

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

19 JUN 1980

UNITED STATES STEEL CORPORATION, : Contest of Order
Contestant :
v. : Docket No. **WEVA** 79-172-R
: :
SECRETARY OF LABOR, : Order No. 0675872
MINE SAFETY AND HEALTH : May 2, 1979
ADMINISTRATION (**MSHA**), :
Respondent : Gary No. 20 Mine

DECISION

Appearances : Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for Applicant;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Stewart

Contestant United States Steel Corporation filed a timely contest of Order No. 675872, pursuant to provisions of section 105(d)1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). **MSHA** and the

1/ Section 105(d) of the Act reads as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such Section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

United Mine Workers of America (UMWA) subsequently filed answers denying the allegations set forth in the contest of order. MSHA and United States Steel Corporation appeared and participated in the hearing in this matter which was held on October 16, 1979, in Charleston, West Virginia. On February 11, 1980, these parties filed posthearing briefs. Proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

Inspector James Christian issued Citation No. 675868 pursuant to section 104(a) of the Act on May 1, 1979. The citation, which alleged a violation of 30 C.F.R. 8 75.1722, described the pertinent condition or practice as follows:

The guards installed on the Grapevine Mains belt conveyor tail pulley and the 3rd Right Grapevine Mains 002 Section belt conveyor drive and tail pulley did not extend a distance sufficient to prevent persons from reaching behind the guards and becoming caught in between the belt and pullies and the existing guards were not secured to the equipment.

On the following day, May 2, 1979, the inspector issued Order of Withdrawal No. 675872, pursuant to section 104(b) 2/ of the Act: He alleged the following therein: "The belt conveyor drive and tail pulleys were not guarded as required by Citation No. 0675868 issued 05-01-79 at 1015 hrs. after the expiration of time as originally fixed."

The primary issue presented is whether Order of Withdrawal No. 675872 was properly issued under section 104(b) of the Act.

In Citation No. 675868, the inspector noted three locations at which he observed alleged violations of section 75.1722. One of these locations was the tail pulley of the Grapevine Mains belt conveyor. The other locations were along the 3rd right conveyor belts at its belt drive and tail pulley.

2/ Section 104(b) of the Act reads as follows:

"(b) 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) 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), 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."

Grapevine Mains Belt Conveyor

With regard to the Grapevine Mains tail pulley, the testimony of the witnesses for Petitioner and Respondent is somewhat at odds. Inspector Christian testified that the guard at the back of the Grapevine Mains was unsecured and leaning against the framework of the tailpulley at an angle. The side of the Grapevine Mains conveyor nearest the 3rd right conveyor was at least partially guarded.- The cyclone fencing on the 3rd right provided some protection but it had been pulled back in this area, thereby exposing that side of the tail pulley. The side of the Grapevine Mains conveyor farthest from the 3rd right conveyor was unguarded.

Robert Hatfield, Respondent's mine inspector for the No. 20 Mine, testified that the guarding on the back of the Grapevine Mains tailpiece was comprised of three or four strips of metal which were each 5 inches wide. The largest opening which he found in this portion of the guarding was a 1-1/2-inch gap at the top of the guard. He stated, however, that the guards on the sides of this tailpiece were loose, or not securely fastened. The guards on the sides were made of expansion metal. One was secured with a single bolt; the other was lying loose against the tailpiece.

The inspector was of the opinion that the guards on the tailpiece did not extend a sufficient distance to **keep a** person from reaching behind the guards and becoming caught between belt and pulley. Robert Hatfield testified that if a person was "intent on getting into it to injure (himself)," he could get his hand between the guarding and moving machinery on the side secured with a single bolt. He testified as to the other side of the **tail-** piece that "there's no way you could get into it on the side, it has to be from the back."

3rd Right Belt Conveyor

The drive pulley on the 3rd right conveyor was partially guarded by a cyclone fence; however, a gap existed in this fence adjacent to the pulley, Estimations of the distance from fence to pulley ranged from 1 to 3 feet. The inspector believed that a person could reach through the opening and become caught between belt and pulley. His description of the gap was essentially a vertical opening in the fencing ranging in width from one to more than 4 inches. The opening was 4 to **4-1/2** inches at the pulley.

Dallas Runyon, Respondent's mine foreman, testified that the hole in the fence at the drive pulley existed to allow passage of a power conductor to the belt motor. He admitted that a person could reach through the fence and contact the roller.

Finally, the inspector was concerned with the absence of guarding at the tailpiece of the 3rd right conveyor. On May 1, 1979, the feeder was discharging coal onto the tailpulley, thereby guarding the top of the belt. However, the sides, back, and lower bottom of the tail pulley were unguarded.

The inspector believed that a person could become caught between belt and pulley. The exposed area was approximately 1-1/2 by 3 feet. In order to gain access, an employee would have to be on hands and knees.

Violation

Section 75.1722 reads as follows:

(a) Gears; sprockets; chains; drive, head, tail, and **takeup** pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

(c) Except when testing the machinery, guards shall be securely in place while machinery is being operated,

The guarding at the Grapevine Mains tailpiece was in violation of all three paragraphs of the standard. Even though the testimony of the inspector and that of Mr. Hatfield conflicted in detail, the testimony of each taken by itself would establish that the guarding was not sufficient to prevent injurious contact with the tail pulley. It is clear that the guarding at the tailpiece did not extend a sufficient distance to prevent a person from reaching behind it and becoming caught. Moreover, it was established that the conveyor had been in operation while certain of the guards were not securely in place. The conveyor drive pulley and the tail pulley on the 3rd right conveyor were in violation of the mandatory standard in that portions of each were unguarded or inadequately guarded. Although confusion exists as to the precise configuration of the hole in the fence at the belt drive, both Dallas Runyon and the inspector testified that contact could be made with the adjacent pulley. With regard to the tailpiece of the 3rd right section, the testimony of the inspector is accepted. When the feeder was in place, the belt and tail pulley could be contacted at the sides and bottom.

