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MSHA V. U.S. STEEL MINING
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FMSHRC-WDC
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PENN 84-49

UNITED STATES STEEL MINING
COMPANY, INC.

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982) (the "Mine Act"), and involves two alleged violations of a roof control standard for underground coal mines, 30 C.F.R. 75.200 (1985). 1/ The administrative

1/ The cited standard provides in pertinent part:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuous 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 ...
The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at east every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support 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.

law judge. found that United States Steel Mining Company, Inc. ("U.S. Steel") committed two violations of the cited standard and assessed civil penalties of \$7 500 and \$350. 6 FMSHRC 2693 (November 1984) (ALJ). We granted U.S. Steel's petition for review of the judge's decision and heard oral argument.

The issues raised by U.S. Steel are: (1) whether in regard to the first violation the judge properly found that U.S. Steel was negligent in connection with a fatal roof fall; and (2) whether the judge properly found that U.S. Steel violated its roof control plan by failing to install a temporary jack for roof support. For the following reasons, we reverse and remand on the negligence issue and affirm on the violation issue.

The alleged violations occurred at the Maple Creek No. 1 Mine, an underground coal mine owned and operated by U.S. Steel. Glen Ward and Nathan Klingensmith were district underground plan coordinators responsible for setting spads and sight lines at U.S. Steel's mines. (Spads and sight lines insure that entries and crosscuts will be driven straight and at proper angles.) As underground plan coordinators they worked in different mines and different areas of a mine as needed and assigned.

On the morning of May 23, 1983, Ward and Klingensmith reported to Earl Walters, the acting mine foreman at the Maple Creek No. 1 mine for their daily work assignment. Walters testified that he and Ward discussed the mining that had been done on previous shifts. They examined the mine maps to determine where spads would be needed that day. Walters testified that he specifically told Ward to set spads in No. 20 split at the intersection of the No. 7 room.

When the two miners arrived at the section of the mine that contained the intersection of No. 20 split and the No. 7 room the section foreman, Walter Franczyk, was on the mine telephone conducting business. They greeted the section foreman, and they proceeded past him. For some unexplained reason, rather than going to the intersection of the No. 20 split and No. 7 room as directed by Walters, Ward and Klingensmith proceeded to the intersection of the No. 20 split and No. 6 room.

The No. 6 room was one of two working places on the section. At the start of the morning shift on May 23, the No. 6 room had already been mined and bolted up to, but not including, the intersection with the No. 20 split. Prior to commencing mining on the section and prior to the arrival on the section of Ward

and Klingensmith, Franczyk had met with his section crew and had visited the intersection. The continuous mining machine operator and the operator's helper advised Franczyk that the roof in the intersection of No. 6 room and No. 20 split was drummy. 2/ Franczyk instructed them to cut the drummy roof down.

2/ The term "drummy" is defined as, "loose coal or rock that produces a hollow, loose, open, weak, or dangerous sound when tapped with any hard substance to test condition of strata; said especially of a mine roof. ..." A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968).

The continuous miner operator and his helper were at the intersection when Ward and Klingensmith arrived. The helper warned Klingensmith, "I wouldn't go in there if I were you." Tr. 31, 47. Nevertheless, Klingensmith proceeded under the unsupported roof where he remained for ten minutes installing two spads. He came out from under the unsupported roof, and Ward then proceeded under the unsupported roof and climbed up onto the continuous mining machine to put more spads in the roof. Klingensmith again went under unsupported roof and was preparing to assist Ward when the roof collapsed on the miners. Ward and Klingensmith were killed. As a result of the accident, MSHA issued the two roof control violations now before us on review.

In one of the citations, the Secretary first asserted that U.S. Steel violated 30 C.F.R. § 75.200 when Ward and Klingensmith proceeded beyond the last permanent support and under unsupported roof. U.S. Steel conceded the violation but argued that the violation was not the result of its negligence. 3/ The judge found otherwise. In doing so, he relied on the testimony of MSHA Inspector Swarrow, one of two MSHA inspectors who investigated the accident, that the section foreman is responsible for the safety of everyone on his section. The judge stated that the section foreman has the "authority and responsibility to control what happens on his section." The judge therefore concluded that foreman Franczyk was negligent "in not stopping the decedents to find out their destination and what they were going to do." 6 FMSHRC at 2696. Finding that the section foreman's negligence was attributable to the operator, the judge found U.S. Steel negligent. We do not agree.

