FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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25 JUN 1980

UNITED STATES STEEL CORPORATION, Contestant	:	Contest of Citation and Order	
v.	:		
	:	Docket Nos.	Citation or Order No. Date
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	WEVA 79-343-R	655331 7/12/79
	:	WEVA 80-81-R	655316 10/2/79
	:	Gary District No. 2 Mine	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket No. WEVA 80-290	
v.	:	Assessment Control No. 46-01419-03026 V	
UNITED STATES STEEL CORPORATION, Respondent	:	Gary District No. 2 Mine	

DECISION

Appearances: Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Contestant;
David Street, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order dated February 28, 1980, as amended April 7, 1980, a hearing was held with respect to the issues raised in Docket No. WEVA 79-343-R on April 15, 1980, in Charleston, West Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Docket No. WEVA 79-343-R

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 164-174):

> The proceeding in Docket No. WEVA 79-343-R is based on a Notice of Contest of Citation No. 655331, and that Notice of Contest was filed on August 13, 1979.

I shall make a few findings of fact in the numbered paragraphs set forth below:

1. On July 12, 1979, Inspector Robbins traveled to the No. 2 Mine of United States Steel Corporation. He first went to the 011 Section and observed that there were some wide areas in the shuttle-car roadway. He made four measurements and found that the measurements ran from 17 feet at the narrowest place to 21 feet at the widest place. He thereupon wrote Citation No. 655331 citing the operator for failure to follow his roof-control plan.

2. On page 21 of the roof-control plan, there is a provision which states, "In areas where the width of the openings exceeds 18 feet, at least one row of posts shall be installed on either side on not more than 5-foot centers lengthwise, limiting the width of the roadways to 16 feet for one full pillar outby the pillar being mined."

3. The inspector testified that he felt the company was aware of the provision in its roof-control plan, and that it had failed to follow this provision; therefore, he felt it was an unwarrantable failure on the part of the company to comply with its roof-control plan. The inspector allowed an extremely long time for termination of the citation because he was scheduled to go for some training, and he knew that a considerable amount of time would elapse before he.would be able to return to the mine to terminate the citation; therefore, he gave the company until August 6, 1979, within which to abate a citation which was written on July 12, 1979.

The company actually had installed the posts almost immediately after the inspector wrote his citation. The actual termination of the citation was written on August 7, 1979, and was received in evidence as Exhibit M-5. The company did demonstrate a good faith effort to achieve rapid compliance. The extremely long time that was given for compliance was related to the inspector's obligations rather than to the period of time it took to comply with the citation.

4. The inspector conceded during his testimony that MSHA has a specialist by the name of Si Gaspersich who primarily assists or confers with operators concerning the occurrence of mountain bumps in their mines. Inspector Robbins indicated that he had discussed the question with Mr. Gaspersich about the occurrence of mountain bumps in the No. 2 Mine, but no one advised the inspector that the roof-control plan should be waived to the extent that it might be advisable not to install posts in the roadway in a mine in which mountain bumps occur.

5. The company's witnesses have testified that they had an understanding with Mr. Gaspersich that it was unnecessary to install posts in a roadway to narrow it down to 16 feet because to install posts in a mine in which mountain bumps may occur increases the hazard to the miners by converting the posts into projectiles in case a mountain bump should occur. In general, a mountain bump has been described as a sudden outburst of coal from the ribs when pressures from the roof become so great that the coal is suddenly forced from the rib and into the roadway or entry.

I think that the above paragraphs are sufficient in the way of basic findings of fact. We have here under review a citation written under section 104(d)(1) of the 1977 Act. In order to support a citation under that section of the Act, an inspector must first of all determine that no imminent danger exists; and I am sure the testimony indicates that there was no imminent danger in the roadway.

If the inspector then finds there is no imminent danger, he is, of course, supposed to find that a violation occurred. On that question, I do not think there is any doubt but that a violation did occur because an operator is required to submit and follow a roof-control plan under section 75.200 of the regulations. And it is undisputed that the roof-control plan did require the installation of posts to narrow the entry down to 16 feet if areas existed which were 18 feet or more in width.

Testimony was given by Mr. Dalton, who was the section foreman on the evening shift from 4 p.m. to midnight on the shift preceding the day shift on which the inspector wrote Citation No. 655331. Mr. Dalton testified that he had stepped off the width of the roadway on his shift and that he did not find any areas that were in excess of 18 feet. I believe that I will have to take the inspector's statement that he measured these areas and found them to be in excess of 18 feet, because I think Mr. Dalton could easily have made a mistake of a couple of feet in stepping off an entry; and I do not think that I can accept an estimate as compared with an actual measurement, especially when the mine foreman, Mr. Blevins, agreed that the inspector had measured an area which was 21 feet wide at the most outby area of this roadway.

