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

UNITED STATES STEEL CORPORATION, CONTESTANT	Contest of Order
v.	Docket No. PENN 81-9-R
SECRETARY OF LABOR, RESPONDENT	Robena No. 1 Mine
SECRETARY OF LABOR, PETITIONER	Civil Penalty Proceeding
v.	Docket No. PENN 81-52 A.C. No. 36-00909-03042V
UNITED STATES STEEL CORPORATION, RESPONDENT	Robena No. 1 Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor; Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for United States Steel Corporation.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

On October 7, 1980, United States Steel Corporation (hereinafter U.S. Steel) filed a notice of contest of an order of withdrawal issued on September 8, 1980, under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(d)(1) (hereinafter the Act). On January 24, 1981, the Secretary filed a petition for assessment of civil penalty with respect to this same order of withdrawal. Pursuant to the Secretary's motion filed February 10, 1981, these two proceedings were consolidated.

Upon completion of the prehearing requirements, a hearing was held in Pittsburgh, Pennsylvania, on June 22, 1981. The following witnesses testified on behalf of U.S. Steel: Louis E. Tiberi, Thomas Stavischeck and Paul M. Kovell, Jr. Orlando J. Abbadini testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). Both parties submitted posthearing briefs.

ISSUES

1. Whether the order was properly issued.

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

APPLICABLE LAW

Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), provides in pertinent part as follows:

> If, upon 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 significantly 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.

75.200 Roof control programs and plans.

[Statutory Provisions]

> 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.

STIPULATIONS

The parties stipulated the following:

1. U. S. Steel owns and operates the Robena Number 1 Mine.

2. U. S. Steel is involved in the extraction of raw coal from its natural deposits in its operations at the Robena Number 1 Mine.

3. Inspector Orlando J. Abbadini was at all times relevant hereto, an authorized representative of the Secretary of Labor.

4. U. S. Steel and the Robena Number 1 Mine, are subject to the Act.

5. The Administrative Law Judge has jurisdiction over these proceedings.

6. The subject order and modification thereof, were properly served by a duly authorized representative of the Secretary of Labor, upon an agent of U. S. Steel, at the dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or the relevancy asserted therein.

7. The assessment of an appropriate civil penalty in this proceeding will not affect U. S. Steel's ability to continue in business.

8. The appropriateness of the penalty, if any, to the coal operators business, should be determined based on the fact that in 1979, the company had an annual tonnage of 15,080,435 production tons and the Robena Number 1 Mine, had an annual tonnage of 671,131 production tons.

9. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in obtaining abatement.

10. U.S. Steel is not challenging the inspector's determination that the violation was significant and substantial.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. U. S. Steel Corporation owns and operates the Robena Number 1 Mine.

2. Inspector Orlando J. Abbadini, who issued the subject withdrawal order, was a duly authorized representative of the Secretary of Labor.

3. Inspector Abbadini is qualified as an expert in the area of mine safety and health.

4. On August 26, 1980, Inspector Abbadini, as part of a regular triple A inspection, observed the conditions of the roof at Numbers 19 and 20 crosscuts. Upon observing slips and looseness in the roof in that area, he informed Mine Foreman Stavischeck of the conditions. Mr. Stavischeck indicated that he was aware of the problem and would take care of it. No citations or orders were issued with respect to the roof conditions on that day.

5. Assistant Mine Foreman Stavischeck was informed of the roof conditions in Nos. 19 and 20 crosscuts by Inspector Abbadini on August 26, 1980.

6. On September 8, 1980, Inspector Abbadini continued to perform a regular inspection of Robena No. 1 Mine and before going underground was told by Mel Tishman, the Motorman, that conditions at number 19 crosscut had not improved.

7. Inspector Abbadini did not inform management of Mel the Motorman's comments about the roof conditions.

8. On September 8, 1980, Inspector Abbadini asked Assistant Mine Foreman Paul Kovell whether the roof conditions in Nos. 19 and 20 crosscuts had been taken care of and he replied that they had not been corrected.

