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METTIKI COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

METTIKI COAL CORPORATION,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. YORK 89-10-R
Citation No. 3110188; 11/1/88

Mettiki Mine

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

v.

METTIKI COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. YORK 89-26
A. C. No. 18-00621-03659

Mettiki Mine

DECISION

Appearances: Judith Horowitz, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA
for the Secretary;

Susan Chetlin, Esq., Crowell and Moring,
Washington, DC, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alleged violations of safety standards and Mettiki Coal Corporation seeks to vacate the citations under 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

Citation No. 3110188

1. In November, 1988, when Citation No. 3110188 was issued, Eimco diesel powered self-propelled personnel carriers, here called "White Knights," ran on an underground track to carry Mettiki's miners to their working sections at the Mettiki Mine.

2. The White Knight personnel carrier was about 22 feet long, 8 feet wide and 4 1/2 feet high, with a capacity of 16 passengers.

3. The White Knight personnel carrier was equipped with two separate braking systems.

4. The regular, or "service," brakes were hydraulic disk brakes on the axles. They were activated simultaneously by pulling the service brake lever.

5. The other braking system was a parking brake. Unlike the service brakes, the parking brake was a mechanical drum brake, designed to prevent the carrier from moving when parked. When the operator pulled the parking brake lever (located to the right of the foot throttle on the front of the engine cover), the brake would lock the motor shaft and remain engaged until the brake handle was physically released.

6. Under Mettiki's safety rules, before the miners boarded the personnel carrier, the operator was required to check the sanders, headlights and other components.

7. As the personnel carrier began to move, both braking systems were to be tested. First, the parking brake was tested by applying power while the brake was still set to be sure it held the vehicle in the parked position; then, the parking brake was slowly released. Once the parking brake was released, the hydraulic brakes were tested by applying them to hold the equipment.

8. After a personnel carrier reached a working section, it was parked on a switch off to the side of the main track until it was needed. When the carrier was parked, the parking brake was set to secure the vehicle.

9. On November 11, 1988, MSHA Inspector Charles Wotring inspected the E-2 section of the Mettiki Mine.

10. An empty White Knight was parked in a crosscut off the main E-2 track, to make room to move supplies into the E-3 section.

11. The personnel carrier was parked almost on the level, about 20 feet from the base of a slight incline; the parking brake was engaged.

12. The inspector briefly examined the personnel carrier, and observed that the parking brake was set. He made no findings that the White Knight was not functioning properly.

13. The inspector issued Citation 3110188, alleging a violation of 30 C.F.R. 75.1403, because he believed that parking the White Knight and securing it only with the mechanical parking brake was insufficient to satisfy Notice to Provide Safeguard 620279, which had been in effect at the Mine since June, 1980, and modified on May 11, 1988.

14. The Safeguard required track-mounted haulage equipment to be secured with a stop block, equipped with derails or chained to the rail to prevent runaway movement.
Citation No. 3110075

15. On September 21, 1981, Notice to Provide Safeguard 857887 was issued at Mettiki's Beaver Run Mine, now known as Mettiki Mine. The notice stated that a crossover was not provided at the tail of the B-2 section belt, "where persons are required to cross the belt for travel, and work," and required a safeguard to provide a crossover "where persons cross belts anywhere at this Mine."

16. On December 5, 1988, Inspector Wotring observed that a belt crossing was not provided at the First Left belt drive near the F Mains belt. Footprints indicated that people had been crossing there.

17. The juncture of the F Mains and First Left belts was about 100 feet from a crossunder. The First Left belt, being about 100 feet long, could be also crossed by walking to the end of the belt and around the tailpiece. However, Mettiki did not prohibit personnel from crossing belts unless the belts were moving.

18. Although miners were not prohibited from crossing non-moving belts, Mettiki policy prohibited miners from crossing moving belts except where crossings were provided.

19. Mettiki policy required a warning system to warn miners that belts were about to be started. A verbal warning was to be broadcast three times over the mine phone pager system, which had speakers along the belt lines. In some places along a belt, a miner would be unable to hear such a warning. Also, the verbal warning system was subject to human error.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3110188

Notice of Safeguard 620279 was modified on May 11, 1988, to change the safeguard requirement to read:

Positive acting stopblocks, derails or chain type car holds shall be used to secure or prevent runaway of track mounted haulage equipment. Other devices not specifically designed for such purpose are not acceptable * * *.

This is essentially the same language as the modification of a safeguard that was invalidated in *Beth Energy Mines, Inc.*, 11 FMSHRC 942 (1989) (Judge Mellick). In that case, the judge found that in the early part of 1988 "all of these safeguards regarding the use of positive acting stopblocks or derails in District 3 were uniformly modified to include language prohibiting the use of certain types of stopblocks," and "this standardized language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine." *Id.* at 943.

Inasmuch as this case involves the same MSHA District and the same standardized provision for a safeguard, I find that the *Beth Energy Mines* decision (which became a final Commission decision because it was not reviewed) creates a collateral estoppel against the Secretary. Having already litigated and lost that issue against a different defendant, the Secretary is estopped from relitigating it in this case. See *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979); and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundations*, 402 U.S. 313 (1971).

Apart from the doctrine of estoppel, I apply the precedent of the *Beth Energy Mines* decision and hold, on the merits, that the underlying Notice to Provide Safeguard is invalid.

Accordingly, Notice to Provide Safeguard 62927 and Citation 3110188 will be vacated.

Citation 3110075

An inspector's authority to issue a notice to provide a safeguard is provided in 314(b) of the Act and the Secretary's regulations at 30 C.F.R. 75.1403.

A notice to provide safeguard must provide the operator with reasonable notice of the hazard it addresses and the conduct required to comply with the safeguard. *Southern Ohio Coal Co.*, 7 FMSHRC 509 (1985); *Jim Walter Resources, Inc.*, 1 FMSHRC 1317

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(1979). In this case, Notice to Provide Safeguard No. 857887 stated that "This safeguard is to require that a crossover be provided where persons cross belts anywhere at this Mine." It cited 75.1403 as its authority. That section, at 75.1403-1(a), states:

- (a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under 75.1403. Other safeguards may be required.

One of the criteria is 75.1403-5 (j), which provides:

- (j) Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

Notice to Provide Safeguard No. 857887 did not state that the safeguard applied to non-moving belts as well as moving belts, nor did it otherwise put the operator on notice that the criterion in 75.1403-5(j) was being expanded by the notice to provide safeguard. Accordingly, Notice to Provide Safeguard No. 877887 may not be applied to non-moving belts at Respondent's mine.

The Secretary did not prove by a preponderance of the reliable evidence that the persons crossing under the cited belts did so while the belts were moving. It was at least as likely that the crossings had occurred while the belts were idle as it was that the miners crossed under moving belts. Since the Secretary has the burden of proving a violation, I conclude that she did not prove a violation of Notice to Provide Safeguard No. 857887.

The Secretary proved that crossing over or under a nonmoving belt is a hazardous practice, because the belt may suddenly move. However, that hazard is not sufficiently addressed by Notice of Safeguard No. 857887.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.
2. Notice to Provide Safeguard No. 62927 and Citation No. 3110188 are invalid.
3. The Secretary failed to prove a violation of 30 C.F.R. 75.1403 as alleged in Citation No. 3110075.