Now, the next step the inspector must take is that he must find the failure of the company to comply with this provision in the roof-control plan on page 21 is an unwarrantable failure. The former Board of Mine Operations Appeals, after having been reversed for some of its holdings on the strictness of the requirements for making a determination of

unwarrantable failure in International Union v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied, 429 U.S. 858, held in Alabama By-Products Corporation, 7 IBMA 85 (1976), that the finding of significant and substantial in an unwarrantable failure notice can be made so long as the inspector finds that something other than a technical violation has occurred. The Board said that the violation did not have to involve even serious bodily harm, much less the threat of death.

So, in the situation that prevailed at the time Citation No. 655331 was issued, under the Board's rationale in the Alabama By-Products case, the violation could be found to be significant and substantial because the inspector said the ribs showed there was weight being applied to them by the roof and that he felt in such circumstances that the roadway could not be considered safe until the supports had been installed. The Alabama By-Products case primarily considered the conditions under which a violation may be found to be significant and substantial.

The former Board in Zeigler Coal Company, 7 IBMA 280 (1977) at pages 295 to 296, stated that an unwarrantable failure can be defined as a condition or practice occurring which the operator knew or should have known existed and which it failed to correct because of a lack of due diligence or because of indifference or lack of reasonable care. The Board stated in that same decision that the inspector's judgment in this regard must be based on a thorough investigation and must be reasonable.

The roof-control plan which was in effect at the time the citation was written and which is Exhibit M-4 in this proceeding, provides that changes shall not be made in the mining system until the plan has been revised accordingly, so I am confronted with the fact that Mr. Dalton, who is the section foreman on the evening shift, stated that he knew that provision about the narrowing of the haulageway to 16 feet in areas in excess of 18 feet when encountered; and I am confronted with the testimony of Mr. Blevins, the mine foreman, who said he had not instructed the foremen or the miners to ignore the provision of the roof-control plan so that they could omit the installation of posts if the area were greater than 18 feet.

So, there is no doubt the company knew what the plan required; the company's own evidence shows that. Still these particular posts had not been installed, and Mr. Blevins stated that in his opinion the 21-foot area did not really look 21 feet wide and that he thought Inspector Robbins had

been pretty strict in measuring this area at the widest places and coming up with areas that were in excess of 18 feet, because in his opinion the roadway just did not look 18 feet wide.

Now, I think the company has presented some very appealing testimony which shows that Mr. Gaspersich had told the company that it was, in his opinion, hazardous to install these posts, particularly since the company rarely had an area wide enough to require the posts. As far as that goes, the inspector himself said that in periods prior to July 12, 1979, he had not seen any areas which appeared to be 18 feet or wider and therefore this was the first time he had encountered the failure to install the posts.

The courts have indicated that an inspector's findings should not be sustained only if it can be found that the inspector clearly abused his discretion. I cannot conclude, in *view* of the fact the roof-control plan does contain a provision requiring the roadway to be narrowed down to 16 feet in case there are areas that are 18 feet or more in width, that it is an abuse of discretion on his part to find it was unwarrantable failure when one takes into consideration the rather mild situations that have to prevail before an unwarrantable failure can be found to exist.

Now, counsel for contestant has stressed the fact that the inspector was actually requiring them to put up these posts in a shuttle-car runway which would not have been used except for about 15 or 20 minutes to mine a final pushout in the pillar which was then being recovered. The fact remains that the shuttle car runway would have been used at least for that period of time; and just as the operator cannot be sure when a mountain bump will occur, neither can the inspector be sure when a piece of roof will fall.

So, without an amendment to the roof-control plan permitting the company to have wider areas than 18 feet without installing posts, I cannot find that the inspector abused his discretion in this instance.

I perhaps should also discuss the fact that there was identified as Exhibit M-6 in this proceeding a roof-control plan which was in effect in August 1976; under that plan the company had some provisions which enabled it to take into consideration mountain bumps, but those provisions were removed from the plan in 1978, after a fatality occurred in which a miner was killed after being struck by a piece of rock which fell from the rib. Also, I should note the

present plan was revised so that those provisions no longer are in the plan and were not in the plan on the day the citation was issued.

