

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W. Suite 9500  
Washington, DC 20001-2021

April 29, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-164
Petitioner	:	A.C. No. 15-17234-21221
v.	:	
	:	Docket No. KENT 2004-215
LONE MOUNTAIN PROCESSING, INC.,	:	A.C. No. 15-17234-23900
Respondent.	:	
	:	Huff Creek No. 1

## DECISION

Appearances: Neil Morholt, Esq., and MaryBeth Bernui, Esq., U.S. Department of Labor, Nashville, Tennessee, Elmer Keen<sup>1</sup>, William Johnson<sup>2</sup>, and Danny Deel<sup>3</sup>, for the Petitioner;  
Noelle M. Holladay, Esq., and Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

## STATEMENT OF THE CASE

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging violations by Lone Mountain Processing, Inc. (Lone Mountain) of various mandatory safety standards set forth in Title 31 of the Code of Federal Regulations. The cases were heard in Johnson City, Tennessee, on January 19, 2005. Subsequent to the hearing the parties filed post hearing briefs.

I. Docket No. KENT 2004-164

A. Citation No. 7536380

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<sup>1</sup> Mr. Keen represented Petitioner in Citation No. 7586387

<sup>2</sup> Mr. Johnson represented Petitioner in Citation No. 7536389.

<sup>3</sup> Mr. Deel represented the Petitioner in Citation No. 7536390.

### The Inspector's Testimony

Lone Mountain operates the underground coal mine at issue. On November 24, 2003, MSHA inspector Robert D. Clay, a certified electrician and electrical inspector, inspected various circuit breakers located on a panel in the 003 unit. The breakers are designed to energize and de-energize mining equipment. He examined an energized 225 amp, 480 volt breaker, but was unable to determine which specific piece of equipment received power from this breaker. Clay traced the cable that had been plugged into the receptacle of the circuit breaker and observed that it ran to a roof bolter.<sup>4</sup>

The parties stipulated that this circuit breaker was labeled "in numerals No. 6". (Tr. 14). A label, approximately 3 inches by 4 inches, had been placed directly above the circuit breaker. According to Clay, a miner who did not work on a regular basis on the section would not have any way of knowing what specific equipment was served by this circuit breaker. Accordingly, if such a person would be instructed to de-energize the breaker and disconnect a cable, he might inadvertently de-energize the wrong breaker. As a result when the miner would attempt to remove the disconnecting device he would receive serious burns and electrical shock which could be fatal.

Clay opined that breakers are required to be identified as to the piece of equipment that they serve. He concluded that since the breaker at issue was not marked in this fashion, it had not been properly identified. He issued Citation No. 7536380 alleging a violation of 30 C.F.R. § 75.904 which provides, as pertinent, that "[c]ircuit breakers shall be marked for identification."

### The Applicability of U.S. Steel Mining Co. 30 C.F.R. § 75.601

In support of its position that a breaker must be identified as to the equipment it services, the Secretary relies on *Secretary of Labor v. U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141 (Sept. 1988). *U.S. Steel, supra*, involved an alleged a violation of 30 C.F.R. § 75.601, which requires disconnecting devices used to disconnect power from trailing cables to be plainly marked and identified. In *U.S. Steel, supra*, the operator was cited for having marked the receptacle on a panel to identify the specific circuit breaker that controlled the receptacle but did not mark the receptacle with the name of the piece of equipment that it served. The Commission held that the Secretary's position requiring that cable plugs and receptacles to be labeled identically was reasonable .

The Secretary, in its brief, after discussing *U.S. Steel, supra*, argues that under "controlling case law" the "only reasonable interpretation" of Section 904, supra, is that the circuit breaker, plug, and receptacle be labeled in a similar manner.

I find that this reliance is misplaced, as the issue presented in *U.S. Steel, supra*, is inapposite to the issue presented herein. In *U.S. Steel, supra*, the regulatory standard before the Commission,

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<sup>4</sup>The plug (Cathead) on this cable was labeled "roof bolter". (Tr. 14)

Section 75.601, supra, contains language that is not similar to Section 904, supra, at issue herein. The operative phrase in Section 601, supra, provides as follows: “disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified.” (Emphasis added.) In contrast, Section 904, supra, requires that circuit breakers shall be marked for identification. Thus, it does not follow that the Commission’s holding in *U.S. Steel*, supra, must be extended to Section 904, supra. In this connection, it is significant to note that the Commission, in *U.S. Steel*, supra, at 1142, explicitly stated that the case before it required it to construe only Section 601, supra, “... and we reserve construction of other standards addressing other concerns to cases raising such issues.”