9. On September 8, 1980, Inspector Abbadini, accompanied by Paul Kovell, Louis E. Tiberi, General Assistant Mine Foreman, Don Albani, and the UMWA walkaround, returned to numbers 19 and 20 crosscuts and through the visual and sound methods of testing, determined that the roof required immediate attention.

10. The condition of the roof in the cited area had deteriorated between August 26, 1980 and September 8, 1980, to the point where the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.

11. On September 8, 1980, at 12:00 p.m., the inspector issued Order No. 841473 under section 104(d) of the Act for a violation of the operator's approved roof control plan. The order alleged the following:

> The roof along No. 4 entry at No. 19 crosscut switch where empties and loads are stored and at No. 20 crosscut, an active track haulage for 3 Main 6-1/2 (018) section was loose, drummy, broken, potted cavities, with slips running across. The roof had fallen around several roof bolts, rendering the bolts ineffective. Additional supports had not been installed. This track haulage was used for mantrip travel and coal haulage. Assistant Mine Foreman Lou Tiberi and General Assistant Tom Stavischeck knew of this reported condition.

12. The conditions were as stated in withdrawal Order No. 841473.

13. The operator knew or should have known of the conditions described in withdrawal Order No. 841473.

14. On July 29, 1980, MSHA had issued Citation No. 0837858 to the operator pursuant to section 104(d) of the Act. No complete inspection occurred between the date that citation was issued and the date the inspector found the instant violation of mandatory health and safety standard 30 C.F.R. 75.200.

15. The failure to abate the conditions prior to September 8, 1980, was due to the unwarrantable failure of the operator to comply with mandatory health and safety standard 30 C.F.R. 75.200.

16. The conditions described in withdrawal Order No. 841473 were abated in a timely fashion by the installation of four cribs and supplemental 10 foot conventional bolts.

17. On September 8, 1980, the order was terminated and at 12:45 p.m. withdrawal Order No. 841473 was modified to delete reference to termination due date and time.

18. The operator demonstrated good faith in abating the condition.

19. Robena No. 1 Mine is a large coal mine and U.S. Steel is a large operator.

20. The assessment of an appropriate civil penalty in this proceeding will not affect U.S. Steel's ability to continue in business.

Violation of 30 C.F.R. 75.200

Order No. 814173 was issued for an alleged violation of 30 C.F.R. 75.200 which requires, inter alia, that "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." MSHA contends that the conditions of the roof in the area of crosscuts nineteen and twenty were such that the existing roof supports were inadequate. U.S. Steel asserts that the roof was well bolted at the No. 19 crosscut and that there were no slips. The operator also contends that the conditions in the No. 20 crosscut, specifically a cavity in the roof, did not indicate a need for immediate attention. It further states that there was no problem with the roof at No. 19 or 20 intersections.

Inspector Abbadini testified that he initially noticed the roof conditions in Nos. 19 and 20 crosscuts on August 26, 1980, while he was walking the haulage out. He saw slips, looseness of the roof and an exposed cavity, all of which were close to the manhole where the switch operator was stationed. The inspector observed a local fall at the No. 20 crosscut about 25 feet from the intersection and he also saw sloughing around some bolts in the No. 19 intersection. Since this was an active working area he

spoke to Tom Stavischeck, an assistant mine foreman, who indicated that he knew about the roof condition and would take care of it. The condition was not serious enough to warrant issuing a citation at this time.

The inspector returned to this section of the mine on September 8, 1980, as part of a regular Triple A inspection. Upon arriving he spoke with Mel Tishman, the motorman, who complained about the condition at No. 19 crosscut. He also spoke with Assistant Mine Foreman Paul Kovell, who indicated that nothing had been done to correct the roof problems. The inspector then proceeded to the area in question accompanied by Louis Tiberi, Paul Kovell and Donald Albani. There he noticed that roof conditions had worsened, showing severe deterioration around the bolts. The slips had opened up due to stress from pillar mining. Visual and sound inspection indicated that there was drumminess in the roof. The inspector testified that the condition presented a danger of causing a fatal accident and that additional supports, cribs and roof bolts were necessary to remedy the situation.

