interpreted the last sentence of section 75.511 to mean that the person who deenergizes equipment must be the person who reenergizes it so long as that person is anywhere at the mine site. MSHA's witnesses took the position that Lambert was "available" to reenergize the equipment even though the vacuum breaker was located 4,800 feet from the surface substation where Lambert had turned off the power.

23. MSHA's witnesses supported their citing respondent for a violation of section 75.803 by testifying that Badger's management knew that the vacuum circuit breaker was inoperable but continued to operate equipment in the mine after Badger's management became aware of the fact that the ground monitoring system was not working. Citation No. 631938 specifically acknowledges the fact that mine management was aware of the fact that the ground monitoring system was not working and states that management was in the process of repairing the ground wire monitoring system when the fatal accident occurred.

24. Guy J. Steerman, in September 1980, was chief electrician at the Badger No. 1 Mine. Steerman was certified by MSHA as a qualified electrician for both underground and surface mining operations and Steerman had 10 years mining experience by September 20, 1980. Steerman testified that Lambert had already checked the vacuum breaker with an ohmmeter and had been unable to determine the cause of the malfunction in the shunt trip coil. Lambert had also advised Steerman that there was continuity in the ground monitoring system. In such circumstances, Steerman asked Lambert to check terminal Nos. 15 and 16 with a voltmeter to determine if there was power on the shunt trip coil. Steerman did not think it was hazardous to check the low-voltage terminal board of the vacuum circuit breaker with the power on. The low-voltage terminal board was sufficiently segregated from the high-voltage components of the vacuum circuit breaker that Steerman did not consider Lambert to be working on high-voltage components when he was checking the low-voltage terminal board. Steerman did not know that Lambert had removed the protective insulated shield covering the high-voltage compartment in which the high-voltage vacuum circuit breaker was located. If Steerman had known that Lambert had removed the insulated shield over the high-voltage components, he would have instructed Lambert to replace the insulated shield before conducting further testing or trouble shooting. Therefore, Steerman did not think Badger had violated section 75.509 or section 75.803. Steerman stated that Lambert knew by talking to Steerman on the phone when the power was on and when it was off. Steerman thought that there was no essential difference between Lambert's telling Steerman to turn the power on and off and Lambert's coming out of the mine for the purpose of turning the power on and off. Therefore, Steerman did not think Badger had violated section 75.511.

25. Lowell Junior Tinney, general superintendent of Badger's No. 1 Mine, testified that he also suggested that Lambert check terminal Nos. 15 and 16 with the power on and that he had no reason to doubt Lambert's ability or his care in avoiding exposure to the high-voltage circuits. Tinney thinks that an electrician should be able to ask another person to turn the power on and off because he thinks that when an electrician is 4,800 feet from the place where the power is turned on and off, that person is "unavailable" for personally turning the power on or off within the meaning of section 75.511. Tinney also believed that Badger was following the provisions of section 75.509 because he believed that it was necessary for Lambert to check the low-voltage circuits with the power on in his effort to determine what was wrong with the shunt trip coil.

26. Larry Fortney, Badger's safety director, testified that the inspectors gave him both the yellow and pink copies of Order No. 631937 and that neither of those copies had any

words scratched out on the line beginning with the words "Area or Equipment". On the contrary, both copies specified that the "Area or Equipment" involved was "The 1 Left vacuum circuit breaker serial No. 4986". It was Fortney's understanding that abatement of the order was dependent upon Badger's replacing the existing vacuum breaker with a new one. That is what was done to abate the order. Fortney additionally said that the inspector who abated the order also asked for the list of men who had signed Exhibit 6 stating that they would personally reenergize any equipment which they had personally deenergized.

27. Wayne Myers, Jr., is head of Pittston's Electrical Department. He has had 32 years of experience in designing and working on complex electrical equipment. He wrote the specifications for the vacuum breaker involved in this proceeding and had the breaker constructed by Line Power Company of Bristol, Virginia. Myers first thought that the defect in the vacuum breaker was in the auxiliary switch. The switch was replaced on Tuesday, September 23, 1980, the day after MSHA's three employees (Phillips, Hall, and Moore) had written the order and citation involved in this proceeding. The vacuum breaker worked perfectly and West Virginia and MSHA personnel were called to Badger's repair shop on Wednesday, September 24, 1980, for a demonstration, but the vacuum breaker again malfunctioned. Myers and his assistants replaced the vacuum bottle and all parts which were suspect and again the vacuum breaker seemed to be working satisfactorily, but it again malfunctioned when West Virginia and MSHA personnel were called for a second demonstration on Thursday, September 25, 1980. Myers then found that a ratchet in the operating handle was failing to create enough force to close the vacuum bottle which was supposed to activate the rod which, in turn, operated the auxiliary switch. The cam was not making a full rotation. The ratchet was redesigned on Friday and Saturday. On Monday, September 29, 1980, the redesigned parts were installed and the vacuum breaker thereafter worked perfectly.

28. Myers said that Badger's personnel had not violated any of the mandatory safety standards. He said that the ground monitoring system was working at all times and that Lambert was aware of the fact that the monitoring system was working. While the vacuum breaker was failing to cut off power, the fault was not in the ground monitoring system; consequently, Myers did not think a violation of section 75.803 had occurred.

29. Myers said that he believed section 75.511 should be interpreted to give some meaning to the word "unavailable" in the last sentence of that section. Myers pointed out that it could take an electrician from 2 to 2 1/2 hours to travel from the equipment on which he was working to the place where the power had been cut off and locked out or tagged. Myers believed

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that the person who cuts off the power is "unavailable" to reenergize the equipment when he is so far away from the power cut-off point that it takes him 2 1/2 hours to go to the power point and reenergize equipment. Myers said that requiring an electrician to spend 2 1/2 hours to turn power on and off would tend to make the electrician impatient and tempt him to check equipment with the power on rather than take the time and effort required to go back to the power point and reenergize or deenergize equipment. Therefore, in Myers' opinion, Lambert was in compliance with section 75.511 when he asked Steerman to turn the power on. So long as Lambert gave the instructions about energizing and deenergizing equipment, Lambert was at all times aware of when the power was on and when it was off. Myers said that Lambert knew that the power was on at the time Lambert was electrocuted and that Lambert's act of asking Steerman to turn the power on for him had nothing whatsoever to do with the occurrence of the fatal accident.

30. Myers also believed that Lambert had engaged in trouble shooting and testing with the power on in full compliance with section 75.509 because, in Myers' opinion, Lambert had determined that a problem existed in the vicinity of the shunt trip coil, which is a low-voltage section of the vacuum circuit breaker, and that Lambert having previously done testing and trouble shooting for sometime with the power off, was not acting unreasonably in doing further testing and trouble shooting on the low-voltage terminal board with the power on. As a matter of fact, all three of MSHA's experts and the other experienced personnel including several electrical engineers) who examined the vacuum circuit breaker for 3 1/2 hours on Monday, September 22, 1980, had failed to find the cause of the malfunction. The fact that a large number of experts could not find the problem with the power off was, in Myers' opinion, rather positive proof of the act that Lambert was trouble shooting and testing with the power on at a time when it was "necessary" within the meaning of section 75.509. As noted in Finding No. 27, supra, the malfunction was not fully determined until several days later when it turned out to be a mechanical problem in the design of the ratchet lever by Line Power Manufacturing Company and not an electrical problem.

31. It was stipulated at the hearing that during the 24 months preceding the citing of the alleged violations in this proceeding, respondent had paid penalties with respect to 52 alleged violations. There is no history showing that respondent has previously violated sections 75.509, 75.511, or 75.803.

The Question of the Validity of Order No. 631937

Badger's Arguments

Badger's brief (pp. 2-7) argues that Order No. 631937, whose provisions are quoted in Finding No. 12, supra, is invalid because its issuance is unsupported by the law and the facts. Section 107(a) provides as follows:

(a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Badger's arguments also refer to section 107(c) which provides as follows:

(c) Orders issued pursuant to subsection (a) shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited from entering.