Further, the specific issue presented before the Commission in *U.S. Steel*, supra, was whether the term “disconnecting device” in Section 601, supra, encompasses both the plug of a trailing cable and the receptacle. As such, the resolution of that issue is not germane to the case at bar, which involves an interpretation of the scope of the requirement in Section 904, supra, that circuit breakers be marked for identification.

#### Further Discussion

Section 904, supra, sets forth in clear plain language that circuit breakers “shall be marked for identification”. (Emphasis added.) Webster’s Encyclopedic Unabridged Dictionary (1994 Ed.) (Webster’s) defines marked as “\* \* \* 3. having a mark or marks ... .” A “mark” is defined in Webster’s as \* \* \* 5. “an affixed or impressed device, symbol, inscription, etc., serving to give information, identify ... .” “To mark” is defined in Webster’s as follows: “v.t. ... 28. to put a distinguishing feature of . . . 30. to furnish with figures, signs, tags, etc.” Webster’s defines “identification” as “1. the act of identifying.” Webster’s defines “identify” as “1. to recognize or establish as being a particular person or thing ... .”

Thus the plain meaning of the words in Section 904, supra, requires, merely, that the circuit breaker must be identified in some fashion. The evidence is clear and the parties have so stipulated, that the circuit breaker cited was labeled as No. 6. The corresponding receptacle was also labeled No. 6. Thus, the record establishes that the breaker at issue, labeled No. 6, was clearly marked in a fashion sufficient for identification.<sup>5</sup> There is not any requirement in the plain unambiguous wording of Section 904, supra, that the breaker be identified as to the specific piece of equipment it is serving.<sup>6</sup> To so find would have the effect of amending the regulation by setting forth an

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<sup>5</sup> It is significant to note the uncontradicted and unimpeached testimony of Respondent’s witnesses, Sheffield and Webb, that Lone Mountain has been using the numerical method of identifying circuit breakers since the mine opened in 1993, and has never been cited before for this method of marking.

<sup>6</sup> I take cognizance of Program Policy Letter No. P0V-V-2(PPL) (effective June 17, 2003), which sets forth as follows: “Circuit breakers shall be marked to clearly identify the circuit or machine receiving power through the circuit breaker ... . In order to comply with the provisions of Sections 75.601, 75.903, 75.904, an example is to label the loading machine cable plug, receptacle, and the circuit breaker through which the loading machine is receiving power as ‘loader’”. (Government Exhibit 1)

additional requirement. Such a step would require notice and comment.

For all the above reasons, I conclude that the Secretary has not established that Lone Mountain violated Section 904, supra, and accordingly, Citation No. 7536380 should be dismissed.

II. Docket No. KENT 2004-215

A. Citation No. 7536387

According to Clay, on November 24, 2003, he observed that a pilot circuit wire was not connected at the belt starting box enclosure for the No. 2 belt drive motor. Clay concluded that because the pilot wire had not been connected, there was not a complete monitoring circuit for the motor starter enclosure. Clay issued a citation alleging a violation of 30 C.F.R. § 75.902 which provides, as pertinent, that “grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit to open when either the ground or pilot check wire is broken ... .”

Lone Mountain argues that the Secretary did not establish that it (Lone Mountain) violated Section 75.902, supra, in that the Secretary failed to prove that the belt drive did not include a fail-safe ground check circuit, or that a pilot wire was not connected to monitor the system. In this connection, Lone Mountain relies on testimony of Sheffield that a pilot wire was connected which monitored the entire belt drive system. In essence, according to Sheffield, the belt drive system consisted of four motors powered by two cables that ran from the power center to the belt starter box. He said that each of the cables had a ground wire and a pilot wire and only one of these needed to be connected to monitor the belt drive system. However, his explanation that only one pilot wire, is sufficient to protect the entire belt drive system, including all four motors is confusing and not clear. In this connection, Sheffield’s testimony is as follows:

Q. Let’s talking about P 1. (Sic) [the pilot indicator in exhibit R3].

A. P 1. was continuous through the circuit to the belt motors, the way it was supposed to be.

Q. So, was it connected as required under law?

A. Yes. (Tr. 138)

\* \* \*

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The Secretary argues that this interpretation of Section 904, supra, should be given deference. However, because the plain meaning of Section 904, supra, is clear and unambiguous, there is not any mandatory requirement to give deference to the Secretary’s interpretation as set forth in the PPL. (See, *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.* 467 US 837, 843 (1984).

