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SOL (MSHA) v. PEABODY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

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

v.

PEABODY COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 91-56
A.C. No. 11-00585-03778

Mine No. 10

DECISION

Appearances: Denise Hockley-Cann, Esq., and Rafael Alvarez,
Esq., Office of the Solicitor, U.S. Department of
Labor, Chicago, Illinois, for the Petitioner;
David S. Hemenway, Esq., Thompson & Mitchell,
St. Louis, Missouri, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) with one violation of the mandatory standard at 30 C.F.R. 75.509 and proposing a civil penalty of \$1,100 for the alleged violation. The general issue before me is whether Peabody violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The withdrawal order at issue, Order No. 3032502, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.509 and charges as follows: (Footnote 1)

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Electrical work was being performed on a continuous-mining machine while the cont. miner was energized with 950 volts alternating current electricity. Power wires to the right cutting motor were being insulated and nonelectrical parts were being installed. Four-hourly maintenance men and one chief electrician was [sic] performing the work. The above condition was observed in the 2 North section off 7 West entries.

The cited standard provides as follows:

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing. (Footnote 2)

There is no dispute in this case that the cited continuous miner was indeed energized at the time Federal Mine Safety and Health Administration (MSHA) Inspector John Stritzel arrived at

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the work scene at the 2 North 7 West section at approximately 8:50 a.m., on August 9, 1990. Stritzel has had extensive experience within the mining industry (including experience as a repairman on continuous miners) and with MSHA. He was previously advised by management that the continuous miner was "down" and as he approached to within about 10 to 12 feet of the miner, Stritzel observed four miners working on the machine. One miner was sitting in the operator's compartment, two were on top of the miner moving cover plates into position, and the fourth miner had electrical tape in his hands and was working on electrical lead wires. Stritzel was certain that the fourth miner was actually in the process of taping the power conductor which is one of the inner wires of the power cable.

When Stritzel asked if the continuous miner was deenergized, one miner responded "no" and another responded "yes." In light of the mixed response, Stritzel directed that all work be halted and he proceeded to check the power center to determine for himself whether the power cable had in fact been disconnected, locked out and tagged out. Maintenance foreman Randy Aymer accompanied Stritzel to the power center and they verified that indeed the power was "on." At that point, Stritzel told Aymer that he was issuing a section 104(d)(2) withdrawal order. Aymer explained to Stritzel that the cable had initially been locked out when they began work on the miner. Stritzel then explained to one of the chief electricians, Bill McGuire, that in order to abate the closure order it would be necessary to deenergize the miner and present a safety talk to the miners. McGuire then proceeded to instruct the miners regarding safe operating procedures when working on electrical equipment.

Stritzel thought that under the circumstances it was "reasonably likely" for a miner to be fatally injured through electrocution. He observed that the circuit breaker on the continuous miner is a mechanical device that is not "foolproof" and that it cannot be verified whether the power is indeed off. Stritzel based his conclusion that the violation was "significant and substantial" and of high gravity, upon his inference that the person who was taping the leads had necessarily earlier been working on bare wires. It is not disputed that 950 volts alternating current is sufficient to cause electrocution. Stritzel further concluded that the violation was the result of high negligence inasmuch as the repairmen were working under the supervision of a foreman, Randy Aymer.

On behalf of Peabody, repairman Robert Eggerman testified that he began working on the subject continuous miner during the third shift that day, to repair a broken bit motor lead wire. According to Eggerman, the power cable was unplugged and locked-out with a padlock. Eggerman testified that after the leads were repaired, the miner was then reenergized and found to be working correctly. When the inspector arrived, Eggerman was

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leaning over the pump motor allegedly repairing hydraulic hoses. He maintains that while the miner was energized, he saw no electrical work being performed, and did not know whether electrical work was indeed then being performed. He maintains that he was not on top of the miner, but leaning on the side of it. He maintains that he did not see what coworker Grauer was doing at the time the inspector arrived.

Maintenance foreman Randy Aymer was maintenance supervisor on the third shift in charge of repairing the bit motor lead wire. According to Aymer, when the inspector arrived, miner William Grauer was in front of the floor jack bracket placing a protective covering or jacket on one of the water hoses. Aymer testified that when Inspector Stritzel asked if the machine was deenergized he responded "yes" because he in fact thought it was deenergized, and was not aware that it had been reenergized. Aymer acknowledged that he never protested or denied to Stritzel that electrical work was being performed on the continuous miner even when he was told that the order was being issued and even when McGuire was instructing the miners about the procedures to be followed when electrical work is being performed.

