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MSHA V. METTIKI COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 29, 1991

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

v. Docket No. YORK 89-6

METTIKI COAL CORPORATION

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act"), the issue before us is whether Commission Administrative Law Judge William Fauver properly found that its roof control plan required Mettiki Coal Corporation ("Mettiki") to replace roof support posts that were removed in order to install longwall equipment. Judge Fauver found that the plan required replacement of the posts and that Mettiki violated its roof control plan, and 30 C.F.R. 75.220 and 75.303(a). He assessed a civil penalty in the sum of $200 against Mettiki for the violations alleged in Order Nos. 3115846 and 3115848. 12 FMSHRC 80, 89-90 (January 1990) (ALJ). For the reasons that

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1/ Section 75.220, entitled "Roof control plan," provides in pertinent part:

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the

> mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered... .

Section 75.303(a) provides in pertinent part:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal

follow, we affirm the judge's decision.

Mettiki operates the Mettiki Mine, an underground coal mine located in Garrett County, Maryland. On July 13, 1988, Joseph Darios, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a quarterly examination of the mine. Inspector Darios was accompanied by Alan Smith, the company representative.

Upon arriving in the L-4 longwall set-up entry, Inspector Darios observed that the area had been mined to widths greater than 18 feet, and that roof support posts were missing from various locations in the L-4 entry and the Nos. 5 and 6 crosscuts. He measured widths ranging from 20 feet 6 inches to 23 feet 9 inches in the areas where the posts had been removed. In addition, he noticed that the roof in the cited area was "scaly," in that there were fractures in the immediate roof, but not in its upper strata. Inspector Darios also observed that the pan line, the conveyor system for removing the coal from the longwall face, had been installed, but that neither the longwall shields nor shearer had been installed. Inspector Darios stated that he overheard two Mettiki employees state that the posts had been removed on July 11, 1988, while the pan chains were being pulled around a turn into the area. Tr. 451.

The roof control plan that was in effect when the first 155 feet of the L-4 set-up entry was mined (the "old plan"), requires a single row of posts on a maximum of 5-foot centers to be installed when the set-up entry is sheared to 21 feet so as "to reduce the entry width to a maximum of eighteen feet." Joint Exh. 5; Gov. Exh. 13; Tr. 434. The roof control plan subsequently adopted by Mettiki and applicable to the remainder of the cited area (the "new plan") allows shearing of entries and connecting crosscuts to maximum widths of 23 feet, but requires a double row of posts to be installed on a maximum of 5-foot centers "to reduce the width of the proposed sheared area to 18-feet wide maximum prior to shearing." Gov. Exh. 13; Joint Exh. 4, p. 31; Tr. 434-35. Both versions of the plan allow removal of the posts as the longwall pan, shields and shearer are installed. 2/ Joint Exh. 4, p. 31.

> mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall ... examine and test the roof, face, and rib conditions in such working section ... and examine for such other hazards

> and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Each such mine examiner shall also record the results of his examination... .

2/ The new plan additionally provides that as "the longwall pan, shields and shearer are installed, posts will be removed as necessary." (emphasis added).

Based upon his observations, Inspector Darios issued Order No. 3115846 to Mettiki pursuant to section 104(d)(2) of the Mine Act, alleging that Mettiki violated its roof control plan and section 75.220, and further alleging that the violation was significant and substantial and caused by Mettiki's unwarrantable failure to comply with the standard. Gov. Exh. 12.

Inspector Darios subsequently modified that order to designate which conditions were violative of Mettiki's old roof control plan, and which conditions were violative of Mettiki's new roof control plan. Tr. 407-08; Gov. Exh. 13.

Inspector Darios also issued Order No. 3115848, pursuant to section 104(d)(2) of the Act, alleging a violation of 75.303(a) because he believed that suitable preshift examinations of the L-4 set-up entry and Nos. 5 and 6 connecting crosscuts were not conducted on July 12 and 13, 1988. He based this conclusion on the fact that the last work day in that area was July 11, 1988, and that the conditions cited in Order No. 3115846 were not recorded in the July 12 and 13, 1988, preshift examination records. Order No. 3115848. Inspector Darios further found Mettiki's alleged violation of section 75.303(a) to be significant and substantial and caused by Mettiki's unwarrantable failure to comply with the standard. Id.

The orders were terminated when posts were replaced in the cited locations and when an adequate preshift examination of the cited areas was conducted and the allegedly hazardous conditions were entered in Mettiki's preshift examination records.

The Secretary proposed a civil penalty of $1100 for the alleged violation of section 75.220 and Mettiki's roof control plan, and $1000 for the alleged violation of 75.303(a). Mettiki contested the validity of the withdrawal orders, the associated special findings, and the civil penalties proposed by the Secretary of Labor.

At the evidentiary hearing, the parties agreed to terminate the hearing prior to Mettiki's presentation of its case, to stipulate the existing record, and to limit the issues to be decided. Tr. 470-72. It was agreed that the only liability issue remaining in dispute was whether Mettiki's roof control plan required Mettiki to replace posts that were removed in order to install longwall equipment. Tr. 470. The parties further agreed that if the judge determined that Mettiki's plan required replacement of the posts, his holding would be dispositive of both orders and the orders would be modified to section 104(a) citations with reduced findings of negligence and gravity. Tr. 471.73. Finally, the parties

agreed that the opinion evidence of Inspector Darios to the effect that the plan did not require replacement of the posts would not be binding on the government. Tr. 471.72.

Before the judge, Mettiki contended that the Secretary failed to meet her burden of establishing that the provision allegedly violated was part of its approved and adopted plan and that the condition cited by Inspector Darios violated any provision of that plan. Mettiki argued that the plain wording of the roof control plan did not proscribe the cited conditions because it did not expressly require replacement of the posts. Mettiki contended that, as a result, it did not receive adequate notice that it was expected to replace

feet to a maximum of 23 feet only after a double row of posts on five-foot centers have been installed. 12 FMSHRC at 89. The judge found that the stated purpose of requiring the double row of posts is o maintain an 18 foot width before the entries and crosscut are widened o 23 feet.

The judge interpreted "as" in the phrase "[a]s the longwall pan, shields, and shearer are installed, posts will be removed as necessary," to mean "during the time that" or "while." Id. The judge concluded that the plan allows removal of the posts only during installation of the pan, shields, and shearer. The judge also stated his belief that use of the phrase "as necessary" in the plan further demonstrates that removal of the posts should be minimized.

The judge also relied upon provisions in the plan setting forth the order in which steps are to be performed so that the entries and crosscuts are narrowed by and supported with posts at each step. The judge emphasized that the plan provision stating that the "entry and crosscut will be sheared to 23 feet wide and supported to plan" read in conjunction with the provision allowing removal of posts only when installation of the longwall equipment is occurring, supports a conclusion that posts removed in order to install longwall equipment must be replaced. The judge explained that a contrary interpretation would render the cutting and roof support procedures superflous. Additionally, the judge stated that a contrary interpretation would create a dangerous situation in which posts could be absent indefinitely. Id.

Consistent with the parties' stipulations, after the judge determined that Mettiki's roof control plan required replacement of the posts and that, consequently, Mettiki had violated its plan and sections 75.220 and 75.303(a), he modified the orders to citations issued pursuant to section 104(a) of the Mine Act. 12 FMSHRC at 90. The judge modified the allegations of negligence in the orders from the original designation of high to moderate, and modified the allegations of gravity in both orders by deleting the significant and substantial designations. Id. Finally, the judge assessed a civil penalty of $100 for each of the two violations.

Mettiki's petition for review challenged the judge's finding that Mettiki's plan requires replacement of posts removed to install longwall equipment. Mettiki essentially argues, as it did before the judge, that its plan does not expressly prohibit the conditions cited in Order No. 3115846, and that the Secretary cannot disregard the express terms of the plan in order to require replacement of the posts without employment of the plan amendment

process. Mettiki asserts that it did not receive adequate notice that replacement of the posts was required, and that even if such a requirement could b+ read into the plan, the orders are nonetheless invalid, because Mettiki was in the process of installing longwall equipment. We disagree.