Order No. 631937 was issued on September 22, 1980, by three MSHA employees, namely, John Phillips, a coal-mine electrical inspector, Paul Moore, a mining engineer, and Paul Hall, chief of the electrical section in MSHA's Morgantown, West Virginia, office (Finding Nos. 10 and 11, supra). The order alleged violations of 30 C.F.R. 75.509 and 75.511. Section 75.509 provides as follows:

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

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Section 75.511 provides:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

Badger's brief (p. 4) correctly notes that the language given under the words "Condition or Practice" in Order No. 631937 alleges only that Badger had violated section 75.509 by performing testing and trouble shooting on electrical equipment when it was not necessary to do so. The order also alleges that Badger had violated section 75.511 in that the certified electrician, Richard Lambert, who locked out the disconnecting device in a surface substation providing power to an underground vacuum circuit breaker, asked the chief electrician to unlock the device and restore power for purposes of trouble shooting. The inspectors issued a modification of Order No. 631937 on September 24, 1980, but that modification simply added words to the effect that Lambert was not wearing protective apparel while he was trouble shooting the low-voltage control circuit on a vacuum circuit breaker (Finding No. 12, supra).

Badger's brief concludes that the language in Order No. 631937 does not comply with section 107(c) of the Act because it does not, in the words of that section, "* * * contain a detailed description of the conditions or practices which cause and constitute an imminent danger." Badger contends, therefore, that anyone reading the order would believe that it does no more than cite Badger for violations of sections 75.509 and 75.511. At the hearing, MSHA's witnesses explained that an imminent danger was associated with Lambert's death "* * *" because there was a practice at Badger's No. 1 Mine which was a continuing imminent danger in that the electrician who turned off high voltage was allowing another electrician to reenergize the equipment for purposes of trouble shooting and testing" (Finding No. 20, supra).

Although Order No. 631937 when first written by Phillips on September 22, 1980, specified under the words "Area or Equipment" that "[t]he 1 Left vacuum circuit breaker serial

No. 4986" was the area from which miners should be withdrawn, or the hazardous equipment which should be withdrawn, the inspectors decided that, since the order dealt with a "practice" instead of a "condition", that the language referring to the 1 left vacuum circuit breaker should be obliterated from the order.

Phillips, at first, stated that while he might have scratched out the words "1 left vacuum circuit breaker serial No. 4986" from the order, he did not specifically recall having done so (Finding No. 15, supra). When Phillips was subsequently recalled as an adverse witness by Badger's attorney, he recalled specifically having put the copies of the order back into his book of forms to scratch out the words under "Area or Equipment". The only explanation which Phillips could give for the fact that the pink copy given to Badger did not show any scratching out of the words "1 Left vacuum circuit breaker serial No. 4986" under "Area or Equipment" was that he may have placed the pink copy under his green copy which does not contain on its back the substance which acts like carbon paper (Finding No. 16, supra).

Larry Fortney, Badger's safety director, testified that the inspectors gave him both the yellow and pink copies of Order No. 631937 and that neither of those copies had any words scratched out on the line beginning with the words "Area or Equipment". On the contrary, both copies specified that the "Area or Equipment" involved was "[t]he Left vacuum circuit breaker serial No. 4986". Fortney understood that abatement of the order required Badger to remove the defective vacuum circuit breaker and replace it with another vacuum circuit breaker which functioned properly and Fortney said that was the action Badger took to abate the order (Finding No. 26, supra).

Badger's brief (p. 5) argues that the lack of specificity and detail in Order No. 631937 renders it defective as a matter of law because it does not specify what constituted an imminent danger at the time the order was issued. Badger further contends that the inspectors, after hearing that the order had been contested, contrived the argument that the imminent danger consisted of a "practice" at the mine of having someone energize equipment other than the individual who had deenergized it. Badger also argues that the inspectors did not really obliterate the words "1 Left vacuum circuit breaker serial No. 4986" on the same day they wrote the order, but decided to obliterate those words from the order after they realized that the 1 left vacuum circuit breaker did not constitute an imminent danger at the time the order was written. Badger's brief (p. 6) points out that the inspectors have always taken great precautions to notify Badger when changing or altering any previous citation or

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order and that MSHA's failure to notify Badger of the obliteration of "1 Left vacuum circuit breaker serial No. 4986" supports Badger's contention that the obliteration occurred after the inspectors learned that the order was going to be contested.

Badger's brief (p. 6), in support of its argument, cites a decision by Judge Boltz in *CF & I Steel Corp.*, 3 FMSHRC 99 (1981), (FOOTNOTE 1) in which Judge Boltz found that no imminent danger existed in circumstances where the operator had detected a hazardous concentration of methane, had turned off all power to the area, and had withdrawn all miners except those working to correct ventilation before the inspector arrived at the scene of an alleged imminent danger. Badger argues that since it was removing the defective circuit breaker at the time the order was written, that the conclusions of Judge Boltz in the *CF & I* case should be applied in this case, that I should find that no imminent danger existed in Badger's mine, and that the order should be vacated as having been issued in error.

The Secretary's Arguments

The Secretary's brief (p. 4) argues that imminent-danger Order No. 631937 was properly issued because "* * * there was in existence at the Grand Badger No. 1 Mine a practice considered normal procedure, wherein a person performing electrical work locked out the equipment and once the work was completed, then instructed someone over the station phone, to remove the lock and reenergize the power." The Secretary also cites a decision

by Judge Koutras in Consolidation Coal Co., 2 FMSHRC 49 (1980), in which he held that the coal company seeking review of an imminent-danger order has the burden of proving that an imminent danger did not exist. Judge Koutras stated in the Consolidation case that "* * * the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued" (2 FMSHRC at 64).

The Secretary's brief (p. 5) contends that the practice of having a different person reenergize equipment from the person who deenergized the equipment comes within the definition of imminent danger in section 3(j) of the Act which provides, "[t]he existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Secretary's brief (p. 6) also quotes from the Legislative History of the Federal Coal Mine Health and Safety Act of 1969, page 215, or from page 89 of Senate Report No. 91-411, which provides as follows:

The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes, may be critical or disastrous. After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector.

The Secretary's brief (p. 7) also quotes from the court's decision in Freeman Coal Mining Co. v. Interior Bd. of Mine Op.App., 504 F.2d 741 (7th Cir.1974), in which the court agreed with the Board's statement that imminent danger relates to the "proximity of the peril to life and limb" (504 F.2d at 743). The court also approved of the Board's discussion of imminent danger in the following language (504 F.2d at 743):

"[w]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger."

The Secretary's brief (p. 8) concedes that the inspectors who wrote imminent-danger Order No. 631937 did not see the "practice" which constituted the imminent danger which was cited in the order, but the Secretary argues that the employees who issued the order were experienced electricians and one of them was a mining engineer. It is contended, therefore, that they had the "education and experience" referred to in the quotation from the Freeman case to recognize that Badger's practice of having another person reenergize equipment from the person who deenergized the equipment indicated the existence of an impending accident or disaster, threatening to kill or cause serious injury at any moment, if that practice were allowed to continue in existence.

The Secretary, therefore, asks me to apply Judge Laurenson's reasoning in Itmann Coal Co., 2 FMSHRC 1643 (1980), in which he upheld the validity of an imminent-danger order issued in circumstances where an inspector saw a miner walk under unsupported roof. The Secretary argues that even though the miner was not under the hazardous roof when the order was issued, Judge Laurenson upheld the order because there was a practice at Itmann's mine for miners to walk under the unsupported roof. The Secretary also cites Peabody Coal Co., 1 FMSHRC 1785 (1979), in which the Commission upheld issuance of an imminent-danger order several days after data were collected showing existence of a dangerous concentration of carbon monoxide after a fire had occurred at Peabody's mine.

The Infirmities in Order No. 631937 Require Its Vacation

There are at least several reasons for vacating Order No. 631937. First, the order, as modified by the inspectors, fails to comply with section 107(a) by determining "* * * the extent of the area of such mine throughout which the danger exists" so as to withdraw miners from the area of danger. As the order was originally issued, it made limited sense by declaring that the area of danger was the "1 Left vacuum circuit breaker serial No. 4986". It is a fact that the circuit breaker in question malfunctioned on Friday, September 19, 1980, and caused the death of an electrician when he was trouble shooting the low-voltage circuits on the circuit breaker on Saturday, September 20, 1980. All power to the circuit breaker was cut off at the moment of the electrician's death and the circuit breaker was not energized again until after it was removed from the mine on Monday, September 22, 1980.

