

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 12, 2003

PEABODY WESTERN COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-201-R
	:	Citation No. 7633896; 1/03/2001
v.	:	
	:	Docket No. WEST 2001-202-R
	:	Order No. 7633897; 1/03/2001
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2001-203-R
ADMINISTRATION, (MSHA),	:	Order No. 7633898; 1/03/2001
Respondent	:	
	:	Kayenta Mine
	:	Mine ID 02-01195
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-98
Petitioner	:	A.C. No. 02-01195-03614
	:	
v.	:	
	:	Kayenta Mine
PEABODY WESTERN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary of Labor;
Karen L. Johnston, Esq., Jackson Kelly, PPLC, Denver, Colorado, for Peabody Western Coal Company.

Before: Judge Manning

These cases are before me on notices of contest filed by Peabody Western Coal Company (“Peabody”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Peabody, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Flagstaff, Arizona. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. SUMMARY OF THE EVIDENCE, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Peabody operates the Kayenta Mine, an open pit coal mine in Navajo County, Arizona. The mine relies on five electrical substations to provide power to the mine. A trunk line from each substation carries electricity from that substation to draglines and other electrical machinery. Substations have to be relocated from time to time as the pit expands. In the winter of 2000, Peabody was setting up a substation in a new location to serve the expanding pit. (Tr. 85, 202). This C-5 substation contained a transformer to reduce the power coming in on overhead power lines at 69,000 volts (69 kv) to 23,000 volts (23 kv). A trunk line for the C-5 substation would carry the 23 kv power to draglines. On December 12, 2000, the electrical crew was completing the work to get this trunk line into operation. The electrical crew was made up of Marlin Gorman, Arlo Ketchum, and Myron Gorman. The electrical manager at the mine was Vern Hongeva.

Near the beginning of the shift, Marlin Gorman and his son Myron Gorman went to the C-5 substation to lock it out.¹ The trunk line was lying on the ground because it was not connected to the substation. There is a large lever on the side of the substation near a door. The lever was in the down position, which means that the 23 kv circuit was open. (Tr. 22-23). If the lever were moved up, the circuit would be closed. The lever was labeled in that manner. (Ex. C-8). They locked this lever in the down, open, position and put a tag on it. They also locked the load door on the substation so nobody could attach the trunk line. The crew performed some work on the isolator, which was at the other end of the trunk line. (Tr. 25; Ex. S-2). The cables to the draglines would eventually be attached to the circuit at this isolator when the C-5 substation was put into use.

A little later, the Gormans drove back to the C-5 substation to put power on the trunk line to see if the isolator was working correctly. The Gormans unlocked the gate to the chain link fence surrounding the substation and removed the locks on the substation. Gorman, a first class electrician, put on his hot gloves so he could attach the three phase trunk line to the three connectors (“cable couplers”) behind the load door of the substation. After he put on his gloves, he looked through the window on the load door. The lever on the outside of the substation controls three knife blade switches inside the substation. The switches are immediately inside the load door and the window is there so that electricians can look at these knife blade switches. Gorman noticed that the knife blades were closed. (Tr. 26). That meant that the blades were engaged and were able to pass current. An open circuit is a de-energized circuit while a closed circuit is energized. Knife blade switches are used as a safety precaution so that there will be a “visual disconnect” that an electrician can observe to assure himself that

¹ Myron Gorman testified at the hearing, but Marlin Gorman did not. To avoid confusion, I refer to Myron Gorman in this decision as “Gorman” and I refer to Marlin Gorman as “Marlin.”

the circuit is not energized before he opens the load door to connect the trunk line. (Tr. 28). The three cable couplers for the trunk line were inside the load door below the knife blade switches. By looking at the knife blades through the window on the load door, Gorman knew that the cable couplers inside the door might be energized, even though the lever to the right of the door indicated that the circuit was open.²

Mr. Gorman tried to fix the problem by pushing the lever on the side of the substation up and down. (Tr. 29). He hoped that by doing so, the knife blades would disengage and open the circuit. The lever apparently controls the knife blades through a chain attached to sprockets, but the mechanism obviously was not working because Gorman could not get the blades to disengage. One of the Gormans called the electrical manager, Mr. Hongeva, who arrived at the substation shortly thereafter. After Gorman described what had happened, Mr. Hongeva attempted to fix the problem. First, he made sure that the circuit breakers for this 23 kv circuit were open. The lights on the control panel for the substation were green, which indicated that the circuit breakers were open. He also checked a meter that indicated that the ground monitor protection system was working. (Tr. 166, Ex. C-6). Hongeva asked the men to again try to get the knife blades to open by operating the lever. The blades did not open. Hongeva believed that the blades were stuck. Hongeva suggested that they open the load door and loosen the plexiglass shield inside the door a little so that he could insert a grounding stick to try to disengage the knife blades. (Tr. 36). Each knife blade was about a foot long. (Tr. 37).