A. No. What was cited, if I could explain: This shows one pilot wire being used. This supply cable – these cables are identical and they both go back to the power center. You don't use this monitor wire; you only use one. And back at the power center it stays – this receptacle uses a pilot interlock jumper in the plug. Do not connect the pilot wire in the trailing cable jumper to the two pilot ends and the plugs. So, we only use one of the pilot wires. The cables are identical, so you only use the pilot wire in this case. (Tr. 140-141)

\* \* \*

A. Okay. And then on these motors, I won't draw the phases, but each motor has a cable going to it.

Q. Out of the starting box?

A. Out of the starting box. Each one of them has a ground on all four motors. Do you want me to put all four of them on there? (Tr. 151)

\* \* \*

Q. Tell me why that satisfies the regulation that we're talking about. Why is that a pilot monitor system?

A. Because it is monitoring continuously ...

Q. And how is it monitoring continuously?

A. ... and in this system it [the pilot wire inside cable "A" depicted in Exhibit R-5] is internally connected in the plug, it comes into the starter, which it actually ties into the pilot wire, and you can tie it into one of these cables or you can tie it into all four cables. As far as the law goes, it really doesn't matter. Internally, every one of these 4-aught cables has a monitor wire. You can come down and tie it into the one in this cable, bring it down here, tie it to ground in this motor.

Q. Tie it to the ground in this motor?

A. Or to the frame in this motor, not to the ground. Tie it in a different location, which connects the whole one piece of equipment which has multiple motors.

Q. Will that complete the circuit, then, for this pilot monitoring?

A. Yes. (Tr. 152 - 153)

\* \* \*

Q. Okay. Now, without going through all of this, this pilot wire in this "B-system cable", let's say, is that pilot wire connected, or was that pilot wire in this particular situation connected this cathead, ...

A. No.

Q. ... the plug?

A. No sir.

Q. And why not?

A. Because in this system you only use the pilot wire in this cable.

Q. Which is System A?

A. Syst -- Cable A.

Q. Yes.

A. And it interlocks through the cathead of Cable B. (Tr. 155 - 156)

\* \* \*

Q. That's okay. That's okay. I want the simplest way to explain it whatsoever. Is there an interconnection?

A. Yes, there is an interconnection in the power center itself.

Q. In the power center.

A. Yeah. The pilot wire comes through.

Q. Yes sir.

A. These are closed.

Q. The pilot wire is System A.

A. And pilot wire in Cable A, ...

Q. Yes.

A. ... or System A, comes over, goes back into the receptacle that feeds Cable B.

Q. Yes sir.

A. It actually interlocks through two internal prongs, comes back into the power center, which makes up the ground-check circuit. (Tr. 156 - 157)

\* \* \*

Q. In other words, the Cable B, the power, the three power leads to Cable B, do they come into this starting box? How do they get to these motors? . . .

A. You've got two contactors. Two motors are run by this power cable.

Q. Which power cable?

A. These two motors are run by Power Cable B. (Tr. 159)

\* \* \*

THE COURT: Are you now saying that coming out of the starter box there were two cables from the A System going to two other motors?

A. That's basically how it works, yes. Feeding from A and from B. (Tr. 160)

\* \* \*

Q. Okay, Mr. Sheffield, I guess first of all, the whole idea, let me ask you, is to provide a pilot monitoring for what here?

A. The belt drive.

Q. The belt drive

A. Yes.

Q. And the belt drive is composed of how many motors?

A. Four motors.

Q. So, are we trying to monitor the motors, then, the pilot to the motors?

What are we trying to monitor?

A. We're monitor this. It's one piece of equipment.

THE COURT: If "this" the belt drive?

A. Yes.

Q. So the belt drive, is that the one system that we're trying to monitor?

A. Yes.

Q. Okay. Now, this system, then, this belt-drive system, we're having power coming in from how many different places?

A. Two different power feeds: AC/DC.

Q. AC and DC. All right. So, is A and B both part of this whole system to power this drive?

A. Yes.

Q. Now within A and B, let me just ask you this: If you have to have a pilot monitor, do you have to have a pilot monitor wire connection in A and B?

A. No. Sir.

Q. And why not?

A. Because they are interconnected through the interlocked circuit of Cable B. going internally into the power center.

Q. So, if we only have a pilot monitoring system in Cable A, does that provide the monitoring system for the entire drive?

A. Yes sir.

Q. Does it provide it for the entire four motors of that drive?

A. Yes sir. (Tr. 161-162)

\* \* \*



Thus, I find that Sheffield's testimony fails to convincingly establish how there can be a complete circuit for the entire belt system, i.e., from the power center, through all four motors and back to the power center, if there are two cables running to the power center, one of which does not have the pilot ground wire connected to the circuit box.

Therefore, for all the above reasons. I find that the Secretary has established that Lone Mountain violated Section 902, supra. Considering all the factors set forth in Section 110(i) of the Act, I find that a penalty of \$60.00 is appropriate.

