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SOL (MSHA) V. UNITED STEEL
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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 v.	Civil Penalty Proceeding Docket No. WEVA 81-214 A/O No. 46-01418-03034
UNITED STATES STEEL CORPORATION, RESPONDENT	No. 9 Mine
UNITED STATES STEEL CORPORATION, CONTESTANT v.	Contest of Citation Docket No. WEVA 81-43-R Citation No. 897803; 9/15/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	No. 9 Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner-Respondent, Louise Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent-Contestant

Before: Judge Charles C. Moore, Jr.

The citation involved in this consolidated review and penalty proceeding reads as follows:

An unplanned roof fall (accident) above the anchorage zone in the active workings of the 4-Left Sandlick section ID No. 042 (section belt loading point and outby distance of 70 feet) where roof bolts (84 inches long) were in use. Occurred on August 26, 1980, and the operator did not contact the subdistrict office (Princeton, West Virginia).

As stated in the citation, a roof fall did occur on August 26, 1980. While the inspector was notified of the roof fall the next day, he did not see the area until September 10, 1980, and did not issue the citation

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quoted above until September 15, 1980. The testimony of the company witnesses indicates that there was a considerable change in the size of the roof fall between the time that it first occurred and the time the inspector saw it. The fall that occurred on the evening of August 26 consisted of an area approximately 12 feet by 15 feet by 5 feet and was not above the anchorage zones of the roof bolts. By 10:30 a.m. on the 27th, the fall had expanded and some roof bolts had fallen out. The area expanded further on the 28th, 29th, and 30th of August. Timbering was started immediately after the first fall and the remaining roof fell despite the company's timbering efforts. On the morning of the 27th of August, a written report of the roof fall was sent to MSHA, and Inspector Snyder, who happened to be at the mine, was informed orally of the fall. The inspector did not think it of sufficient importance to examine the area, however.

30 C.F.R. 50.10 states that if an accident occurs in a mine, the operator "shall immediately contact the MSHA District or Subdistrict Office * * *." Section 50.2(h) defines twelve situations as accidents for the purpose of these regulations. Subsection 50.2(h)(8), at issue herein, defines as an accident:

An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage; . . .

There is no doubt that the roof fall occurred in an active working, that it did not impede ventilation, that it did not impede passage and that at some time it did involve the area of the roof above the anchorage zone of the roof bolts.

U.S. Steel reports all roof falls whether technically reportable or not, but makes a distinction between accidents that are reportable by telephone and those which are reportable by a written document. U.S. Steel contends that it was told by the district manager not to report accidents which occur at night where no miner is injured or trapped, and that it was told it did not have to immediately (by telephone) report a roof fall that was not in a working section unless either ventilation or passage was impeded. Inspector Snyder agreed with the first part of this instruction, that is, that no accidents were to be reported at night unless a miner was injured or trapped. He did not agree with the second part of the assertion by U.S. Steel but his reasons for not doing so were simply that the director was aware of the inspector's actions and had agreed that a citation should be issued.

U.S. Steel also contends, that in addition to the instructions by the subdistrict manager, it relied on almost identical wording contained in the preamble to the accident reporting rule published in Volume 42 of the

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Federal Register on December 30, 1977, at page 65535. That statement, under the heading of "DEFINITION OF ACCIDENT" is as follows:

With respect to 50.2(h)(8), unplanned roof or rib falls in active workings which impair ventilation or passage must be reported immediately, but falls which do not do so need not be reported immediately regardless of their size.