As Hongeva was considering how to open the blades, Gorman asked him whether the knife blades on the other side of the substation should be opened first. These knife blades control the 69 kv coming into the substation from the overhead lines. Opening the 69 kv blades would ensure that the entire substation was de-energized. Gorman testified that Hongeva did not respond to this question and, as a consequence, the 69 kv knife blades were not opened. (Tr. 35). Gorman believed that it was not a good practice to rely on the circuit breakers to confirm that it was safe to use the grounding stick to open the 23 kv blades. (Tr. 39). A grounding stick, sometimes called a hot stick, is used to bleed off any residual power in a circuit after it has been de-energized. Gorman testified that as Hongeva was getting the grounding stick, he again suggested that the 69 kv blades should be opened. (Tr. 43). Gorman testified that Hongeva replied that it was not necessary. Hongeva testified that he told Gorman that the knife blade switches were not “hot” because the breaker was open. (Tr. 173-74).

Hongeva first used the grounding stick to discharge any residual energy on the three cable couplers. (Tr. 69, 170). He then inserted the grounding stick through the crack in the loosened plexiglass shield. He was able to open one of the knife blade switches. Hongeva

² The lever also controls a locking device on the load door. When the lever is in the closed position, the load door cannot be opened. This locking mechanism was working correctly. (Tr. 32).

testified that there was no indication that the blade was energized. (Tr. 171). Gorman testified that when Hongeva opened this switch, he saw a small, tennis ball-sized ball of fire. (Tr. 44). He further testified that Marlin said, “Hey, that has power on it” and that Hongeva replied, “No, we just grounded it out.” *Id.* Hongeva testified that Marlin told him that he saw a spark and that he replied that it was just a “capacitive discharge.” (Tr. 171).

At this point, they closed the load door again and tried moving the lever on the outside of the substation up and down to try to open the other two blades. The blades moved but they did not pop out into the open position. (Tr. 44-45). They reopened the load door and Hongeva tried to use the grounding stick to open the other two blades. Gorman was standing on the ground behind Marlin and Hongeva, so he could not see exactly what was happening. (Tr. 45-46). Marlin and Hongeva were on the pad for the substation. Gorman testified that he heard a loud noise and the sound of arcing current. (Tr. 46). Gorman started backing up and told Marlin to get off the pad. They both went out the gate and Hongeva followed shortly thereafter. Gorman testified that he saw a large ball of fire come out of the area where the blades were. (Tr. 47-48). Everyone exited the area in case the substation exploded or caught on fire. Gorman testified that he could hear electrical parts flying through the air. (Tr. 49-50). Nobody was injured as a result of these events.

Hongeva testified that there was an arc, which he described as a phase-to-ground arc. (Tr. 172, 179). He dropped the grounding stick and stepped away from the substation. (Tr. 184). He never saw the arc, but he heard it. (Tr. 185). Hongeva testified that he “couldn’t believe what had happened.” *Id.* He thought that maybe there was a problem with the breakers. He stated that he never feared for his safety because he was protected by the plexiglass shield.

When the men returned to the substation, they used fire extinguishers to put out residual fires. After he believed it was safe, Gorman walked around to a different side of the substation so that he could enter the substation through a doorway to put out any fires inside. Gorman opened and locked out the 69 kv knife blades before he entered the substation. Once inside, Gorman saw that the three 23 kv wires traveled from the transformer directly to the knife blade switches without first going through the circuit breakers. (Tr. 51,182; Ex. S-4). He immediately called out to Hongeva in order to show him. The circuit breakers had been installed between the knife blades and the cable couplers rather than between the transformer and the knife blade switches. As a consequence, the knife blades had actually been energized that morning despite the fact that the circuit breakers were open. If the knife blade switches on the 69 kv side of the substation had been opened, as suggested by Gorman, the 23 kv knife blades would not have been energized.

