CCASE:
MSHA V. METTIKI COAL
DDATE:
19910522
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 22, 1991

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

Docket Nos. YORK 89-19-R
v. YORK 89-20-R

YORK 89-42

METTIKI COAL CORPORATION

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 810 et seq. (1988) (the "Mine Act" or "Act"). It involves the validity of a withdrawal order and two citations issued by th Secretary of Labor to Mettiki Coal Corporation ("Mettiki") based on the improper functioning of the lockout device on the No. 34 circuit breaker ("breaker"), controlling the power to the motor for the raw coal silo conveyor belt ("No. 34 belt") of the Mettiki General Preparation Plant. The withdrawal order and citations were issued during an inspection by the Mine Safety and Health Administration ("MSHA") following MSHA's receipt of a complaint alleging that the No. 34 breaker could be turned on even if it were locked out.

Administrative Law Judge William Fauver affirmed both citations. He concluded that the violations were serious and were the result of a high degree of negligence, but that they were not of a significant and substantial nature. Mettiki Coal Co., 12 FMSHRC 722 (April 1990) (ALJ). He modified the imminent danger withdrawal order issued under section 107(a) 1/:

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1/ Section 107(a) of the Mine Act provides. in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section

of the Mine Act to a failure to abate withdrawal order issued under section 104(b) 2/ of the Act. Id. For the reasons set forth below, we reverse the judge's conclusion that Mettiki violated section 104(b). We affirm the violations alleged in the citations, but reverse the judge's conclusion that the violations were the result of Mettiki's gross negligence.

I.

Factual and Procedural Background

Mettiki operates a coal preparation plant in Garrett County, Maryland. The No. 34 breaker, which controls the power to the motor for the No. 34 belt, is located in a building adjacent to the raw coal silo. This breaker is on the motor control panel and is clearly marked. The handle for the breaker's switch is rectangular with a point at one end and is turned in a circular motion to one of three designated settings, on, off, or reset. The settings are clearly marked with white lettering on a red background. The handle turns within a metal collar or retaining ring, which completely encircles the handle and setting designations. This collar has a notch cut in it opposite the "off" designation. Thus, when the breaker is in the off

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1/ [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. 817(a).

2/ Section 104(b) provides:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be

> withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. 814(b).

position, the blunt end of the handle is located at this notch. A slide bar is recessed inside the handle at the blunt end. When the switch is in the off position, this slide bar can be partially pulled out of the handle and through the notch. If this procedure is followed, the switch cannot be turned from the off position. The slide bar has a slot in the middle to enable a padlock to be attached, preventing anyone without a key from turning on the power.

About three years before the contested order and citations were issued, a new breaker for the No. 34 belt was installed at the same location in the existing panel. Apparently the breaker was physically smaller than the previous breaker. As a consequence, the switch handle did not protrude out of the motor control panel sufficiently to allow the slide bar to clear the notch in the collar. At that time, part of the slide bar was cut away with a hack saw so that the slide bar could be pulled through the notch and the switch could be locked out.

On November 29, 1988, MSHA received a complaint that the No. 34 breaker could be turned on while locked out. MSHA Inspector Kerry George was sent to investigate. At the time of the inspection. the preparation plant and surface belts, including the No. 34 belt, were idle for scheduled maintenance. Two miners were making mechanical repairs on the speed reducer, a type of gear box, for the No. 34 belt. When Inspector George arrived at the control panel, the No. 34 breaker was tagged out and locked out. Clarence "Ted" Bowman, the surface electrician, was asked to try to turn the breaker on with the lock in place. After the men working on the speed reducer were no longer at the belt, Bowman attempted to turn on the breaker. He could not do so on his first try. He then pushed the slide bar into the switch handle about one quarter of an inch with the lock still in place. As a result, the slide bar apparently could clear the notch in the collar and he was able to turn on the No. 34 breaker without removing the lock. Turning on the breaker did not restore power to the belt.

Inspector George issued an imminent danger withdrawal order alleging that the "main breaker for the belt drive at the raw coal silo had been modified to the point that when the breaker was locked out the lock could be bypassed." Gov. Exh. 4. The order was issued at 8:50 a.m. on November 30, 1988 and the condition was abated at 9:50 a.m. on that same day when "a new switch was installed eliminating the hazard." Id.

