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SOL (MSHA) V. US STEEL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
August 30, 1984

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

v. Docket Nos. LAKE 82-35-M
LAKE 82-6-RM

UNITED STATES STEEL CORPORATION

DECISION

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982), involves the interpretation and application of 30 C.F.R. 55.15-5, a mandatory personal protection standard. 1/ The Commission's administrative law judge concluded that U.S. Steel Corporation ("U.S. Steel") violated the standard and assessed a civil penalty. 4 FMSHRC 1104 (June 1982)(ALJ). For the reasons that follow, we affirm the judge in part and reverse and remand in part.

The events at issue in this proceeding occurred at U.S. Steel's Minntac Mine iron ore preparation plant in Mountain Iron, Minnesota. At this plant U.S. Steel produces taconite pellets, a high grade iron ore concentrate used in making steel. After iron ore concentrate is formed into marble-sized taconite pellets during the agglomeration phase of the preparation process, the pellets are discharged into a cooler. A cooler is a large doughnut-shaped installation, about 56 feet in diameter, where the hot taconite pellets are cooled on a circular conveyor consisting of a series of metal grates, called pallets. Each pallet is about 8 feet long and widens from about 5 feet at its inner end near the center of the cooler to just under 7 feet at its outer end.

When the cooling cycle is almost complete a pallet pivots open to an upright position and tips the cooled pellets into a storage bin

18 feet below the pallet. There is only one opening to the storage bin, so each pallet pivots open in turn when it is in position over the opening. When a pallet is in the open position it creates two openings on either side of its axis, one of which is large enough for a person to fall through. There is an entrance into the cooler located about 4 to 4-1/2 feet above the pallet conveyor floor in the vicinity of the opening to the storage bin.

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1/ 30 C.F.R. 55.15-5 provides:

> Mandatory. Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

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On September 10, 1981, during a regular inspection of the preparation plant, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") observed a maintenance foreman, who was not wearing a safety line, climbing out of a cooler after performing a repair. While exiting, the foreman was in the immediate vicinity of the opening to the storage bin. The cooler was not operating at the time. During the repair work, a pallet was in the upright position over the storage bin. Plywood panels had been placed over the openings created by the raised pallet. Before climbing out of the cooler, the foreman handed up the plywood panels.

After investigating the situation, the inspector concluded that there was a danger of falling 18 feet to the storage bin through the large opening created by the raised pallet, and that the foreman's failure to wear a safety line was in violation of 30 C.F.R. 55.15-5. The inspector also found that the violation was significant and substantial and caused by the operator's "unwarrantable failure" to comply with the standard, and he cited the violation in a withdrawal order issued pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. 814(d)(2). 2

2/ Section 104(d) of the Mine Act provides:

(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 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 ... 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.

30 U.S.C. 814(d)(1) & (2).

U.S. Steel filed a notice of contest of the order, and the Secretary of Labor filed a petition for the assessment of a civil penalty. At the consolidated hearing before the Commission's administrative law judge, U.S. Steel argued that the standard was too vague to be enforced. In his decision the judge disagreed. He concluded that the standard's phrase, "danger of falling" did not extend to de minimis situations, i.e., possible falls of only a few inches or feet, and was sufficient to apprise "reasonably prudent operators" when safety belts are to be worn. 4 FMSHRC at 1109. Finding that an "ordinary working person" would have recognized a danger of falling through the large opening created by the raised pallet in the cooler, the judge concluded that, on the facts present in the case, the foreman's exit from the cooler amounted to a violation of section 55.15-5. 4 FMSHRC at 1109-10.

The judge also concluded that the inspector had issued a valid withdrawal order under section 104(d)(2) of the Mine Act. The judge held that to sustain a section 104(d)(2) withdrawal order, the Secretary of Labor has the burden of proving the absence of an intervening clean inspection of the entire mine and that the violation was caused by an unwarrantable failure to comply with a mandatory standard. The judge relied on CF&I Steel Corporation, 2 FMSHRC 3459 (December 1980), in which we approved an identical allocation of evidentiary burdens under the analogous provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977). Although acknowledging that the evidence was "skimpy" and "possibly conflicting," the judge held that the Secretary had made out a prima facie case establishing the absence of an intervening clean inspection. 4 FMSHRC at 1107-09.

Finally, relying on the definition of unwarrantable failure announced under the 1969 Coal Act by the Department of the Interior's Board of Mine Operations Appeals in Zeigler Coal Company, 7 IBMA 280 (1977), the judge held that the violation was unwarrantable because it was committed by a foreman, a representative of management, who "should have known of the hazard and should have taken steps to avoid it." 4 FMSHRC at 1110.

