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

METTIKI COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. YORK 89-19-R A. C. No. 3110337; 11/30/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. YORK 89-20-R A. C. No. 3110339; 11/30/88 Mettiki General Prep Plant Mine ID 18-00671
	CIVIL PENALTY PROCEEDING
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Docket No. YORK 89-42 A.C. No. 18-00671-03537 Mettiki General Mine
v.	
METTIKI COAL COMPANY, RESPONDENT	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA,
for the Secretary;
Susan Chetlin, Esq., Crowell and Mooring,
Washington, DC, for Mettiki Coal Company.

Before: Judge Fauver

Mettiki seeks to vacate an imminent danger order and two citations, and the Secretary of Labor seeks to affirm them, with civil penalties, under 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

1. Mettiki Coal Company, through a subsidiary, owns and operates a coal preparation plant known as Mettiki General Preparation Plant.

2. On November 29, 1988, MSHA received a complaint that the No. 34 breaker, a disconnect switch that controls the power to the raw coal silo conveyor belt, had a defective lock out device. The complaint was that the breaker could be turned to the on position even when the lock out device was padlocked.

3. On November 30, 1988, MSHA Inspector Kerry George investigated the complaint. When he arrived the surface belts were idle for belt maintenance. Two miners were on top of the silo making repairs to the speed reducer for the No. 34 belt.

4. The No. 34 breaker was in the off position and tagged (with a danger tag warning not to turn on the circuit). Its lock out device was padlocked.

5. The two miners had pulled the emergency cord on the No. 34 belt before beginning repairs.

6. The miners were called down from the silo, and the surface electrician, Clarence Bowman, who was the electrical examiner for all surface breakers, was called to test the lock out device. Because of a sawed out cut in the lock out device, the breaker could be turned on despite the padlock. It was not difficult to turn the breaker on when padlocked. This defect was the result of poor installation of the breaker, and not a deliberate intention to defeat the lock out device.

7. Mr. Bowman had known of this defect in the lock out device from his first inspection of the breaker, within a few months of its installation two or three years before November 30, 1988. He was aware that the breaker could be turned on despite a padlock, but he did not consider this a safety problem. In his view, a danger tag was sufficient safety protection to prevent re-energizing a circuit. He inspected this breaker every month for over two years, but never reported the defective lock out device or removed the breaker from service in order to repair it.

8. Inspector George issued an imminent danger order withdrawing the No. 34 breaker from service. He also issued two citations. Citation No. 3110339 charges a violation of 30 C.F.R. 77.507. Citation No. 3110340 charges a violation of 30 C.F.R. 77.502.

9. After issuance of the above order and citations, the defective lock out device was replaced within an hour.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3110339

This citation charges a violation of 30 C.F.R. 77.507, which provides:

> All electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed.

A "switch" is defined by the Dictionary of Mining as "[a] mechanical device for opening and closing an electric circuit . . . . " U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1111 (1968). The breaker for the No. 34 belt circuit is a disconnect switch that meets this definition.

A lock out device for a disconnect switch is an integral part of the switch, essential to control the switch when locking out is required by a safety regulation. It is therefore included in the scope of 77.507. This interpretation is consistent with that of Congress as expressed in the legislative history. The Senate report on 305(o) of the 1969 Act1 states:

> This section requires that electric equipment be provided with switches or other safe control[s] so that the equipment can be safely started, stopped, and operated without danger of shock, fire, or faulty operation.

S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969) at 65, reprinted in House Comm. on Education and Labor, 91st Cong., 2d Sess., Legislative History of the Federal Coal Mine Health and Safety Act (1970 Comm. Print) at 65.

The lock out device on the No. 34 breaker was not safely installed in that it did not prevent turning the breaker on when it was padlocked. This was a safety hazard, in violation of 77.507. The surface electrician, who was also the electrical examiner, was responsible for the safety of this equipment. He knew about the defect but did not repair it. His continued failure to replace the lock out device constituted gross negligence, in violation of 77.507.

Citation No. 3110340

This citation charges a violation of 30 C.F.R. 77.502, which provides:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating condition. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

Under 77.502-2, the examinations must be conducted at least monthly.

Based on the previous holding, I find that the lock out device was an integral part of the disconnect switch and therefore was required to be inspected under 77.502.

