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KAISER STEEL V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

KAISER STEEL CORPORATION,

CONTEST OF CITATION PROCEEDING

CONTESTANT

DOCKET NO. WEST 80-494-R  
Citation No. 827208; 9/23/80

v.

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

DOCKET NO. CENT 81-26-R  
Citation No. 827236; 9/24/80

MINE: York Canyon Mine No. 1

DECISION

APPEARANCES:

David B. Reeves, Esq., Kaiser Steel Corporation  
P.O. Box 217, Fontana, California,  
For the Contestant

Robert Cohen, Esq., Office of the Solicitor  
United States Department of Labor, 4015 Wilson Boulevard  
Arlington, Virginia 22203,  
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF PROCEEDINGS

Pursuant to section 105(d) (FOOTNOTE 1) of the Federal Mine Safety  
and Health

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Act of 1977, 30 U.S.C. 801 et seq. (hereinafter referred to as "the Act"), the contestant filed two separate Notices of Contest challenging the validity of two citations issued at two different mine sites.

The contestant's motion to consolidate these two cases and expedite the proceedings was granted and a hearing on both cases was held in Raton, New Mexico, on December 17, 1980.

CENT 81-26-R

#### STIPULATIONS

At the outset of the hearing, the parties stipulated as follows:

1. The West York Strip mine produces 800,000 tons of coal a year.
2. The products produced at the mines enter into and affect interstate commerce.
3. That the said mine is under the jurisdiction of the Federal Mine Safety and Health Act of 1977.

#### ISSUES

1. Whether the Contestant violated safety standard 30 C.F.R. 77.404(a) by operating a pickup truck after it was determined that said truck was in an unsafe condition?
2. Whether the alleged violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

#### FINDINGS OF FACT

1. Contestant operates a strip coal mine in the State of New Mexico designated as the West York Strip Mine.
2. Daniel R. Martinez, safety inspector for the Mine Safety and Health Administration, issued a citation to the contestant on September 23, 1980, for a violation of 77.404(a) as the result of an inspection of a motor vehicle.
3. The inspection of the motor vehicle was prompted by a statement of a representative of the miners that said vehicle was in an unsafe condition (Tr. 10).
4. The motor vehicle inspected was a light blue pickup truck, license number CG-7344 usually operated by Michael Stairwalt, assistant superintendent of strip operations during the day shift. The vehicle was also driven by Rocky Sanchez on the second shift and Manuel D. Romero on the third shift.

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5. A bent steering stabilizing bar was observed on the pickup truck by the mine inspector.

6. During a test drive of the truck, the steering wheel and truck would vibrate at a speed of 25 miles per hour (Tr. 14). The "shaking" of the vehicle increased as the speed was increased (Tr. 15).

7. The mine inspector issued a 104(d)(1) citation removing the motor vehicle from service until it was repaired. The violation was abated on September 26, 1980 after the stabilizing bar was replaced (Tr. 21 and Exhibit 1).

8. The condition cited herein was classified by the inspector as "significant and substantial."

#### DISCUSSION

Citation number 827236 (FOOTNOTE 2) charges the contestant violated mandatory safety standard 77.404(a). The standard provides that:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Further, the inspector issued the above citation pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 which provides as follows:

If, upon any 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

The contestant in its Notice of Contest alleged, inter alia, (1) that no violation of the cited mandatory standard existed to support the issuance of the citation; (2) that the citation was improper since the alleged violation was not "caused by unwarrantable failure" of contestant to comply with the cited standard or any other mandatory health or safety standard; and (3) that the conditions set forth in the citation were not "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." An answer was filed by the Mine Safety and Health Administration (MSHA) on October 29, 1980.

The facts in this case, as developed through the testimony of the witnesses, do not support the contestant's position regarding the violation of the standard. It was uncontroverted that the pickup truck cited herein would "vibrate and shimmy" at speeds over 25 miles per hour. The testimony of Mike Stairwalt, contestant's assistant superintendent of Strip Operations, who operated this vehicle on his shift, testified that the pickup had a bent stabilizer on the front and that the part was on order (Tr. 38). During the test drive, Stairwalt was driving the pickup accompanied by the mine inspector and testified that the vehicle started to "shake" around 27 and 28 miles per hour. He then stated as follows: "I slowed it down and got it back under control and drove it back up and turned it around and came back down, and the second time it started to shimmy was probably 45 miles per hour" (Tr. 39).