The record establishes a violation of section 75.1722. Citation No, 675868 was properly issued.

Order of Withdrawal

Section 104(b) of the Act requires that an inspector shall issue an order when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. The test as to whether a 104(b) order was properly issued was enunciated by the Board of

Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). It was stated therein that "the inspector's determination to issue a section 104(b) order must be based on facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed." The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

Citation No. 675868 was issued at 10:15 a.m. on May 1, 1979. The inspector specified that the condition was to be corrected by 8 a.m. on May 2, 1979. The inspector reentered the area of the Grapevine Mains and 3rd right conveyors at approximately 12 noon on May 2, 1979. He observed the condition as previously cited, and issued 104(b) Order No. 675872. The parties stipulated that Order No. 675872 caused the shutdown of the entire section until the order was terminated. At the hearing, the inspector testified that he issued the closure order because Contestant had ample opportunity to correct the condition but failed to do so.

The order was orally modified at 12:30 p.m. to allow use of the Grapevine Mains conveyor. After this modification, mine management decided to remove the 3rd right conveyor from service. The inspector was notified of management's decision after he issued Order No. 675872 and the subsequent modification, but before he put them into writing. He put the orders into writing after proceeding to the surface. Contestant spent 7 hours dismantling the 3rd right conveyor. The inspector terminated the entire order on the following morning, May 3, at 9:30 a.m.

When the inspector arrived in the affected area on May 2, the following problems remained:

(a) Guards had been installed on the Grapevine Mains conveyor tailpiece but openings still existed at the sides of the tailpiece through which a person could contact and become caught in belt and pulley. The installed guards did not extend far enough to prevent the possibility of this occurrence.

(b) The gap still existed in the cyclone fence at the belt drive of the 3rd right conveyor. To abate the condition, Contestant need only have wired the fence together.

(c) Some guarding had been installed on the 3rd right conveyor tailpiece but there was still no guarding on the sides. A person could still reach into and become caught in between the belt and the pulley.

Dallas Runyon testified that work had been done on the guarding throughout the second shift on May 1, and completed during the early part of the first shift on May 2. He also testified that the guarding on the Grapevine Mains tailpiece had been installed and removed on a number of occasions because of two separate malfunctions, the second of which occurred on the morning of May 2.

It is clear that the length of time set by the inspector for abatement was adequate. The Grapevine Mains tailpiece could have been sufficiently guarded within the time set. The condition was abated with respect to this tailpiece 20 minutes after the order was issued. The gap in the fence by the belt drive needed only to be wired together. Finally, Contestant had installed a guard at the 3rd right conveyor tailpiece, but left an opening of approximately 18 inches. Adequate guarding clearly could have been installed by 8 **a.m.**, the next day, the time set by the inspector for abatement.

Given the facts with which the inspector was confronted at the time he issued Order No, **685872**, extension of the time set for abatement would have amounted to condonation of Contestant's failure to abate. The inspector arrived in the affected area **3** hours after the time set for abatement had expired, yet he observed substantially the same conditions which gave rise to Citation No, **675868**. Some effort to abate had been made, but the effort was inadequate. No extenuating circumstances were communicated to the inspector which would have warranted the failure on the part of the Contestant to abate the violation. It was not demonstrated that the two malfunctions were sufficiently serious to have excused this failure. Moreover, there is no indication on the record that the malfunctions had any relationship to Contestant's failure to comply with the mandatory standard as regards the hole in the cyclone fence at the 3rd right belt drive or the gaps which existed at the 3rd right tailpiece. It may have been improbable that an accident would have occurred due to Contestant's failure to adequately guard parts of the conveyors but it cannot be said that no safety hazard was presented. In view of the adequacy of the time originally set for abatement, the existence of some safety hazard, and the absence of extenuating circumstances, it is found that the inspector acted reasonably in refusing to extend the time for abatement and in issuing Order No. 675872,

Contestant also asserted that the inspector abused his discretion in failing to terminate Order No, 675872 when he learned of the operator's plan to abate the order by physically removing the 3rd right conveyor belt. It was reasoned that the operator had eliminated the hazard which the standard was intended to prevent because it had shut down the conveyor and put in motion its efforts to remove the conveyor from service.

The operator did not initiate efforts to abate the order with respect to the 3rd right conveyor prior to the time the inspector left its immediate vicinity. The inspector was first notified that the operator would remove the conveyor to abate the violation after he had proceeded to an area one break from the conveyor. Dallas Runyon proposed its removal in response to the inspector's requirement that an area one break down from the tailpiece be cleaned to eliminate a slipping hazard.

The actual dismantling of the conveyor began only after the inspector left the area to proceed **out** of the mine. The record does not contain more than a general indication of the relevant sequence of events. Contestant has

not established that the condition had been abated before the inspector proceeded out of the mine; nor did Contestant establish the time at which abatement actually occurred. In this instance, the inspector was not unreasonable in refusing to terminate the order, notwithstanding his knowledge of Contestant's intent to abate the violation by removing the conveyor.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.



Forrest E. Stewart
Administrative Law Judge

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