The Commission has held that when a violation is committed by a miner, the mine operator's negligence may be gauged by considering the foreseeability of the miner's conduct, the risks involved, and the operator's supervision, training and disciplining of its employees to prevent violations of the standard at issue. A.H. Smith Stone Co., 5 FMSHRC 13 (January 1983). All of the witnesses who testified in this proceeding agreed that the decision of Ward and Klingensmith to proceed beyond the last permanent roof supports and under unsupported roof was inexplicable and unforeseeable. Nor was any evidence offered by the Secretary to establish that U.S. Steel's selection or training of Ward and Klingensmith was in any way inadequate. To the contrary, the evidence clearly establishes that Ward and Klingensmith were very experienced underground plan coordinators who had received all required training concerning the hazards of working under unsupported roof and who, as far as is known, had never before performed their jobs under unsupported roof. Thus, there is nothing in the record

from which to conclude that Ward and Klingensmith's own lack of care is attributable to U.S. Steel under the imputation principles discussed in A.H. Smith Stone.

3/ Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), requires that in assessing penalties for violations the Commission must consider, among other criteria, "whether the operator was negligent".

The Commission also has held that consideration of a foreman's negligence is proper in assessing a penalty against an operator. Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981). Where a foreman's negligence is at issue the Commission looks to whether the foreman acted with the care required by all of the circumstances surrounding the violation. Southern Ohio Coal Co., 4 FMSHRC 1459, 1461 (August 1982). In finding negligence, the judge relied on the inspector's statement that a section foreman is responsible for the safety of everyone on his section. This ipso facto approach to a section foreman's negligence cannot be fully reconciled with the Commission's emphasis in Southern Ohio that the determinants of a section foreman's duty of care are the circumstances under which the violation arose.

The pertinent inquiry here is whether, under the circumstances described, section foreman Franczyk breached a duty of care toward Ward and Klingensmith. The record establishes that Ward and Klingensmith were employees who were not in Franczyk's chain of command. They were employees who worked in all of U.S. Steel's mines in the district and when they worked in the Maple Creek No. 1 mine, they were assigned as needed to different areas of the mine by the mine foreman. Nevertheless, Ward and Klingensmith were well known to Franczyk. Thus, when he saw them on his section he had every reason to assume what they were there to set spads, as directed by the mine foreman. This was not a situation in which unknown persons, with unknown responsibilities, were present in Franczyk's section.

Franczyk was on the telephone conducting mine business when Ward and Klingensmith arrived on his section, greeted him and proceeded past him. To his knowledge, Ward and Klingensmith had never installed spads under unsupported roof. Further, he had absolutely no basis to think that they would be installing spads in an area where the continuous miner operator and his helper were working to take down drummy roof. The inspector stated that the conditions in the intersection of the No. 20 split and No. 6 room were not in violation of the Mine Act. Drummy roof in a working place is not uncommon and to remove the danger posed, 30 C.F.R. § 75.200 requires the roof to be supported or adequately controlled. Franczyk was in the process of complying with this requirement; he ordered the continuous miner operator and his helper to take down the drummy roof. After the drummy roof was removed, required roof bolting would have commenced. While there might be conditions on a section so unusual and hazardous that a section foreman would be under a duty to warn everyone on the section of the existence of the hazards, here, given the obvious nature of the conditions and the expertise and experience of Ward and Klingensmith in working with mine roof, a warning to the

two miners not to enter into an area of unsupported roof, and not to set spads until the roof had been supported, was not required and Franczyk's "failure" to give such warning does not constitute a lack of reasonable care. We conclude, therefore, that under these facts Franczyk was not negligent. 4/

4/ On review, the Secretary alternately argues that the negligence of Ward and Klingensmith can be imputed to the mine operator because, as management employees, Ward and Klingensmith were agents of U.S. Steel

(footnote 4 continued)

The second citation charged that U.S. Steel violated its approved roof control plan in that a temporary jack had not been installed on the left side of the intersection of No. 6 room and No. 20 split as specified in Drawing No. 1 of the plan. The judge held that the violation occurred as alleged.

Section 302(a) of the Mine Act, 30 U.S.C. § 862(a), and the mandatory safety standard which implements section 302(a), 30 C.F.R. § 75.200, require the operator to adopt and the Secretary to approve a roof control plan suitable to the conditions of the mine. Such plans are intended to be essentially negotiated agreements between the Secretary and the operator regarding procedures to be followed by the operator in the interest of miner safety and for the control and support of roof and ribs. Cf *Zeigler Coal Company v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *Penn Allegh Coal Company*, 3 FMSHRC 2767 (December 1981); *Bishop Coal Company*, 5 IBMA 231 (1975). In recognition of this negotiation process the Commission has held that:

[A]fter a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.

Penn Allegh, 3 FMSHRC at 2770. The basis of the dispute in this case is a disagreement over the application of provisions of the previously agreed upon plan. The plan did not include a specific drawing for the mining and roof support sequence to be followed during the mining of an intersection, a routine occurrence. The Secretary argued and the judge found that Drawing No. 1 of the approved roof control plan applied to the mining of the intersections. Under Drawing No. 1, a second temporary jack is installed after the third cut of coal has been mined and before a fourth cut is mined. Because the second temporary jack was not set and a fourth cut of coal had been mined, the judge found that U.S. Steel was in violation of its approved roof control plan and of 30 C.F.R. § 75.200. 6 FMSHRC 2696-97. For the reasons that follow, we conclude that substantial record evidence supports the judge's findings concerning the applicability of Drawing No. 1 and the violation thereof.