We turn first to U.S. Steel's challenge that the standard is too vague to be enforced. The standard's requirement that safety belts and lines shall be worn by miners where there is a danger of falling is the kind of regulatory mandate "made simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). We have held previously that application of such a broad standard to particular factual contexts

does not offend due process if the operator's allegedly violative conduct is judged with reference to the objective test of what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the standard. U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982). Subsequent to the granting of review in this case, we applied this construction to the

identical personal protection standard dealing with safety lines contained at 30 C.F.R. 57.15-5. Great Western Electric Company, 5 FMSHRC 840, 841-42 (May 1983). U.S. Steel has presented no arguments that would lead us to reconsider that holding. The judge's application of the standard in this case, while differing in some minor respects from the Great Western formulation, was sufficiently similar to our approach in that case to pass muster on review. We therefore reject U.S. Steel's vagueness challenge.

U.S. Steel's petition for discretionary review frames the issue with respect to the judge's conclusion of a violation only in terms of a generalized vagueness challenge. Nevertheless, the operator's brief contains some discussion that can be read as a challenge to the judge's specific findings that U.S. Steel violated the standard. We must emphasize the procedural bar against a party attempting in its brief to enlarge upon the issues raised in its petition for discretionary review. See 30 U.S.C. 823(d)(2)(A)(iii)&(B); Commission Procedural Rules 70(f) & 71, 29 C.F.R. 2700.70(f) & 71. We wish to make clear, however, that the judge's findings are supported by substantial evidence.

There was no dispute that the foreman, when climbing out of the cooler, did not wear a safety belt. The judge evaluated the foreman's testimony describing his exit from the cooler, and concluded that a danger of falling should have been recognized under the circumstances. 4 FMSHRC at 1109-10. The exit from the cooler was at least four feet above the pallet conveyor floor. The foreman testified that he pulled himself out by grabbing a gate bar located at the exit while bracing his knee against the cooler wall for balance. As noted above, the foreman had already handed up the plywood panels used to cover the openings over the storage bin and his exit was performed in the immediate vicinity of the openings. An 18-foot drop would have occurred if the foreman had fallen through the large opening over the storage bin. We conclude that substantial evidence, evaluated in the light of our Great Western Electric test, supports the judge's conclusion that U.S. Steel violated the standard.

We next examine the judge's findings concerning the validity of the section 104(d)(2) withdrawal order. The plain language of section 104(d)(2) of the Mine Act (n. 2 supra) establishes three general prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard "similar to [the violation] that resulted in the issuance of the withdrawal order under [section 104(d)(1)];" and (3) the absence

of an intervening "inspection of such mine disclos[ing] no similar violations."

Our resolution of the issue raised in this case turns on the third element -- the intervening clean inspection. Recently, we reaffirmed the rationale of CF&I, supra, and extended the prior consistent interpretation of "clean inspection" under the 1969 Coal Act to the 1977 Mine Act. Kitt Energy Corp., 6 FMSHRC 1596, 1598-1601 (July 1984), petition for review filed sub nom. United Mine Workers of America v. FMSHRC, No. 84-1428 (D.C. Cir. August 17, 1984). We held in Kitt Energy that to establish the validity of a section 104(d)(2) withdrawal order under the 1977 Mine Act, the Secretary of Labor must prove the absence of an intervening clean inspection of the entire mine. We further held that such an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety. Thus, the judge appropriately relied on CF&I in addressing the clean inspection issue raised here. We conclude, however, that substantial evidence does not support the judge's factual finding that the Secretary established the absence of an intervening clean inspection. The entire testimony on the issue is limited and we quote it in full.

Initially, on direct examination the inspector testified:

> Q. [By counsel for the Secretary] Now, when you decided to issue your particular 104(d)[(2)] ... order, were you aware that there was a prior 104(d)(1) order in effect at the Minntac plant?
>
> A. Yes, I issued it.
>
> Q. You said you were the inspector who issued the prior 104(d)(1) order?
>
> A. I was.
>
> Q. Could you tell us what standard was cited in the prior 104(d)(1) order?
>
> A. That was also a 15-5 safety belt standard.
>
> 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.

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Q. And how do you know that

A. Cuz I was the inspector. I issued the last one.

Tr. 27-28 (emphasis added).

In response to questions on cross-examination, the inspector also testified:

Q. [By counsel for U.S. Steel] Okay. Now did you inspect Minntac operations between March 3rd, 1981 -- March 31, 1981 and September lOth, 1981?

