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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

PETITIONER

Civil Penalty Proceeding

Docket No. PENN 79-97
A.C. No. 36-03425-03017

v.

Maple Creek No. 2 Mine

UNITED STATES STEEL CORPORATION,
RESPONDENT

DECISION

Appearances: James Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter, MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), to assess a civil penalty against United States Steel Corporation (hereinafter, U.S. Steel) for a violation of a mandatory safety standard. The petition alleges a violation of 30 C.F.R. 75.200, failure to comply with the approved roof-control plan. A hearing was held in Pittsburgh, Pennsylvania, on January 22, 1980. Inspector Basil Zaycosky testified on behalf of MSHA. Ronald Franczyk, John Lowther, and Robert K. Bryan testified on behalf of U.S. Steel. The parties filed briefs with proposed findings of fact and conclusions of law.

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At the commencement of the hearing, MSHA moved to withdraw Citation No. 620282 which alleged a violation of 30 C.F.R. 48.9(a), failure to make training certificates of miners available for inspection. At the hearing, MSHA stated that U.S. Steel did not violate the above regulation. U.S. Steel did not oppose the withdrawal of this petition. Hence, Citation No. 680282 was vacated and the portion of the petition for assessment of civil penalty relating to Citation No. 680282 was dismissed. Although the hearing commenced on the remaining proposed assessment of Citation No. 391262, it became apparent during the hearing that the civil penalty was proposed under order No. 391264 rather than Citation No. 391262. Without objection, MSHA amended its petition to assess a civil penalty to include Citation No. 391262 and Order No. 391264. At all times, U.S. Steel asserted its right to contest the validity of the order of withdrawal in this civil penalty proceeding even though it did not file any contest of that order with the Federal Mine Safety and Health Review Commission (hereinafter Commission).

This matter involves the alleged violation of 30 C.F.R. 75.200, failure to comply with an approved roof-control plan, on March 28 and March 30, 1979, at the Maple Creek No. 2 Mine. The specific violation alleged is that the roof control plan for the area in question permitted mining of entries, crosscuts, rooms, and splits to a 16-foot width. MSHA alleged the mining of entry No. 15 to a width of between 16 feet 8 inches and 17 feet 6 inches. U.S. Steel contended as follows: (1) it is impossible to mine exactly 16 feet; (2) although there were areas measuring more than 16 feet, they were "offsets" at intermittent locations; and (3) it was unnecessary to erect posts to support the roof in areas exceeding 16 feet in width.

ISSUES

Whether U.S. Steel violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. 75.200 provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Section 110(i) of the Act provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. U.S. Steel owns and operates the Maple Creek No. 2 Mine and both U.S. Steel and the mine are subject to the Mine Safety and Health Act of 1977.
2. Inspector Basil Zaycosky is an authorized representative of the Secretary of Labor.
3. Copies of Citation No. 391262 are authentic and may be admitted into evidence as authentic documents.
4. U.S. Steel is a large operator.
5. The assessment of a civil penalty in this proceeding will not adversely affect the operator's ability to remain in business.

SUMMARY OF THE EVIDENCE

On March 28, 1979, Inspector Basil Zaycosky performed a "spot" inspection of U.S. Steel's Maple Creek No. 2 Mine. He was accompanied by Cletus McConville, chairman of the union safety committee. The approved roof-control plan for this area of the mine provided for 16-foot widths of entries and crosscuts. It also provided that "[t]olerances of 12 inches on width openings %y(3)5C may be allowed provided tolerances are at intermittent locations." In entry No. 15 of five flat 15 room section, Inspector Zaycosky and Cletus McConville measured nine places between crosscuts or splits 19 and 22 which were between 16 feet 8 inches and 17 feet 6 inches. Three of the measurements were in excess of 17 feet. The measurements were taken approximately 20 to 30 feet apart. There was no significant sloughing of the ribs in question. Inspector Zaycosky testified that the continuous miner cut the entries too wide. Thereupon, he issued Citation No. 391262 for a violation of the approved roof-control plan.

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Concerning the gravity of the cited violation, Inspector Zaycosky testified that the excessive width of the entry would cause additional stress on the roof and possibly cause the roof to collapse. He stated that the following miners would be exposed to this hazard in the haulageway: motormen, mechanics, and passengers on the portabus. A collapse of the roof could result in injuries ranging from minimal to fatal. However, he conceded that he was unaware of the condition of the roof in the area in question. He did not inspect or test the roof. He was unaware of any roof falls in this section. However, he had observed roof falls in other parts of this mine at distance of 2,000 to 3,000 feet away from the section in question.