The inspector who wrote the order, which was issued with the concurrence of two other MSHA employees, testified that no imminent danger existed on Monday, September 22, 1980, when the inspectors examined the circuit breaker, because the circuit breaker had been deenergized. The inspectors apparently

recognized that they could not sustain the citing of an imminent danger on a deenergized piece of equipment, so they thereafter removed from the order any reference to "the area of such mine throughout which the danger exists" and contended that the order was withdrawing the "practice" at the mine of having a person reenergize equipment other than the person who deenergized the equipment.

Once the inspectors had changed their minds about the concept underlying the issuance of the order, it was incumbent upon them to notify Badger's personnel of the fact that they were not withdrawing a piece of hazardous equipment from the mine, but were, instead, withdrawing the "practice" of having a person reenergize equipment other than the person who deenergized the equipment. The Secretary's brief (p. 13) argues that the inspectors' failure to inform Badger of the obliteration of any area from which miners were to be withdrawn was not prejudicial to Badger. The theory behind the claim of no prejudice is that the inspectors required Badger to have all electricians sign a statement that they would not have someone else reenergize equipment which they had deenergized before working on it. The Secretary, therefore, argues that Badger knew that the real imminent danger cited in the order was the practice with respect to reenergization of equipment and that the order was not officially terminated until all of the electricians had signed a statement (Exh. 6) showing that they would not ask another electrician to reenergize equipment which they had deenergized.

The Secretary's contention that Badger was not prejudiced is hard to sustain within the concept of an imminent danger. The Secretary has defended his action in issuing the order by citing legislative history to the effect that the primary reason for issuing imminent-danger orders is to remove miners from the area of danger. When Badger removed the circuit breaker from the mine, it thought it had removed all miners from the area of danger because Badger's copy of the order continued to specify that the "area throughout which the danger exists" was the "1 Left vacuum circuit breaker serial No. 4986". The order was written on September 22, 1980, but Badger did not succeed in getting all the electricians to sign the statement about deenergization of electric equipment until September 24, 1980, but throughout that time, miners were allowed to work in the mine because the inspectors had not advised Badger that the entire mine was hazardous until the "practice" which caused the imminent danger ceased to exist.

The confusion pertaining to the area from which miners were required to be withdrawn was augmented by the fact that another inspector had issued a withdrawal order pursuant to section 103(k) of the Act on September 20, 1980, after the electrician, Richard Lambert, had been electrocuted. That order had initially

been issued by specifying that the "entire mine" was the area from which miners should be withdrawn, but the order was modified 3 hours after it was issued to specify that the area from which miners were to be withdrawn was the section where circuit breaker with serial No. 4986 was located. Therefore, two withdrawal orders had been issued and both of them required Badger to withdraw miners only from the area where the defective circuit breaker was situated, but, according to the Secretary, the miners throughout the entire mine were under the peril of an imminent danger while Badger, over a 2-day period, was obtaining signatures of the electricians who worked at the mine.

Since the primary purpose for issuing Order No. 631937, or any other imminent-danger order, is to withdraw miners from the area of danger, the inspectors completely failed to carry out their obligation under the Act by failing to specify the "entire mine" as the area from which the miners should be withdrawn until such time as all electricians were made aware of the requirement that they never have another person reenergize equipment which they had deenergized for the purpose of working on it. In other words, the miners were continuing to work at the mine throughout the period during which the imminent-danger order was in effect. Many of the electricians did not sign the statement saying that they would not have another person deenergize equipment until September 24, 1980. Therefore, if the "practice" was as widespread and as hazardous as it would have had to be to justify the issuance of an imminent-danger order, the inspectors cannot justify allowing the miners to continue working for 2 days while the electricians were being made aware of the imminent danger which existed throughout that period.

There are other aspects about Order No. 631937 which support a finding that it should be vacated. Badger did not request that the order be terminated because Badger thought it had eliminated the dangerous condition causing the imminent danger when it withdrew the defective circuit breaker from the mine. Therefore, the imminent-danger order was technically in effect until it was officially terminated on October 2, 1980. At that time, the justification for terminating the order was that "[m]anagement has given specific instructions to each qualified electrician at the mine to comply with the instructions mentioned in the order." Since the order was not terminated until October 2, 1980, the inspectors had allowed the miners to continue working in the mine from September 22, 1980, the day the order was issued, to October 2, 1980, without Badger's having any idea that its mine or personnel were under some sort of binding withdrawal order.

The cases cited by the Secretary in support of his action of having issued Order No. 631937 are not persuasive. In the Itmann case, *supra*, the area from which miners were withdrawn

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was unsupported roof at a point where a roof fall had occurred. There is no doubt as to what constituted the imminent danger in that case. The danger was the falling of unsupported roof. The "practice" which the miners were barred from doing was the act of walking under the unsupported roof. Itmann was required to erect timbers and planks to prevent miners from going under the unsupported roof before the order was terminated (2 FMSHRC at 1648). Therefore, the "practice" of walking under the hazardous roof was necessarily terminated at the same time the bulwark was constructed to stop the miners' "practice" of walking under unsupported roof.

Judge Laurenson distinguished his finding of an imminent danger in the Itmann case from his finding of no imminent danger in Sharp Mountain Coal Co., 3 FMSHRC 115 (1981), by pointing out that the imminent danger order in the Itmann case was written moments after the inspector saw a miner walk under unsupported roof, as compared with the imminent-danger order in the Sharp Mountain case in which the order was written 11 days after the inspectors had observed nonpermissible caps and fuses in Sharp Mountain's coal mine. Judge Laurenson held that the mere existence of nonpermissible caps and fuses did not create an imminent danger and that the inspectors had failed to find that Sharp Mountain's owners were actually using the nonpermissible caps and fuses at all, much less using them in a hazardous manner.

The inspectors in this proceeding acted like those in the Sharp Mountain case in issuing an imminent-danger withdrawal order without having seen any electrician have another person reenergize equipment which he had just deenergized for the purpose of working on it. The inspectors had simply interviewed the chief electrician after Richard Lambert's death and had learned that the chief electrician had turned the power off and on after having received, by telephone, Lambert's instructions to do so. At no point in Order No. 631937 did the inspectors state that the imminent danger cited in their order was Badger's "practice" of having equipment reenergized by a person other than the one who deenergized it. The conditions and practices described in the order simply allege that Badger had violated sections 75.511 and 75.509. Those violations, by themselves, do not normally result in an imminent danger and the inspector who wrote the order agreed at the hearing that an imminent danger did not exist at the time they were examining the defective circuit breaker because the power was off. Nevertheless, at the time the order was written, the alleged practice of having equipment reenergized by a person other than the person who deenergized it did exist and continued to exist until September 24, 1980, when all electricians had signed the statement saying that they would not test equipment with power on unless it was necessary to do so and would not ask someone else to reenergize equipment which they had personally deenergized.

In the Peabody case, supra, cited by the Secretary, in support of his arguments that Order No. 631937 was properly issued under section 107(a) of the Act, the imminent-danger order was issued 3 days after a fire had occurred, but instrument tests were being made at the time the order was issued and those tests showed that carbon monoxide and inadequate oxygen continued to exist in the mine at the time the order was issued. The order was not terminated until such time as instrument readings showed that the levels of carbon monoxide and oxygen were within acceptable limits.

In *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir.1975), the court stated that an inspector has a difficult job because he has to be concerned about safety while coal companies are concerned about production and profit. Therefore, the court stated that an inspector's imminent-danger order should be sustained unless the evidence shows that he has clearly abused his discretion. I agree with the court's statement and I have never held that an imminent-danger order was invalid unless I believed that the inspector had clearly abused his discretion in issuing it. The evidence in this proceeding shows that the inspectors clearly abused their discretion by stretching the concept of an imminent danger beyond its reasonable limits.

The inspectors clearly abused their discretion in this case (1) by failing to describe circumstances which actually created an imminent danger, (2) by failing to advise Badger that the "1 Left vacuum circuit breaker serial No. 4986" was not the equipment which had to be withdrawn and was not the area from which miners had to be withdrawn, (3) by failing to advise Badger that they were withdrawing a "practice" of having another person reenergize equipment who had not deenergized it in the first instance, and (4) by failing to withdraw any miners from the mine while the alleged imminent danger was being eliminated by having the electricians, over a 2-day period, sign a statement that they would not trouble shoot or test equipment with the power on unless absolutely necessary, and would not have another person reenergize equipment which they had deenergized (Exh. 6). For the foregoing reasons, I find that Order No. 631937 was improperly issued and should be vacated as hereinafter ordered.

