# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

December 22, 1998

| | | |
|---|---|---|
| ISLAND CREEK COAL COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. VA 99-11-R |
| | : | Order No. 7297950; 10/14/98 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | VP 8 Mine |
| ADMINISTRATION (MSHA), | : | Mine ID 44-03795 |
| Respondent | : | |

## DECISION

Appearances: Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, for the Contestant;
Robert S. Wilson, Esq., Howard N. Berliner, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, and
Larry Coeburn, Conference and Litigation Representative, Mine Safety and Health Administration, Norton, Virginia, for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a Notice of Contest filed by Island Creek Coal Company (AIsland Creek@) challenging the issuance by the Secretary of Labor (Athe Secretary@) of an order issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (Athe Act@) alleging a violation of 30 C.F.R. ' 75.1725(c). On October 21, 1998, Island Creek filed a Motion for Expedited Hearing. A conference call was convened on October 22, 1998, with counsel for both parties and it was agreed that the matter be scheduled for hearing on November 12, 1998. On that date a hearing was held in Abingdon, Virginia.

II. Findings of Fact and Discussion

On September 20, 1998, Elmer L. Deel, Jr., Island Creek=s general maintenance foreman, was responsible for supervising all maintenance work being performed at the VP 8 Mine. In this capacity he was supervising the installation of a new roller on the 5A belt which was deengerized, but was not locked and tagged.[1] Deel noted that the speed reducer which was a part of the drive

[1]/ According to Deel, he had told Tommy Lee Proffit, the section mechanic on the day shift, to lock and tag out the 5A belt and the latter nodded his head. Proffit, in contrast, testified

mechanism of the 5A belt, and attached to that belt, needed oil. Deel told Ronnie Maggard, a maintenance foreman, that he should add oil to the speed reducer. Deel did not tell Maggard to make sure that the 5A belt was tagged and locked, although Deel was aware that it was company policy to have the belt tagged and locked prior to the performance of maintenance. Maggard in turn told Charles David Miller, a rock dust motorman, to add oil to the speed reducer, but did not tell him to lock and tag out the belt. Miller climbed on a I beam located within arms length of the speed reducer, and at a point 4 to 5 feet above the 5B belt which is located above the 5A belt and dumps material on the 5A belt. Thomas K. Ray, an electrician, was asked by Miller to assist in the task. Ray stood on the 5B belt, which had been deenergized, in order to pump oil into a hose that Miller had placed in the speed reducer to fill it with oil. The 5B belt was unexpectedly energized and it traveled 400 feet carrying Ray with it before it was stopped. Ray injured his hand, and as of the date of the hearing had been off from work since September 20, 1998.

The order at issue, issued subsequent to an investigation, alleges a violation of 30 C.F.R. ' 75.1725(c)[2] in that maintenance was being performed on the 5A conveyor belt drive A. . . while the injured employee was positioned on top of the 5B conveyor tail piece. The 5B conveyor belt drive was not locked against motion. The 5B conveyor drive was started from a remote location, . . . .@ (Emphasis added). At the hearing, counsel for the Secretary in his opening argument alleged as a basis for the violation, that maintenance was being performed on the 5B belt as an employee was on it, and that the 5B belt was not locked and tagged. He also argued that the 5A belt was not locked and tagged while it was being worked on.

III. Discussion

A. Maintenance on the 5B Belt

---

that he had asked Deel if everything was tagged and locked and the latter said Alets go@ (Tr. 96). Later in his testimony, he testified that Deel said that A[E]verything is locked out. Lets go@ (Tr. 103). In light of my finding (III, infra) sustaining Island Creek=s contest of the order at issue, it is not necessary to resolve this conflict in testimony relating to Island Creek=s negligence.

[2]/ 30 C.F.R. ' 75.1725(c) provides, as follows: A[R]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.@

It is the Secretary=s position, in essence, that maintenance was being performed on the 5B belt, which was not locked and tagged. The assertion that maintenance was being performed on this belt is predicated upon the fact that, in adding oil to the speed reducer, Ray was standing on 5B belt. I take cognizance of the holding by the Commission that the purpose of section 75.1725(c), supra, is to prevent Ato the greatest extent possible,@ accidents in the use of equipment, and that Athe manifest intent of the regulation is to restrict repair of machinery while the power is on.@ (*Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (1991)). Nontheless, in order for section 75.1725(c), supra, to apply to the situations presented at the 5B belt herein, it must be established by the Secretary that Arepairs or maintenance@ were being performed on that belt. There is no evidence that any repairs were being performed on that belt. The Secretary must thus establish that the action of Ray in standing on the 5B belt in order to assist in the addition of oil to the speed reducer located on the 5A belt, constituted Amaintenance@ of the 5B belt.

In *Southern Ohio Coal Company*, 14 FMSHRC 978, 983 (June 25, 1992), the Commission set forth the essence of the term maintenance as follows:

> That essence, as the dictionary indicated is that maintenance means >the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . [p]roper care, repair, and keeping in good order . . . [t]he upkeep, or preserving the condition of property to be operated.= See Webster=s Third New International Dictionary, Unabridged 1362 (1971); A Dictionary of Mining, Mineral, and Related Terms 675 (1968); and Black=s Law Dictionary 859 (5th ed. 1979).