U.S. Steel presented testimony contradicting the inspector's testimony and also challenging his conclusions about the roof conditions and the assessed danger. Thomas Stavischeck stated that he spoke with Inspector Abbadini on August 26, 1980, and that he was not told about a roof problem. He was aware of a cavity in the No. 20 crosscut where there had been a roof fall but maintained that it had been there for 5 months with no change in size. He saw no slips in the No. 19 crosscut and felt that there were no problems with the roof which required immediate attention.

Paul Kovell, an assistant mine foreman testified that he was not aware of any roof problems in the Nos. 19 and 20 intersection prior to September 8, 1980. He indicated that rehabilitative work was being done at that time inside the No. 20 crosscut where there was a cavity. Mr. Kovell stated that he had an opportunity to observe roof conditions from a jeep during his weekend runs, but had not noticed any slips in the Nos. 19 and 20 intersections requiring additional support.

Louis Tiberi, a general assistant mine foreman, testified that the condition was good at the No. 20 crosscut. He had instructed Mr. Kovell to bolt a small cavity located in the No. 20 crosscut, but the task had not been completed by September 8, 1980. Mr. Tiberi insisted that this cavity did not present a hazard, and that a man doing a preshift inspection would probably not notice it. He saw nothing wrong with the roof in the No. 19 crosscut and felt that the additional cribs which were installed to abate the order served no purpose and provided no support. Mr. Tiberi, could not remember testing the roof for drumminess on the day the withdrawal order was issued.

U.S. Steel argues that Inspector Abbadini's testimony regarding the violation is not credible. It asserts that Mr. Abbadini had difficulty describing the condition of the roof on

August 26, 1980 and September 8, 1980 except to say that it looked drummy and had slips. It also found the inspector's definition of a slip or a clay vein to be inadequate. U.S. Steel maintains

that the testimony of the management witnesses was straight forward and consistent and that their observations concerning the safety of roof conditions should be believed.

MSHA argues that the inspector's testimony regarding roof conditions was corroborated by notes which he made contemporaneously with his inspection. It points out that the inspector was consistent in his testimony on both direct and cross-examination. Finally, MSHA relies on the inspector's qualifications as an expert witness and his ability to judge the safety of roof conditions as factors supporting the inspector's credibility.

In resolving the issue of credibility, I find that the inspector's testimony is not unclear or inconsistent. If there are discrepancies, they are only minor. As U.S. Steel concedes, the errors were with regard to "inconsequential matters" and he was evasive only about "collateral matters." (U.S. Steel Brief p. 7 and 8). The instances cited by U.S. Steel do not undermine the inspector's qualifications as an expert witness. He kept careful and descriptive notes of his observations which accurately reflect his testimony (Exh. G-5 and G-6). He also made a drawing, illustrating the roof conditions while they were still fresh in his mind (Exh. G-1).

While the operator's witnesses all agreed that the roof conditions were not serious enough to warrant a withdrawal order, they each admitted that there was a cavity in the No. 20 crosscut. The operator's exhibit representing the area in question shows a slip which extends into the intersection at the No. 20 crosscut. (Exh. 0-2). This drawing reinforces the inspector's testimony rather than management testimony regarding roof conditions. As the inspector stated at the hearing, slips indicate that the roof is unstable, posing a danger of a roof collapse and a fatal injury.

The inspector tested the roof for drumminess through the visual and sound methods of testing. While the inspector recalled that Mr. Tiberi assisted him in these testing procedures, Mr. Tiberi simply states that he does not remember whether he tested the roof on September 8. Since the inspector's notes indicate that Mr. Tiberi had agreed that the roof needed immediate attention, it appears that Mr. Tiberi's lack of recollection was used to avoid acknowledgement of the test results.

Having concluded that the conditions in the Nos. 19 and 20 crosscut were as indicated in Order No. 841473, I find that MSHA has established a violation of 30 C.F.R. 75.200.