There was testimony by the company's chief mine inspector, Mr. Dickinson, to the effect that within the last 6 weeks or month, a provision has been submitted to MSHA under which the roof-control plan would be amended to permit the company to have a roadway 20 feet wide before it is necessary to install posts to narrow the entry down to 18 feet, but that particular amendment has not been put in writing yet and, of course, was not a part of the roof-control plan on July 12, 1979, when Citation No. 655331 was written.

For the reasons given above, I find that Citation No. 655331 was properly written under section 104(d)(1) of the Act and should be affirmed, as hereinafter ordered.

Docket No. WEVA 80-290

The order providing for hearing with respect to the Notice of Contest filed in Docket No. WEVA 79-343-R consolidated all civil penalty issues which might subsequently be raised if the Secretary of Labor should file a petition seeking to have a civil penalty assessed for the violation of section 75.200 which had been alleged in Citation No. 655331 which was the subject of the Notice of Contest filed in Docket No. WEVA 79-343-R. The Secretary did file such a petition in Docket No. WEVA 80-290 on April 24, 1980, and a decision with respect to that petition is set forth below, based on the findings which were made above in my decision in Docket No. WEVA 79-343-R.

The petition in Docket No. WEVA 80-290 seeks assessment of a civil penalty for the violation of section 75.200 alleged in Citation No. 655331. The petition raises the usual issues which have to be considered in civil penalty cases, that is, whether a violation of section 75.200 occurred in this instance and, if so, what penalty should be assessed based on the six criteria set forth in section 110(i) of the Act. I have already found, in considering the Notice of Contest filed in Docket No. WEVA 79-343-R that a violation of section 75.200 occurred when United States Steel Corporation failed to install timbers in a roadway which was more than 18 feet in width. Therefore, the six criteria will now be considered in assessing an appropriate penalty.

It was stipulated at the hearing that U.S. Steel is a large operator and that payment of civil penalties will not cause it to discontinue in business. There is nothing in the record to show that respondent has such a significant history of previous violations as to warrant an increase in the penalty under the criterion of history of previous violations.

I found above in my decision under Docket No. WEVA 79-343-R that respondent demonstrated a good faith effort to achieve rapid compliance after the

violation was cited. That mitigating factor will be taken into consideration in assessing the penalty.

The violation was moderately serious. The roadway had been driven wider than 18 feet and posts had not been erected to narrow the roadway to a width of 16 feet as required by the roof-control plan then in effect. The inspector did not find any roof conditions which made it appear that the roof was likely to fall and the roadway would have been used for only a period of 15 or 20 minutes because the roadway was needed for the purpose of hauling coal from a pushout which was being mined at the time the violation was cited. Moreover, the inspector said that respondent rarely exceeded the 18-foot width and that the roadways were normally not wide enough to require installation of posts. In such circumstances, a relatively nominal penalty is warranted under the criterion of gravity.

The facts considered in my decision in Docket No. WEVA 79-343-R above support a finding that the violation was associated with a low degree of negligence because respondent's roof-control plan which had been in effect shortly before the violation of section 75.200 was observed permitted respondent to omit the installation of timbers to narrow roadways because of the occurrence of bumps in the mine here involved. Bumps occur when a large section of the rib pops off with sufficient force to convert posts near the ribs into projectiles which constitute hazards as great as a roof fall might be.

The evidence shows that respondent is currently seeking to have its roof-control plan amended so as to allow it to omit installation of posts in roadways where bumps are prevalent. In such circumstances, a nominal penalty under the criterion of negligence is warranted.

A penalty of $50 is appropriate under the six criteria of the size of respondent's business, the fact that payment of penalties will not cause it to discontinue in business, the fact that respondent demonstrated a good faith effort to achieve rapid compliance, the moderate gravity of the violation, the low degree of negligence involved, and respondent's history of previous violations.

Docket No. WEVA 80-81-R

A hearing with respect to the Notice of Contest in Docket No. WEVA 80-81-R was held in Charleston, West Virginia, on April 16, 1980, under section 105(d) of the Act. Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 154-163):

> Counsel for United States Steel Corporation filed on November 5, 1979, in Docket No. WEVA 80-81-R a Notice of Contest challenging Order No. 655316, which was issued on October 2, 1979, at its Gary District No. 2 Mine.