Since no action was being taken by any miner to care for the condition of the 5B belt, I find that it has not been established that any maintenance was being performed on that belt.

The plain language of section 75.1725(c), supra, does not contain any words that could reasonably be interpreted as prohibiting a person from standing on one piece of equipment in order to assist in the maintenance of another piece of equipment. I thus find that no maintenance was being performed on the 5B belt. Since neither repair nor maintenance was being performed on the 5B belt, any conditions or circumstances relied upon by the Secretary relating to that belt can not be the basis of any violation under section 75.1725(c), supra.

B. The 5A Belt

The record establishes that on September 20, repairs were being made to the 5A belt in the nature of replacement of a roller. Also, maintenance was being performed in the addition of oil to the speed reducer, a part of this belt. According to section 75.1725(c), supra, if these activities are performed it is mandated that: 1. The power be off, and 2. the machinery be blocked against motion.[3] Hence, a violation is established where maintenance is performed either

[3]/ Section 75.1725(c), supra, provides for an exception Awhere machinery motion is necessary to make adjustments.@ Both parties agree that this exception does not apply to the instant case.

with the power on, or where the machinery is not Ablocked against motion.@ The parties have agreed that during the time in question the power was off at the 5A belt. It appears to be the Secretary=s position that the latter requirement in section 75.1725(c), supra, for Amachinery@ to be Ablocked against motion,@ was not being complied with because the 5A belt was not Alocked and tagged.@ It is true that imposing such a requirement would fulfill the broad intent of section 75.1725(c), supra, as described by the Commission in *Arch of Kentucky*, supra. However, in evaluating the scope to be accorded the language of a regulatory standard, the test to be applied is whether the regulation gives a reasonably prudent person notice that it prohibits the cited conduct. (*Southern Ohio Coal Co.*, 14 FMSHRC 978 (June 1992). Section 75.1725(c), supra, does not give notice that it prohibits the cited conduct. The plain language of section 75.1725(c), supra, requires that Amachinery@ being repaired or maintained shall be Ablocked against motion.@ There is no requirement that the equipment or circuits energizing the equipment be tagged and locked out. The mere fact that it is the policy of Island Creek to require that the power source to the belt be tagged and locked prior to performing nonelectrical work on the belt does not, per se establish that Island Creek was on notice that section 75.1725(c), supra, requires tagging and locking the power source. There is nothing in the record regarding Island Creek=s intent in establishing such a policy. It is entirely possible that such a policy was adopted by Island Creek in order to require a higher standard of conduct than that set forth in section 75.1725(c), supra.

I note the testimony of Thomas K. Ray, an electrician, Charles David Miller, a motor man, and Tommy Lee Proffit, an electrician, all employed by Island Creek that, in essence, they were told by Amanagement@ that the Alaw@ required locking and tagging prior to working on belts. However, in reaching a decision regarding the scope of section 75.1725(c), supra, I place more weight upon the Commission=s interpretation of the requirement of this standard. I am guided by the Commission=s decision in *Mettiki Coal Corp*. 13 FMSHRC 760 (1991) interpreting 30 C.F.R. ' 77.404(c), which pertains to surface coal mines, and contains the exact same language as section 75.1725(c), supra. In *Mettiki*, the operator was cited for an improperly functioning electrical breaker in that the lock out device on the switch did not function as it was designed. The Commission found that at the time of MSHA=s inspection that led to the issuance of the citations at issue therein, there was no electrical work in progress, but rather miners were making nonelectrical repairs to the speed reducer for the belt that was powered by the breaker in question. The Commission emphasized the distinction between electrical work requiring devices to be locked out and tagged pursuant to 30 C.F.R. ' 77.501,[4] and mechanical repairs which require, under section 77.404(c), supra, which parallels section 75.1725(c), supra, that the power be off and the machinery blocked against motion. The Commission, in setting forth that locking and tagging out is not required, stated as follows: AA lock out of the equipment or circuit is not required. Thus, when mechanical repairs are being made to mechanical equipment and there is no danger of contacting exposed energized electrical parts, MSHA requires only that the power be turned off and the machinery be blocked against motion.@ (*Mettiki*, supra, at 766). Although the Commission=s above analysis may be construed to constitute dictum, nontheless it constitutes a clear sound pronouncement of regulatory interpretation, and accordingly should be followed.

[4]/ The parallel requirement regarding underground coal mines is forth in 30 C.F.R. ' 75.511.

Therefore, for the all above reasons, I conclude that there is no requirement set forth in section 75.1725(c), supra, that locking or tagging of a circuit is required prior to mechanical work on a belt.[5] Accordingly, Island Creek did not violate section 75.1725(c), supra, when its employees added oil to the 5A belt and repaired it while the power was off, but when it was not locked and tagged. Hence, the Contest is **SUSTAINED**.

## ORDER

It is **ORDERED** that Island Creek=s Notice of Contest is **SUSTAINED**, and Order No. 7297950 shall be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

Elizabeth S. Chamberlin, Esq., CONSOL Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

Robert S. Wilson , Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

dcp

[5]/ I find that the contrary interpretation argued the Secretary is not reasonable, and it not entitled to difference especially since it has not been embodied in any policy statement.