Unwarrantable failure

U.S. Steel has also challenged the issuance of the withdrawal order on September 8, 1980. It claims that it had no notice of the alleged dangerous roof conditions and that it could not have been aware of any problem prior to the inspector's

issuance of the order. U.S. Steel also claims that the withdrawal order is defective because the inspector did not personally observe the conditions which were the subject of the order. It maintains

that Mr. Abbadini heard about a roof bolting problem while he was still on the surface, and issued the order before going down to actually check on the situation. U.S. Steel asserts that the inspector was therefore obligated to find violations to support his order even though they did not actually exist. Finally, the operator states that Inspector Abbadini received his information about roof conditions from a miner and was obligated under section 103(g)(1) of the Act to have the complaint reduced to writing and presented to management. It concludes that the inspector's violation of the Act justifies vacating the Order. MSHA has countered each of U.S. Steel's arguments and maintains that the withdrawal order was issued properly and should be upheld.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

> [A]n inspector should find that a violation of a mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

MSHA argues that U.S. Steel knew or should have known of the roof conditions in Nos. 19 and 20 crosscuts. It presented evidence demonstrating that the operator had actual knowledge of the violation. Inspector Abbadini testified that he had observed the roof conditions while engaging in a regular inspection on August 26, 1980. He noticed sloughing in No. 19 intersection around the bolts. The inspector stated that he was worried about the looseness of the roof and the exposed cavity since it was an active area and close to the location of the switch operator. Since the condition was not serious at the time, the inspector stated that he told management about the problem and recommended bolting and cribbing. During the course of his conversation with Tom Stavischeck on August 26, he learned that management was aware of the problem and would take care of it. According to MSHA's statement of facts, when the inspector arrived on September 8, 1980 to conduct a regular triple A inspection, he asked Mr. Kovell whether the bad roof conditions in 19 and 20 crosscuts had been abated, and Mr. Kovell replied that they had not. The inspector then rode the mantrip in with Mr. Kovell and Mr. Tiberi, and observed the conditions. Finding that immediate attention was necessary, the inspector issued the withdrawal order.

MSHA also offered exhibits showing the inspector's notes which were written following the inspections of August 26, 1980

and September 8, 1980. These notes mention the conversations the inspector had with management on both inspection days.

U.S. Steel contends that the inspector did not inform management prior to September 8, 1980 of the roof conditions. Mr. Stavischeck testified that the inspector did not mention any roof problems on August 26, 1980. Mr. Kovell testified that when the inspector asked him whether the conditions at 19 and 20 crosscuts had been taken care of, he replied that he had not done any work in these areas. U.S. Steel does not attempt to explain this statement, although Mr. Kovell's testimony implies that he did not know the conditions to which the inspector was alluding.

After careful consideration of the testimony and evidence submitted, I find that U.S. Steel did have actual knowledge of the conditions in Nos. 19 and 20 crosscuts. The inspector's testimony, together with his notes and Mr. Kovell's statement that he had not done any work, lead me to this conclusion. Furthermore, even if the operator was not actually informed of the roof conditions on August 26, 1980, it should have known that a dangerous condition existed. The operator is required by law to preshift the area and as MSHA points out, examination would have revealed the worsening conditions. The evidence indicates that management was aware of the cavity in No. 19 crosscut and additional testing would have revealed the drumminess, sloughing, and slips. Therefore, U.S. Steel knew or should have known of the violation of 30 C.F.R. 75.200. The inspector's finding of an unwarrantable failure is reasonable in light of the facts and circumstances presented. See Zeigler Coal, supra, at 296.

U.S. Steel has also challenged the withdrawal order based upon its contention that the inspector did not personally observe the alleged condition but rather issued the order from the surface based upon a miner's complaint. I find this claim to be groundless. MSHA has established that Inspector Abbadini came to the mine on September 8, 1980, and spoke with the motorman on the surface, who informed him that conditions at Nos. 19 and 20 crosscuts had not been taken care of. He confirmed this complaint in his conversation with Mr. Kovell, and thereupon, proceeded to the area in question accompanied by management. He issued the withdrawal order only after observing the deteriorated conditions. It was, therefore, validly issued.