The following findings of fact provide the basis for my decision in this proceeding:

1. Two coal mine inspectors, namely Donald C. Simpkins and Tommy Robbins, went to U.S. Steel No. 2 Mine on October 2, 1979, and as they approached the No. 011 Section, they inspected the track haulageway. Inspector Simpkins issued Citation No. 656018 in which he alleged there was a violation of section 75.202 because loose, unsupported ribs existed at three locations along the track entry.

2. After the inspectors had continued on into the 011 Section here involved, Inspector Robbins became concerned about some loose ribs which he observed inby the loading point in a shuttle car haulageway. After appraising the situation, the two inspectors jointly issued Order No. 655316 under section 104(d)(1) of the Act.

That order cites the following condition or practice, "[1 loose, unsupported ribs were present on the left and right side of the active shuttle-car roadway, beginning approximately 68 feet inby the shuttle-car dumping point and extending inby for a distance of 32 feet on the right side and beginning approximately 50 feet inby the dumping point and extending inby for a distance of 14 feet on the left side."

3. The shuttle-car haulageway is a main travelway for shuttle cars and the inspectors also saw some men cleaning around the dumping point outby the area of the 32 feet and 14 feet, respectively, of loose ribs that were cited in their order.

4. Respondent demonstrated a good faith effort to achieve rapid compliance because the order was written at 9:45 a.m. and the inspector terminated the order at 11:15 a.m. It was testified by one of the contestant's witnesses that the actual abatement process occupied a period of from 30 to 45 minutes. The actual work taken to abate the violation of section 75.202 which was cited in the order, was the setting of five posts on the left side of the shuttle-car roadway. It was unnecessary to take down any of the loose ribs on the left side.

5. On the right side, one post was set at the corner on the most inby portion of the 32-foot area, some coal was pried down about the middle of the 32-foot area, and a little coal was taken down toward the outby part of the 32-foot area. A portion of loose roof on the rib at the corner had to be taken down with a scoop, because it could not be pried down with a bar, in view of the fact that there was a rib bolt holding that section of rib into the wall.

6. Exhibit D shows that there were rib bolts and boards spaced along the entire rib on an average of 6 feet apart. And the mine foreman, Mr. Grygiel, testified that the roof was in good condition and that the roof had been roof bolted on 4-foot centers or less.

7. The angle of repose on the 32-foot right side was toward the roof; that is, the rib was farther into the roadway at the bottom of the rib than it was at the top. On the 14-foot left side of the area cited in the order, the angle of.repose was nearly vertical or perpendicular to the mine floor, but none of the rib was loose enough to require any of it to be taken down in order for the inspectors to terminate the order.

8. Section 75.202 to the extent here pertinent, provides "[l]oose roof and overhanging Gr loose faces and ribs shall be taken down or supported." A violation of section 75.202 was proven by both the contestant's evidence and MSHA's evidence because some of the coal was loose on the right side and was taken down, even though the quantity only amounted to from one-half to three-quarters of a ton.

9. For the civil penalty aspect of this case, I would like to note some stipulations entered into by the parties which will become pertinent when I receive the file containing the Petitibn for Assessment of Civil Penalty for this alleged violation of section 75.202. The first stipulation was that United States Steel Corporation is a large operator. The second stipulation was that United States Steel Corporation is subject to the jurisdiction of the Commission and the 1977 Act. The third stipulation was that payment of penalties would not affect the operator's ability to continue in business. The nine parapgraphs above constitute the findings of fact on which my decision will primarily be based.

In International Union, UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied, 429 U.S. 858, the court held that when a notice or citation is issued under section 104(c)(1) of the 1969 Act, which reads the same as section 104(d)(1) of the 1977 Act, there must be a finding that there was a violation which would significantly and substantially contribute to the cause and effect of a mine safety and health hazard, and be an unwarrantable failure violation. The court held, however, the equivalent that an order may be issued under section 104(c)(1) or section 104(d)(1) of the 1977 Act even if no finding as to gravity is made. In short, the court held that it is sufficient for the issuance of a 104(d)(l) order if the inspector only finds that there was an unwarrantable failure violation.

In this particular proceeding, therefore, since we are dealing with an order issued under section 104(d)(1) of the Act, we do not have to give any great consideration to the question of how grave this particular violation was. From the civil penalty aspect of the case, however, it might be sufficient or adequate or relevant for me to point out that the preponderance of the evidence in this case shows that this was not a serious violation. There was very little rib surface which was loose enough to require it to be taken down and there was little likelihood that any of these ribs would have fallen with sufficient force to cause any serious injury. So I would find that the violation was moderately serious.