Hongeva testified that he had never seen a substation wired like the C-5 substation. (Tr. 186). All other substations that he is familiar with are wired so that the electricity flows through the circuit breakers before entering the knife blade switches. (Tr. 186; Ex. S-3). After this incident, he checked all of the other substations at the mine and confirmed that none

of the others were wired like the C-5. Hongeva investigated the history of this substation to try to understand why it was not wired correctly. The C-5 substation arrived at the mine in 1985. At some point after it arrived and before Hongeva transferred to the Kayenta Mine, the breakers and blade switches were changed out. The original breakers and blade switches were part of “one whole unit.” (Tr. 190). Hongeva believes that when this single unit was replaced with separate breakers and knife switches, the wiring was not modified to account for this change. (Tr. 190-91). Hongeva was not the electrical manager when this change was made.

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) received an anonymous complaint that there had been an electrical arc and fireball at the C-5 substation. MSHA Inspector John Hancock was sent to the mine to investigate this complaint. At the conclusion of his investigation, Hancock issued a citation and two orders under section 104(d)(1) of the Mine Act.

The inspector testified that it is bad electrical practice to rely on circuit breakers to determine whether a circuit is energized because breakers do not provide a visual disconnect. (Tr. 89, 93). He also stated that it was hazardous to use the grounding stick to try to open the blades because there is a cable at the opposite end of the grounding stick that is attached directly to the grounding medium of the substation. (Tr. 96). If someone touches a live component with the grounding stick, an immediate phase to ground fault would be created. Arcing and a “big bang” would result. (Tr. 96). Hancock testified that, based on the observations of Gorman, all three phases “became involved in the fault” and “that’s when the fireball grew and came out of the load door.” (Tr. 96-97).

A. Citation No. 7633896.

Inspector Hancock issued Citation No. 7633896 under section 104(d)(1) of the Mine Act alleging a violation of section 77.500 of the Secretary’s safety standards. The body of the citation states as follows:

The 69 kv high voltage power was not de-energized at the C-5 substation before work was performed. The electrical manager thought that he dropped the 23 kv high voltage power by tripping the circuit breaker. When he used a hot stick to pull loose the stuck blades of the 23 kv disconnects he made a phase to ground condition that caused an arc and a fireball. The power conductors came from the transformer to the top of the disconnects instead of to the line side of the circuit breaker. The disconnects were destroyed and there was smoke discoloration in the 23 kv side of the substation.

The inspector determined that the gravity was serious, that the violation was of a significant and substantial nature (“S&S”), and that the negligence was high. The safety standard provides that “[p]ower circuits and electrical equipment shall be de-energized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing.” The Secretary proposes a penalty of \$5,000 for this violation.

Peabody argues that because “no electrical work was being performed at the time the incident occurred, the standard does not apply and citation should be vacated.” (P. Br. 6). Peabody contends that Hongeva was troubleshooting at the time of the incident and that no electrical work had yet been performed. Peabody believes that troubleshooting is “the act of determining what is the cause of the problem [and that] electrical work occurs once the cause of the problem is determined.” (P. Br. 5-6). Hongeva was using the grounding stick to try to figure out why the blades were sticking. Everyone at the hearing agreed that Hongeva did not know why the blades were sticking. He did not authorize the hourly employees to begin working on the problem because he did not yet know what the problem was. Only bargaining unit employees can perform work at the mine under the union contract. Thus, it believes that Hongeva was troubleshooting, not working.

The Secretary argues that once Hongeva loosened the plexiglass shield in front of the knife blades, any troubleshooting ended. Hongeva was working to get the blades to disengage. She points to her Program Policy Manual for guidance, which provides that “‘troubleshooting or testing,’ for the purpose of this section would include the work of locating an electrical problem in the electric circuits on an energized machine, but would not include the actual repair with the machine energized.” (V MSHA, U. S. Dep’t of Labor, *Program Policy Manual*, Part 77.500 (1993) (“PPM”). The Secretary argues that Hongeva had located the electrical problem and was attempting to repair it when he inserted the grounding stick behind the plexiglass shield.