Inspector George issued citation No. 3110339 which charged a violation of 30 C.F.R. 77.507 3/ for the condition described in the imminent danger order ("lockout citation"). Gov. Exh. 3. Inspector George also issued

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3/ Section 77.507, entitled "Electric equipment; switches" provides:

All electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed.

Citation No. 3110340 which charged a violation of 30 C.F.R. 77.502 4/ for not properly conducting monthly electrical examinations of the No. 34 breaker ("electrical examination citation"). Gov. Exh. 2. The citations were abated within an hour. The parties agree that both citations were abated in good faith.

In his decision, the judge concluded that "the defective lock out device did not create an imminent danger." 12 FMSHRC at 727. The judge modified the section 107(a) imminent danger order to a section 104(b) failure to abate order. The judge concluded that the "inspector could have issued a 104(b) order withdrawing the breaker from service until the defective lock out device was corrected" because of Mettiki's failure to remove the breaker from service once the defective condition was known by the electrical examiner. Id. The judge further concluded that such a withdrawal order is "implied" because the electrical examination standard cited requires that potentially dangerous equipment be removed from service with the result that "no abatement time need be allowed in a citation for this type violation." Id.

The judge sustained the lockout citation. He concluded that the No. 34 breaker is a switch, as that term is used in the standard, that the lockout device is an integral part of the switch and that, in violation of the standard, the switch was not safely installed. 12 FMSHRC 724. He determined that Mettiki's failure to replace the lockout device constituted gross negligence since the electrical examiner knew that the switch was defective. Although he determined that the violation was not of a significant and substantial nature ("S&S"), he concluded that the violation was serious for the purpose of determining the civil penalty. 12 FMSHRC 727, 728.29.

The judge also sustained the electrical examination citation which charged a violation of section 77.502. The judge found that the electrical examiner knew that the lockout device was defective and knew that the breaker could be turned on while padlocked. 12 FMSHRC 725. He determined that the examiner's "attitude and failure to report the lock out defect and remove the breaker from service demonstrates gross negligence" and that this negligence was imputable to Mettiki. 12 FMSHRC 725.26. The judge held that the violation was not S&S but that it was serious. 12 FMSHRC 727.28.

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4/ Section 77.502 entitled "Electric equipment; examination, testing and maintenance" provides:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person

to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

II.

Disposition of Issues

A. Section 104(b) Withdrawal order

As stated above, the judge determined that the conditions found by Inspector George did not constitute an imminent danger, but he modified the order of withdrawal to a section 104(b) order. The judge erred in so modifying the withdrawal order in this case.

First, the judge did not have the authority to modify the imminent danger order to a section 104(b) order. Inspector George did not charge Mettiki with a violation of section 104(b) of the Mine Act. That section provides. in part:

> If ... an authorized representative of the Secretary finds ... that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended ... he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons ... to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. 814(b). It was the judge who made the specified findings and who, through modifications of the imminent danger order issued by Inspector George, in essence issued the section 104(b) order. Commission administrative law judges are not authorized representatives of the Secretary and do not have the legal authority to charge an operator with violations of section 104 of the Mine Act.

Sections 104(h) and 105(d) of the Mine Act authorize the Commission to modify an order issued under section 104, and section 107(e) authorizes the Commission to modify an order issued under section 107(a). The Commission has concluded that this authority "is conferred in broad terms" and that it "extends under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations." Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1982). In that case, the 104(d)(1) order contained the requisite special findings (unwarrantable failure and significant and substantial findings). but the underlying 104(d)(1) citation had been previously modified to a section 104(a) citation. The Commission

held that the judge had the authority to modify the 104(d)(1) order to a 104(d)(1) citation so long as fair notice was provided and the operator was not unfairly prejudiced. 4 FMSHRC at 1795. The Commission emphasized, however, that the necessary special findings were contained in the order as issued so that "the judge was not adding new findings to 'create' a

104(d)(1) citation." 4 FMSHRC at 1796. Thus, allegations contained in an order of withdrawal, such as the fact of violation or special findings, survive the vacation of the order. As a consequence, modification of an order is the appropriate means of assuring that such allegations do survive. 4 FMSHRC at 1794 n. 9; Southern Ohio Coal Co. 10 FMSHRC 138, 143-44 (February 1988).

In this case, modification is not appropriate because the judge added new findings to "create" a 104(b) order. The findings necessary to establish an imminent danger are quite different from the findings to establish a 104(b) order. As discussed below, the allegations contained in Inspector George's order that survived the judge's determination that no imminent danger existed do not support a violation of section 104(b). Thus, the judge's modification was beyond the authority conferred on him under sections 104(h), 105(d), and 107(e) of the Mine Act.

The modification was also improper for a second, independent reason. The facts in this case do not support the issuance of a section 104(b) order. Before a 104(b) order can be issued, an inspector must find that the violation described in the underlying citation "has not been totally abated within the period of time originally fixed therein or as subsequently extended." Inspector George did not set a time for abatement for the citations, the citations were abated within one hour of their issuance, and the parties stipulated that the citations were abated in good faith. Exhs. G.2, G.3; Tr. 5.

In addition, the Commission has held that in order to establish a prima facie case that a section 104(b) order is valid, the Secretary must prove that "the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued." Mid-Continent Resources, Inc., 11 FMSHRC 505, 509 (April 1989). Here, the citations were quickly abated so that neither the Secretary nor the judge could have made these findings.

The judge concludes that no abatement time was required in a citation for this type of violation. But even assuming that the inspector could have issued a 104(b) order, he did not and the facts do not demonstrate that such an order can be implied. Moreover, it is not disputed that the violations were abated within an hour and that Mettiki "demonstrated good faith ... in attempting to achieve rapid compliance after notification of [the] violation." 30 U.S.C. 820(i).

For the reasons set forth above, the judge's modification of the withdrawal order issued by Inspector George is reversed and the order of

withdrawal is vacated.

B. Lockout Citation

As a preliminary matter, it is important to recognize that Mettiki was not required to have the No. 34 breaker locked out at the time of Inspector George's inspection. The Secretary's surface electrical standards, Subpart F-J of Part 77 of 30 C.F.R. (sections 77.500.77.906), contain only one

standard requiring the use of lockout devices. Section 77.501 provides in pertinent part that "[d]isconnecting devices shall be locked out and suitably tagged" by persons performing "electrical work ... on electric distribution circuits or equipment."

Electrical work was not in progress at the time of MSHA's inspection. Two miners were making non-electrical repairs to the speed reducers for the No. 34 belt at the time of the inspection. Mechanical repairs are covered by section 77.404(c), which provides, in pertinent part, that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion." A 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.

We now turn to our analysis of the safety standard cited by the inspector. Section 77.507 provides that "[a]ll electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed." This regulation is exactly the same as the interim mandatory standard enacted by Congress in section 305(o) of the Mine Act. 30 U.S.C. 865(o). The legislative history of the interim mandatory standard states:

> This section requires that electric equipment be provided with switches or other safe control[s] so that the equipment can be safely started, stopped, and operated without danger of shock, fire, or faulty operation.

S. Rep. No. 411, 91st Cong., 1st Sess. 68, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969" at 194 (1975) ("Coal Act Legis. Hist.").

In the Program Policy Manual ("Manual"), the Secretary states:

> The intent of this section [77.507] is to require that all control devices be fully enclosed to prevent exposure of bare wires and energized parts. Improvised starting methods such as plug and receptacle devices, trolley taps and trolley wire "stingers" that are used to start or stop electric

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5/ A speed reducer is a "train of gears, totally enclosed for mine work,

placed between a motor and the machinery which it will drive, to reduce the speed with which power is transmitted." Bureau of Mines, U.S. Department of Interior, Dictionary of Mining, Mineral and Related Terms. 1052 (1968). A speed reducer is not electric equipment, thus the use of the word "power" in this definition refers to mechanical power.

motors are examples of noncompliance with this provision.

Manual, Volume V. Part 77, p. 176. 6/

The judge concluded that Mettiki violated the safety standard because the "lock out device on the No. 34 breaker was not safely installed in that it did not prevent turning the breaker on when it was padlocked." 12 FMSHRC at 724. He stated that this condition presented a safety hazard in violation of section 77.507.

The citation was not issued by the inspector or affirmed by the judge on the basis that the breaker was not locked out, but rather because the lockout device did not work. Mettiki argues that the lockout device is not a "switch or other control" because the cited slide bar was a mechanical device with no electrical function. As a consequence, it maintains that section 77.507 did not apply to the malfunctioning slide bar lockout device.

