FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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24 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. WEVA 80-40 A/O No. 46-02843-03025
v.		Madison Mine No. 1
KANAWHA COAL COMPANY,	Respondent	Docket No. WEVA 80-78 A/O No. 46-02844-03016 Docket No. WEVA 80-83 A/O No. 46-02844-03017
		Madison Mine No. 2

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Harold S. Albertson, Jr., Esq., Hall, Albertson and Jones, Charleston, West Virginia, for Respondent.

Before: Judge Edwin S. Bernstein

PRELIMINARY STATEMENT

Pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, the parties each moved for summary decision 1/ with respect to Citation No. 09911015 (Docket No. WEVA 80-40), Citation No. 09911086 (Docket No. WEVA 80-78), and Citation

1/ Rule 64 provides in part as follows:
"(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law."

No. 09911223 (Docket No. WEVA 80-83). 2/ The MSHA Assessment Office recommended that penalties of $305, $160, and $195, respectively, be assessed for alleged violations of 30 C.F.R. § 70.100(b). That mandatory health standard reads:

> Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

Respondent argued that there is no valid and enforceable standard under the Federal Mine Safety and Health Act of 1977 (the 1977 Act). Petitioner argued that a valid respirable dust standard exists, and that based upon the stipulated facts, Respondent violated 30 C.F.R. § 70.100(b).

APPLICABLE STATUTES AND REGULATIONS

Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 (the 1969 Act) provided, prior to amendment:

> References to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare. As used in this title, the term "MRE instrument" means the gravimetric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England.

2/ On March 31, 1980, I issued an order which approved settlement motions for Citation No. 09911054 (Docket No. WEVA 80-78) and Citation No. 09910793 (Docket No. WEVA 80-83). Thus, the three citations listed above are the only ones which remain to be decided in these cases.

Section 318(k) of the 1969 Act provided, prior to amendment:

> For the purpose of this title and title II of this Act, the term -
>
> * * * * * * *
>
> (k) "respirable dust" means only dust particulates 5 microns or less in size * * *.

Section 202 of the Federal Mine Safety and Health Amendments Act of 1977 (the Amendments Act) reads:

> (a) Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows:
>
> "(e) References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."
>
> (b) Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is repealed.

Section 301(c)(2) of the Amendments Act reads:

> All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

Section 307 of the Amendments Act reads, in pertinent part:

> Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the

date of enactment of this Act. * * * The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective on the date of enactment.

Section 202(b)(2) of the 1977 Act reads:

> Effective three years after the date of enactment of [the 1969] Act, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

30 C.F.R. § 70.100(b) reads:

> Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

FINDINGS OF FACT

The parties stipulated and I find:

1. Respondent, Kanawha Coal Company, is subject to the jurisdiction of the 1977 Act and I have jurisdiction over these proceedings.

2. The inspector who issued the citations is a duly authorized representative of the Secretary of Labor and properly served the citations upon Respondent.

3. Respondent mines 974,127 tons per year.

4. Any negligence by Respondent in connection with these citations constitutes ordinary negligence.

5. Payment of an appropriate penalty will not affect Respondent's ability to continue in business.

6. Respondent exercised good faith in abating all citations within the time set for abatement, or a reasonable time thereafter.

7. The number of violations assessed against Respondent during the 24-month period prior to issuance of each citation was 155 for Citation No. 9911086, 153 for Citation No. 9911223, and 276 for Citation No. 9911015.

8. The possible occurrence which could reasonably be expected is lost work days if exposure continued to exceed the statutory maximum of 2.0 milligrams per cubic meter of air, or if such overexposure frequently recurred.

9. The number of samples taken pursuant to 30 C.F.R. § 70.100(b) and cumulative concentration of respirable dust found with respect to each citation are:

Citation No.	No. of Samples	Cumulative Concentration (mg.)
9911086	10	24.9
9911223	7	24.5
9911015	10	25.7

10. Pursuant to Section 202(b)(2) of the 1977 Act and 30 C.F.R. § 70.100(b), the maximum allowable concentration of respirable dust in the mine atmosphere during each shift to which each miner can be exposed is 2.0 milligrams per cubic meter of air.

11. Respirable dust is defined in Section 202(e) of the 1977 Act to mean the average concentration of respirable dust measured with a device approved by the Secretaries. 3/

12. Provisions for approval of sampling devices are contained in 30 C.F.R. Part 74. At the time these citations were issued, devices were jointly approved by the National Institute for Occupational Safety and Health (NIOSH) (Department of Health, Education, and Welfare) and MSHA (Department of Labor). Before 1977, devices were approved by NIOSH and the Mining Enforcement and Safety Administration (MESA) (Department of the Interior).