At the hearing MSHA Inspector Moody stated that Drawing No. 1 was applicable to the intersection. The inspector acknowledged that Drawing No. 1 depicts an entry with two ribs of coal and that the intersection

and their actions are directly attributable to their employer. However, this issue was not raised before the judge. Instead, it was first advanced on review. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. § 823(d)(2)(A)(iii). Jones & Laughlin Steel Corp., 5 FMSHRC 1209, 1212 (July 1983). Such good cause has not been demonstrated. Therefore, this issue is not properly before us and we decline to reach the question as to whether employees such as Ward and Klingensmith are "agents" of an operator within the meaning of section 3(e) of the Mine Act. 30 U.S.C. § 802(e).

had only one rib. However, he stated that the row of roof bolts on the right side of the intersection (Letter "C", Op. Ex. 3) served the same support function as a rib and thus took the place of the right rib on Drawing No. 1. Further, the inspector testified that the temporary jack, when installed, serves a roof support function and reduces the area of unsupported roof to which miners are exposed when installing the permanent roof supports required by the plan. A first temporary jack was installed. The testimony of both MSHA Inspector Swarrow and of U.S. Steel's chief mine inspector established that a fourth cut of coal was mined and a second temporary jack was not installed.

U.S. Steel contends that the judge erred in concluding that Drawing No. 1 applies. It argues that a different provision of its plan, Drawing No. 23, applies to the mining of intersections. It states that Drawing No. 23 depicts a situation where it is unnecessary for a miner to proceed under unsupported roof to advance ventilation or to take gas samples. According to U.S. Steel, the only purpose of the temporary jacks indicated in Drawing No. 1 "is to protect people going under the roof to advance curtain, take tests, or set bolts." Brief at 8. It asserts that in the mining of the cited intersection there was no need for a miner to go under unsupported roof in order to advance line curtains or take gas samples. Stating that Drawing No. 23 is more analogous to the cited intersection than Drawing No. 1, it argues that the setting of temporary jacks was not required and that it did not violate its roof control plan in this respect. 5/

Section 113(d)(2)(A)(ii)(I) of the Mine Act mandates that factual findings of administrative law judges be upheld if supported by substantial evidence of record. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The judge here found the conclusion that Drawing No. 1 applied to the mining of intersections to be "inescapable". We might not have reached this conclusion so readily. The operator's argument that Drawing No. 23 also can be analogized to the mining of intersections because the required ventilation and gas testing can be accomplished from under the adjoining, previously bolted entry cannot be rejected summarily. If all required ventilation and gas testing can be accomplished from an adjoining entry without miners entering under unsupported roof, then Drawing No. 23, viewed in conjunction with Drawing No. 24, conceivably could be read to support the mining sequence argued for by U.S. Steel. However, we

5/ U.S. Steel also argues that even if Drawing No. 1 applied the setting of a second jack was not required until mining sequence No. 3 was completed, and that this had not yet occurred. This

argument is rejected. MSHA Inspector Swarrow and U.S. Steel's witness Cortis testified that cut No. 4 had been completed except for a little "cleaning up." Even if cut No. 4 was not completely finished, a second jack was required under Drawing No. 1 immediately upon completion of cut No. 3. The subsequent determination to remove more roof would not have affected the previously triggered requirement of setting a second jack.

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cannot say that the trial judge's conclusion that Drawing No. 1 applied is not supported by substantial evidence. The testimony of the MSHA inspector that Drawing No. 1 applies to the mining of intersections was detailed and consistent and provides a substantial basis supporting the judge's finding. Also supportive of this conclusion is the fact that one temporary jack had been set by the miners, which would have been required by Drawing No. 1, but not by Drawing No. 23.

Accordingly, we affirm the judge's conclusion that Drawing No. 1 was applicable and was violated. We note, however, that roof control plans are reviewed at least every six months. If U.S. Steel continues to believe that a provision other than Drawing No. 1 should apply when mining an intersection, it has the opportunity to pursue this when the plan is next reviewed.

For the foregoing reasons, we reverse the judge's finding that U.S. Steel was negligent in connection with the two miners working under unsupported roof, and we remand to the judge for recomputation of an appropriate penalty. We also affirm the judge's conclusion that U.S. Steel violated 30 C.F.R. § 75.200 by failing to install a second temporary jack pursuant to Drawing No. 1 of U.S. Steel's approved roof control plan. 6/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ Chairman Ford has elected not to participate in the consideration or disposition of this case.

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