The lockout device was defective because it had been notched in such a way that the breaker could be reset even when padlocked. The intention apparently was not to defeat the locking device, but to accomodate a poor installation of the breaker. Mettiki's electrical examiner for surface facilities, Mr. Bowman, testified that it was poorly installed and it was the only one of some 300 breakers that had been installed this way. For years, he knew of this defect and the fact that it would permit the breaker to be reset despite a padlock. He did not report the defect because he regarded the tagging of a circuit as sufficient protection for safety purposes. Mr. Bowman was also the surface electrician. His testimony and demeanor on the stand indicated that he expected others to comply with his danger tags and would probably consider physical revenge against anyone who turned on a circuit that he had tagged. This is hardly the intent of the safety standard or a basis for allowing a defective lock out device. Mr. Bowman's attitude and failure to report the lock out defect and remove the breaker from service demonstrate gross negligence, in violation of 77.502. Although Mettiki contends that its electrical examiner did not know that the defect permitted the breaker to be turned on despite a padlock, I find that he did have such knowledge but chose to ignore the defect in his numerous examinations of the No. 34 breaker.

Imputation of Negligence

Mettki contends that any negligence of the electrical examiner is not imputable to the company, citing decisions such as Southern Ohio Coal Co., 4 FMSHRC 1459 (1982). There the Commission held that, "where agents are negligent, that negligence may be imputed to the operator for penalty purposes"

but "where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." Id at 1464. However, Mettiki's electrical examiner was more than a rank-and-file employee. He was the operator's designated person to conduct electrical examinations of surface electrical equipment in order to protect the miners. In such capacity, it was his responsibility to certify the equipment to be safe or to report conditions requiring correction. For electrical safety examinations, he served more in the capacity of an agent of the operator than as a rank-and-file employee. His negligence is therefore imputable to the operator as to both citations. In light of his gross negligence, Citation No. 3110340 should be modified to cite "high negligence" instead of "moderate negligence"; the allegation of high negligence in Citation No. 3110339 is sustained by the evidence.

Order No. 3110337

Section 3(j) of the Act defines an imminent danger as:

> The 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 test of validity of an imminent danger order is whether a reasonable person given a qualified inspector's education and experience would conclude that the facts indicated an imminent danger. Freeman Coal Mining Co. v Interior Board of Mine Operations Appeals, 804 F. 2d 741 (7th Cir. 1974). See also C.D. Livingston, 8 FMSHRC 1006 (1986); and United States Steel, 4 FMSHRC 163 (1982).

The inspector issued an imminent danger order because of the defective lock out device and the fact that two miners were working on top of the silo at the time the belt circuit was supposedly locked out.

Respondent contends that it was not required to lock out the No. 34 breaker circuit because the miners were doing mechanical, rather the electrical work on the belt speed reducer. It contends that 30 C.F.R. 77.404(c) applied and required only that the belt be turned off and blocked against motion. However, the record does not show that the belt was blocked against motion in compliance with this standard.

Apart from this, Mettiki argues that many independent actions would be required to cause injury due to the defective lock out device, and therefore there was no imminent danger.

These include: 1) ignoring the warning tag and padlock; 2) turning the breaker on; 3) reactivating the emergency pull cord on No. 34 belt; 4) starting the two outby belts in order to start No. 34 belt; and 5) ignoring the sirens that would sound before a belt is started. I agree that these circumstances indicate that the defective lock out device did not create an imminent danger. Also, they do not indicate a "significant and substantial" violation under the Commission's test in Mathies Coal Co., 6 FMSHRC 1 (1984), and similar cases.

However, the defective lock out device was still "potentially dangerous" within the meaning of 30 C.F.R. 77.502, which requires that, "When a potentially dangerous condition is found on electrical equipment, such equipment shall be removed from service until such condition is corrected." The defective lock out device could have contributed to an accident in which a miner inadvertently or even intentionally reset the breaker under circumstances in which a reenergized circuit could cause injury to persons working on the belt or its electric circuit. "Potentially dangerous" conditions are not limited to the precise circumstances existing at the time of the citation, but include possible dangers that could cause injury to miners if the cited condition continued during day to day mining operations.