B. Citation No. 7537389

In the inspection on November 24, Clay observed that a conduit leading to the No. 4 continuous haulage bridge carrier was cut in two locations, and that the pick breaker handle was missing. Clay issued a citation alleging a violation of 30 C.F.R. § 75.503, which, in essence, provides that electrical equipment used in by the last open crosscut be maintained in a "permissible condition".

According to Clay, the purpose of the conduit was to protect the power cable within and to eliminate a possible flame path in the event of a methane release. Clay indicated that the interior cable was exposed in the two locations where the conduit was damaged.

Clay opined that the lack of a handle made the pick breaker non-permissible because "... it comes approved in a certain manner by Mine Safety and Health. (Sic.) And that piece of equipment being approved in its entirety is with the permissible and explosion-proof covers on it; and that includes handles and lock-washers, and everything that goes with it." (Tr. 175) Aside from this opinion, the Secretary did not proffer any documentary evidence to establish the permissibility of the pick breaker, i.e., that a handle was required to make it permissible.

"Permissible" is defined in Section 318(i) of the 1977 Mine Act, 30 U.S.C. § 801, supra, et seq., and 30 C.F.R. §75.2(i) as follows:

"[P]ermissible" as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which ... are designed, constructed, and installed, that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specification of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment ... . [Emphasis added.]

Based on this definition, it appears that the test of permissibility regarding a non-electrical feature, i.e., a handle, is based on the specification of the Secretary. In the case at bar, the Secretary has failed to adduce any evidence or make any reference to any of the Secretary's specifications that would indicate that the pick breaker at issue requires a handle in order to be permissible. Further,

that the purpose of permissibility is to assure against a mine explosion or fire. (See, Solar Fuel Co., 3 FMSHRC 1384 (June 1981)). The inspector did not explain how the missing handle contributed to a risk of a fire or an explosion. According to the uncontradicted testimony of Webb, although the handle was missing, there was no damage to the shaft, and the breaker could still be de-energized at the power center by pulling the cathead or plug.

According to the citation issued by Clay, a 480 volt power cable was exposed because of a cut in the conduit. However, on cross-examination, he indicated that “this was a 480 volt system; ... .” (Tr. 177), but admitted that he did not know the voltage of the cable. On the other hand, Webb indicated, in testimony that was not contradicted or impeached, that the cable at issue was a communication cable carrying approximately two volts, and that the purpose of the cable was to transmit computer signals. The Secretary has not proffered any evidence to establish that such a cable must be permissible. Indeed, Clay admitted on cross examination that “the law” does not require communication cables to be in a conduit. (Tr. 178)

Within the framework of this evidence, I find that the Secretary has failed to establish that the cited conditions regarding the conduit, and pick breaker handle, made any equipment non-permissible. Thus, I find that it has not been established that Lone Mountain violated Section 503, supra.

C. Citation No. 77537390

According to Clay, the conduit leading into the No. 2 continuous haulage bridge carrier had been cut in two locations. The cuts were approximately one-half inch wide and one inch long. Clay indicated that the purpose of the conduit was to protect the power cable within, and eliminate a possible flame path in the event of a methane release. Clay cited Lone Mountain for violating Section 503, supra.

According to Clay, there was not any damage to the cable enclosed within the conduit. Further, based on the uncontradicted and unimpeached testimony of Webb, the capacity of the cable at issue was approximately two volts and served as a communication cable similar to that discussed regarding Citation No. 7536389. Aside from the Secretary’s assertion in its brief that the cut “was clearly violative of the permissibility requirement”, the Secretary did not adduce any evidence establishing such a communication cable was required to be permissible. Essentially for the same reasons set forth above regarding Citation No. 7537389 I find that the Secretary herein has not established a violation under Section 503, supra.

D. Citation Nos. 7536378, 7536381, 7536382, 7536383, 7536384, 7536385, 7536391, and 7536392

The parties filed a Joint Motion to Approve Settlement of the civil penalty proceedings regarding these citations. The original assessment for these citations was \$1,824.00. The parties agreed to settle for a penalty of \$756.00. Based on the parties’ representations, and the record

regarding these citations, I find that the proposed penalty is proper within the framework of the Federal Mine Safety and Health Act of 1977, and I grant the Motion.

**Order**

It is **Ordered** that, within 30 days of this decision, Respondent pay a total civil penalty of **\$816.00** based on the parties' settlement, and the violation of Section 75.902, supra. It is further **Ordered** that Citation Nos. 7536380, 7537389, and 7537390 be **Dismissed**.

Avram Weisberger  
Administrative Law Judge

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