The question here is whether this pickup continued to be used and driven by the miners after it developed the unsafe condition referred to in safety standard 77.404(a). The bent stabilizing bar, as part of the steering mechanism of this pickup truck, caused it to vibrate and shake at speeds over 25 miles per hour. This had the potential of causing the driver to lose control of the vehicle and either collide with other vehicles or roll over. Either occurrence would endanger the health and safety of the driver or other miners in the area. This obviously was an unsafe condition, and the standard requires that the equipment be removed from service.

The contestant argues that the condition is not different from other mechanical defects of vehicles, such as broken head lights, faulty windshield wipers, etc. I find a distinct difference between these items and the more essential parts of a vehicle such as brakes and the steering mechanism involved herein.

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The subject 104(d)(1) citation contains the allegation that the cited condition was caused by the contestant's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. 77.404(a). A violation of a mandatory health or safety standard is caused by an unwarrantable failure to comply where "the operator involved has failed to abate the condition 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 lack of reasonable care" Zeigler Coal Company, 7 IBMA 280, 295-296, 841. D-127, I BNA MSHC 1518, 1977-1978 CCH OSHD par. 21, 676 (1977). The findings of fact as set forth in this decision clearly show that the contestant, through its' employees, knew of the damaged part on the cited pickup truck and failed to abate this violative condition by removing said truck from service. Accordingly, it is found that the violation was caused by the contestant's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. 77.404(a).

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par 25, 294 (1981), the Review Commission held "that a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. Additionally, the Review Commission stated that "[a]lthough the [1977 Mine Act] does not define the key terms 'hazard' or 'significantly and substantially,' in this context we understand the word 'hazard' to denote a measure of danger to safety or health, and that a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause and effect must be health. In other words, the contribution to cause and effect must be significant and substantial." 3 FMSHRC at 827. (Footnote omitted).

The particular facts surrounding the violation involved herein reveal that the condition of the steering mechanism on the pickup truck could have been a major cause of a serious accident with a reasonable likelihood that it would result in an injury of a reasonably serious nature. Accordingly, I conclude that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

Accordingly, IT IS ORDERED that the contestant's contest in Docket No. CENT 81-26-R be, and hereby is DENIED, and that Citation no. 827236 be, and hereby is AFFIRMED.

WEST 80-494-R

This proceeding was initiated by the contestant filing a Notice of Contest pursuant to section 105(d) of the Federal Mine

Safety and Health

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Act of 1977, 30 U.S.C. 801 et seq. (1978) (FOOTNOTE 3) to contest the issuance of Citation No. 827208, dated September 23, 1980. The citation alleged that the contestant failed to follow its approved roof control plan in violation of 30 C.F.R. 75.200. Specifically, it alleged that miners were allowed to proceed a distance of 12 feet beyond permanent support and under temporary supports. (FOOTNOTE 4)

#### STIPULATIONS

The parties stipulated that the contestant's York Canyon No. 1 Mine is a large, underground, coal mine and is under the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 68). Also, stipulated to and received into evidence were the following Exhibits:

Government Exhibit No. 1: Citation No. 827208, Modification, and Abatement  
Government Exhibit No. 2: Roof Control Plan  
Government Exhibit No. 3: Drawing of Entry 1 and 2, ten left section.  
Contestant Exhibit No. 1: Drawing of Entry No. 1 and 2, ten left section  
Contestant Exhibit No. 2: Inspectors notes and drawing of area.

#### FINDINGS OF FACT, DISCUSSION AND CONCLUSION

The question of whether or not there was a violation of 30 C.F.R. 75.200 centers around an interpretation of this section of the Act and several provisions of the contestant's roof control plan. Section 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, 1980. 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. 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. [Emphasis added.]

MSHA mine inspector Anthony Duron testified that he conducted a regular safety and health inspection during the "grave yard" (FOOTNOTE 5) shift at the contestant's York Canyon Mine No. 1 on September 23, 1980. While accompanying the fire boss on his tour of the mine, the inspector observed what he described as something wrong in the No. 1 entry of the ten left section (Tr. 75 and 76). A sign was posted near the last permanent roof supports in the No. 1 entry saying "unsupported roof." Further investigation by the inspector indicated that there was a distance of approximately 19 feet from the last permanent support to the working face (Tr. 95).