William Grauer, another repairman working on the continuous miner that shift, testified that all the work was done on the machine when he arrived except for placing protective jackets over the hydraulic hoses. He estimated that it was around 8:45 that morning when the inspector arrived. He was kneeling beside the continuous miner purportedly taping a hydraulic hose. In response to a question at hearing as to whether he heard the inspector inquire whether the machine was energized, he answered "not really." He conceded that the inspector could see the tape in his hands, but maintains that he was not taping electrical leads and that his hands were no closer than 15 inches from the exposed electrical leads. (Footnote 3)

William Dowdy, another Peabody repairman testified that he was working in the cab area of the cited continuous miner at the time Inspector Stritzel arrived. He maintains that he saw no electrical work being performed while the machine was energized. He acknowledged, however, that no one protested or denied that electrical work was being performed on the energized miner when McGuire gave his safety speech.

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Roger Ingram, another repairman, testified that during the third shift when he reported to the cited continuous miner he first verified that it was locked and tagged-out. At that time the leads were waiting to be bolted in. Ingram testified that he was the person who actually attached, bolted and insulated the three lead wires. He testified that he had completely covered the leads so that there was no need for Grauer to tape the leads any further. Ingram noted that Eggerman then gave up the keys and the power was returned at the power center to test the continuous miner. Ingram maintains no further electrical work was performed after the machine was tested and the motor found to be working. The breaker was then purportedly turned off and he was on top of the machine replacing some covers when the inspector arrived. Ingram maintains that he later argued with the inspector stating that he did not see a problem but the inspector denied that such a conversation ever occurred. Indeed Inspector Stritzel testified that no one at the mine denied that work was being performed on the electrical power leads until he received a telephone call days later from Grauer.

I find in this case that the Secretary has met her burden of proving the cited violation by a preponderance of the evidence. The testimony of Inspector Stritzel is completely credible. He was in position to clearly observe what was going on and has no reason to fabricate. Accordingly, I find that a miner, either William Grauer or another, was indeed taping the electrical leads at a time when the continuous miner was energized. While that miner was most likely Mr. Grauer, I do not, because of his lack of contemporaneous protestation, find his later denials after notice of reprimand to be credible.

The Secretary's evidence is additionally supported by the absence of any contemporaneous protestation or denial from any of the other miners to Inspector Stritzel's order to deenergize the continuous miner and upon his issuance of a withdrawal order for performing electrical work on energized electrical equipment. Moreover, as already noted, the sole undisputed protest arose only after one of the miners, William Grauer, was later issued a letter of reprimand for his alleged participation in the unlawful activity. Under the circumstances this belated protestation is, as already noted, without much credibility.

I do not, however, accept the inference of Inspector Stritzel regarding the gravity and "significant and substantial" nature of the violation. Stritzel based his conclusions of high gravity upon an inference that one of the repairmen must have been working on bare lead wires at some point in time while the continuous miner was energized. In this regard, I find credible that portion of the testimony of Eggerman, Aymer, and Ingram to the effect that the leads had already been attached and at least partially taped and insulated before the power was returned to the continuous miner for purposes of testing. It more reasonably

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may be inferred that at the time the bare leads were being insulated and taped, the continuous miner was indeed locked out and deenergized. It would appear under the circumstances that the miner observed by Stritzel taping the leads was placing another layer of insulating tape upon leads that had already been initially insulated in part. Under the circumstances, I do not find sufficient evidence to support a conclusion that the violation was "significant and substantial" or of high gravity.

I also find credible the testimony of maintenance foreman Aymer that the continuous miner had been in fact earlier deenergized and locked out while electrical work was being performed. His initial response to Stritzel's inquiry as to whether the continuous miner was deenergized clearly suggests that he in fact believed that the miner was then deenergized. Accordingly, I find that while Aymer was negligent in failing to have controlling knowledge of the lock-out status of the continuous miner, this negligence was not of such an aggravated nature as to constitute "unwarrantable failure." See: Emory Mining Corporation, 9 FMSHRC 1997 (1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987).

Under the circumstances and considering the criteria under section 110(i) of the Act, I find that the civil penalty of \$300 is appropriate.

ORDER

Order No. 3032502 is hereby MODIFIED to a citation under section 104(a) of the Act, and that citation is AFFIRMED. Peabody Coal Company is hereby directed to pay a civil penalty of \$300 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Footnotes start here:-

1. Section 104(d) of the Act reads as follows:

"(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator

to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

2. The Secretary in this case is proceeding solely on the theory that electric equipment must be deenergized only when performing electrical work in this case by allegedly insulating the power wires to the right cutting motor of the cited continuous miner.

3. Grauer also acknowledged that he was issued a letter of reprimand by Peabody for allegedly working on the electric leads of the energized continuous miner, but the reprimand was dropped at "step 2" of the disciplinary procedures for reasons not clearly established. Under the circumstances, this evidence, even if properly admissible, is of no probative value to this case.