The judge did not hold that the slide bar is a switch but that the lockout device "is an integral part of the switch, essential to control the switch when locking out is required by a safety regulation." 12 FMSHRC 724. The Secretary's interpretation of the term "switch" to include safety components that do not directly control the flow of electricity advances the goals of the Mine Act and is not inconsistent with its plain language. We give weight to the Secretary's interpretation of the standard in this case because it is reasonable, consistent with the purposes of the Mine Act and is supported by substantial evidence. 7/ We conclude that the term switch includes the slide bar lockout device.

The next issue is whether Mettiki violated the cited standard. Mettiki argues that this safety standard is designed to protect miners from the hazards associated with an electrically defective switch. It points to the Senate Report, which states that the standard requires that equipment be provided with switches "so that the equipment can be safely started,

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6/ The title page of the Manual states that the "MSHA Program Policy Manual is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." The D.C. Circuit has stated that while the Manual may not be binding on the agency, "[w]e consider the MSHA Manual to be an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989).

7/ The legislative history of the Mine Act provides that "the Secretary's

interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 637 (1978).

stopped, and operated without danger of shock, fire, or faulty operation." Coal Act Legis. Hist. at 194. It maintains that it is undisputed that the switch could be turned on and off safely without presenting any danger of shock, fire or faulty operations. It further argues that since the Secretary's regulations do not require that a breaker be equipped with a lockout device and the failure to have such a device would not violate section 77.507, then having a modified lockout device cannot be deemed to violate the safety standard. Finally, it contends that the Secretary's Manual supports its interpretation because the Manual states that the "intent" of the standard is to require that all switches be fully enclosed to prevent exposure of energized parts and to prevent the use of improvised starting methods.

The Secretary argues that because the standard requires that switches be safely installed, the improper and unsafe installation of the No. 34 breaker violated the standard. She contends that the No. 34 breaker was not "safely installed" in violation of section 77.507 because the modification that was made to the slide bar "negated the operation of the safety device." Sec. Br. 7. She states further that the Manual is only a guide for inspectors and does not discuss every hazard to which the standard applies.

The word "install" means "to set up for use or service." Webster's Third International Dictionary (Unabridged) at 1171 (1986). The No. 34 breaker was installed by physically attaching it to the panel and connecting the electrical conductors. Part of the installation included, in this instance, modifying the lockout device. Mettiki states that it was safely installed because, as an electrical device, it worked as it was designed. The Secretary maintains that it was not safely installed because the lockout device on the switch did not function as it was designed.

Section 77.501 requires that electric equipment be locked out whenever electrical work is performed. Lockout devices are essential to comply with the standard. Thus, switches to be used to lock out electric equipment must be equipped with functioning lockout devices so that the required lockout can be undertaken. It is not unreasonable for MSHA to be concerned about defective lockout devices on electric circuits because miners' lives are at risk. It is also not unreasonable for the Secretary to interpret section 77.507 to require that pertinent switches be installed with functioning lockout devices.

Mettiki argues, however, that the standard is unenforceably vague as applied to the facts of this case, because it was not given fair warning of the conduct required. In instances of broadly worded standards, the Commission has determined that adequate notice is provided if the conduct at issue is measured against what a "reasonably prudent person, familiar

with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection,intended by the standard." See, e.g., Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987). A standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December

1982) (citation omitted). In interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal Cement Company, 12 FMSHRC 2409, 2416 (November 1990).

Mine operators, including Mettiki, are on notice that electric circuits and equipment must be locked out whenever electrical work is performed. Operators are also on notice that electric equipment must be equipped with safely installed switches. In addition, operators should know that switches used to lock out circuits and equipment must be installed with lockout devices that function properly. A reasonably prudent person would have recognized that the standard required that the No. 34 breaker, a switch used by Mettiki to lock out the belt motor circuit, be equipped with a functioning lockout device and that the improperly installed lockout device on the switch was in violation of section 77.507.

Mettiki had designated the No. 34 breaker as the "disconnecting device" to be locked out when required by section 77.501. It is clear that the device was defective. Consequently, a reasonably prudent person would be put on notice that the protective purpose of the standard required that the defective lockout device be replaced or repaired.

We now turn to the question of whether the violation was caused by Mettiki's gross negligence. The judge reached the following conclusion with respect to Mettiki's negligence:

> The surface electrician, who was also the electrical examiner, was responsible for the safety of this equipment. He knew about the defect but did not repair it. His continued failure to replace the lock out device constituted gross negligence, in violation of 77.507.