Inspector Duran testified that the mining sequence followed in this two entry section was to first have the continuous miner cut a 20 foot cut, approximately four foot high or the height of the coal seam. This is done under permanent roof supports. Then the continuous miner moves to the other entry while the "jack leg drillers" (FOOTNOTE 6) come into the area vacated by the continuous miner and "drills" and "shoots" (FOOTNOTE 7) the sandrock overlay or cap which is approximately 4 foot thick. When cleaned out, the entry is then approximately 8 feet high so other equipment and machinery can enter (Tr. 99 and 100).

The inspector testified that the jack leg or drill is operated by two miners. One miner, described as a helper, will hold the end of the "bit" at the face while the operator proceeds to move the drill forward on its hydraulic leg towards the face to drill a 6 foot hole to receive the explosives. In this instance, the operator starts approximately six feet from the face due to the six foot steel or drill (Tr. 100). Under normal procedures, the helper and operator of the drill are under supported roof,

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as the roof bolter will have previously installed permanent roof supports up to at least five foot of the working face of the entry. If it is over five feet away from the face, temporary supports will be placed to support the roof (Tr. 101).

Inspector Duran testified that what he saw as an "unusual situation" was that the "jack leg" operators had gone in under temporary supports in entry No. 1 to drill the overlay of rock. He concluded this from observing that there was a distance of 12 feet from the last permanent support to the area where drilling and shooting had occurred and then the additional 6 foot of rubble which showed that the area had been drilled and "shot" (Government's Ex. No. 3 and Tr. 102). Duran testified that in his opinion, the operator and helper would have been under temporary and then unsupported roof (Tr. 102). There were three temporary jacks installed as shown on Contestant's Exhibit No. 1 as "x" and on Government's Exhibit No. 3 as "o". Two additional temporary supports were observed laying in the last open cross cut near the continuous miner (Government's Ex. 2 and Tr. 124).

Pertinent parts of the contestant's approved roof bolting plan described the roof bolting sequence as follows:

Page 6-3 (a) Upon completion of the loading cycle, a reflectorized warning device, such as a "stop" sign, shall be conspicuously placed to warn persons approaching any area that is not permanently supported. It is to be emphasized that the warning device has been placed to cause the person to stop, examine, and evaluate the roof and rib conditions prior to entering the area--even after temporary supports have been installed.

(b) Where required, temporary supports shall be installed immediately after the loading cycle is completed unless roof bolting machines are equipped with acceptable automated temporary supports.

(i) Except when the District Manager has determined that more than 5 minutes are needed, "immediately" is interpreted to mean that the installation of such temporary supports shall be started no later than 5 minutes after mining of the cut is completed and, after the installation of such supports is started, the installation of supports shall be continued until at least the minimum number are installed as required in the approved plan. If the installation of permanent supports is not started within 60 minutes after the loading cycle is completed, temporary supports shall be installed in the entire cut on 5 foot centers.

Page 7 (c) Only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary

supports are installed. Before any person proceeds inby permanently supported roof, a thorough visual examination of the unsupported roof and ribs shall be made. If the visual examination does not disclose any hazardous condition, persons proceeding inby permanent supports

for the purpose of testing the roof by the sound and vibration method and installing supports shall do so with caution and shall be within 5 feet (less if indicated on sketch Nos. D) of a temporary or permanent support. If hazardous conditions are detected, corrective action shall be taken to give adequate protection to the workmen in the area involved.

4. When installing permanent supports, temporary supports may be repositioned in the sequence indicated on the attached sketch (Nos. C). However, if it is necessary to remove temporary supports (other than those specified above) before permanent supports are installed, such temporary supports shall be removed by some remote means, or another temporary support shall be installed in such a manner that the workman removing the support remains in a supported area. Means of removal of such supports shall be approved by the District Manager.

5. Work such as extending line curtains, other ventilating devices or making methane tests in by the roof bolts shall not be done unless a minimum of two temporary supports are installed. This minimum is applicable only if they are within 5 feet of the face or rib and the work is done between such supports and the nearest face or rib. Other methods of providing temporary supports for this work will be accepted if equivalent protection is provided.