The Question of Whether Section 75.509 Was Violated

Badger's Arguments

Although I have found above that Order No. 631937 should be vacated, the Commission has held that violations cited in withdrawal orders survive vacation of the orders (*Island Creek Coal Co.*, 2 FMSHRC 279 (1980), and *Van Mulvehill Coal Co.*, 2

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FMSHRC 283 (1980) Therefore, it is necessary to determine whether Order No. 631937 validly cited a violation of section 75.509 (Finding No. 12, supra).

Badger's brief (p. 7) emphasizes the word "work" in section 75.509 which provides that "[a]ll power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing." Badger states that the language of section 75.509 is quite clear and easily interpreted because it obviously prohibits the performance of work on energized equipment and allows trouble shooting or testing of energized equipment when necessary. Badger avers that the Secretary has made the decision that doing work on energized equipment is so hazardous that it should be absolutely prohibited, but the Secretary has also recognized that an electrician may use his discretion to trouble shoot or test energized equipment when he deems it necessary to do so.

Badger claims that the foregoing interpretation is reasonable because the Secretary has other regulations which restrict the performance of work on electrical equipment by anyone other than a properly qualified and properly trained electrician. Badger correctly notes that a qualified electrician will try to determine what is wrong with electrical equipment while the equipment is deenergized, if possible, just as Lambert attempted to do so in this proceeding (Finding Nos. 2, 3, and 4, supra).

Badger's brief (p. 9) stresses the fact that each qualified electrician is allowed, under the provisions of section 75.509, to use his own discretion in determining when it is necessary to trouble shoot or test electrical circuits with the power on. Badger recognizes that MSHA's Underground Manual does not have the force of regulations (King Knob Coal Co., Inc., 3 FMSHRC 1417 (1981)), but notes that the policy for application of section 75.509, as stated in the manual, is as follows (Exhibit P):

Section 75.509 applies when electrical work is to be performed on a machine or a machine trailing cable.

* * *

"Trouble shooting or testing" for the purpose of Section 75.509 would include the work of locating a problem in the electric circuits of an energized machine, but would never include the actual repair of such circuits with the machine energized.

MSHA's Electrical Manual makes similar policy statements about the application of section 75.509 and states that examples of trouble shooting or testing which may be performed with equipment energized includes "[v]oltage and current testing" (Exhibit 8, page 48).

Badger's brief (p. 10) argues that Lambert, the electrician who is charged with having violated section 75.509, was doing precisely the kind of trouble shooting or testing which MSHA's manuals define as permissible activities under section 75.509. Badger's brief (p. 11) concludes, therefore, that Lambert did not violate section 75.509 and that the citation should be vacated.

The Secretary's Arguments

The Secretary's brief (p. 10) contends that Lambert, as a trained and certified electrician, should have been able to determine the cause of the circuit breaker's malfunction without having the circuit breaker energized. As proof that it was not necessary to have the circuit breaker energized to determine the cause of the malfunction, the Secretary notes that the investigating team of seven persons was able to determine the cause of the malfunction with the power off by using an ohmmeter. The Secretary concedes that it took the team 3 1/2 hours to find the malfunction, but argues that time is not a factor to be considered where safety is involved.

The Secretary cites Judge Kennedy's decision in Consolidation Coal Co., 2 FMSHRC 866 (1980), and argues that Judge Kennedy's holding in that case to the effect that a restricted application of section 75.509 "* * * is contrary to the exception which permits troubleshooting with the power on where the evidence shows, as it does here, that without the power on the trouble found was not reasonably susceptible of correction" (2 FMSHRC at 867). The Secretary supports his argument by stating that section 75.509 "* * * prohibits trouble shooting with the power on only where it can be shown that the trouble encountered is reasonably susceptible of repair without power on" (Secretary's brief, p. 11). The Secretary says that the foregoing assertion was proven to be correct in this proceeding because (Br., p. 11):

* * * The testimony offered on behalf of MSHA at trial establishes the fact that the problem was reasonably susceptible of being located and repaired without power. Thus, the more limited meaning of the regulation--trouble shooting without power on--rather than the exception, was applicable in this case.

The Secretary also notes that Lambert was not wearing any type of protective clothing and that if he had worn protective clothing, the accident might not have resulted in his death.

The Preponderance of the Evidence Does Not Support a Finding of a Violation of Section 75.509

MSHA did not challenge at the hearing the fact established by Badger to the effect that Lambert was a well-qualified electrician who had had nearly 11 years of experience as an underground electrician and who had been a shift maintenance foreman for 3 years and 9 months (Finding No. 2, supra). He had discovered the malfunction in the circuit breaker on Friday and had advised the chief electrician of that fact. Lambert also volunteered to come in on the following Saturday for the purpose of repairing the malfunction. He cut off all power to the circuit breaker and locked the gate which had to be opened before anyone could reenergize the circuit breaker (Finding Nos. 2 and 3, supra). After examining the circuit breaker with the power off, he found a loose connection on the shunt trip coil and believed that was the cause of the malfunction. At that time, he had the chief electrician, Guy Steerman, to reenergize the circuit breaker so that he could trouble shoot or test the performance of the coil. Lambert's testing failed to show that the malfunction had anything to do with the loose wire which he had previously discovered (Finding No. 4, supra).

Lambert's checking of the circuit breaker was interrupted by his attendance of a foremen's meeting on the surface of the mine. After the meeting, Lambert discussed the malfunction of the circuit breaker with the chief electrician and another management employee. During the discussion, Lambert was asked to check two terminals in the low-voltage portion of the circuit breaker with a voltmeter (Finding Nos. 5 and 6, supra).

Lambert returned underground and examined the circuit breaker for an additional period without having the equipment energized. Lambert then removed the cover from the circuit breaker to facilitate his examination of the low-voltage terminal board, but, in doing so, he also removed the insulated protective shield over the high-voltage portion of the circuit breaker (Finding No. 24, supra; Exhs. H and 10). Lambert then had Steerman reenergize the circuit breaker so that he could check the low-voltage terminal board. Steerman did not know, when he reenergized the circuit breaker, that Lambert had removed the protective shield over the high voltage portion of the circuit breaker (Finding No. 24, supra).

The preponderance of the evidence, therefore, shows that a well trained and qualified electrician had tried to determine the cause of the malfunction after considerable examination of the deenergized circuit breaker. He had then discussed the problem with his supervisor, the chief electrician, and with another supervisory employee who had requested that the low-voltage terminal board be checked (Finding No. 25, supra).

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Lambert's having the circuit breaker reenergized was done only after he had exhausted his ability to locate the malfunction without energizing the equipment to test some components suspected of being defective. In such circumstances, the evidence shows that Lambert was following the provisions of section 75.509.

The Secretary's argument to the effect that the investigating team found the cause of the malfunction by trouble shooting and testing with the power off is not supported by the preponderance of the evidence. It is true that an investigating team composed of an electrical engineer and six other persons having a great deal of electrical training and experience examined the circuit breaker for 3 1/2 hours with the power off and thought that they had traced the malfunction to excessive wear in the auxiliary switch. They formed that erroneous conclusion despite the fact that the trip counter on the circuit breaker showed only 230 operations when, in fact, the switch should have worked for thousands of times before wearing sufficiently to malfunction because of excessive wear (Finding No. 21, supra).

The Secretary's claim that the investigating team had discovered the cause of the malfunction by deenergized trouble shooting is refuted by the fact that when the malfunctioning circuit breaker was removed from the mine so that a new auxiliary switch could be installed, the circuit breaker continued to malfunction. Thereafter, Badger's personnel replaced a vacuum bottle and other parts but the circuit breaker continued to malfunction. After 3 days of testing with the power on and off, it was finally determined that there was a design flaw in the operating handle on the circuit breaker. It was necessary for the manufacturer of the circuit breaker to redesign and reconstruct the parts in the operating handle before the circuit breaker ever performed properly (Finding No. 27, supra; Exhs. J and N).