12 FMSHRC at 724.

Bowman is the hourly employee who was assigned to conduct the monthly electrical inspections. He knew that the slide bar of the switch had been modified, but it is difficult to determine from the record when he first became aware that this modification could allow the lockout device to be bypassed. His testimony is ambiguous. There is evidence in the record to support a finding that, at the time the citation was issued, he did not know that the lockout device could be bypassed and there is evidence to support

the finding made by the judge.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). Donald F. Denu v. Amax Coal Co., 12 FMSHRC 602 610 (April 1990). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support: a conclusion."
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Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Nevertheless, "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera v. NLRB, 340 U.S. 474, 488 (1951).

We conclude that substantial evidence supports the judge's conclusion that Bowman knew the lockout device could be defeated. It appears from his testimony that while he knew the lockout device could be defeated, he did not believe that this defect created a safety hazard because turning on the breaker would not energize the system. The record establishes that "many independent actions would be required to cause injury due to the defective lock out device." 12 FMSHRC 726. The judge concluded that such independent actions would include "1) ignoring the warning tag and padlock; 2) turning the breaker on; 3) reactivating the emergency pull cord on No. 34 belt; 4) starting the two outby belts in order to start No. 34 belt; and 5) ignoring the sirens that would sound before a belt is started." 12 FMSHRC 727. In addition, Bowman stated that nobody would turn on a breaker with a lock and danger tag on it unless "they mean to do you some harm to start with." Tr. 114. 125. Thus, the record indicates that Bowman knew that a miner could purposefully bypass the lockout device on the breaker, but that he did not report it because he did not think it would cause any safety problems.

The Commission has not precisely defined what constitutes ordinary, high or gross negligence. Typical definitions of gross negligence include: "the intentional failure to perform a manifest duty in reckless disregard of the consequences;" "an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care;" "indifference to present legal duty and to utter forgetfulness of legal obligations;" and "a heedless and palpable violation of legal duty." Black's Law Dictionary (5th ed). 931-32 (1979). In Eastern Associated Coal Corp., 13 FMSHRC 178. 187 (February 1991), the Commission stated:

> "Highly negligent" conduct involves more than ordinary negligence and would appear, on its face, to suggest unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

The facts in this case do not present highly negligent conduct or gross negligence. Mettiki modified the slide bar on the switch in order to enable the breaker to be locked out. It required the breaker to be locked out whenever work was being performed on the belt even though the Secretary only requires a lock out when electrical work is being performed. A number of independent steps are required to energize the No. 34 belt,

including the resetting of the emergency pull cord at the belt. The modified lockout device functioned, in that a lock could be placed on the device to lock it out. The lockout device could be purposefully defeated, however, by jiggling the device while turning the switch.

The electrical examiner knew that the device could be defeated, but

apparently he believed that nobody else knew it. He also knew that turning on the breaker would not energize the circuit because other miners are required to take independent actions at other locations to energize the system.

The record does not indicate that any electrical work requiring the switch to be locked out was performed on the circuit during the period of time that the modified lockout device was in place. The Secretary did not attempt to prove that Mettiki relied upon the modified lockout device to comply with the lockout requirements of section 77.501. Thus, as far as the record before us discloses, the modified lockout device was used only in situations where there was no legal duty to lock out the circuit. Although the Secretary was not required to prove a violation of section 77.501 in order to establish a violation in this case, the fact that she did not show that Mettiki relied upon the defective lockout device to fulfill its obligations under the Mine Act is a factor to be considered when determining the degree of negligence.

Moreover, the language of section 77.507, when read together with the Secretary's interpretation in the Manual, "made it difficult and confusing for a reasonable operator to know the true standard of care imposed by [section 77.507], and, hence, whether it was in a state of violation or compliance." King Knob Coal Co., 6 FMSHRC 1417, 1422 (June 1981). The Manual states that the intent of the standard is to require that switches be enclosed "to prevent exposure of bare wires and energized parts." Manual Volume V, Part 77, p. 176. Although Mettiki did not show actual reliance on the Manual "confusion caused by the Manual interfered with [Mettiki's] ability to ascertain the true standard of care and therefore placed it in a position where it could have believed it was in compliance." King Knob., 6 FMSHRC at 1422. Thus, even though Bowman knew that the lockout device could be defeated, he could have reasonably believed that the defect was not out of compliance with the safety standard or the Mine Act. Penalizing Mettiki with a finding of gross negligence for confusion caused by MSHA would be "unfair and harsh." Id.

