

CCASE:
MSHA V. OZARK-MAHONING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 21, 1990

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

v.

Docket Nos. LAKE 88-128-RM
LAKE 88-108-M

OZARK-MAHONING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

At issue in this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), is whether Ozark-Mahoning Company ("Ozark") violated 30 C.F.R. § 57.12016, a mandatory underground metal/nonmetal mine safety standard requiring deenergizing and locking out electrically powered equipment before mechanical work is done on the equipment. 1/ Commission Administrative Law Judge George Koutras concluded that Ozark violated section 57.12016 and assessed a civil penalty of \$25. 11 FMSHRC 859 (May 1989)(ALJ). The Commission granted Ozark's petition for discretionary review. For

1/ 30 C.F.R. § 57.12016 provides:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

the reasons that follows, we affirm the judge's decision.

Ozark operates the Annabel Lee Mine, an underground fluorspar mine in Cavernrock, Illinois. An electrically-powered hoist with a skip bucket is used to transport ore out of the mine. The hoist also is used to transport miners up and down the mine shaft in a man cage. The skip bucket is attached under the man cage and is approximately 4 feet high, 3 feet wide, and 3-1/3 feet long. When in use, the bucket moves up and down the shaft with the man cage.

The hoist is operated from a control booth inside a shop building located approximately 200 feet from the top of the shaft. The main disconnect switch for the electric power used to operate the hoist is located approximately 10 to 20 feet away from the control booth. Another power switch is located on the hoist control panel inside the control booth. The hoist is equipped with two sets of brakes, each set capable of holding a full load. The hoist also is equipped with a "dead man" braking switch. Foot pressure must be applied to the "dead man" braking switch in order to activate the hoist but, as soon as the pressure is released, the brakes automatically set. The hoisting system includes a control lever that must be manually engaged in order for the hoist to move. Thus, in order for the hoist system to move, both power switches must be energized, foot pressure must override the "dead man" braking switch, and the control lever must be appropriately engaged. The hoist system also has a manual brake lever that may be used to lock the brakes.

On March 4, 1988, Mine Safety and Health Administration ("MSHA") Inspector Gene Upton conducted a safety and health inspection at the Annabel Lee Mine. Upton observed a miner inside the skip bucket using welding equipment to patch the bottom of the skip bucket. That miner was assisted by another miner, who was approximately five feet from the shaft, bringing supplies to the area where the work was being performed. The skip bucket was located "a little above the level" of the top of the shaft while the work was being performed. Tr. 38. A hoist operator was at the controls in the control booth. The hoist control operator could not see the miner working inside the skip bucket but could see the bucket itself.

Inspector Upton found that the hoisting system was still energized because the control power switch, located inside the control booth, and the main disconnect switch were not deenergized. Upton also found that these switches were not locked out. However, the brakes were engaged, the foot pedal overriding the "dead man" braking switch was not activated, and the hoist was stationary.

Upton issued a citation to Ozark alleging a violation of 1 section 57.12016. The citation stated:

An employee was observed working in the skip under the man cage in the main hoist shaft without deenergizing the power for the hoist and locking the switch out. The hoist operator was sitting at the hoist controls.

Upton also designated the violation as being "significant and substantial" in nature. Ozark abated the violation within 10 minutes by shutting off and locking out the power switches and hoist controls.

Before the judge, Ozark argued that it did not violate section 57.12016 because it complied with the second sentence of the standard. Ozark argued that, although it had not deenergized the hoist system (or locked out the power switches), appropriate "other measures," within the meaning of the standard's second sentence, prevented the hoist from being moved without the knowledge of the miner working on it. These "measures" included the two sets of brakes, the "dead man" switch, the control lever, and the control panel switch. In Ozark's view, with these controls in place, turning the main power switch on could not cause the hoist to move. In addition, Ozark contended that the hoistman in the control booth was prohibited from starting or moving the hoist unless he received a signal to do so with the knowledge of the person doing the work.

The judge concluded that Ozark violated section 57.12016. He found that the hoist was "electrically powered equipment," that the skip bucket was a part of the hoist, that the work being performed in the bucket was "mechanical work," and that, therefore, the cited conditions fell within the scope of section 57.12016. 11 FMSHRC at 868. He construed section 57.12016 to require that the mine operator both: (1) deenergize electrically powered equipment; and (2) lock out power switches before any mechanical work is done on the equipment. 11 FMSHRC 868-69.

Crediting Inspector Upton's testimony, the judge found that the main power switch located outside the hoist operator's control booth and the second power switch located inside the control booth were neither deenergized nor locked out during the time that work was performed on the skip bucket. 11 FMSHRC 869-70. While the judge found "some merit" in Ozark's argument that the second sentence of section 57.12016 provides for an alternative method of insuring against inadvertent energizing of the equipment while it is being worked on, short of locking out the power switches, he concluded that "[the] language [of the second sentence] only comes into play once the requirements found in the first sentence for completely deenergizing the equipment [are] complied with...." 11 FMSHRC at 869. Thus, according to the judge, "any alternative 'other measures' for insuring against the inadvertent energizing of the equipment while it is being worked on ... may not serve as a defense to the requirement found in the first sentence that all such equipment be initially deenergized." Id. Accordingly, the judge rejected Ozark's argument that there was no violation because Ozark had complied with the second sentence of the standard. 11 FMSHRC at 869-70. The judge also determined that the violation was not significant and substantial and assessed a civil penalty of \$25. 11 FMSHRC at 872-73, 874.

On review, Ozark argues, for the first time in this proceeding, that section 57.12016 applies only to unmanned types of electrically powered equipment. It asserts that the hoist is manned equipment with an authorized person, a hoist operator, in charge and that, therefore,

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the regulations at 30 C.F.R. § 57.19000 et seq. (Subpart R-Personnel Hoisting) apply. Alternatively, Ozark again argues that it complied with the second sentence of section 57.12016, thus negating any finding of violation.

Ozark's contention that section 57.12016 is applicable only to unmanned types of equipment was not presented to the judge. Under the Mine Act and the Commission's procedural rules, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii); 29 C.F.R. 2700.70(d). Ozark has not proffered any reason why it did not present that argument before the judge, and therefore we do not address this issue.

With respect to the judge's construction of the cited standard, we agree that the plain meaning of the first sentence of section 57.12016 requires that electrically powered equipment be first deenergized before mechanical work is done on such equipment. The second sentence of the standard requires appropriate measures to prevent reenergization of the equipment without the knowledge of the individuals working on it. The two sentences set forth conjunctive requirements, not alternative requirements. It is undisputed that the hoist was not deenergized within the meaning of the regulation. Tr. 10-11, 12, 19, 29, 62. We agree with the judge that Ozark's failure to comply with the first sentence of the standard is sufficient to sustain a finding of violation of section 57.12016.

For the reasons set forth above, we affirm the judge's decision.