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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	Civil Penalty Proceeding Docket No. LAKE 82-35-M A.O. No. 12-00820-05031
v.	Minntac Mine
UNITED STATES STEEL CORPORATION, RESPONDENT	
UNITED STATES STEEL CORPORATION, CONTESTANT	Contest of Order
v.	Docket No. LAKE 82-6-RM Order No. 486720; 9/10/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Minntac Mine
LOCAL UNION NO. 1938, DISTRICT 33, UNITED STEELWORKERS OF AMERICA, REPRESENTATIVE OF THE MINERS	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary of Labor
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, on behalf of United States Steel Corporation;
Clifford Kasenan, Safety Chairman, Local Union 1938, United Steelworkers of America, Virginia, Minnesota, on behalf of the Representative of the Miners

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The two cases have been consolidated since they both involve the same order of withdrawal. The notice of contest filed by U.S. Steel

challenges the validity of the order and the civil penalty proceeding seeks a penalty for the violation charged in the order. Pursuant to notice, a hearing was held on the consolidated cases in Duluth, Minnesota on March 24, 1982. Federal mine inspector Thomas Wasley and Terry Martinson testified on behalf of the Secretary. Nick Brascugli, Herbert Brandstrom, Randall Pond and Phillip Anderson testified on behalf of U.S. Steel. No witnesses were called by the Representative of the Miners. The Secretary and U.S. Steel have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, U.S. Steel was the operator of the Minntac Plant, a mine as defined in the Federal Mine Safety and Health Act of 1977. The subject plant produces goods which enter interstate commerce.

2. U.S. Steel is a large operator, and the assessment of a penalty will not affect its ability to continue in business.

3. A total of 180 violations were assessed against the subject mine within the 24 months prior to the violation involved herein, of which 170 have been paid.

4. Respondent demonstrated good faith in abating the condition after the issuance of the order involved in this proceeding.

5. An order of withdrawal had been issued under section 104(d)(1) of the Act on March 31, 1981, for an alleged violation of 30 C.F.R. 55.15-5.

6. The order of withdrawal referred to in Finding 5 was issued during a regular mine inspection which was completed prior to the issuance of the order involved in this proceeding.

7. The Inspector was regularly in the subject facility between March and September, 1981. However, he did not carry out a complete inspection of the facility between March 31, 1981 and September 10, 1981.

8. The subject plant contains an agglomerator in which iron ore concentrates are formed into pellets, fired at high temperatures, cooled, and shipped out to steel mills.

9. Cooling of the pellets takes place in a large structure called a cooler where outside air is drawn in through large fans to cool the bed of pellets.

10. The cooler is a vessel with a donut-like shape. The heated pellets are dumped into the cooler on to castings or pallets, which rotate slowly around the cooler, following which the pallets are tipped to a vertical position and the taconite pellets are dumped into a bin below the cooler.

11. There is a door to the cooler through which maintenance personnel go in to inspect or make repairs on the inside of the vessel.

12. On June 10, 1981, a maintenance crew entered the cooler to patch a burned-out area on the load wall of the cooler.

13. Before any of the men went into the cooler they dropped plywood boards to cover the openings which resulted from one of the pallets being locked in the vertical position. A form was erected in the shop, placed in the cooler and the patch was made on the wall. The entire operation took about three hours and a half. The crew was in the cooler about 45 minutes.

14. The crew left the cooler, after which the foreman inspected the job and handed out the plywood sheets. After handing out the last sheet of plywood he pulled himself from the cooler. He was not wearing a safety belt at the time.

15. When the plywood was removed there were two openings resulting from the pallet being in the vertical position: one was 51 inches by 44 inches by 8 feet; the other was 11-1/2 inches by 6 inches by 8 feet. The openings go to the dump zone, more than 18 feet below.

16. On September 10, 1981, Inspector Wasley issued a withdrawal order under section 104(a)(2) of the Act charging an unwarrantable failure to comply with 30 C.F.R. 55.15-5.

17. The condition was abated and the order terminated on September 15, 1981, when U.S. Steel instructed employees entering the cooler to use a safety belt when a danger of falling into the cooler exists.

18. At the time the order was issued, U.S. Steel had a company safety rule requiring the use of a safety belt where there is danger of falling 5 feet or more.

REGULATION

30 C.F.R. 55.15-5 provides as follows: "Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks or other dangerous areas are entered."

ISSUES

1. Did the Secretary establish the prerequisites for a 104(d)(2) order, i.e., was there an intervening "clean inspection" between the 104(d)(1) order and the 104(d)(2) order?

2. Is 30 C.F.R. 55.15-5 impermissibly vague?

3. If it is not, did the evidence establish a violation of 30 C.F.R. 55.15-5?

4. If a violation was established, was it caused by the operator's unwarrantable failure to comply with the standard in question?

5. If a violation was established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. The U.S. Steel Corporation is subject to the provisions of the Federal Mine Safety and Health Act of 1977, in the operation of the Minntac Plant.

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

3. The Secretary established prima facie that there was no clean inspection of the facility intervening between the 104(d)(1) and the 104(d)(2) orders.