On review of the facts and the reasonableness of the inspector's enforcement action, I find that the 107(a) order should be modified to be a 104(b) order instead of a 107(a) order.2 Mettiki's failure, through its electrical examiner, to report the defective lock out device and remove the breaker from service until the defect was corrected constituted a violation of 30 C.F.R. 77.502. Citation No. 3110340 is therefore sustained by the evidence. Because of this citation, the inspector could have issued a 104(b) order withdrawing the breaker from service until the defective lock out device was corrected. Indeed, such an enforcement order is implied, because the regulation specifies that "potentially dangerous" equipment "shall be removed from service until such condition is corrected." Thus, no abatement time need be allowed in a citation for this type violation.

The operator contends the lock out defect should not be considered potentially dangerous because half of the 300 surface breakers had no lock out device and MSHA did not cite violations for them. This argument is not persuasive. First, all of the surface conveyor belt breakers at the plant had a lock out device, and No. 34 was the only defective one. It was thus recognized that a lock out device was feasible and required for

the conveyor belt circuits. Secondly, MSHA's manual presents a firm policy of enforcement of the lock out standard (77.501), stating:

> Disconnecting devices shall be locked out, where possible, and suitably tagged by persons who perform the work. Locking out is "possible" in almost all cases and can be accomplished in a practical manner. * * *

[Vol. V MSHA Program Policy Manual (July 1, 1988) p.62.]

The reasons for MSHA's failure to issue citations for the non-belt breakers that did not have a lock out device are not shown by this record. However, if the local MSHA district was lax in enforcing the lock out safety standard, despite the regulation and MSHA's own Program Policy Manual, such laxness is not probative regarding the potential danger of the defective lock out device on No. 34 breaker.

This leaves the question of gravity of the two violations for civil penalty purposes.

"Gravity of the violation," as used in 110(i), is not tied to the question whether a violation is or is not "significant and substantial" within the meaning of 110(d)(1). "Gravity," for civil penalty purposes, is the seriousness of a violation. This includes the importance of the safety or health standard, and the seriousness of the operator's conduct, in relation to the Act's purpose of deterring violations and fostering compliance with safety and health standards. Many types of safety or health violations are serious even though a single violation might not show a "reasonable likelihood" of causing serious injury or illness, or even fit into a probability-of-injury-or-illness mold. For example, some violations are serious because they demonstrate recidivism or an attitude of defiance by the operator. Others are serious because the safety and health standard involved is an important protection for the miners. Important safety or health standards are such that, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote or even slight.3 Other mine safety and health violations are serious because they may combine with other conditions to set the stage for a mine accident or disaster, even though individually, or in isolation, they do not appear to forecast injury or illness. Still others are serious because they involve a substantial possibility of causing injury or illness, if not a probability.

I find the violations in these cases to be serious because (1) they involve a potentially dangerous condition, (2) the cited standards are an important protection for the miners, (3) and the operator's conduct should be deterred.

Considering Mettiki's gross negligence, through its electrical examiner, in violating 77.502, and all the other criteria in 110(i) of the Act, I find that a civil penalty of $500 is appropriate for this violation.

Considering Mettiki's gross negligence, through its electrical examiner, in violating 77.507, and all the other criteria in 110(i) of the Act, I find that a civil penalty of $500 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Mettiki Coal Company violated 30 C.F.R. 77.502 on November 30, 1988.

3. Mettiki Coal Company violated 30 C.F.R. 77.507 on November 30, 1988.

4. The Secretary of Labor failed to prove an imminent danger as alleged in Order No. 3110337. This order should be modified to be a 104(b) order.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3110339 is MODIFIED to DELETE the allegation of a "Significant and Substantial" violation. As MODIFIED, it is AFFIRMED.

2. Citation No. 3110340 is MODIFIED to DELETE the allegation of a "Significant and Substantial" violation and to change the allegation of negligence from "Moderate" to "High." As MODIFIED, it is AFFIRMED.

3. Order No. 3110337 is MODIFIED to be a 104(b) order instead of a 107(a) order, deleting the allegation of an imminent danger and cross-referencing Citation No. 3110340. As MODIFIED, it is AFFIRMED.

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4. Mettiki Coal Company shall pay the above civil penalties of $1,000 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

1. Section 77.507 mirrors 30 C.F.R. 75.512, an underground standard, which repeats the statutory language of 30 U.S.C. 865(o).

2. A 104(b) order would have the same effect in removing the defective equipment from service.

3. For example, a stop-look-and-listen safety law for public service vehicles may be considered an important safety standard even though a particular instance of violation may not show a "reasonable likelihood" of colliding with a train.