Now we get to the question of whether the order was unwarrantable, that is, whether you could find that there was unwarrantable failure on the part of the operator in failing to take care of this problem before the inspectors observed it.

The former Board of Mine Operations Appeals, after being reversed on the holding about significant and substantial in the Kleppe case, which I just cited, stated in Zeigler Coal Company, 7 IBMA 280 (1977), at pages 295 and 296, that an unwarrantable failure to comply exists if the operator involved has failed to abate the condition or practices constituting the violation, and these conditions are such that the operator knew or should have known that they existed, or that the operator failed to abate them because of a lack of due diligence or because of indifference or lack of reasonable care.

We have the testimony in this proceeding of Inspectors Robbins and Simpkins and the testimony of two of the company's witnesses, one being a mine foreman and the other being an assistant foreman. A determination has to be made as to whether they knew or should have known, or whether their section foremen or preshift examiners, should have known about these loose ribs and should have done something about them before they were cited by the inspectors.

Inspector Simpkins' recollection of the facts was not very vivid because a lot of time had passed since this order was issued and because he had apparently not reviewed his notes before coming here today. He was, in fact, called as a witness by me instead of the Government. Consequently, I do not think his testimony is particularly useful in making a determination about the operator's knowledge or lack of knowledge in this area. So for all practical purposes, I have to balance the testimony of two mine officials with that of Inspector Robbins.

I was very much impressed with Mr. Grygiel's testimony and with the amount of effort he had made to preserve a record of the conditions that he found on October 2. I find that his knowledge of the area and what was done was much more full and complete than that of Inspector Robbins.

There must be a time in one of these cases when the company's testimony preponderates over that of the inspector, and I think this case is one in which a finding of that nature is justified. Exhibit D, which was prepared by Mr. Grygiel in great care and detail, shows that while there may have been some cracks in the areas cited in the inspector's order, Mr. Grygiel did not consider them sufficient to have attracted a preshift examiner's attention or section foreman's attention. Mr. Grygiel felt and, in fact, both of the contestant's witnesses felt that the areas outby those cited in the order looked the same as the actual areas cited in the order and both witnesses said that they would not have considered any of this area inby the loading point needed any special work.

The roof-control plan, which is Exhibit M-4 in this proceeding contains in Paragraph 18 a provision that rib bolts or posts shall be installed when the mining height exceeds 6 feet. According to Mr. Grygiel, every area in the mine exceeds 6 feet, so it is a requirement in this mine that rib supports be installed.

But that Paragraph 18 provides, "When rib supports have become ineffective because of weight or pressure conditions, the supports need not be replaced." The provision goes on to say "[h]owever, loose ribs or brows shall be taken down or supported according to federal and state mining laws."

Consequently , there is no doubt but that the roof-control plan would require contestant to take down loose ribs, if they are observed, but the question is whether contestant's employees should have observed these particular loose ribs and whether it was so obvious that they should have observed them that the inspector properly considered contestant's failure to take down these loose areas to be an unwarrantable failure.

After listening to the testimony of the company's witnesses and that of Inspector Robbins, I am of the opinion that these particular loose ribs were simply not so obvious and dangerous that a preshift examiner would have picked them out as something requiring special attention, or that a section foreman would have done so either.

I am extremely reluctant to find against an inspector. I have done it on very few occasions. I am sure he acted in good faith in this instance. It is certainly easier to review somebody else's actions in the calm and unhurried atmosphere of a hearing room than it is to make determinations pertaining to the difficult task of inspecting mines and making decisions about health and safety while examining an underground mine.

Nevertheless, I think in this instance, I shall have to find that this particular violation was not something which should have been considered an unwarrantable failure under the cases which I have cited above.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. WEVA 79-343-R is denied and Citation No. 655331 dated July 12, 1979, is affirmed.

(B) Respondent in Docket No. WEVA 80-290 shall, within 30 days from the date of this decision, pay a civil penalty of $50.00 for the violation of section 75.200 alleged in Citation No. 655331 dated July 12, 1979.

(C) The Notice of Contest filed in Docket No. WEVA 80-81-R is granted and Order No. 655316 dated October 2, 1979, is vacated.

(D) The civil penalty issues consolidated in this proceeding with respect to Order No. 655316 are severed from this decision and will be decided in a separate decision when I receive the file in which the Secretary seeks assessment of a penalty for the violation of section 75.202 alleged in Order No. 655316.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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