Concerning the issue of negligence of the operator, Inspector Zaycosky testified that the excessive width of the entry was readily observable. Since the face of this entry was approximately 500 feet away, he estimated that this condition had been present for one or two weeks.

When he returned to the mine on March 30, 1979, to inspect the abatement of this violation, he found that nine posts had been set between 19 and 20 splits but no other posts had been set. He again made measurements and found three points between 20 and 22 splits in excess of 17 feet. His initial citation on March 28, 1979, required that the violation be abated by 4 p.m. of that date. In his opinion, little had been done to abate the violation. Thereupon, he issued an order of withdrawal pursuant to section 104(b) of the Act. Thereafter, the violation was abated in 1-1/2 hours. He did not believe that a further extension of the time for abatement was warranted because of the lack of good faith compliance by U.S. Steel. He

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reiterated his belief that the posts were necessary to support the excessive width of the roof.

At all relevant times, Ronald Franczyk was the assistant mine foreman of sections at U.S. Steel's Maple Creek No. 2 Mine. He has 7 years of experience in coal mine employment. He was familiar with the roof and the roof-control plan of the mine in question. He described the roof as "excellent." He testified that there had never been any roof falls in 15 room. The roof-control plan for the area in question permitted 16-foot entries with a 12-inch tolerance at intermittent locations. Subsequently, in September 1979, the roof-control plan was amended to permit 20-foot entries in 2 flat, 24 room. That room was approximately 2,000 to 3,000 feet away from the roof in controversy here. The roof in each room was the same. The amended roof-control plan was for a longwall staging entry where the roof was expected to be supported for about 2 years. The room in question in this proceeding was to be mined conventionally with a continuous miner.

On March 28, 1979, Assistant Foreman Franczyk was called to the area in question. He observed chalk marks on the ribs at excessive widths. He measured some of the widths with Inspector Zaycosky. He recalls some widths "around 17 feet" but does not recall any in excess of 17 feet. He believed that the excessive widths were "offsets" caused by the continuous miner avoiding the line brattice on the right side. These would occur when the continuous miner went in at an angle rather than at a straight cut. He expressed his belief that it is impossible to cut entries at exactly 16 feet. Although he did not believe that there was a violation of the roof-control plan because the "offsets" were at intermittent locations, he did not question

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the inspector's measurements. He ordered nine posts to be set on the next shift. Inspector Zaycosky never told him to set posts on 4-foot centers. While he conceded that the posts gave some support to the roof, he did not believe that they were necessary.

On March 30, 1979, Inspector Zaycosky returned to the mine. He advised Mr. Franczyk that U.S. Steel had not properly reduced the excessive widths. At the time the order of withdrawal was issued, approximately 20 posts had been set. Thereafter, another 12 or 13 posts were set. On that date, he also assisted Robert K. Bryan, mine operating engineer, in measuring the widths at 2-foot intervals between splits 21 and 22. Of the 33 measurements taken in that entry, only two were 16 feet or less. Seven of those measurements were in excess of 17 feet. Mr. Bryan also measured the other areas in controversy. In 15 entry between splits 20 and 21, there were no measurements of 16 feet or less.

John Lowther was the assistant mine foreman on the third shift at all relevant times. He testified that on March 29, 1979, he received a note from Ronald Franczyk to measure and post entry 15 between 19 and 22 splits. His crew set 12 posts between 19 and 20 splits on that date. He measured the widths and found a couple in excess of 17 feet. Twelve more posts were set. He described the roof as "exceptionally good." There was not much sloughing at the ribs. He did not see any violation of the roof-control plan. He did not think that posts were really needed.

Robert K. Bryan, mine operating engineer, took measurements of the area in controversy on March 30, 1979. Thereafter, he prepared a map of the area

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(Exh. 0-6). His measurements were made in feet and tenths of a foot. A measurement listed as 17.3 means 17.3 feet not 17 feet 3 inches.

Documentary Exhibits

The pertinent facts concerning the citation, order of withdrawal, approved roof-control plan, amendment to the approved roof-control plan, and maps of the affected area have been previously summarized. U.S. Steel also put in evidence one page of the MSHA Underground Manual which, under the heading "Policy," provides as follows:

Excessive width is defined as twelve inches or more than the width approved in the roof control plan. If it is evident that excessive widths are prevalent and are caused by poor mining practices, a citation shall be issued. The citation should describe the distance that the excessive widths existed.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, briefs, and proposed findings of fact and conclusions of law have been considered. The evidence shows that on March 28, 1979, Inspector Zaycosky made numerous measurements of the width of 15 entry in Maple Creek No. 2 Mine. The approved roof control plan for that entry provided for a 16 foot width with "tolerances of 12 inches %y(3)5C at intermittent locations." The inspector made nine measurements between 16 feet 8 inches and 17 feet 6 inches in the entry between splits 19 and 22. Thereupon, he issued Citation No. 391262 for violation of the approved roof control plan pursuant to 30 C.F.R. 75.200. The citation provided that the condition be abated by 4:00 p.m. on that day. On March 30, 1979, the inspector returned to the area. He testified that only nine posts had been set between