13. Applications for approval of sampling devices are submitted to NIOSH for testing to determine if the performance standards set forth in 30 C.F.R. Part 74 are met. Applications for approval of the pump unit of a sampling device are submitted to MSHA. MSHA determines whether the pump unit is intrinsically safe in accordance with 30 C.F.R. § 18.68. After testing procedures, NIOSH may issue an approval for the sampling unit if MSHA has approved the pump unit of the device.

14. The respirable dust samples upon which all citations were based were taken with a Bendix Environmental Science Division Micron Air II permissible air sampling pump, Model No. 2417504-0001, which was approved by MESA as No. 2F-2120-0 on September 5, 1967. This approval was issued to Union Industrial Equipment Corporation (UNICO) and was extended by MESA as follows:

3/ The meaning of the term "Secretaries" is at issue and thus was not defined in the stipulations.

September 30, 1969	2F-2120-1	(UNICO)
March 6, 1970	2F-2120-2	(UNICO)
April 21, 1970	2F-2120-3	(UNICO)
January 17, 1972	2F-2120-4	(To Bendix Corporation, which bought the rights from UNICO)
July 24, 1974	2F-2120-5	(internal modification to MESA)
August 2, 1974	2F-2120-6	(Bendix)
January 17, 1975	2F-2120-7	(Bendix)

NIOSH initially approved the device as TC No. 74-018 micron air on April 16, 1975, revocation November 22, 1976, certification reissued May 20, 1977 under TC No. 74-025 micron air II.

I further find that the citations were issued on the following dates based upon respirable dust samples collected during the following time periods:

Citation No.	Citation Date	Time Period When Samples Were Taken
9911086	June 28, 1979	March 2-June 13, 1979
9911223	August 9, 1979	July 17-23, 1979
9911015	May 24, 1979	May 1-10, 1979

PRIOR LEGISLATIVE AND JUDICIAL BACKGROUND

The 1969 Act contained two definitions of respirable dust. Section 202(e) stated:

> References to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare * * *. 4/

4/ Section 3(a) of the 1969 Act defined "Secretary" as "the Secretary of the Interior or his delegate."

Section 318(k) of the 1969 Act stated, "'respirable dust' means only dust particulates 5 microns or less in size * * *."

In Eastern Associated Coal Corporation, Docket No. MORG 73-131-P et al. (December 16, 1974), the contractor challenged the dust program which had come into being under the 1969 Act on the ground that the statutory definitions were inconsistent. Eastern claimed that the MRE instrument and other instruments approved by the Secretaries and used as a basis for such citations did not screen out particulates larger than five microns in size. Judge Moore agreed and vacated the citations based upon his finding "that the instruments do collect particles larger than the statutory definition of respirable dust."

On appeal, the Interior Board of Mine Operations Appeals (IBMA) first reversed Judge Moore's decision (see 5 IBMA 185 (1975)), but then affirmed it upon reconsideration (see 7 IBMA 14 (1976)). The decision applied to the MRE instrument as well as two personal samplers approved by the two Secretaries. 5/

The Board stated:

5/ The Board noted that, "[u]nder section 202(e), the Congress approved the MRE instrument as a device for sampling dust, but the MRE is a large, bulky instrument, and on March 11, 1970, the two Secretaries approved usage of alternative personal sampler units conforming to requirements and conditions now codified at 30 CFR Part 74." 7 IBMA at 28. In describing the personal air sampler, the Board continued: "This device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10 mm. in diameter which is supposed to separate the respirable from the non-respirable particulates." Id. at 30.

> On the basis of the record as described above, we find that MESA has been systematically ignoring the legislative definition of the term "respirable dust" as meaning "* * * only dust particulates 5 microns or less in size." * * * [I]t follows that the data memorialized in these notices, purporting to show alleged concentrations of "respirable dust," represent as well the weight of some particulates which are oversize if the legislative 5-micron definition is applicable. [Emphasis by the Board.]

7 IBMA at 34.

The Eastern Associated decision prompted quick congressional action. Section 202 of the Amendments Act of 1977 repealed the five-micron definition and rewrote Section 202(e) of the 1969 Act to define respirable dust as "the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."

The Senate Report on the 1977 Act contained the following explanation of these changes:

> Respirable Dust
>
> Section 318 of the Federal Coal Mine Health and Safety Act of 1969 is amended by deleting subsection (k) which defines respirable dust in terms of dust particles 5 microns or less in size. The new definition in subsection (e) defines respirable dust in terms of average concentration, a method of determining the amount of dust in a mine atmosphere on the basis of weight. Since all devices approved by the Secretary and the Secretary of Health, Education and Welfare measure respirable dust on the basis of weight, arther [sic] than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 51 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 639 (1978).

DECISION

The pivotal issue in this case involves the interpretation of Section 202(e), as amended. The statute defines respirable dust as dust measured by "a device approved by the Secretary and the Secretary of Health, Education, and Welfare." If this phrase is read as meaning "a device to be approved by the Secretary of Labor and the Secretary of Health, Education, and Welfare subsequent to the effective date of this section," the citations must be vacated. This is because there were no such approvals as of the dates the citations were issued. On the other hand, if the statute means "a device approved since the effective date of the 1969 Act by the Secretary of the Interior and the Secretary of Health, Education, and Welfare," the citations must be affirmed.