The preponderance of the evidence shows that the investigating team of seven electricians could not and did not find the cause of the malfunction with the power off the circuit breaker. Moreover, modified Order No. 634063, which was issued on September 20, 1980, under section 103(k) of the Act, withdrew miners from the area of the defective circuit breaker until the malfunction was corrected, but that order was terminated 5 days before the circuit breaker was actually repaired with the statement that "[t]he auxiliary switch for the breaker control circuit of the Line Power 12,470 vacuum circuit breaker S.N. 4986 has been repaired by a factory service representative" (Exh. A, p. 4). The termination of Order No. 634063 was written by the same inspector who wrote the order citing Badger for a violation of section 75.509. The inspector's entry on the termination sheet shows that he did not actually know what was wrong with the circuit breaker having Serial No. 4986.

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In the circumstances discussed above, the Secretary is also incorrect in contending that the statement by Judge Kennedy in his Consolidation decision, supra, is inapplicable to the facts in this proceeding. The circuit breaker which malfunctioned in this instance was a very complex piece of equipment which had been designed by Badger's chief electrical engineer and constructed by Line Power Manufacturing Company in accordance with his specifications. Consequently, the belief expressed by Judge Kennedy in the Consolidation case may appropriately be used in this proceeding, namely, that a restricted application of the provisions of section 75.509 is irreconcilable with the exception in that section "* * * which permits troubleshooting with the power on where the evidence shows, as it does here, that without the power on the trouble found was not reasonably susceptible of correction" (2 FMSHRC at 867).

Inasmuch as Badger's electrical maintenance foreman tried to determine the cause of the malfunction with the power off, and performed trouble shooting and testing with the power on, only after such testing with the power on became essential for locating the malfunction, I find that Badger did not violate section 75.509 as alleged in Order No. 631937.

The Question of Whether Section 75.511 Was Violated

Badger's Arguments

Badger's brief (p. 11) begins its discussion of the alleged violation of section 75.511 by first quoting the pertinent portion of section 75.511 with emphasis on the word "persons", as used throughout the section, as follows:

No electrical work shall be performed * * * except by a qualified person or by a person trained to perform electrical work * * *. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work * * * such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons, or if such persons are unavailable, by persons authorized by the operator or his agent. [Emphasis supplied by Badger.]

Badger argues that the Secretary's interpretation of section 75.511 is unreasonable because he argues that only the person who locks out power to equipment is permitted to remove the lock if that person is anywhere at the mine site. Badger's brief contends that the use of the word "persons" in the plural shows that the Secretary understands that in many instances several persons will be performing electrical work or testing on equipment. In such circumstances, Badger's brief (p. 12) claims that when more than one person is working on the equipment,

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the regulation clearly permits any of the persons who are working on the equipment to reenergize the equipment for testing because each of them would be a person who would be aware of the dangers involved and of the precautions to be taken.

Badger further notes that the disconnecting device here involved was located 4,800 feet from the circuit breaker so that Lambert would have had to make a round trip of almost 2 miles just to cut the power on and off to the circuit breaker. Badger argues that the purpose of the regulation is to insure that reenergizing does not occur accidentally when individuals are performing electrical testing or work on machinery.

Badger claims that if the Secretary intended that the person who deenergizes equipment must be the person who reenergizes that equipment, if that person is anywhere at the mine site, he should have written section 75.511 to so provide. Badger's brief (p. 13) contends that the Secretary did not so provide because he recognized that it is necessary in an industrial society for workers to rely upon each other in the performance of difficult and dangerous tasks--such as crane operators who move heavy loads while being directed by fellow workers.

Finally, Badger argues that the last sentence of section 75.511 should be interpreted to mean that the person who deenergized equipment is unavailable at the mine site for the purpose of reenergizing the equipment, if the person who originally deenergized the equipment is 1.8 miles, or a greater distance than that, from the place where the disconnects were opened and locked out.

The Secretary's Arguments

The Secretary's brief (p. 9) maintains that section 75.511 should be interpreted exactly as written, that is, that the person who locks out or tags equipment is required to be the person who removes the lock and restores power to the equipment. The Secretary contends that no exception should be granted just because the disconnecting device is a considerable distance from the equipment being worked on because the safety considerations are more important than the factors of time or distance.

The Preponderance of the Evidence Shows that a Violation of Section 75.511 Occurred

I do not believe that Badger's argument to the effect that the use of the word "persons" in the plural in section 75.511 means that if several persons are working on electrical equipment, any single person may be permitted to reenergize equipment regardless of whether he is the individual who deenergized the equipment in the first instance. The initial sentence in section 75.511 provides that no "person" shall perform work on electrical

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equipment unless he is qualified to do so or is directly supervised by a qualified person. The next two sentences of section 75.511 switch to the use of the word "persons" in the plural, but the next two sentences also refer to "disconnecting devices" in the plural and to "locks" and "tags" in the plural. Therefore, I believe that the use of the word "persons" in the plural has no significance other than an intent by the Secretary to be all inclusive so that no one is likely to conclude that any particular type of disconnecting device or tag is exempt from the provision that the person who deenergizes is also required to be the person who reenergizes.

The interpretation advocated by Badger would promote lack of safety because any one of "several" persons working on equipment could decide that it was time to test or trouble shoot with the power on and proceed to turn on the power before it was entirely clear to all persons that power was going to be restored.

Badger's other argument, however, has considerable appeal, that is, that Lambert was still, in effect, in charge of turning the power on and off because Steerman was standing by the telephone for the sole purpose of receiving specific instructions from Lambert as to when Lambert wanted the circuit breaker energized and when he wanted it deenergized. Badger is correct in contending that the purpose of section 75.511 is to assure that reenergizing does not occur accidentally when individuals are performing electrical testing or work on equipment. Section 75.511 is a statutory provision which appeared as part of section 305(f) of the Federal Coal Mine Health and Safety Act of 1969. House Report No. 91-563, reprinted in the Legislative History of the Federal Coal Mine Health and Safety Act of 1969 explained the intent of section 75.511 as follows (Leg.Hist., p. 1078 or Report, p. 48):

* * * Switches must be locked in an open position where the power is disconnected to prevent accidental reclosing. The persons performing the work must retain possession to the key to guard against such reclosing.

Although the legislative history supports Badger's claim that the purpose of section 75.511 is to assure that equipment on which a person is working will not be accidentally reenergized, the remaining portion of Badger's argument fails to provide that assurance. When all of the facts are considered, it is clear that Lambert and Steerman violated both the spirit and the letter of section 75.511.

The first point which is important is that when Lambert deenergized the circuit breaker on the morning of September 20, 1980, he opened the switch on the surface to stop power from

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flowing to the underground circuit breaker which was located 4,800 feet from the disconnecting switch. Lambert then locked the gate through which a person had to pass to close the disconnecting switch, but Lambert violated the letter and spirit of section 75.511 by placing the key to the lock behind a high-voltage sign instead of retaining possession of the key to assure that someone else did not know the hiding place of the key so as to remove it from behind the high voltage sign for the purpose of entering the area where the disconnecting switch was located.

If Lambert had kept the key in his possession, as was intended by Congress when it drafted section 75.511, Lambert would have been unable to call Steerman later in the morning for the purpose of asking Steerman to reenergize the circuit breaker. Since Steerman did not participate in the locking out of power to the circuit breaker, Badger's argument is flawed in contending that Lambert and Steerman complied with the spirit, if not the letter, of section 75.511, because both of them were among the "persons" who locked out the power for the purpose of working on the circuit breaker.

The second point which is important is that, after lunch, when Lambert returned underground to work on the circuit breaker, he asked Steerman to stay near the telephone which was close to the disconnecting switch in the substation so that Lambert could give Steerman instructions as to when Lambert wanted the circuit breaker energized and when he wanted it deenergized. At that point in Lambert's work on the circuit breaker, no person (in the singular or plural) actually locked out the power because Steerman did not consider it necessary to lock out the power since he was within sight of the substation at all times (Finding Nos. 5 and 6, supra). The only exception in section 75.511 to the requirement that the power be "locked out" is "* * * where locking out is not possible". Since Lambert had locked out the power in the first instance before going underground on the morning of September 20, there is no doubt but that the disconnecting switch was capable of being locked out. Therefore, Lambert and Steerman clearly violated section 75.511 when neither one of them locked out the power in the afternoon when Lambert returned underground to work on the circuit breaker. As a matter of fact, section 75.511 does not specifically refer to the reclosing of the switch or the reenergizing of equipment. The last sentence of section 75.511 refers only to the fact that the persons who install the locks or tags shall be the persons who remove the locks or tags.