MSHA has an explanation for the fact that the language in the preamble to the regulations is contrary to the language in the regulations themselves. After quoting the regulation and the preamble thereto, MSHA quotes a previous proposed regulation which contained the following words at the end of 50.2(h)(8): "or exceeds 100 cubic feet of material." MSHA makes the following argument:

MSHA contends that a reading of the three regulatory passages set forth above conclusively shows that the operator's argument is without merit. The paragraph in the preamble to which the operator refers obviously deals only with the second clause of 50.2(h)(8) which, in addition to the first part of paragraph (8), requires immediate notification to MSHA under 50.10. The reason that the preamble to the final rule discusses only the second clause of paragraph (8) is simply that only the second part was revised in the final rule distinguishing it from the version set forth in the notice of proposed rule-making. There is no doubt now, nor was there any doubt during the rule-making process, that the immediate accident notification requirement referred to all unplanned roof falls at or above the anchorage zone in active workings where roof bolts were in use. It is equally clear that the rule-making process resulted in a change in the second clause of paragraph (8), eliminating the 100 cubic feet of material requirement for unplanned roof or rib falls in active workings that impair ventilation or impede passage.

I will accept MSHA's explanation as to how the preamble came into being because I cannot believe that the Government would deliberately try to deceive the public as to the requirements of a regulation. The fact remains, however, that the preamble is deceptive because if the reader happened to be unaware of the proposed "100 cubic feet of material" requirement, he would read it exactly as U.S. Steel read it and as I believe the subdistrict manager read it. In this connection, the affidavit filed by the subdistrict manager, Conrad Spangler, is very general in terms. While he states that he has at all times interpreted the notification requirements for reporting in accordance with the definition in the rules, he does not answer U.S. Steel's contention that he stated there was a difference in the reporting requirements depending on whether the roof fall was in a working section or not, nor does he comment on the clearly established

fact that he gave instructions not to report an accident at night unless a miner was trapped or

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injured. If he had the authority or thought he had the authority to modify the word "immediately" so that it does not mean at night, except in certain circumstances, then it would seem reasonable that he thought he had the authority to modify that word in other circumstances. Furthermore, the affidavit denies an allegation that has not been made. Mr. Spangler denies that he ever told anyone that an unplanned roof fall above the anchorage zone in active workings was not to be reported "under Section 50.10 unless that fall impairs ventilation or impedes passage." The question involved here is not what has to be reported but what has to be immediately reported and what does that word "immediately" mean? I therefore give very little weight to the affidavit of the subdistrict manager.

Despite the good faith reliance by U.S. Steel on the previously quoted statement in the preamble to the rule and its reliance on statements made by the subdistrict manager, the preamble cannot take precedence over the regulation itself. Unintentional roof falls above the anchorage zone of the roof bolts are reportable immediately. I do not believe that the subdistrict manager has authority to alter the word "immediately" to mean when business starts the next day or that he would have authority to in any way alter the terms of the regulation itself. I therefore agree with MSHA that the unintentional roof fall as described in the citation is of the type that should be reported immediately.

The citation says that an unplanned roof fall above the anchorage zone in the active workings "occurred on August 26, 1980, and the operator did not contact the subdistrict office (Princeton, West Virginia)." The evidence does not establish that the described roof fall occurred on August 26, 1980. On that date, there was a roof fall but it was not above the anchorage zones of the roof bolts. On the following morning, August 27, the accident was reported in writing and it was reported orally to Inspector Snyder who is certainly an agent of the subdistrict office. Had he been at the subdistrict office and answered the phone and received the report, there could be no question that the subdistrict office had been notified and I see no difference created by the fact that he happened to be at the mine when he was notified. He was notified at 8 a.m. on August 27 and made the decision that the fall area was not sufficiently important to inspect. The written report was filled out by 8 a.m. and it was not until 10:30 a.m. that Mr. Paul discovered that the fall had expanded so that some roof bolts had fallen out. It was thus not until 10:30 a.m. on August 27 that a report was required. Inasmuch as the roof fall had already been reported more than 2 hours earlier, however, there would be little point in reporting it again. MSHA had not argued that there is any requirement to continue to report the progress of a roof fall. Once a report has been made, it is up to MSHA whether it wishes to investigate the matter and in this case it obviously chose not to do so since it did not even issue the citation until some 20 days later. But the charge is that on August 26, U.S. Steel failed to report a reportable accident. I hold that it was not a reportable accident until some time on August 27 and that

by that time it had already been reported.

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The citation is VACATED and the above cases are DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge