

CCASE:
USS, A DIVISION OF USX v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th floor
5203 Leesburg Pike
Falls Church, Virginia 22041

USS, A DIVISION OF USX CORP.,
CONTESTANT

v.

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

LOCAL UNION NO. 1938,
UNITED STEELWORKERS OF
AMERICA, DISTRICT NO. 33,
REPRESENTATIVE OF MINERS

CONTEST PROCEEDINGS

Docket No. LAKE 90-28-RM
Citation No. 3469434; 1/3/90

Docket No. LAKE 90-29-RM
Order No. 3469435; 1/3/90

Docket No. LAKE 90-30-RM
Order No. 3469437; 1/3/90

Docket No. LAKE 90-31-RM
Order No. 3469438; 1/8/90

Docket No. LAKE 90-32-RM
Order No. 3469439; 1/8/90

Docket No. LAKE 90-33-RM
Order 3469440; 1/8/90

Docket No. LAKE 90-36-RM
Order No. 3469471; 1/24/90

Minntac Plant

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

v.

USX CORPORATION,
RESPONDENT

LOCAL UNION NO. 1938,
UNITED STEELWORKERS OF
AMERICA, DISTRICT NO. 33,
REPRESENTATIVE OF MINERS

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 90-35-M
A.C. No. 21-00820-05588

Docket No. LAKE 90-65-M
A.C. No. 21-00820-05594

Docket No. LAKE 90-66-M
A.C. No. 21-00820-05595

Docket No. LAKE 90-92-M
A.C. No. 21-00820-05599

Minntac Plant

DECISION

Appearances: Billy M. Tenant, Esq., Pittsburgh, Pennsylvania, for USS, a Division of USX Corp. (USS); Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for the Secretary of Labor (Secretary); James Ranta, Staff Representative, United Steelworkers of America, Virginia, Minnesota, for for the Representative of Miners (USWA).

Before: Judge Broderick

The above proceedings involve one citation and six withdrawal orders concerning which USS has filed notices of contest, and 16 alleged safety violations charged in 10 citations and 6 withdrawal orders (including the contested citation and orders) for which the Secretary seeks civil penalties. The citations and orders were issued between November 28, 1989, and January 24, 1990, during an inspection at the Minntac Plant. Therefore, they were consolidated for purposes of hearing and decision. Local Union 1938, USWA requested and, without objection, was granted party status in the proceeding. Pursuant to notice the case was called for hearing in Duluth, Minnesota, on October 17 and 18, 1990. James King and John Keating testified on behalf of the Secretary; John Keating also testified on behalf of USWA; Ronald Rantala, Bruce Long, Tom Hakala, and Randall Pond testified on behalf of USS. All parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

USS is the owner and operator of the Minntac Plant located in St. Louis County, Minnesota. It produces taconite pellets from low-grade iron ore. The plant includes a mine, a crusher, a concentrator and an agglomerator. During the year prior to the citations and orders involved herein, approximately 1,159,284 hours of work were performed at the Minntac Plant, and over 3 million hours were performed by the controlling entity. USS is a large operator. Between January 24, 1988 and January 23, 1990, there were 414 paid violations of mandatory health and safety standards at the subject facility, including 178 assessed violations of 30 C.F.R. 56.11001, and 28 assessed violations of 30 C.F.R. 56.20003. In view of the size of the facility, this history is not such that penalties otherwise appropriate should be increased because of it. Payment of the proposed penalties in these cases will not affect the ability of USS to continue in business. All of the citations and orders involved in these proceedings were abated promptly and in good faith.

The inspection which resulted in the citations and orders was of the milling facility of the plant and particularly, the agglomerator. The agglomerator is the last step in the taconite

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producing process, and the pellets are formed there. It is located in two separate buildings, each with six floors. One building has about 800,000 square feet of floor space, the other about 400,000. There are 169 conveyor belts in one building and 125 in the other. They carry approximately 52,000 tons of material each day in order to produce about 41,000 tons of pellets. About 240 miners are employed in the agglomerator.