We conclude that the violation of section 77.507 was caused by Mettiki's ordinary negligence. Mettiki was negligent in failing to test the lockout device at the time the new breaker was installed to determine if it functioned properly. In addition, Bowman was negligent in failing to report the defect to Mettiki and in failing to replace or repair the breaker after he discovered the defect.

Based on the above considerations, we vacate the judge's gross negligence finding and remand the proceeding to the judge to assess an

appropriate penalty.

C. Electrical Examination Citation

Mettiki did not properly seek review of the judge's holding that it violated the requirements of section 77.502. Citation No. 3110340 alleges that the monthly electrical examinations were not being conducted properly because the examiner did not report that the lockout device could be

bypassed. The judge upheld the citation.

In its petition for discretionary review, Mettiki seeks review of that portion of the judge's decision "modifying the operator's negligence from moderate to high with respect to 104(a) Citation No. 3110340." PDR at pg. 1. The petition does not elsewhere seek review of the judge's determination that Mettiki violated section 77.502. Review by the Commission is limited to issues raised by the petition for discretionary review, 30 U.S.C. 823(d)(2)(A)(iii), or directed for review by the Commission on its own motion, 30 U.S.C. 823(d)(2)(B). Consequently, this issue is not before the Commission. See Odell Maggard v. Chaney Creek Coal Co., 9 FMSHRC 1314, 1315 n.2 (August 1987).

With respect to Mettiki's negligence, the judge held that "Mr. Bowman's attitude and failure to report the lock out defect and remove the breaker from service demonstrates gross negligence, in violation of 77.502." 12 FMSHRC at 725. The judge's finding of negligence is based on his finding that Bowman knew about the defect and his belief that Bowman's actual knowledge established gross negligence. For the reasons discussed with respect to the lockout citation, the judge's conclusion that the violation was caused by Mettiki's gross negligence is reversed. Given the fact that Bowman could have reasonably believed that the modification made to the lockout device did not violate section 77.507, his failure to report the defect does not constitute gross negligence. King Knob, 6 FMSHRC at 1422. We conclude that Bowman's failure to report the defect and remove it from service was thus the result of his ordinary negligence.

The judge further held that Bowman's negligence could be imputed to Mettiki, because he was Mettiki's "designated person to conduct electrical examinations of surface electrical equipment." 12 FMSHRC at 726. Mettiki argues that the judge erred as a matter of law. For the reasons set forth in Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (February 1991), the judge's conclusion that Bowman's negligence is imputable to Mettiki is affirmed. Consequently, we vacate the judge's gross negligence finding and remand the proceeding to the judge to assess an appropriate penalty.

(D) Civil Penalty

Mettiki asserts that the judge did not properly consider the six statutory criteria set forth in section 110(i) when he assessed the civil penalties. Specifically, it alleges that he ignored the fact that the parties stipulated that both violations were abated in good faith and that he erroneously determined that the violations were the result of its gross negligence.

The judge did not discuss the good faith criterion of section 110(i) in assessing the civil penalties. 30 U.S.C. 820(i). In modifying the imminent danger order to a failure to abate order, the judge apparently determined that the violations were not abated in good faith. The parties stipulated that the violations were abated in good faith. Tr. 5; Sec. Br. to Judge at 2. The evidence supports the stipulation.

Section 110(i) requires the Commission to consider all six criteria set forth in that section "in assessing civil monetary penalties." 30 U.S.C. 820(i). See, Pyro Mining Co. v. FMSHRC, 3 BNA MSHC 2057, 2059, 785 F.2d 31 (Table) (6th Cir. 1986); Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1152-53 (7th Cir. 1984). The judge erred in failing to consider and enter findings with respect to the good faith criterion. We conclude that Mettiki abated both violations in good faith. We remand this proceeding to the judge to assess appropriate civil penalties.

## III.

## Conclusion

For the foregoing reasons, we reverse the judge's conclusion that Mettiki violated section 104(b) of the Mine Act and we vacate the order of withdrawal. We affirm the judge's determination that Mettiki violated section 77.507, but we reverse his gross negligence finding. We also reverse the judge's finding that Mettiki's violation of section 77.502 was the result of its gross negligence. We hold that both violations were the result of Mettiki's ordinary negligence and that Mettiki abated these violations in good faith. Accordingly, we remand this proceeding for reconsideration of appropriate civil penalties.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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Distribution

Thomas C. Means, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Colleen A. Geraghty, Esq.
Office of the Solicitor
U,S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge William Fauver
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041