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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

METTIKI COAL CORPORATION, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. YORK 87-1-R Order No. 2701331; 9/10/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. YORK 87-2-R Order No. 2701332; 9/10/86 Docket No. YORK 87-3-R Order No. 2701333; 9/11/86
SECRETARY OF LABOR MINE SAFETY AND HEALTH A DMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. YORK 87-5 A.C. No. 18-00621-03568
v.	"A" Mine
METTIKI COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Susan Chetlin, Esq., Crowell & Moring, Washington, DC, for Mettiki Coal Corporation;
Edward Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," to challenge three withdrawal orders issued by the Secretary of Labor under Section 104(d)(2) of the Act and for review of civil penalties proposed by the Secretary for the violations alleged therein. (FOOTNOTE 1)

Order Number 2701331 alleges as follows:

> "In the A-portal in the designated haulage number 4 intake air entry beginning about 100 feet inby the tunnel lining and extending inby to break number 10 where 7 x 9 inch wooden cross-bars had been installed for additional roof supports there were no indications that the operator of this mine made an effort to promptly reset the dislodged legging that had been dislodged by diesel powered equipment (rubber tire) one leg under one end of 12 of the bars has been dislodged and both legs under both ends of 9 of the bars had been dislodged."

The Secretary alleges that these facts constitute a violation of that part of the standard at 30 C.F.R. 75.202

(entitled "Roof Support Materials") which reads as follows: "Except in the case of recovery work, supports knocked out shall be replaced promptly."

The Mettiki Coal Corporation (Mettiki) does not dispute the factual allegations set forth in the order, but maintains that those facts do not constitute a violation of the cited standard since the cited "leggings" that had been dislodged were not in fact performing a roof support function. Mettiki claims that, consistent with that part of the cited standard requiring "safety posts, jacks, or other devices" be used as temporary supports to hold crossbars in place during installation, once the crossbars at issue herein were permanently installed with roof bolts there was no continuing obligation to keep the legs in place. Finally, Mettiki argues that while the regulation admittedly requires that any device performing an active support function must be promptly replaced if dislodged, the legs cited herein were not performing such a function.

According to Blucher Allison, Mettiki's chief engineer, (a graduate mining engineer with 41 years experience in the mining industry) Mettiki was, at the time the order was issued, in full compliance with its roof control plan. It is a "full roof bolting plan" with roof bolts as the primary means of support. According to Allison the cited legs had been placed under the crossbars as temporary support in compliance with Item Number 7 of its roof-control plan (Exhibit CÄ5) while the crossbars were bolted into the roof. The legs were not subsequently removed after the crossbars were affixed with roof bolts because it was not cost effective to do so.

The crossbars were bolted on 2 foot centers with two 6 foot resin-grouted bolts and one 16 foot combination bolt. Allison observed that once the crossbar was bolted into position it formed a laminated beam of strata by putting the roof into compression and the legs then no longer contributed to the roof support. Indeed Allison opined that should the roof bolts ever fail the legs would fail too. Accordingly, he also believed that there was no likelihood of a roof fall resulting from the removal of the legs alone. Allison also observed that the roof control plan does not require legs under crossbars except when timbering is used as the sole means of roof support. (See Item Number 10 of the Roof Control Plan, Exhibit CÄ5).

MSHA Inspector Phillip Wilt disagreed with Allison and maintained that the legs were in fact "supports" within the meaning of the cited standard. It is apparent however that Inspector Wilt was not familiar with the support system being used by Mettiki in the cited entry. Wilt did not know the length of the roof bolts being used and apparently thought that

timbering was the primary method of roof support. Under such a system it is essential that the crossbars be supported by legs (Tr. 42). Indeed Wilt thought that the roof bolts here were used only to hold the crossbars in position to protect workers should the legs become dislodged. Under the circumstances I am not persuaded by his testimony. I am convinced by the expert testimony of Mining Engineer Allison that the displaced legs were not in fact permanent "roof supports" within the meaning of the cited standard. The fact that temporary supports have been left in position does not alone make those supports a part of the permanent support system. Under all the circumstances there was no violation and the order must therefore be vacated.