DISCUSSION

Although U.S. Steel did not specifically raise the issue in its pleadings, the question whether there was an intervening clean inspection between the prior 104(d)(1) order and the 104(d)(2) order involved herein is properly before me. It is MSHA's obligation to establish prima facie the absence of an intervening clean inspection in order to sustain the order being challenged. Secretary v. CF & I Steel Corporation, 2 FMSHRC 3459. Unfortunately, the evidence bearing on this issue is skimpy, and possibly conflicting. The Inspector testified:

> Q. Now, when you decided to issue the - the 104(d)(2) order, did you know whether there was a prior intervening clean inspection that had taken place since your issuance of the 104(d)(1) order?

A. There was not no clean inspection, no.

Q. And how do you know that?

A. Cuz I was the inspector. I issued the last one. (Tr. 28).

* * * * * * *

Q. Okay. Now did you inspect Minntac operations between March 3rd, 1981 -- March 31, 1981 and September 10th, 1981?

A. Oh, sure.

Q. Were you there every day?

A. No, not every day.

Q. Were you there regularly?

A. Just about.

Q. And did you cover the entire facility?

A. Um, I have covered the entire facility, yes.

* * * * * * *

Q. So between March 3rd, 1981 -- March 31, 1981, and September 10, 1981, you had been entirely through the Minntac Plant?

A. Are you talking about a complete thorough inspection?

Q. I'm asking you if you went to every area in the Minntac Plant between March 31st, 1981, and September 10th, 1981.

A. This was a different inspection on -- in March. That one was completed.

Q. Between --

A. Then we started another inspection.

Q. But between March 31st, 1981, and September 10th, 1981, you had gone through the entire Minntac plant?

A. Well, that's possible I went through there.

(Tr. 54).

I conclude, based on the above testimony, that MSHA established prima facie that there was not an intervening clean inspection between the (d)(1) and the (d)(2) orders. U.S. Steel did not offer any evidence to rebut the prima facie showing.

4. The mandatory standard in 30 C.F.R 55.15-5 is not impermissibly vague.

DISCUSSION

The standard in question has been construed by the Commission in at least one case. Secretary v. Kerr McGee Corporation, 3 FMSHRC 2496 (1981). Although the issue of vagueness was apparently not raised, the Commission did refer to the general language of the regulation: "As contrasted with more detailed regulations, it is the kind made simple and brief in order to be broadly adaptable to myriad circumstances. From an operator's standpoint, one benefit of this flexible regulatory approach is that it affords considerable leeway in adapting safety requirements to the variable and unique conditions encountered in different mines." Id, at 2497.

U.S. Steel argues that the regulation is deficient because (1) it does not specify any distance or depth for the possible fall and (2) no standards are set for the probability of a fall. I conclude that the words "danger of falling" (1) eliminate the de minimus situation, i.e., a fall of a few inches or feet and (2) are sufficiently specific to apprise reasonably prudent operators when safety belts are required. I also conclude that the standard requires safety belts to be worn during the entire time when a danger of falling exists. Thus, one exiting a vessel must wear his belt until he has reached a point in his exit where the danger is passed.

5. A violation of 30 C.F.R. 55.15-5 was established by the evidence in this case.

DISCUSSION

Once the plywood flooring was removed, a workman in the cooler could fall a distance of more than 18 feet through the larger opening created by the pallet being in a vertical position. It is true that the foreman in this instance stated that he positioned himself in such a way when exiting the cooler that he would fall back on the pallet

rather than toward the large opening. It is also true that the foreman had crawled out of similar coolers for years without injury, that he had worked on construction jobs up to 180 feet in the air without a safety belt, and that it was his opinion that a safety belt was not needed in the circumstances of this case. Whether a danger of falling exists must be determined with reference to the ordinary working person. Considering the foreman's testimony describing how he climbed out of the cooler (Tr. 115, 119-121), it seems evident to me that an ordinary working person could have slipped and fallen through the large opening. There was (and is) a danger of falling in exiting the cooler in question. Failure to wear a safety belt is a violation of the standard.

6. The violation was caused by the unwarrantable failure of the operator to comply with the standard.

DISCUSSION

The violation was committed by a foreman, a representative of management. He should have known of the hazard and should have taken steps to avoid it. Zeigler Coal Company, 7 IBMA 280 (1970); Cleveland Cliffs Iron Co. v. Secretary, 4 FMSHRC 171 (1982).

7. I conclude that the violation was serious, since a serious injury could have resulted. The violation was the result of the operator's negligence. I conclude that an appropriate penalty for the violation is $1,250.

ORDER

On the basis of the above findings of fact and conclusions of law, IT IS ORDERED that Order No. 486720 issued September 10, 1981, is AFFIRMED. IT IS FURTHER ORDERED that U.S. Steel Corporation, within 30 days of the date of this decision, pay the sum of $1,250 as a civil penalty for the violation of 30 C.F.R. 55.15-5 charged in the order.

James A. Broderick
Administrative Law Judge