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19 and 20 splits and no posts had been set between 20 and 22 splits. On the other hand, Ronald Franczyk, assistant mine foreman, testified that approximately 20 posts had been set by March 30. John Lowther, another assistant mine foreman, testified that 24 posts had been set by March 30. In any event, Inspector Zaycosky issued an order of withdrawal on March 30, 1979, under section 104(b) for failure to abate the violation. Thereafter, another 12 or 13 posts were set and the order was terminated.

While there was some confusion at the hearing as to whether the civil penalty was assessed on the initial citation or the subsequent order, this question was resolved without objection when MSHA amended its petition to include the order as well as the citation. The first issue to be resolved is whether U.S. Steel violated the Act or regulation. It is clear that a violation of an approved roof control plan is a violation of 30 C.F.R. 75.200. See Ziegler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). I find that the testimony of Inspector Zaycosky concerning measurements of 15 entry in excess of 16 feet was credible and corroborated by U.S. Steel's measurements set forth in its mine map (Ex. 0-6). In the area in controversy, the U.S. Steel mine map shows several areas in 15 Entry in excess of 17 feet in width. Moreover, of the 33 measurements by U.S. Steel in 15 entry between splits 21 and 22 only 1 was less than 16 feet and one was 16 feet. Hence, even under the twelve inch tolerance, allowed by the roof control plan, the tolerances were not "at intermittent locations." Any reliance on the MSHA Underground Manual to excuse the excessive widths is rejected. The manual does not have the force and effect of law and is not controlling. Therefore, I find that U.S. Steel was in violation of its approved roof control plan

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and 30 C.F.R. 75.200 as alleged by MSHA. This is so because MSHA has established that 15 entry measured in excess of 17 feet in several places and the remaining measurements in excess of 16 feet were not at intermittent locations.

U.S. Steel also contends that there was "no basis for issuing an order on March 30, 1979." The order of withdrawal under section 104(b) of the Act was issued because the inspector found that the condition had not been totally abated and the period of time for the abatement should not be extended. There is a dispute between MSHA and U.S. Steel concerning the number of posts which had been set prior to the issuance of the order. Inspector Zaycosky contended that only nine had been set while U.S. Steel alleged that approximately 20 had been set. For the purpose of determining the validity of the order, this conflict will be resolved in favor of U.S. Steel. Nevertheless, after the order was issued additional posts were set in 1-1/2 hours. U.S. Steel failed to establish any valid reason why the condition could not have been abated prior to the issuance of the order. Likewise, it presented no basis for an extension of the time for abatement. Its principal contention in this regard is that the posts were unnecessary. Such an assertion is entitled to little weight in the light of the fact that U.S. Steel was in violation of the approved roof control plan and its witnesses admitted that the posts provided additional support for the roof. Hence, I reject U.S. Steel's challenge to the validity of the order for the reasons that the violation was not totally abated within the time allowed and no valid reason has been established for an extension of the time for abatement.

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Since I have found the citation and order to be valid, the next issue is the amount of the civil penalty to be assessed. In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, the operator's prior history of 276 violations in this mine in the previous two years is noted. Forty-three of those violations were of 30 C.F.R. 75.200. U.S. Steel is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

U.S. Steel was negligent in its failure to discover and correct the violation of the approved roof control plan. Such conduct amounts to ordinary negligence.

Since many miners pass through the entry in question, the number of miners exposed to potential injury is high. However, the uncontroverted evidence of record is that the roof in question was excellent. The inspector did not examine or test the roof. There was no history of roof falls in this section. Subsequent to the citation and order in controversy here, a roof control plan was approved for a nearby section permitting entries up to 20 feet in width. Thus, while a significant number of miners were exposed to potentially severe injuries, the likelihood of such an injury was remote.

The failure of U.S. Steel to abate the citation in time prescribed demonstrates a lack of good-faith compliance. Its belief that it was not in violation of the approved roof control plan is no excuse for failure to abate a citation. Its claim that it abated the citation by setting posts

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where there were marks on the rib is rejected because the inspector gave it proper notice of the area in violation and it had the means available to attain compliance.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$500 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that respondent pay the sum of \$500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. 75.200. It is FURTHER ORDERED that Citation No. 680282 is vacated and the petition to assess a civil penalty thereon is DISMISSED.

James A. Laurensen
Judge