CITATION 3444248

On November 28, 1989, a citation was issued for an alleged violation of 30 C.F.R. 56.11001 because an area of the washdown floor in the agglomerator was covered with wet slurry across the entire walkway. There were also washdown hoses lying on the floor. The slurry was about 1 or 2 inches deep and covered an area of about 20 feet by 30 feet. No one was cleaning the area when the citation was issued, and no employees were present in the area. The area was frequently used as a travelway to other areas of the plant. It was not the sole route to these areas however. The violation was abated the following day when the cited area was cleaned.

CITATION 3469424

On January 2, 1990, a citation was issued for an alleged violation of 30 C.F.R. 56.20003 because of an accumulation of dust and other extraneous materials including tools on a walkway adjacent to a conveyor belt. There was also dust on machinery in the area of the walkway. The dust on the walkway was about 1 to 2 inches deep. The walkway was about 10 feet wide and 60 to 70 feet long. Dust on the machinery was 4 to 5 inches deep. Employees did not regularly work in the area, and no one was in the area at the time the citation was issued. Footprints were seen in the dust. The violation was abated on or before the termination date, January 8, when the walkway was cleaned.

CITATION 3469425

This citation was issued January 2, 1990, alleging a violation of 30 C.F.R. 56.20003 because of an accumulation of dust, hoses and tools on an elevated walkway adjacent to the head end of the conveyor. No employees were working in the area and it was travelled only infrequently. The accumulation varied from 1 to 2 inches deep and covered an area of about 20 feet by 20 feet. On the day in question the wash pumps were inoperative, and it was not possible to hose down the area. The pumps had been down for about 3 days. The violation was abated on or before the termination date of the citation when the walkway was cleaned.

CITATION 3469426

This citation was issued January 2, 1990, charging a violation of 30 C.F.R. 56.11001 because of an accumulation of

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ore up to 8 inches deep along a walkway. The area covered was approximately 10 feet by 3 feet. The material was dry . This area also could not be washed down because the pump was inoperative. The conveyor was seldom used and employees worked infrequently in the area. However, there were footprints and a heater in the cited area. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469427

A violation of 30 C.F.R. 56.20003 was charged because of an accumulation of ore, hoses and other materials along a walkway adjacent to a conveyor. The walkway was used by attendants who were supposed to clean the areas where they worked. As in the previously cited areas, this area could not be washed down because the pump was inoperative. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469428

A violation of 30 C.F.R. 56.20003 was cited because slurry and ore as well as hoses were permitted to accumulate in a walkway of a washdown floor. The slurry and ore accumulation varied from 1 to 3 inches deep. It was slippery. Employees were not working in the area at the time the condition was cited. The area had been partially washed down before the pumps became inoperative. The violation was abated on or before the termination date when the walkway area was cleaned.

CITATION 3469429

A violation of 30 C.F.R. 56.11001 was alleged because of an accumulation of slurry in a walkway of a washdown floor. The accumulation was 3 to 4 inches deep and covered an area 5 feet wide and approximately 500 feet long. Hoses were lying on the walkway, some of them buried in the slurry. The area was not normally travelled. The slurry resulted from an overspill from the filter. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469431

A violation of 30 C.F.R. 56.11001 was alleged on January 3, 1990, because of an accumulation of slurry and dry ore in the center walkway of a washdown floor. Part of the accumulation was wet and part was dry. The area was not frequently travelled, but it was necessary to travel it for maintenance purposes. The violation was abated on or before the termination date when the area was cleaned.

CITATION 3469433

A violation of 30 C.F.R. 56.11001 was charged because of an accumulation of slurry on a walkway between two conveyors.

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The slurry was 4 to 6 inches deep and covered the entire walkway, 150 feet long and 5 feet wide. It was very wet and very slippery. The walkway was used relatively infrequently for maintenance of the conveyors. No employees were in the area at the time the citation was issued. The violation was abated on or before the termination date when the walkway was cleaned.

CITATION 3469434

This citation was issued on January 3, 1990, and charges an unwarrantable failure violation of 30 C.F.R. 56.11001. It was issued under section 104(d)(1) of the Act. The inspector originally told USS that he was going to issue a 104(a) citation. However, he informed USS by telephone on January 4 that the citation would be issued under section 104(d)(1). The written citation was actually delivered on January 8. The citation charges a violation because of an accumulation of slurry 1-1/2 inches in depth, 10 feet wide and 90 to 100 feet long. There were footprints in the slurry and hoses lying across the walkway. Several employees used the walkway. The washdown hoses were inoperative at the time. The condition was abated prior to the termination date when the area was barricaded and the walkway cleaned up.

ORDER NO. 3469435

On January 3, 1990, Inspector King issued a 104(d)(1) withdrawal order alleging an unwarrantable failure violation of 30 C.F.R. 56.11001 because of an accumulation of fine dry ore along both sides of an elevated walkway adjacent to a conveyor. The accumulation was conically shaped and covered the entire walkway and was up to 10 inches in depth. The walkway was used for maintenance purposes and was the only access to the conveyor. There were no employees in the area at the time of the citation. The condition was abated on January 8, 1990, when the area was barricaded and cleaned up.

ORDER NO. 3469437

The inspector issued a 104(d)(1) order for a condition observed on January 3, 1990, alleging a violation of 30 C.F.R. 56.1101. Initially Inspector King informed USS that he would issue a 104(a) citation for the condition. On January 4, 1990, he informed USS by telephone that he was going to issue a 104(d)(1) order. The written order was served on USS on January 8. Ore was present on a walkway around a tail pulley of a conveyor. The accumulation was approximately 2 to 3 feet deep on both sides of the tail pulley and covered about two-thirds of the walkway. The area was not frequently travelled, but was used by maintenance workers and supervisors. A sign was present restricting access to the area. The condition was abated by barricading and cleaning the area.

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ORDER NO. 3469438

On January 8, 1990, Inspector King received written complaints from miners given him by the union safety representative all having to do with cleanup problems at the plant. The inspector found piles of fine dry ore and a buildup of slurry across the entire floor of the washdown floor. There were footprints in the material indicating that it had been present for some time. The Union safety committeeman had pointed out the problem to USS some days previously. At the time of the inspection, two employees were cleaning the area with a water hose. The area was used by maintenance workers and operational personnel. None were in the area at the time the order was issued. The area was not barricaded, nor were any warning signs posted. In early January 1990, USS was attempting to reclaim the frozen chunks of concentrate, and it overloaded its reslurrying system, causing a major spill on the washdown floor. This occurred on and prior to January 7. USS has a cleanup program for the agglomerator plant, and additional men were assigned to clean up after the spill. The order was terminated February 13, 1990, after the area was barricaded and cleaned up. It had been cleaned up by the end of January.

ORDER NO. 3469439

On January 8, 1990, Inspector King, again acting on a miner's complaint, issued a 104(d)(2) order alleging a violation of 30 C.F.R. 56.11001 because the floor of classifier pit, approximately 30 feet by 30 feet, was covered with slurry and water up to 1 foot in depth. The pumps had overflowed causing the accumulation. The area was travelled by miners once or twice each shift to check the pumps. No one was in the area when the order was issued. The area had been cited many times previously for accumulation problems. The order was terminated January 31, 1990, after the area was barricaded and cleaned up.

ORDER NO. 3469440

This order was issued on January 8, 1990, following a miner's complaint. It alleges a violation of 30 C.F.R. 56.11001 for an accumulation of water and slurry on the floor of another classifier pit. The accumulation was about 1 foot deep and covered an area of about 25 feet by 30 feet. The area was used by maintenance personnel to service the pumps. The condition was similar to that cited in order No. 3469439 and resulted from the same problem. The area was not barricaded or posted. The order was terminated on January 22, 1990, after the area was barricaded and cleaned up.