A. Oh, sure.

Q. Were you there everyday?

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. The entire Minntac plant?

A. The entire I.D. No. 820, yes. [I.D. No. 820 refers to the Minntac plant.]

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 lOth, 1981.

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

Q. Between -

A. Then we started another inspection.

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

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

Tr. 53-54 (emphasis added).

As noted, these exchanges represent the entire testimony concerning intervening clean inspection. The judge quoted these exchanges and acknowledged the "skimpy" and "possibly conflicting" nature of the testimony. The judge provided no analysis of this evidence and concluded, "[B]ased on the above testimony, ... MSHA established prima facie that there was not an intervening clean inspection between the section [104](d)(1) and (d)(2) orders. U.S. Steel did not offer any evidence to rebut the prima facie showing" 4 FMSHRC at 1109. We respectfully disagree.

During direct examination, the inspector appeared to give clear testimony that "There was not no clean inspection, no." Tr. 28. Presumably, however, the inspector's view of what constitutes a clean inspection agrees with that argued by the Secretary: that only a regular quarterly inspection without similar violations lifts the section 104(d) chain. Our presumption is strengthened by the inspector's testimony on cross-examination, when he tried to distinguish regular inspections he had conducted between March 31 and September 10, 1981. As noted above, we have held that any combination of regular or other inspections that covers the entire mine can constitute an intervening clean inspection. The inspector testified that he was at the Minntac Mine regularly and that between March 31 and September 10, 1981, "I have covered the entire facility, yes. ... The entire I.D. No. 820, yes." Tr. 53-54. The inspector's final word on the subject only compounded the confusion between his initial testimony and his later testimony: "Well, that's possible I went through there." Tr. 54.

Precisely the same kind of concession of a "possible"intervening clean inspection composed of a series of spot inspections covering the entire mine led the Commission in CF&I to conclude that a prima facie case of the absence of an intervening clean inspection had not been established. 2 FMSHRC at 3460-61. We also are mindful that the judge himself characterized the inspector's testimony in this proceeding as "skimpy" and "possibly conflicting." Our responsibility on review is to examine the entire record, and the totality of the inspector's testimony on direct examination and cross-examination is entirely too vague and uncertain to establish a prima facie case of the absence of

an intervening clean inspection. We cannot treat this contradictory evidence as affording substantial evidentiary support to the judge's finding that there was an absence of an intervening clean inspection. Accordingly, because a prerequisite to issuance of a valid section 104(d)(2) withdrawal order is lacking, we vacate the order.

However, allegations of violation and any section 104(d) special findings associated with the violation survive the vacation of orders in which they are contained. Consolidation Coal Co., 4 FMSHRC 1791, 1793-97 (October 1982); Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980). In Consolidation Coal, supra, we vacated a procedurally defective section 104(d)(1) withdrawal order that contained special findings that the violation was significant and substantial and caused by an unwarrantable failure to comply. We held that an absolute vacation of the order and dismissal would allow a serious violation to fall outside the statutory sanction expressly designed for it--the section 104(d) sequence of citations and orders. 4 FMSHRC at 1793-94. Thus, under the circumstances present in that case, we affirmed the judge's modification of the defective order to a section 104(d)(1) citation. 4 FMSHRC at 1793-97. In a related vein, we have also held recently that special findings may be included in a citation issued pursuant to section 104(a) of the Mine Act. Consolidation Coal Co., 6 FMSHRC 189, 191-92 (February 1984).

In this case, the inspector cited the violation as being significant and substantial and caused by an unwarrantable failure to comply. The requisite special findings therefore are present to support a possible modification of the section 104(d)(2) order to the appropriate section 104(d)(1) order or citation. Because the section 104(d)(2) order cannot stand, we remand to the judge to determine the appropriate modification. 3/

The final issue in this case is whether the judge erred in concluding that the violation was caused by the unwarrantable failure of the operator to comply with the standard. As just noted, this finding bears on the appropriate modification. The judge summarily concluded, "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." 4 FMSHRC at 1110. U.S. Steel contends that the judge

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3/ We note that for a section 104(d)(1) withdrawal order to issue validly, the violation must have been caused by an unwarrantable failure to comply with the standard, and the order must have been issued within the same inspection or any subsequent inspection within 90 days after the issuance of the original 104(d)(1) citation. If this violation did occur within the 90-day limit, then it may be cited within a section 104(d)(1) order if it also occurred as a result of the unwarrantable failure of the operator to comply with the standard--the final issue discussed below in this decision. If, however, the violation occurred outside the 90-day period, the invalid

order could still possibly be modified to a section 104(d)(1) citation if the violation was both significant and substantial and unwarrantable. (If the judge needs to decide whether the violation here was significant and substantial, he shall afford the parties the opportunity to submit additional argument on the subject, if they desire.) If on remand, the judge determines that modification to a section 104(d)(1) order or citation is not possible then the violation should be reduced to a section 104(a) citation.