6. Where rehabilitation work is being done, the following temporary support pattern shall apply:

- a. Where bolts are being replaced in isolated instances (such as where equipment has knocked bolts loose) one temporary support shall be installed within a radius of 4 feet from each bolt to be replaced.
- b. Where crossbars or roof bolts are being installed in an area where roof failure is indicated, a minimum of two rows of temporary supports shall be installed on not more than 5 foot centers across the place so that the work in progress is done between the installed temporary supports and adequate permanent supports in sound roof.

7. (a) Where loose material is being taken down, a minimum of two temporary supports on not more than 5 foot centers shall be installed between the miner and the material being taken down unless such work can be done from an area supported adequately by permanent roof supports. (Emphasis added).

Section 75.200 requires a mine operator to adopt and maintain a roof control plan suitable for its mine and it is well settled that any violation of the approved plan is a violation of Section 75.200, Peabody Coal Company, 8 IBMA 121 (1977) and Affinity Mining Company, 6 IBMA 100 (1976).

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Citation No. 827208 contains a description by the inspector of what condition or practice he considered caused a violation of Section 75.200. It states in part: "The roof control plan was not complied with in that miners (Jack leg drillers) were allowed to proceed beyond the last permanent support for a distance of 12 feet under temporary supports to drill . . ." (Government's Exhibit No. 1). A further understanding of the inspector's interpretation of how the roof control plan was violated is provided in a review of the following transcript colloquy at pages 120, 121, and 122:

Mr. Reeves (Contestant's counsel): Mr. Duran, did you issue the citation because you believed the roof control plan was not being complied with?

Mr. Duran (MSHA inspector): Yes.

Mr. Reeves: Was the company violating a specific section?

Mr. Duran: 75.200.

Mr. Reeves: Was the company violating a specific section of its roof control plan?

Mr. Duran: Yes.

Mr. Reeves: What section is that?

Mr. Duran: That is Page 7, Item C.

Mr. Reeves: Item C at the top?

Mr. Duran: Yes.

Mr. Reeves: Was that the only section that was violated?

Mr. Duran: Yes.

Mr. Reeves: If that section had not been violated, you would not have issued a citation, is that correct?

Mr. Duran: I didn't quite get that question.

Mr. Reeves: If that Section C on Page 7 had not been violated, then you would have not issued a citation; is that correct?

Mr. Duran: I might have not.

Mr. Reeves: Is it your testimony, that you issued the citation because you believed the company was in violation of Section C on Page 7?

Mr. Duran: Yes.

Mr. Reeves: Is it your testimony that you believed the company was in violation of any other section?

Mr. Duran: No, only to allow people to go in by the last permanent support.

Mr. Reeves: Well, you issued the citation because you believed the company was in violation of its roof control plan?

Mr. Duran: Yes.

Mr. Reeves: And is it correct, that the only section you believed the company violated was Section C, which is found on Page 7?

Mr. Duran: Yes.

Mr. Reeves: I would like you to examine Section C on Page 7 and tell us how the company violated that section?

Mr. Duran: "Only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports."

Mr. Reeves: Does your copy have a period there, or does it go on?

Mr. Duran: No, it don't.

Mr. Reeves: It continues on to say "until temporary supports are installed."

Mr. Duran: Until temporary supports are installed.

Mr. Reeves: What about the second section, did the company violate that?

Mr. Duran: I do not know that.

Mr. Reeves: And the third sentence, did the company violate that?

Mr. Duran: I cannot answer because I didn't observe that.

Mr. Reeves: And the fourth sentence, did the company violate that?

Mr. Duran: We are talking about No. 4.

Mr. Reeves: The fourth sentence of Paragraph C on Page 7?

Mr. Duran: I cannot answer that either because I don't

know they would have found hazardous conditions.

Mr. Reeves: I would like to direct your attention to Sketch A. Did the company violate Sketch A in some fashion?

Mr. Duran: Yes, they did.

Mr. Reeves: And the provisions of Sketch A, did they violate that?

Mr. Duran: The last permanent support was over four foot as required of the working face.