It is a well settled rule of construction that a written document must be read as a whole, and that particular provisions should not be read in isolation. U.S. v. Morton, 467 U.S. 822, 828 (1984); rehearing den., 468 U.S. 1226 (statute); Washington Metro v. Mergentime Corp., 626 F.2d 959, 961 (D.C. Cir. 1980) (contract). If the provision allowing removal of the posts is read in isolation from the provisions requiring that entries and crosscuts be supported with posts to reduce the width of these areas to a maximum of 18 fe+t, one might well reach the conclusion that the posts need never be replaced. Such a reading, however, would result in a contradiction between the provisions allowing removal of the posts and the provisions requiring support and would render the support phrases superfluous. It is well established that written provisions of the same document must be read and interpreted consistently with each other and that effect must be given to each part of a document to avoid making any word meaningless or superfluous. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979@ (statute); 17 Am Jur. 2d Contracts 258.59 (1964).

We find that the judge properly interpreted Mettiki's roof control plan in accordance with these settled canons of construction. We are unpersuaded by Mettiki's assertion that the Secretary failed to meet her burden of proving that Mettiki's plan required replacement of the posts because Inspector Darios testified that the posts did not have to be replaced once they were removed. The parties agreed to consider Inspector Darios' opinion testimony irrelevant and non-binding on the Secretary. Tr. 443, 471-72; M. Br. at 9. We also are unconvinced by Mettiki's argument that it did not receive adequate notice that it was required to replace posts following their removal. If Mettiki's plan is read as a whole, avoiding conflicts between provisions and without rendering provisions superfluous, the plan clearly requires that a maximum width of 18 feet must be maintained and that this plan requirement can be exceeded only when posts are temporarily removed as necessary to install the specified longwall equipment. Furthermore, Mettiki had notice of other mandatory standards pertaining to roof control which recognize and seek to prevent the hazards associated with excessive widths of entries and crosscuts. See, i.e., 30 C.F.R. 75.203(a), 75.203(e), and 75.206(a).

We similarly reject Mettiki's argument that the subject enforcement action was nonetheless invalid since Mettiki had not yet completed

installation of the longwall equipment because, although it had installed the longwall pan, it had not yet installed the shields and shearer. Mettiki essentially argues that if the plan requires replacement of the posts, it should be read to require replacement of the posts only after all three components of longwall equipment have been installed. The Secretary responds by stating that Mettiki's argument is unavailing in light of evidence in the record that, in this instance, installation of the longwall equipment was not a continuous, uninterrupted process. S. Br. at 8. The judge did not directly consider Mettiki's argument that the orders were invalid because Mettiki was in the process of installing the equipment. Instead, his determination that

Mettiki's plan required replacement of posts removed to install longwall equipment was dispositive of this issue. 12 FMSHRC at 89-90. His decision is consistent with the parties' stipulation that "the only issue remaining on liability ... is whether Mettiki's roof control plan required Mettiki to replace posts that were removed in order to install longwall equipment." 12 FMSHRC at 88. The parties further agreed that, if the judge decided "that the roof control plan is [to be interpreted] as MSHA contends, then ... the 104(d)(2) order would be converted into a 104(a) citation, with reduced allegations as to gravity and negligence." Tr. 472. Thus, in view of these agreements between the parties, we need not determine the period of time during which the posts could remain absent before Mettiki was required to replace them in accordance with its roof control plan.

Finally, we reject Mettiki's argument that Order No. 3115848 alleging a violation of section 75.303(a) should be vacated because the Secretary allegedly failed to introduce the order into evidence or present evidence regarding its issuance. At the evidentiary hearing, Mettiki agreed that the judge's determination of whether Mettiki's plan required replacement of the roof support posts would be dispositive of both orders. Tr. 472-73. We believe, therefore, that the judge properly held Mettiki to the terms of its agreement.

We conclude that the judge correctly interpreted Mettiki's roof control plans to require replacement of roof support posts which are removed in order to install longwall equipment. Accordingly, we affirm the judge's decision.