ORDER NO. 3469471

On January 24, 1990, Inspector King issued a 104(d)(1) order alleging a violation of 30 C.F.R. 56.11001, for an accumulation of wet slurry on a travelway around a conveyor tail pulley. The

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accumulation was from one to eight inches deep and covered an area of 20 feet wide and 60 feet long. The wet slurry was very slippery. Footprints were seen in the walkway. The walkway was not heavily travelled. No one was cleaning in the area when the order was issued. The order was terminated on January 25, 1990, after the area was barricaded and the slurry was hosed away.

STATUTORY PROVISION

Section 104(d)(1) of the Mine Act provides as follows:

(d)(1) 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 hazards, 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following

an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

REGULATIONS

30 C.F.R. 57.11001 provides as follows:

Safe means of access shall be provided and maintained to all working places.

30 C.F.R. 56.20003 provides as follows:

At all mining operations--

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

(b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable; and

(c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes or loose boards, as practicable.

ISSUES

1. Whether the violations charged in the citations and orders were established by the evidence.

1a. Whether to establish the violations charged, it is necessary to show that employees were actually working in the cited areas when the citations and orders were issued.

2. Whether the violations charged in citations 3444248 and 3469434 and in order 3469438 were properly designated significant and substantial.

3. Whether the violations charged in citation 3469434 and Orders 3469435, 3469437, 3469438, 3469439, 3469440 and 3469471 were the result of USS's unwarrantable failure to comply with the cited standards and whether the citation and orders were properly issued.

4. If the violations are established, what are the appropriate penalties.

I

USS is subject to the provisions of the Mine Act in the operation of the Minntac Plant and I have jurisdiction over the parties and subject matter of these proceedings.

II

The safety standard contained in 30 C.F.R. 56.11001 requires mine operators to provide and maintain safe means of access to all working places. I interpret this to require that all ordinarily used travelways be kept clear of slipping and tripping hazards. I do not accept the argument that only designated travelways are covered by this standard. I conclude that all walkways or passageways used by miners, whether they are engaged in maintenance, cleaning or production are covered by the standard. I interpret working places to include all areas where work is ordinarily performed. I do not accept USS's argument that the standard only applies to areas where work is being performed at the time the violation is cited. Such an interpretation is unrealistic, and not in keeping with the promotion of health and safety envisioned by the Mine Act.

III

The safety standard contained in 30 C.F.R. 56.20003 requires mine operators to keep workplaces and passageways clean and orderly; it requires them to keep workplace floors clean and, so far as possible, dry, and to maintain drainage and dry standing places where wet processes are used. As in my interpretation of 56.11001, I conclude the standard applies to all workplaces and passageways, even though no work was being performed at the time of the cited violations, and even though the passageways were not designated or regularly used as such. The standard recognizes that some operations will result in wet conditions: the issue in each of the cited violations is whether there were excessive amounts of dust, dirt, slurry, etc., in the cited areas.

It is not clear in the citations and orders involved herein, why some were issued under 56.11001 (safe means of access to working places), and some under 56.20003 (housekeeping requirements). Most of the violations charged under either standard involve walkways. There is an overlap in the requirements of the two standards, however, and I do not find that any of the citations or orders improperly cited one standard or the other.

IV

The evidence concerning citation 3444248 shows that portions of a walkway 20 feet by 30 feet were covered with 2 inches of slippery slurry. There were also hoses buried in the slurry. The area was a washdown floor, and employees had been assigned to clean it. However, no one was cleaning it at the time it was cited. The condition rendered the walkway unsafe. A violation of 30 C.F.R. 56.11001 is established. It was moderately serious and the result of ordinary negligence.

Citations 3469424 and 2469425 were issued because of dust and other materials on walkway. In both cases, the accumulation had existed for some time. The walkways were not frequently used. Violations of 30 C.F.R. 56.20003 are established. They were not serious but resulted from USS's negligence.