For the reasons given above, I find that the preponderance of the evidence supports a finding that Badger violated section 75.511. Since I have found that Badger violated section 75.511 by failing to lock out the power to the circuit breaker, it is actually unnecessary for me to decide the arguments about

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Lambert's unavailability and whether a person other than the one who deenergizes may reenergize if the disconnecting switch is 4,800 feet from the equipment being tested, but I shall give my views on those points so that Badger may argue them before the Commission if a petition for discretionary review should be granted by the Commission.

I agree with the Secretary that the matter of reenergizing high-voltage equipment which is being worked on or tested is a matter of vital importance to the safety of the miners. The question of the distance between the equipment and the disconnecting switch should not be allowed to take precedence over the importance of assuring that equipment does not accidentally become reenergized while it is being worked on or tested. I also agree with the Secretary that so long as the person who locks out equipment is available at the mine, he is available for the purpose of removing the locks and reenergizing the equipment. As indicated above, Congress intended that the person who locks out the equipment be the person who is going to perform the work and Congress also intended that the person who locks out the equipment be the person who retains possession of the key. The aforesaid considerations assure that the person who has the key will also be the person who removes the lock. If Lambert had retained possession of the key, as intended by Congress, it could hardly have been argued that he was "unavailable" for the purpose of removing the lock.

DOCKET NO. WEVA 81-37-R

The Question of Whether Section 75.803 Was Violated

Badger's Arguments

The violation of section 75.803 was alleged in Citation No. 631938 issued September 22, 1980, pursuant to section 104(a) of the Act. The condition or practice described in the citation is given in full in Finding No. 19, supra. Briefly, the violation cited was the failure of Badger to have an operative fail-safe ground check system which would remove power from the mine in case a grounding circuit was broken. Section 75.803 provides as follows:

On and after September 30, 1970, high-voltage, resistance grounded systems shall include a fail safe ground check circuit to monitor continuously the grounding circuit to assure continuity and the fail safe ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken, or other no less effective device approved by the Secretary or his authorized representative to assure such continuity, except that an extension of time, not in excess of 12 months, may be permitted by the Secretary on a mine-by-mine basis if he determines that such equipment is not available.

Badger's brief (p. 15) states that MSHA cited it for a violation of section 75.803 because Badger continued to mine coal after it was determined that the circuit breaker had malfunctioned. Badger claims that it learned of the problem during the 4 p.m. to midnight shift on Friday, September 19, 1980, and that the next shift was a maintenance shift which began at 8 a.m. and ended at 4 p.m. on Saturday, September 20, 1980. Badger states that the only persons in the mine on Saturday were two men who were working on a continuous-mining machine and some other men who were doing track work (Finding nos. 4 and 6, supra). Badger's brief (p. 15) concedes "* * *" that the vacuum circuit breaker was not doing what it should have been capable of doing, but this was due to a design defect and not a failure on the part of Badger, or a failure to continuously monitor the grounding circuit." Badger also notes that the miners who were working in the mine on Saturday were aware of the fact that Lambert was working on the circuit breaker during their shift.

Badger also contends that any finding of a violation of section 75.803 must rest on the basis that the circuit breaker was being tested in the mine as opposed to removing it to the surface for testing. Badger asserts that finding a violation on the failure to remove the circuit breaker to the surface would be a strained construction of the section and would be unwarranted in the circumstances which existed in this instance.

The Secretary's Arguments

The Secretary's brief (pp. 13-14) argues that Citation No. 631938 correctly alleges a violation of section 75.803. The Secretary claims that the fail-safe ground check circuit would not cause the circuit breaker to open or shut off power because the auxiliary switch was inoperative. It is further asserted that if the auxiliary switch does not work, then the ground monitor system cannot cause the circuit breaker to trip when either the ground check wire or ground wire is broken. The Secretary maintains that since the fail-safe ground check system could not do the job it was intended to do, there was a violation of section 75.803.

The Preponderance of the Evidence Supports a Finding of a Violation of Section 75.803

There is some confusion by the parties as to what is being charged by the Secretary with respect to the violation of section 75.803. As I have hereinbefore explained in the portion of this decision devoted to the discussion of the imminent-danger issues, the MSHA employees who participated in citing Badger for a violation of section 75.803 did not actually know at the time they cited Badger for a violation of section 75.803 what was causing the circuit breaker to malfunction. The Secretary's brief (pp. 13-14) continues to allege that the circuit breaker did not work

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because the auxiliary switch was defective. As explained in Finding Nos. 27 through 30, the actual cause of the circuit breaker's malfunction was a mechanical problem in the design of the ratchet lever constructed by Line Power Manufacturing Company. Therefore, Citation No. 931938 contains some factual statements which are not supported by the preponderance of the evidence.

The fact remains, however, as conceded by Badger in its brief (p. 15), that the circuit breaker would not turn off the power as it was supposed to do. Badger's electrical engineer, who designed the circuit breaker, also conceded that the circuit breaker would not cut off the power, but he argued that Badger had not violated section 75.803 because the ground monitoring system was working in a technical fashion because it was monitoring the continuity of the grounding circuit. Consequently, the difficulty with the parties' arguments is that neither one specifically addresses the defects in the other's arguments. All that is required to violate section 75.803 is for the fail-safe ground system not to "* * * cause the circuit breaker to open when either the ground or pilot check wire is broken."

It is technically correct, as Badger claims, that the failure of the circuit breaker to cut off power was not specifically related to the ground or pilot check wire because the actual trouble was confined to the design flaw in the ratchet lever as stated in Finding Nos. 27 through 30, supra. Nevertheless, it is also correct, as the Secretary argues, and as Badger concedes, that the circuit breaker was not doing what it was constructed to do. Section 75.803, like section 75.511, is a statutory provision which was a part of the 1969 Act, as indicated above. The legislative history or House Report No. 91-563 states with respect to section 75.803 or section 308(d) of the Act (History, p. 1081 or Report, p. 51) that "[s]ubsection (d) requires that fail-safe ground check system be installed with each underground high-voltage circuit to remove the power in case the grounding circuit is broken."

It is obvious, therefore, that Congress intended for the fail-safe ground check system to cut off the power in case a grounding fault occurs. The use of the term "fail safe" is meaningless if it can be argued that the fail-safe ground check system was working and yet could not cut off the power because of a mechanical problem, instead of an electrical problem.

Although MSHA failed to terminate Order No. 631937 for the right reason, it did terminate Citation No. 631938 for the correct reason, namely, that the fail-safe ground check system was restored to proper operation by the removal of the defective circuit breaker from the mine and replacement by a circuit breaker which worked properly. In other words, regardless of

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the technicality of what was actually inoperative about circuit breaker Serial No. 4986, it is a fact that the fail-safe ground check system was restored to an operative condition when the defective circuit breaker was removed from the mine and replaced with an operative circuit breaker. Therefore, I find that a violation of section 75.803 occurred as alleged and that Citation No. 631938 should be sustained because it is a fact that the circuit breaker was an integral part of the fail-safe ground check system in that it prevented the system from doing the job it was placed in the mine to do, namely, cut off power when an electrical fault occurred.

Since Badger's notice of contest filed in Docket No. WEVA 81-37-R was filed to challenge the question of whether a violation of section 75.803 had been properly alleged in Citation No. 631938, Badger's notice of contest will hereinafter be denied and Citation No. 631938 will be affirmed as having properly alleged a violation of section 75.803.

CIVIL PENALTY ISSUES

DOCKET NO. WEVA 81-285

The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-285 seeks assessment of civil penalties for the violations of sections 75.509 and 75.511 alleged in imminent-danger Order No. 631937 hereinbefore considered. I have previously found that no violation of section 75.509 occurred. Therefore, the Secretary's petition for assessment of civil penalty will hereinafter be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.509.

In assessing a penalty for the violation of section 75.511, which I have found did occur, I shall use the six criteria listed in section 110(i) of the Act, rather than the penalty formula explained in 30 C.F.R. 100.3 and used by the Secretary for the purpose of proposing civil penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

Assessment of a Penalty for the Violation of Section 75.511 Size
of Badger's Business

The parties stipulated to the facts given in Finding No. 1, supra. The production tonnage and other facts given in Finding

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No. 1 support a conclusion that Badger is a large operator and that any civil penalties assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of Badger's business.