I resolve this issue on a more fundamental basis by considering the unambiguous wording of the safety standard taken as a whole. The safety standard does not provide that circuits can remain energized whenever troubleshooting or testing is being performed. Rather, it requires that circuits and electrical equipment be de-energized “except when *necessary* for troubleshooting and testing.” There are many situations that arise when it is necessary that the power be on when equipment or circuits are being tested or when troubleshooting is being performed. Under the facts in this case, however, there was absolutely no reason for the knife blades to be energized when Hongeva was using the grounding stick to disengage the blades. Indeed, Hongeva thought that the blades *were* de-energized when he inserted the grounding stick and it is clear that he would have had Gorman open and lock out the 69 kv knife blade switch had he known that the 23 kv blades were hot. Nobody disputes the fact that power should not be applied to knife blade switches when someone is trying to disengage them with a grounding stick. The troubleshoot exception clearly does not apply when an electrician thinks that a circuit is de-energized as he is performing his “troubleshooting” tasks when, unknown to him, the circuit is actually energized. It especially would not apply in situations,

such as this one, where the electrician would not have performed the alleged troubleshooting had he known that the circuit was energized. Peabody's argument that the Secretary failed to establish a violation because Hongeva was engaged in troubleshooting is illogical and I reject it.

I also find that Hongeva was working on the circuit, rather than troubleshooting, when he used the grounding stick to try to disengage the knife blades. He knew that the blades were not disengaging within the switch because of a mechanical problem. Either the mechanism that connects the exterior lever to the blades was not functioning properly or there was a problem with the blades themselves.³ In any event, inserting a grounding stick through the crack in the plexiglass to dislodge the blades would not reveal the cause of the problem. In order to determine why the blades did not open when the lever on the substation was in the down position, someone would have to examine the entire mechanical actuating system for the 23 kv blades. Hongeva was actually trying to repair the blades on a temporary basis so that his crew could permanently repair or replace the knife blade switches, the mechanism that actuates the blades, or both. Hongeva was not troubleshooting because he was not performing "the work of locating an electrical problem in the electric circuits." *Id.* I find that the Secretary established a violation of section 77.500.

Peabody argues that the Secretary failed to meet her burden of proving that the violation was S&S. Hongeva was standing several feet from the opening in the plexiglass shield. Although Hancock testified that an electrical arc produces great heat, Hongeva testified that he did not feel any heat from the arc. (Tr. 193). Gorman also testified that he felt no heat. (Tr. 72). As a consequence, it was not reasonably likely that the Gormans or Hongeva were exposed to a hazard that would contribute to a serious injury. Peabody points to the photographic and physical evidence that the arc did not produce much heat. (Ex. S-9; Tr. 137). Paint did not blister and the rubber gasket around the load door did not melt. Peabody argues that Gorman's testimony about a large ball of fire should not be credited. Hongeva testified that he merely stepped back a few feet from the substation. Peabody states that, if there had been a ball of fire that flew 20 feet through the air as Gorman alleged, there would have been more damage to the substation.

The Secretary contends that it is reasonably likely that a "serious injury could occur from the violative condition of working on energized high voltage equipment." (S. Br. 10). She relies on the testimony of Hancock, an MSHA electrical inspector and certified electrician. He reviewed statistics that showed that since 1986, "there have been 56 incidents of electrical injuries in the surface metal/nonmetal industry of which 24 were caused by the failure to de-energize electrical circuits." *Id.* Hancock emphasized the danger of working near energized high voltage equipment. He believes that the initial arcing warned the men to

³ In *Royal Cement Co., Inc.*, 23 FMSHRC 764 (July 2001) (ALJ), a knife blade switch did not open in much the same manner as in the instant case. In that instance, MSHA determined that the blade failed to open because of an accumulation of dust and dirt in the switch itself.

get out of the area before the phase-to-phase event that created the fireball. The Secretary also relies on the testimony of Gorman about the explosion, the ball of fire, and a bolt of lightning at the top of the substation. Peabody had removed most of the damaged electrical equipment so the remaining physical evidence should not be relied upon.

I find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The violation clearly contributed to a discrete safety hazard. The issue is whether there was a reasonable likelihood that the hazard contributed to would result in an injury. The citation was issued because Peabody employees were working on power circuits that had not been de-energized. Such work can most definitely contribute to a serious injury. Whether the events of December 12, 2000, created a huge fireball is not determinative. The evidence establishes that someone could have been seriously injured, or killed, when Hongeva tried to open the energized blade switches with the grounding stick, especially since he thought they had been de-energized. When an electrician unknowingly works on an energized power circuit the results can be lethal. *See e.g. Royal Cement Co., Inc.*, 23 FMSHRC at 766-67. It was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature.