Alleged Failure to Comply With Section 103(g)(1) of the Act

U.S. Steel's argues that the inspector was required to have the motorman's complaint presented in writing to the operator pursuant to section 103(g)(1). Although citing no authority, U.S. Steel states that "the purpose of this part of the Act is clearly to get a dangerous situation corrected as soon as possible." (Brief p. 6). The language of this section clearly demonstrates that it is inapplicable to the present situation. The pertinent part states:

> (g)(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard

> exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists.

On both August 26, 1980 and September 8, 1980, Inspector Abbadini was engaged in a regular triple A inspection, when he received a complaint from Mel the motorman. As the inspector stated at the hearing, "we get these complaints every portal we go to, we get all kind of complaints from different miners and if any of the complaints are dealing with any Health and Safety, any violations of any Health and Safety Act, we're to follow it up." (Tr. p. 60). The inspector did not go to Robena Mine pursuant to a miner complaint and he would have inspected the area in question regardless of any specific complaint. MSHA asserts that, "if such conversations by themselves were to make an inspection into a 103(g) inspection, the clear language of the Act requiring miner complaints to be written would be subverted, [since] virtually every inspection conducted would be considered 103(g) inspections and the inspector could be placed in the intolerable position of not being able to talk with miners informally for fear of having all enforcement actions vacated for failure to get every miner statement placed in writing." I agree with this contention, and find that the withdrawal order is valid since there was no need for a written complaint pursuant to section 103(g).

Assessment of a Civil Penalty

MSHA has proposed a civil penalty of $1,000.00 for the violation herein. In considering the appropriateness of this penalty, the six criteria set forth in section 110(i) of the Act have been considered. The parties have stipulated to the size of the operator and the effect of the proposed penalty on the operator's ability to remain in business. I have considered the operator's history of 194 violations over a 2 year period.

MSHA submits that the operator should be found grossly negligent in failing to correct the violation because the evidence shows that the operator knew or should have known of the violation. I disagree with this determination since the roof conditions did not deteriorate until after the August 26th inspection. The inspector testified at the hearing that he did not issue any citations on his initial inspection because the roof conditions were not serious at that time. Therefore, although the operator ignored the inspector's instructions about correcting the condition, its negligence in this regard involves only a 13 day period between inspections. U.S. Steel offered evidence showing that it was correcting other roof problems which indicates that the operator was concerned about roof falls and

mine safety. Accordingly, I find that the operator should be charged with ordinary negligence.

The inspector testified that the area where the violation occurred was an active area since it was the main travelway for entering and exiting the working face. He evaluated the likelihood of an accident occuring as probable. The inspector indicated that the conditions presented a danger of a roof collapse with a probable fatal injury to exposed miners. Based upon this evidence, I find the violation to be serious.

While U.S. Steel did not exercise good faith in correcting the condition prior to September 8, 1981, it did abate the condition immediately upon issuance of the withdrawal order. The evidence supports the stipulation that the operator demonstrated good faith in achieving timely abatement.

My reduction in the amount of negligence attributed to the operator should be reflected in the civil penalty. I therefore conclude that a penalty of $600 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. U.S. Steel and its Robena Mine are subject to the Act.

3. Withdrawal Order No. 841473 issued or September 8, 1980, charging a violation of mandatory safety standard 30 C.F.R. 75.200, is affirmed.

4. The violation of the above mandatory standard was caused by the unwarrantable failure of U.S. Steel to comply with 30 C.F.R. 75.200.

5. Withdrawal Order No. 841473, was properly issued under section 104(d)(1).

6. The violation of the above mandatory standard could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.

7. U.S. Steel's contest of Order No. 841473 is denied.

8. Considering the criteria specified in section 110(i) of the Act, U. S. Steel is assessed a civil penalty in the amount of $600 for the violation of 30 C.F.R. 75.200.

ORDER

WHEREFORE IT IS ORDERED that the contest is DENIED and the subject order is AFFIRMED.

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IT IS FURTHER ORDERED that U.S. Steel pay the sum of $600 within 30 days of the date of this decision as a civil penalty for violation of 30 C.F.R. 75.200.

James A. Laurenson Judge