improperly apPlied a per se rule that merely because the foreman was a representative of management his violative conduct constituted an unwarrantable failure to comply. We find the judge's conclusion on this issue to be insufficiently explained. Consequently, we are unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence. See The See The Anaconda Company, 3 FMSHRC 299, 299-302 (February 1981). Accordingly, we remand this question to the judge. In the interests of procedural fairness, the judge should allow the parties to reargue their positions concerning unwarrantability, if they desire. After considering any such argument, the judge should articulate fully the reasons for his ruling on this issue.

Accordingly, we affirm the judge's conclusion that U.S. Steel violated section 55.15-5. Because we reverse his finding concerning the absence of an intervening clean inspection, we vacate the section 104(d)(2) withdrawal order and remand for proper modification of the order as discussed above. We also remand for reconsideration of the issue of unwarrantable failure and, if necessary, the question of whether the violation was significant and substantial (see n. 3, supra). 4/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

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4/ The Secretary also argues that U.S. Steel violated Commission Procedural Rules 20(c) and 28, 29 C.F.R. 2700.20(c) & .28, by not specifically pleading its reliance on the issue of the intervening clean inspection, and that the judge erred in excusing that failure. The issue of the absence of an intervening clean inspection was part of the Secretary's prima facie case. The Secretary was required to prove all those elements of the prima facie case that had not been

admitted or waived. In this instance, U.S. Steel generally denied "all other allegations of fact and law" in its answer, and did not concede the absence of an intervening clean inspection. Moreover, it would have been permissible for the judge to allow liberal amendment to the pleadings by U.S. Steel at the hearing. Cf Fed. R. Civ. P. 15(b). Under these circumstances, the judge properly proceeded to rule on the merits of the intervening clean inspection issue.

Commissioner Lawson dissenting in part:

The judge's conclusion that U. S. Steel violated section 55.15-5 is clearly correct, supported by substantial evidence, and was challenged by this operator only in terms of a generalized vagueness assertion, as the majority acknowledges. My colleagues, however, have chosen to discount the substantial evidence found by the judge below to have established that MSHA did not carry out a complete (clean) inspection of this mine during the applicable period. Finding of Fact 7; Conclusion of Law 3.

The decision below has been found wanting by the majority because the judge "summarily concluded" that this violation was caused by the unwarrantable failure of the operator to comply with the standard, and his conclusion was "insufficiently explained." As they note, "we are unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence ... Accordingly, we remand this question to the judge." Slip op. at 9 (citation omitted).

However, a different standard of review is applied to the "clean inspection" question. The majority here, too, finds that "the judge provided no analysis of this [intervening clean inspection] evidence." Slip op. at 7. Although I would not disagree that the judge's ruling would be significantly more satisfactory had it included an expanded explanation for its bases, I am not prepared so readily to overturn his clear holding that MSHA "established prima facie that there was not an intervening clean inspection," 4 FMSHRC at 1109, and, as the majority acknowledges, "'J.S. Steel did not offer any evidence to rebut the prima facie showing." Id.

As the judge acknowledged, the testimony below was "skimpy" and "possibly conflicting." The judge, performing his fact-finding duty, resolved that conflict. His reasons may have included an evaluation of the witness' demeanor, evidence that MSHA inspector Wasley had a continuous presence at this mine, and, of most significance, his clear testimony that: "There was not no clean inspection, no." Slip op. at 5, Tr. 27-28. 1/ (Emphasis added). The Commission should be loath to overturn the judge's determination and substitute a differing view of the facts absent any rationale other than disagreement with the fact-finder's resolution of the conflicting evidence and speculation regarding its meaning (see note 1, supra).

My colleagues' failure to remand this issue for necessary clarification is thus internally inconsistent. In lieu of affirmation

of the judge on this issue, which would appear to me supportable on this record, I would remand for clarification on this issue as well. See The Anaconda Company, 3 FMSHRC 299 (1981). Whatever may transpire in the future in this case will be better accomplished with such judicial clarification.

A. E. Lawson, Commissioner

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1/ The majority's assertion that, "Presumably ... the inspector's view of what constitutes a clean inspection agrees with that argued by the Secretary ...," slip op. at 7, lacks record support and is mere speculation.

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