Mr. Reeves: What particular sentence are you referring to?

Mr. Duran: I'm referring to the maximum distance from the last roof bolts to the face shall equal four feet before continuous mining starts.

Mr. Reeves: Wasn't the last permanent support within four feet of the face before the continuous mining started?

Mr. Duran: I cannot answer that, because I didn't observe the mining cycle.

Mr. Reeves: Do you know that it wasn't?

Mr. Duran: No, I don't.

Mr. Reeves: So you can't say the company violated that?

Mr. Duran: No, sir.

Mr. Reeves: When is the loading cycle completed?

Mr. Duran: In this particular condition, I would say when the loading cycle is completed is when the rock is cleaned up.

Mr. Reeves: And you saw the rock hadn't been cleaned up?

Mr. Duran: No, sir.

Mr. Reeves: Would you say the loading cycle had not been completed?

Mr. Duran: In this particular condition, I would say, yes.

Mr. Reeves: Did the company violate Sketch B in any way?

Mr. Duran: I would say, no.



Mr. Reeves: Did the company violate Sketch C in any way?

Mr. Duran: I would say, yes.

Mr. Reeves: And a particular provision was violated?

Mr. Duran: In that only three temporary jacks were used.

Mr. Reeves: Do you know how many were used?

Mr. Duran: No, I don't.

Mr. Reeves: So maybe more than three were used; is that correct?

Mr. Duran: That is possible.

Mr. Reeves: So you don't know how many were used?

Mr. Duran: I only seen two, and I won't say they were not there. They were thrown over by the miner if they did use temporary supports there was only two that I could observe at the time of the citation.

Mr. Reeves: Is that why you wrote the citation, because you believe only two temporary jacks were used?

Mr. Duran: No, I wrote the violation because people were allowed to go in by the last permanent support under the temporary support.

Much of the trial time in this case involved questioning the inspector as to his interpretation of how the roof control plan and Section 75.200 was violated. The sole issue appears to be that miners were allowed to go in by the last permanent support to advance the working face under temporary supports (Tr. 97 and 126).

In earlier testimony, the inspector indicated that it was usual practice for the miner's helper to go beyond the permanent roof support, and under temporary supports to hold the end of the drill bit near the face (Tr. 101). Also, testimony was given that the "fire boss" was permitted to go to the entry and check for methane under temporary support. At the conclusion of the Secretary's case he argues that, although the plan does not specifically address this particular situation, it is obvious from tradition and from the inferences drawn from the plan itself, that this type of activity is prohibited (Tr. 150).

If, as the Secretary argues, the Contestant's roof control plan or Section 75.200 does not address this particular situation, and the Secretary is relying on "tradition" or "inference" then an ambiguity exists here. In a similar case where the documents resulted in an absolute ambiguity in the points which were the crux of the case, it was determined that MSHA has a duty to immediately make an effort to clarify the plan so that no question exists in the future as to what is required for the safety of the miners. Secretary of Labor v. Penn Allegh Coal Company, Inc., Docket No. PITT 79-190-P; (February 28,

1979), 1 MSHC 2028.



The light-blue Ford truck (N.M. license No. CG-7344) used on the mine property for transportation of Mike Stairwalt was not maintained in a safe operating condition. The stabilizing jack for the steering of the truck was bent and the truck would shake at speeds ranging from 25-45 miles per hour. Mike Stairwalt stated he knew the violation existed.

~FOOTNOTE\_THREE

3 See footnote No. 1.

~FOOTNOTE\_FOUR

4 Citation No. 827208 alleges the following:

The roof control plan was not been complied with in that miners (jack leg drillers) were allowed to proceed beyond the last permanent support for a distance of 12 feet under temporary supports to drill 5 - 6 foot holes and shot down 3 to 4 feet of top sandrock to allow for height in the No. 1 room in the 10 feet section, I.D. No. 008-0. This was conducted during the third shift.

~FOOTNOTE\_FIVE

5 The night shift usually beginning at 11 or 12 p.m. and relieved by the day shift.

~FOOTNOTE\_SIX

6 An operator of a compresses-air, percussion type rock drilling machine mounted on a leg called a jack.

~FOOTNOTE\_SEVEN

7 To break coal or rock away from seam with explosives.