The Question of Whether the Payment of Penalties Will Cause Badger To Discontinue in Business

Badger did not present any evidence at the hearing pertaining to its financial condition and none of the stipulated findings of fact address the question of whether the payment of penalties would cause Badger to discontinue in business. The Commission held in the Sellersburg case, *supra*, that a judge may conclude that payment of penalties would not cause a company to discontinue in business if it fails to present any evidence in support of that contention. Therefore, I find that any penalties which may be assessed in this proceeding need not be lowered under the criterion that Badger is in a difficult financial condition.

History of Previous Violations

It was stipulated in Finding No. 31, *supra*, that during the 24 months preceding the occurrence of the violations alleged in this proceeding that Badger had paid penalties with respect to 52 alleged violations. It has been my experience that the occurrence of 52 violations over a period of 2 years is not unusual for a large operator. Also it has always been my practice to consider the question of whether an operator has previously violated the same section of the regulations for which I am required to assess a civil penalty in a given case. Badger has not previously violated sections 75.511 or 75.803. If Badger had had no history of previous violations, I would have reduced any penalty otherwise assessable; if Badger had had a history or previously violating sections 75.511 or 75.803, I would have increased the penalty somewhat. Therefore, Badger's rather favorable history of previous violations justifies a finding that the penalties otherwise assessable be neither increased nor decreased under the criterion of history of previous violations.

Good-Faith Effort To Achieve Rapid Compliance

MSHA required Badger to obtain the signatures of all its electricians on a piece of paper to show that all of them would trouble shoot or test equipment with the power on only when absolutely necessary and would personally unlock and reenergize any equipment which they had deenergized in the first instance. That list contains 65 names or signatures and they were all obtained within a 2-day period (Exh. 6). Since the electricians worked on three different shifts, it appears that Badger obtained their signatures in an unusually short period of time,

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especially when it is considered that Badger thought that abatement of the violation was based entirely upon its having promptly removed from the mine the defective circuit breaker which had originally been cited as the source of the imminent danger alleged in Order No. 631937 (Finding No. 26, supra).

In the circumstances described above, I believe that any penalty hereinafter assessed for the violation of section 75.511 should be reduced by \$100 for Badger's outstanding effort to achieve rapid compliance.

Negligence

Badger's brief (p. 16) refers to some inspectors' statements evaluating gravity and negligence which were submitted as a part of Badger's brief. MSHA failed to introduce the inspectors' statements as a part of the record and they were not submitted as a part of the Secretary's petition for assessment of civil penalty in Docket No. WEVA 81-285. The inspectors testified at the hearing, however, that they believed the violation of section 75.511 contributed to Lambert's electrocution (Finding No. 22, supra). Therefore, I do not believe that the inspectors' statements submitted as a part of Badger's brief make any allegations which were not made at the hearing.

I have already held that the complexity of the circuit breaker and the unusual design flaw which caused the circuit breaker to malfunction justified Lambert's having performed trouble shooting with the power on. In trying to evaluate the question of Badger's negligence with respect to the violation of section 75.511 here under consideration, it is necessary to consider whether Lambert would have acted any differently from the way he did act if he had personally gone back to the surface substation for the purpose of removing the lock and reenergizing the circuit breaker. The evidence certainly shows that Lambert knew the power was on at the time he was trouble shooting and fell into the high-voltage portion of the circuit breaker (Finding Nos. 6 and 24, supra).

It is undisputed that Lambert, upon his own initiative, removed the insulated protective board which covered the high-voltage portion of the circuit breaker. Lambert did not discuss with Steerman on the telephone that he had removed the insulated board and Steerman stated that he would have instructed him to replace the board before trouble shooting with the power on if he had known that Lambert had removed the board (Finding No. 24, supra). Exhibits E, H, and 10 in this proceeding show that the insulation board covered nearly all of the interior of the high-voltage portion of the circuit breaker and support to some extent Badger's claims that Lambert had sufficient room to trouble shoot on the low-voltage portion of the circuit breaker without coming into contact with the high-voltage components.

The facts in this proceeding are somewhat like those in Nacco Mining Co., 3 FMSHRC 848 (1981), in which the Commission held that the operator was not negligent when a foreman with proper training, who had previously shown good judgment in discharging his responsibilities, acted aberrantly by exposing himself to unsupported roof, in a wholly unforeseeable manner, which resulted in his death. I do not believe, however, that the Commission's finding of no negligence in the Nacco case should be applied in this proceeding because, in this proceeding, other supervisors also contributed to Lambert's trouble shooting and testing with the power on by asking Lambert to check the low-voltage terminal board. The other supervisors were fully aware of the proximity of the low-voltage terminal board to the high-voltage portion of the circuit breaker. Therefore, they should have made certain that Lambert did his own locking and unlocking of the disconnecting switch in the substation. Steerman's failure to lock out the switch while he was awaiting for instructions from Lambert on the telephone could have resulted in an inadvertent reenergizing of the circuit breaker at a time when Lambert was not prepared to trouble shoot with the power on. If Steerman had been distracted by some other event at the mine, there is a possibility that the disconnecting switch could have become thrown accidentally so as to catch Lambert with the power on in the circuit breaker at a time when he was not prepared to trouble shoot or test with the power on.

Additionally, if Lambert had come to the surface to reenergize the circuit breaker because of Steerman's refusal to reenergize the circuit breaker for Lambert, Steerman's adherence to strict safety rules might well have caused Lambert to work around the circuit breaker with an increased amount of care which might have prevented his coming into contact with the high-voltage components which caused his death. It is also possible that if Lambert had come to the surface to reenergize the circuit breaker, he would have mentioned that he had removed the protective shield over the high-voltage components and that would have given Steerman the opportunity to learn of his lack of prudence so that he could have instructed Lambert to replace the protective shield before he did any trouble shooting or testing with the power on.

It is true that the discussion above is based on speculation, rather than facts, but there have been many deaths by electrocution in coal mines and it is difficult to show that management was not in any way negligent in the way power was turned off and on to the circuit breaker while Lambert was trouble shooting and testing. Therefore, I find that the violation of section 75.511 was associated with ordinary negligence.

The Secretary's brief (p. 15) argues that Badger was grossly negligent in allowing the violations of section 75.509 and

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75.511 to occur. The Secretary's discussion of gross negligence includes an argument that Lambert had no reason to feel that he had to trouble shoot or test the circuit breaker with the power on. I have hereinbefore shown that the evidence fails to support that contention.

I am agreeing with the Secretary's argument to the extent of finding that Badger showed ordinary negligence in connection with the violation of section 75.511, but I do not think that Steerman's participation in the turning of power on and off to the circuit breaker rises to the level of gross negligence because it is a fact that Steerman did remain by the telephone near the substation so as to be able to act immediately to any instructions which Lambert might give him. If Steerman had gone back to his office and waited for calls from Lambert or had been indifferent about the hazards associated with taking directions from Lambert as to the deenergization and reenergization of the circuit breaker, I would agree that the violation was associated with gross negligence.

Based on the discussion of negligence above, I find that the portion of the penalty to be assessed for the violation of section 75.511 under the criterion of negligence should be \$1,000.

Gravity

When it is considered that Lambert was working on a circuit breaker whose high-voltage components carried 12,470 volts and that the low-voltage portion of the circuit breaker was located about 12 inches from the insulated high-voltage components (Exhs. E and H), a finding must necessarily be made that it was very serious for Badger's management to fail in any way to follow explicitly all safety precautions associated with trouble shooting or testing such equipment. Badger's arguments to the effect that Lambert's death was not in any way caused by Badger's failure to follow the lock-out procedures required by section 75.511 is based entirely on conjecture because there were no eye witnesses to Lambert's electrocution (Finding Nos. 7 and 8, supra). While it is true that my discussion above under the heading of "Negligence" was also based on speculation, Badger's claim that Lambert slipped and fell into the high-voltage components because of his carelessness in removing the insulated protective shield over the high-voltage components is also based on pure speculation. It is just as possible that Lambert was trying to test the low-voltage portion of the circuit breaker and accidentally touched a high-voltage component with the result that he was severely shocked and fell head first into the circuit breaker (Finding No. 7, supra). Inasmuch as the violation was one of extreme gravity, I believe that the portion of the penalty associated with gravity should be \$2,000.