Peabody also argues that the Secretary did not present sufficient evidence to support a finding that the violation was the result of its unwarrantable failure to comply with the safety standard. The evidence shows that Hongeva did not know that the 23 kv line was energized when he touched the grounding stick to the blades nor could he have reasonably known, given the steps he took to de-energize the circuit. He did not know that the substation was wired differently and the fact that Hancock testified that it was “bad electrical practice” to rely on the circuit breakers to de-energize the circuit is “not sufficient to sustain a finding of unwarrantable failure conduct.” (P. Br. 11).

The Secretary contends that Hongeva's actions and lack of knowledge concerning the electrical systems at the mine amounts to a reckless disregard for safety. Hongeva, the electrical manager, lacked basic knowledge of the wiring in the C-5 substation and he disregarded good electrical practices by relying on the breakers to de-energize the circuit. Hongeva became the electrical manager in 1998-99, yet he had never been inside the substation and had never reviewed the schematic. Thus, his reliance on the circuit breakers was not based on first-hand knowledge. Finally, Hongeva failed to heed the suggestion of a first class electrician on his crew that the 69 kv line coming into the substation should be de-energized. This failure was especially egregious after there was an electrical discharge when Hongeva was able to open one of the knife blades with the grounding stick.

I find that the Secretary established that the violation was the result of Peabody's unwarrantable failure to comply with section 77.500. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

It is important to keep in mind that it is Peabody that is being charged with the unwarrantable failure violation here, not Hongeva, so the issue is whether Peabody unwarrantably failed to comply with the standard. At some point in the past, Peabody incorrectly wired the C-5 substation and did not advise its electrical employees that the circuit breakers did not protect the knife blade switches on the substation. This situation created a serious hazard that could have resulted in a fatality and Peabody's failure to prevent or correct it was grossly negligent. Peabody was not required under MSHA's electrical standards to regularly inspect the inside of the substation, but it could have easily inspected it at a time when the substation was being moved.

The hazard created by the violation of section 77.500 was extremely serious. Gorman suggested an easy method to eliminate the hazard: open the 69 kv switch to de-energize the transformer. Gorman made this suggestion twice. Hongeva told him not to open the 69 kv blades because the 23 kv side of the transformer was not hot. (Tr. 210). Gorman knew that relying on the circuit breakers was not a good practice because one or more of the phases in the breakers could also be stuck and the lights and meters on the controls might not register the problem. (Tr. 39). Inspector Hancock testified that it is poor electrical practice to rely on circuit breakers to ensure that a high voltage circuit is de-energized because a circuit breaker does not provide visible proof that the circuit is dead. (Tr. 89, 93). Hongeva admitted that relying on breakers to ensure that the 23 kv line was de-energized when the 69 kv visible disconnect blades were closed was not a good electrical practice. (Tr. 211).

"The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding." *Midwest Materials Co.*, 19 FMSHRC 30, 34 (Jan. 1997) (citations omitted). Although no employee was injured as the events played out in this

instance, the condition could have seriously injured or killed someone. When evaluating whether a violation was the result of an operator's unwarrantable failure to comply with the standard, the Commission has also considered whether the violation took place in the presence of a foreman. *Id.* at 35. A foreman is held to a higher standard of care. *Id.* In this case, not only did the violation occur in the presence of Peabody's top electrical manager, but he is the individual who committed the violation. Moreover, he committed the violation in the face of suggestions from one of his first class electricians that the 69 kv switch be opened, which would have eliminated the hazard and prevented the violation. I find that the violation was the result of aggravated conduct constituting more than ordinary negligence. Although the violation was not intentional, it displayed a serious lack of reasonable care. The Secretary established that the violation of 77.500 was caused by Peabody's unwarrantable failure to comply with that standard.

B. Order No. 7633897

The Secretary moved to vacate this citation at the commencement of the hearing. (Tr. 5). For good cause shown, the motion is granted.

C. Order No. 7633898

Inspector Hancock issued Order No. 7633898 under section 104(d)(1) of the Mine Act alleging a violation of section 77.501 of the Secretary's safety standards. The body of the citation states as follows:

The 69 kv high voltage power was not de-energized, locked, and suitably tagged before work was performed on the 23 kv disconnects. The power conductors came from the transformer to the top of the 23 kv disconnects. The electrical manager stated that he thought he dropped the 23 kv power by tripping the circuit breaker.