Order Nos. 2701332 and 2701333 allege violations of the standard at 30 C.F.R. 75.305 and more particularly that part of the standard that reads as follows:

> In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in . . . at least one entry of each intake and return air course in its entirety. . . . The person making such a examinations and tests shall place his initials and date and time at the places examined, and if any hazardous conditions are found, such conditions shall be reported to the operator promptly. . . . A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book, approved by the Secretary, kept for such purpose in an area on the surface of the mine, chosen by the mine operator, to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Order Number 2701332 alleges as follows:

> In the A-portal beginning at the entrance of the Number 4 intake designated haulage entry on the surface and extending inby to the east mains track haulage entry there are no initials, dates, and time to indicate that this entry is being examined at least once each week by a certified person for hazardous conditions, there are date boards posted at various locations in this entry and there were initials and dates on three of the boards. One was 10/2/85, one was 12/12/85 and one was 5/28/86 indicating that the 5/28/86 date could have been the last date this entry was properly examined by

a certified person in its entirety, the distance of the affected area was about 6000 feet.

Order Number 2701333 alleges as follows:

> This inspection began at 10:00 a.m. at Break Number 9, survey station number BRÄ95, and extended inby a distance of 3200 feet to survey station number AÄ827 in the Number 1 Skipper Return Air Entry and there were no initials, dates, or times throughout the entry to indicate that this entry was being examined in its entirety by a certified official at least once each week for hazardous conditions, including tests for methane. There were initials, date, and time indicating that the entry had been examined in its entirety by L. Sliger, certified official this date, 9/11/86, prior to this inspection. But according to other initials and dates in various locations in the entry the last examination conducted prior to this date was 4/02/86, conducted by Alan Smith who was at that time mine foreman at this mine.

Mettiki does not dispute the factual allegations contained in these two orders, and indeed, readily acknowledges that the cited entries were, in fact, not inspected under the cited standard. It nevertheless maintains that there was no violation of the standard because "at least one entry of each intake and return air course was examined in its entirety" in accordance with the standard. Mettiki points out that the standard requires a weekly examination of only one entry of each intake and return air course, but does not require the examination of all entries of each intake and return air course. The Secretary maintains, on the other hand, that each of the cited entries in the above orders were separate and distinct "air courses" and did not constitute separate entries of the same air course. Accordingly the Secretary argues that the violation is proven as charged.

It is undisputed that Metiki's "A" Mine is ventilated by an exhaust fan with the air entering the Number 4 and 5 entries and then proceeding to all areas of the mine. The Skipper Number 1 intake entry is ventilated with mixed air from both the Numbers 4 and 5 entries. At the Number 9 crosscut some of this air separates into the main section through the Number 5 track entry (which was being examined in compliance with 30 C.F.R. 75.305). The air from the Skipper Number 1 intake and the Number 5 track entry again merges at the Number 40 crosscut. Indeed the undisputed evidence shows that the air in the skipper entries mixes freely with that in the EÄMains.

MSHA Supervisor Barry Ryan, opined that the Skipper Number 1 intake entry constituted a separate air course and accordingly was subject to weekly inspections under the cited standard separate from the inspections performed in the Number 5 track entry. Ryan's opinion was however completely arbitrary and not based on any definition of the term "air course" in any relevant statute, regulation, MSHA policy, or industry past usage. Moreover the Secretary presented no evidence of any prior consistent enforcement under his proferred definition of the term "air course" that might have established that Mettiki was on notice regarding the Secretary's interpretation. See Jim Walter Resources Inc. v. Secretary, 9 FMSHRC ÄÄÄÄ, Docket No. SE 85Ä36ÄR, et. al., May 29, 1987. To the contrary it is clear from the language of the regulation that each air course may consist of more than one entry. Mettiki's position herein is consistent with that language.

The Secretary similarly argues that with respect to Order Number 2701333, Mettiki's weekly examination of the Number 7 and Number 9 return escapeways was not sufficient because the Number 3 Skipper Return Air Entry (FOOTNOTE 2) was a separate "air course" requiring a separate weekly inspection under the cited standard. However, for the reasons previously stated I find no legal or evidentiary support for the Secretary's arbitrary definition of the term "air course." To the contrary I find that Mettiki was examining on a weekly basis "at least one entry of each . . . . return air course in its entirety" and was therefore in compliance with the cited standard.

Under the circumstances Order Nos. 2701332 and 2701333 must be vacated.

ORDER

Order Nos. 2701331, 2701332, and 2701333 are VACATED and the contests of those Orders are GRANTED. Civil Penalty Proceeding Docket Number YORK 87Ä5 is DISMISSED.

GARY MELICK
Administrative Law Judge

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~FOOTNOTE_1

1 Section 104(d) of the Act reads as follows:

"(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

~FOOTNOTE_TWO

2 The entry at issue was cited in the Order at bar as the No. 1 Skipper Return Air Entry but the undisputed evidence shows that it was actually the No. 3 Skipper Return Air Entry. The order at bar was never amended to correct this error but in light of the findings herein, that issue is now moot