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Summary

I have hereinbefore found that Badger is a large operator, that payment of penalties will not cause it to discontinue in business, that it has a favorable history of previous violations, that it showed an outstanding effort to achieve rapid compliance requiring a reduction in the penalty otherwise assessable in the amount of \$100, that the violation was associated with ordinary negligence warranting a penalty of \$1,000, and that the violation was very serious so as to merit a penalty of \$2,000. The penalties under negligence and gravity amount to \$3,000 which should be reduced by \$100 under rapid good-faith abatement to \$2,900. The total penalty, of course, takes into consideration that Badger is a large operator.

DOCKET NO. WEVA 81-277

The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-277 seeks assessment of a penalty for the violation of section 75.803 alleged in Citation No. 631938 issued under section 104(a) on September 22, 1980. I have already found that a violation of section 75.803 occurred because the fail-safe grounding system could not deenergize power on September 19, 1980.

The findings made above as to the criteria of the size of Badger's business, the fact that payment of penalties will not cause Badger to discontinue in business, and Badger's favorable history of previous violations are also applicable to a determination of the penalty for the violation of section 75.803.

Good-Faith Effort To Achieve Rapid Compliance

Citation No. 631938 was written at 5 p.m. on September 22, 1980, and the citation gave Badger until the next day, September 23, 1980, as the time within which the violation should be abated. The inspector wrote a subsequent action sheet on September 23, 1980, terminating the citation on the ground that the defective circuit breaker had been removed from the mine and replaced with a circuit breaker which would allow the fail-safe grounding system to cut off power if a fault should occur. Inasmuch as Badger abated the violation within the time given by the inspector, I find that Badger demonstrated an average good-faith effort to achieve rapid compliance and that the penalty to be assessed for the violation of section 75.803 should neither be increased nor decreased under the criterion of good-faith abatement.

Negligence

Badger's chief electrician had drawn up the specifications which were followed by Line Power Manufacturing Company in constructing the defective circuit breaker. The counter on the

circuit breaker showed that it had successfully worked 230 times so that Badger's management had no reason to believe that it had a defective design problem in the ratchet lever. Even after the circuit breaker malfunctioned, a team of seven electrical experts failed to find the actual cause of the malfunction after spending 3 1/2 hours trying to do so with the power off (Finding No. 21, supra). After the circuit breaker was removed from the mine, the parts which the seven experts thought were defective were replaced, but the circuit breaker still continued to malfunction. Badger's chief electrician and the manufacturer's employees worked the remainder of the week of September 21, 1980, before finally discovering on Thursday, September 25, 1980, that the malfunction was caused by a design flaw in the ratchet in the operating handle. The ratchet was redesigned on Friday and Saturday and a new one, which worked successfully, was installed on Monday, September 29, 1980. The evidence shows, therefore, that Badger's management did not know and could not have foreseen that the circuit breaker would malfunction in the way that it did.

The Secretary's brief (p. 16), however, argues that Badger was grossly negligent in allowing the power to remain on in the mine while miners worked for the remainder of the 4 p.m. to midnight production shift on Friday, September 19, 1980, which was the shift during which Lambert found that the circuit breaker would not cut off power when he tested it for that purpose (Finding No. 2, supra). Badger's brief (p. 15) is silent about the fact that miners were allowed to work for the remainder of the 4-p.m.-to-midnight production shift after the defective circuit breaker was discovered, but argues that the only persons who worked in the mine while Lambert was trying to discover the defect in the circuit breaker on the 8 a.m.-to-4 p.m. maintenance shift on Saturday, September 20, 1980, were seven miners who worked on a continuous-mining machine and some other miners who worked on a haulage track. Badger's brief claims that the miners working on September 20, 1980, were aware that the circuit breaker was being worked on and that the power would be cut on and off during their shift.

Badger's chief electrical engineer conceded that the circuit breaker would not cut off power as it was supposed to at the time Lambert discovered that the circuit breaker was malfunctioning (Finding Nos. 2 and 28, supra). Since Lambert had reported the malfunction to Badger's chief electrician, there is no way for Badger to deny that miners were allowed to work on the 4 p.m.-to-midnight production shift on Friday, September 20, 1980, without having proper protection from an electrical fault if one had occurred. It is also true that two mechanics were allowed to work on a continuous-mining machine on Saturday, September 20, 1980, at the time Lambert was trying to determine what was wrong with the circuit breaker. While power was off part of the time, it was also on part of the time. Therefore, any miners working on electrically powered equipment

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were subjected to a possible injury if power had come on at a time when they were not expecting it.

Therefore, the preponderance of the evidence supports the Secretary's argument that Badger's management knew the circuit breaker would not cut off power in case of an electrical fault and yet Badger allowed the miners to work on the 4 p.m.-to-midnight shift on Friday and allowed two mechanics to work on a continuous-mining machine on Saturday without having the protection to which they were entitled. In such circumstances, I find that there was a high degree of negligence associated with the violation of section 75.803 and that a penalty of \$3,000 should be assessed for that violation under the criterion of negligence.

Gravity

While the miners working in the mine were undoubtedly exposed to a possible shock hazard because of the malfunctioning circuit breaker, no one other than Lambert was actually working close to a high-voltage circuit. Some electrical fault would have had to occur before any miner working on either the 4 p.m.-to-midnight shift on Friday or the 8 a.m.-to-4 p.m. shift on Saturday could have been injured. Lambert was not working on the circuit breaker on Friday and his exposure to electrocution on Saturday was not increased by the fact that two mechanics were working on a continuous-mining machine. Therefore, the gravity of the violation of section 75.803 should be examined primarily from the standpoint of the miners who were working in the mine on the 4 p.m.-to-midnight shift on Friday. Some electrical fault would have had to occur before any of the miners working on Friday would have been exposed to a shock hazard. There is no evidence to show that such a fault occurred or that any other electrical equipment in the mine was defective. Therefore, the gravity of the violation of section 75.803, while serious, was not as extreme as Lambert's exposure was when he was trouble shooting in close proximity to 12,470 volts with the power on. For the foregoing reasons, a penalty of \$750 will be assessed under the criterion of gravity for the violation of section 75.803.

Summary

Bearing in mind that Badger is a large operator, that payment of penalties will not cause it to discontinue in business, that it has a favorable history of previous violations, that it demonstrated an average effort to achieve rapid compliance, that there was a very high degree of negligence associated with the violation warranting assessment of a penalty of \$3,000, and that the violation was sufficiently serious to justify a penalty of \$750, a total penalty of \$3,750 will hereinafter be assessed for the violation of section 75.803.

The Request for Finding No. 34

When the parties were suggesting changes in the proposed findings of fact which had been mailed to them, Badger's counsel requested in a draft filed on July 19, 1983, that I include as part of the stipulated findings one which he had suggested as No. 34 in the draft that he had submitted for my consideration. The Secretary's counsel was opposed to inclusion of that proposed finding, and I was also of the opinion that it was more in the nature of a conclusion than a finding of fact. Badger agreed to my omitting it as one of the parties' stipulated findings, but requested in a letter filed on August 29, 1983, that I reconsider the proposed finding at the time I wrote my decision in this proceeding.

I believe that my decision shows that it would be inconsistent with other portions of the decision for me to make Badger's proposed finding No. 34 a part of this decision. Therefore, the request that I make finding No. 34 a part of this decision will hereinafter be denied.

WHEREFORE, it is ordered:

(A) Badger Coal Company's application filed in Docket No. WEVA 81-36-R for review of imminent-danger Order No. 631937 issued September 22, 1980, is granted and Order No. 631937 is vacated to the extent that it alleged the existence of an imminent danger.

(B) Badger Coal Company's notice of contest filed in Docket No. WEVA 81-37-R challenging the validity of Citation No. 631938 issued September 22, 1980, is denied and Citation No. 631938 is affirmed.

(C) The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-285 is dismissed insofar as it seeks assessment of a penalty for the violation of section 75.509 alleged in Order No. 631937 issued September 22, 1980, and granted to the extent that it seeks assessment of a civil penalty for the violation of section 75.511, and Badger Coal Company, within 30 days from the date of this decision, shall pay a civil penalty of \$2,900.00 for the violation of section 75.511 alleged in Order No. 631937 issued September 22, 1980.

(D) The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-277 seeking assessment of a civil penalty for the violation of section 75.803 alleged in Citation No. 631938 issued September 22, 1980, is granted, and Badger Coal Company, within 30 days from the date of this decision, shall pay a civil penalty of \$3,750.00 for the violation of section 75.803 alleged in Citation No. 631938.