The inspector determined that the gravity was serious, that the violation was of a significant and substantial nature, and that the negligence was high. The safety standard provides, in part, that "[d]isconnecting devices shall be locked out and suitably tagged by the persons who perform [electrical] work. . . ." The Secretary proposes a penalty of \$7,000 for this violation.

Peabody argues that this standard is also limited to situations where electrical work is being performed. It maintains that "when this standard is taken in context with other standards, the regulations draw a distinction between performing electrical work and troubleshooting." (P. Br. 6). Peabody relies on the *PPM* which states, in relation to this standard, electrical work includes "the design, installation, maintenance, or repair of electric equipment or circuits." (*PPM* at Part 77.501). Peabody contends that Hongoeva was not designing, installing, maintaining, or repairing electric equipment or circuits.

The Secretary maintains that Hongeva was performing work at the time of the incident. She relies, in part, on her Program Policy Manual and Commission precedent. She quotes from language in the *PPM* that defines “electrical work” to include “work performed inside electrical substations or other areas in proximity to exposed energized electrical parts, work performed inside transformers . . . or other enclosures of electric equipment and circuits. . . .” *Id.* The Secretary argues that the evidence establishes that “Hongeva was performing electrical work and his intent was to repair the disconnect blades.” (S. Br. 16).

I find that the Secretary established a violation of section 77.501. Peabody failed to lock out and tag out the disconnecting devices. The applicable disconnecting devices that were required to be locked out were the 69 kv knife blades. Under this standard, if work were being performed on the 23 kv trunk line after it was energized, Peabody could have complied with the standard by locking out the 23 kv knife blade switches. In this instance, however, Peabody was working on these 23 kv knife blades at the time of the violation, so Peabody was required to lock out and tag out the 69 kv knife blades. For the reasons set forth above, I find that Hongeva was performing “electrical work” when he used the grounding stick to try to dislodge the knife blades. The general “troubleshooting” exception is designed to allow an electrician to *knowingly* work on a live circuit in certain circumstances. Peabody’s “troubleshooting” arguments are illogical. There is no dispute that the 69 kv knife blade switches were not locked out as required and I conclude that a violation of 77.501 has been established.

Failing to lock out and tag out the circuit clearly contributed to a discrete safety hazard. The citation was issued because Peabody had not locked out the power circuit that Hongeva was working on. This violation, while similar to the violation of section 77.500, is a distinct violation. Failure to lock out and tag out a circuit creates a serious risk of electrocution or serious injury. Hongeva could have been seriously injured, or killed, when he used the grounding stick to open the 23 kv blade switches on a circuit that had not been locked out. It was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature.

For the reasons set forth with respect to the violation of section 77.500, I find that the Secretary established that the violation of 77.501 was the result of Peabody’s unwarrantable failure to comply with the standard. The violation was committed by Peabody management over the objection of an hourly employee.⁴ It is clear that Gorman believed that the circuit should be locked out at the 69 kv knife blades. (Tr. 77). Gorman wanted to comply with the

⁴ Gorman was asked why he did not just lock out and tag out the 69 kv circuit without getting Hongeva’s approval. He was a first class electrician who clearly had the authority and responsibility to lock out electrical circuits. Gorman testified that when he is working with electrical management, he places “a lot of trust” in them and believes that they are paid to “know [the] equipment.” (Tr. 54, 62). Gorman followed Hongeva’s instruction because “he’s the one that’s in charge.” (Tr. 77).

safety standard but mine management did not want him to do so. Peabody's violation of section 77.501 demonstrated a serious lack of reasonable care that was greater than ordinary negligence.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The record shows that Peabody has a history of 170 paid violations at the Kayenta Mine during the 24 months preceding January 2, 2001. (Ex. S-1). Peabody is a rather large coal mine operator. All of the violations were abated in good faith. As discussed above, the violations were very serious and Peabody's negligence with respect to the violations was high. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7933896	77.500	\$7,000.00
7933897	77.502	Vacated
7933898	77.501	\$8,000.00
	TOTAL PENALTY	\$15,000.00

Order No. 7933897 is **VACATED** and WEST 2001-202-R is **DISMISSED**. Peabody's contests of Citation No. 7933896 and Order No. 7933898 are **DENIED** and the citation and order are **AFFIRMED** as written by Inspector Hancock. WEST 2001-201-R and WEST 2001-203-R are **DISMISSED**. Peabody Western Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$15,000.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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RWM