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SOL (MSHA) V. UNITED STATES 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. LAKE 82-35-M A.O. No. 21-00820-05031 V Minntac Mine
UNITED STATES STEEL CORPORATION, RESPONDENT	
UNITED STATES STEEL CORPORATION, CONTESTANT v.	CONTEST PROCEEDING 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 ON REMAND

Before: Judge Broderick

On August 30, 1984, the Commission reversed my finding that there had not been an intervening clean inspection of the subject mine between the issuance of the contested 104(d)(2) order issued on September 10, 1981, and the prior 104(d)(1) order issued on March 31, 1981. However, the Commission affirmed my finding that the operator violated the mandatory standard involved and remanded the case for modification of the order based on new findings concerning whether the violation was caused by the operator's unwarrantable failure to comply with the standard, and concerning whether the violation was significant and substantial. The Commission decision states (page 8, fn. 3) that the contested order

issued under section 104(d)(2) should be modified to a section 104(d)(1) order, a 104(d)(1) citation or a 104(a) citation. However, as I read 104(d)(1) and 104(d)(2), a 104(d)(1) withdrawal order (issued at this mine on March 31, 1981) can only be followed by a 104(d)(2) order (assuming no intervening clean inspection), and not by a 104(d)(1) order. Where a clean inspection has intervened as in this case under the Commission decision, a violation can only be cited as a 104(a) citation or a 104(d)(1) citation.

Following remand, I issued a briefing schedule order on September 6, 1984. Both parties have filed briefs. Based on a reconsideration of the entire record, the Commissions decision on review, and the contentions of the parties, I make the following decision.

THE VIOLATION

The standard found to have been violated in this case requires that "safety belts and lines shall be worn when men work where there is danger of falling." Therefore, the violation ipso facto involves a safety hazard, namely the danger of falling.

UNWARRANTABLE FAILURE

My prior decision concluded that the violation was caused by the unwarrantable failure of the operator based on the fact that it was committed by a foreman who represented management. The Commission found my conclusion to be insufficiently explained for meaningful review by the Commission.

The most complete discussion of the meaning of the term "unwarrantable failure" is contained in the Interior Board of Mine Operations Appeals decision in the case of Ziegler Coal Company, 7 IBMA 280 (1977). The Board said at pages 294-295:

> "Usually, where liability is dependent upon a determination of fault with regard to a person's knowledge, the fault typically concerns the person's knowledgeability as to matters of fact. Given the foregoing and inasmuch as the literal language of section 104(c) [of the Coal Act] implies that the fault encompassed in the "unwarrantable failure' requirement is of the typical kind, we are of the opinion that both

> the conferees and the House Managers were talking about an operator's failure to abate conditions or practices the operator knew or should have known existed and therefore should have abated prior to discovery by an inspector." [Emphasis in the original.]

Applying this rather ponderous language to the facts of this case, the foreman did not wear a safety belt "where a danger of falling should have been recognized under the circumstances" (Commission Dec. p. 4). The foreman asserted that the practice was not dangerous. The violation by its very terms involved a danger. I found that it occurred and the Commission affirmed. The foreman knew of the exposure (he could have fallen 18 feet). In the words of the Ziegler decision, this was a matter of fact. He should have known of the danger. Therefore, the foreman knew or should have known that the violative conditions or practices existed or occurred.

Is the knowledge of the foreman imputable to the operator?

In Pocahontas Fuel Co., 8 IBMA 136, 147-8 (1977), aff'd Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (1979), the Board found unwarrantable failure to comply on the basis that "the knowledge or constructive knowledge" of a preshift examiner was "properly imputable to Pocahontas."

In the case of Secretary v. Ace Drilling Co., 2 FMSHRC 790 (1980), the Commission stated (in a penalty case) at pages 790-1: "In determining liability for conduct regulated by the Act, the actions of the foreman cannot be separated from those of the operator. The foreman acts for the operator."

I conclude that where a foreman knew or should have known that he was engaging in a practice, which practice is found to be a violation of a mandatory standard, the operator can be found to have unwarrantably failed to comply with the standard.

SIGNIFICANT AND SUBSTANTIAL

In my prior decision, I did not make findings on the question whether the violation was significant and substantial, because such findings are unnecessary in determining the propriety of a 104(d)(2) order. However, they are necessary in determining whether a 104(d)(1) citation or a 104(a) citation should have been issued. My decision

found that when the foreman exited the cooler, there were two openings through which he could have fallen to a dump zone more than 18 feet below. I concluded that there was "a danger of falling." As I previously explained the violation by its terms implies that it could contribute to a hazard. The hazard (falling 18 feet) clearly is reasonably likely to result in serious injury. See Secretary v. Mathies Coal Company 6 FMSHRC 1 (1984).

Therefore, I conclude 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.

ORDER

Based upon the above findings and conclusions, IT IS ORDERED that Order No. 486720 is MODIFIED to a 104(d)(1) citation. The findings, conclusions and order related to the civil penalty proceeding in my decision of June 8, 1982, were not directed for review, and therefore are not part of the order of remand.

James A. Broderick
Administrative Law Judge