Citation 3469426 charged a violation of 56.11001 because of an accumulation of ore on a walkway up to 8 inches deep covering an area of 10 feet by 3 feet. Employees seldom entered the area. The condition had existed for some time. It was moderately serious and resulted from more than ordinary negligence.

Citations 3469427 and 3469248 both charge violations of 56.20003 because of ore, hoses and other materials (427), and slurry and ore (428). Both cases involve walkways and extensive areas. Both were low traffic areas. I conclude that the violations were established; that they are not serious and were the result of negligence.

Citations 3469429, 3469431, and 3469433 charge safe access violations: 56.11001. Each involves a substantial accumulation of wet slurry on walkways. The areas were not frequently travelled. The extent of the accumulations make the violations moderately serious. They resulted from USS negligence which was mitigated to some extent by the fact that the pumps needed for cleanup were inoperative.

Citation 3469434 was issued under section 104(d)(1) charging a violation of 56.11001 because of an accumulation of slurry along a walkway with hoses lying across the walkway. The walkway was used by a large number of employees. It posed a hazard to such employees and a violation was established. It was serious and resulted from the negligence of USS.

Orders 3469435, 3469437, 3469438, 3469439, and 3469440 were issued under section 104(d)(1) and charge violations of 56.11001 because of accumulations of ore along walkways, slurry along walkways, slurry and water covering the entire floor. In each instance, I conclude that a violation was established. In each case it was moderately serious and the result of the negligence of USS. The negligence concerning the violation

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charged in order 3469437 is mitigated by the fact that a sign restricting access was present.

Order 3469471 charges a violation of 56.11001 because of an accumulation of wet slurry along an infrequently used walkway. A violation was established. It was not serious but was the result of negligence.

V

Citations 3444248 and 3469434 and Order 3469438 charge violations of a significant and substantial nature. The Commission has held that a violation is significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (1984); U.S. Steel Mining, Incorporated, 6 FMSHRC 1834 (1984). In each of the violations involved here, substantial areas of accumulation were involved. The walkways were frequently travelled. Both slipping and tripping hazards were present. I conclude that in each instance, serious injuries were likely to result. The violations were significant and substantial.

VI

Citation 3469434 and Orders 3469435, 3469437, 3469438, 3469439, 3469440, and 34694471 were issued under section 104(d)(1) and charge that the violations were the result of the unwarrantable failure of USS to comply with the standard in question. In Emery Mining Corp., 9 FMSHRC 1997 (1987), the Commission stated that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. I conclude that the Secretary has failed to establish such aggravated conduct in relation to any of the cited instances. There were a large number of violations of the standards involved herein. Miners had complained of cleanup problems on many occasions. On the other hand, mitigating circumstances were present in that the water pumps were inoperative for a period of time. USS had devoted substantial overtime work to attempt to alleviate the problems. Negligence was established; unwarrantable failure was not. The violations were not properly written under section 104(d).

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citations 3444248, 3469426, 3469429, 3469431, 3469433, 3469424, 3469425, 3469427 and 3469428 are AFFIRMED, Citation 3444248 including its special finding of a significant and substantial violation.

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2. Citation 3469434 and Orders 3469435, 3469437, 3469438, 3460439, 3469440 and 3469471 are MODIFIED to 104(a) citations; the unwarrantable failure finding is removed.

3. The contest proceedings are thus GRANTED IN PART, in that the unwarrantable failure finding is removed, and DENIED IN PART in that the violations are AFFIRMED.

4. Guided by the criteria in section 110(i) of the Act, I conclude that the following civil penalties are appropriate for the violations and USS shall, within 30 days of the date of this decision pay civil penalties as follows:

CITATION	PENALTY
3444248	\$ 250
3469426	350
3469429	400
3469431	400
3469433	400
3469434	750
3469435	750
3569437	600
3569438	750
3469439	750
3469440	750
3469471	200
3469424	200
3469425	200
3469427	200
3469428	200
TOTAL	\$7150

James A. Broderick
Administrative Law Judge