Respondent's argument is based upon three recent decisions in which Judge Moore concluded that, "there is not and never has been a valid enforceable respirable dust program * * *." MSHA v. Olga Coal Co., Docket No. HOPE 79-113-P (June 28, 1979); MSHA v. B.B.W Coal Co., Docket No. PIKE 76-149-P (January 9, 1979); and MSHA v. Alabama By-Products, Docket No. SE 79-110 (February 12, 1980).

In Olga and B.B.W., Judge Moore held: "As far as I have been able to determine, the Secretary of Labor has not joined the Secretary of Health, Education and Welfare in approving devices for the collection of respirable dust. If that is true, there has been no effective standard

since November 9, 1977." 6/ While I have great respect for Judge Moore, an able and articulate judge, I respectfully disagree with his conclusions on this issue. 7/

It is a fundamental rule of statutory construction that a statute should not be interpreted to defeat its obvious intent. In Wilson v. United States, 369 F.2d 198, 201 (D.C. Cir. 1966), the court stated, "[t]he literal meaning of a statute cannot be followed where it leads to a result contrary to legislative intention as revealed by the legislative history or other appropriate sources." In Perry v. Commerce Loan Company, 383 U.S. 392, 400 (1966), the Supreme Court stated: "Frequently, * * * even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." This cannon of statutory interpretation has even been applied in criminal cases. In United States v. Braverman, 373 U.S. 405, 408 (1963), the Supreme Court stated: "We have considered the statute before us in light of the salutary rule that criminal statutes should not by interpretation be expanded beyond their plain language. But neither can we interpret a statute so narrowly as to defeat its obvious intent."

6/ The Commission granted the Secretary of Labor's petition for review of the Olga case on August 7, 1979, and the Secretary of Labor's petition for review of the Alabama By-Products case on March 5, 1980. However, neither case has been decided.

7/ As stated by Commission Rule 73, 29 C.F.R. § 2700.73, "[a]n unreviewed decision of a judge is not a precedent binding upon the Commission." Therefore, although I accord considerable weight to a fellow judge's views, where I disagree, I am not bound by his decision.

Another canon of statutory interpretation is that remedial statutes are to be liberally construed to advance the remedies intended. 8/ It is clear that an essential purpose of the 1969 Act and the 1977 Amendments Act was to protect miners against coal workers' pneumoconiosis, commonly known as "black lung," which is caused by the inhalation of respirable coal dust particles. Thus, Section 2 of the 1969 Act, as amended, states that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner," and stresses the need to prevent occupational diseases originating in the mines. The balance of Section 2 also stresses the importance of protecting the health of miners, and Title IV, dealing with black lung benefits, specifically provides benefits to miners who are disabled by coal workers' pneumoconiosis.

Finally, Section 201(b) of the 1969 Act stated:

8/ See 3 Sands, Sutherland Statutory Construction § 60.01. In St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959), the court made the following comments concerning the 1952 Federal Coal Mine Safety Act:

> The statute we are called upon to interpret is the outgrowth of a long history of major disasters in coal mines * * *. It is so obvious as to be beyond dispute that in construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed.

Similar statements were made by the courts under the 1969 Act. See Reliable Coal Co. v. Morton, 478 F.2d 257, 262 (4th Cir. 1973); Phillips v. IBMA 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); Freeman Coal Mining Company v. IBMA, 504 F.2d 741, 744 (7th Cir. 1974); International Union, UMWA v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. 1976), cert. denied, 429 U.S. 858 (1976).

> Among other things, it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation related disease during or at the end of such period.

Thus, it is clear that one of the essential purposes of this legislation was to prevent miners from contracting pneumoconiosis as a result of inhaling respirable dust, and to require mine operators to maintain an atmosphere as free as possible from such dust.

Turning to the legislation in question, Section 202 of the Amendments Act reads:

> a. Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows:
>
> > "(e) References to concentrations of respirable dust in this title mean the average of concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."
>
> b. Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is repealed.

As I read Section 202(e), the word "approved" is ambiguous and is subject to two possible definitions. It can mean, as contended by Respondent, devices to be approved in the future. Alternatively, it can mean devices which have been approved as well as devices which may be approved in the future. Since either meaning is plausible, I interpret this language to have the meaning which would effectuate the purposes of Congress and maintain the continuity of a respirable dust program which Congress considered so important.

Respondent argued that the word "Secretary," as used in Section 202(e), means the Secretary of Labor because Section 102(b)(1) of the Amendments Act amended Section 3(a) of the 1969 Act to read: "For the purpose of this Act, the term Secretary means the Secretary of Labor or his delegate." Prior to amendment, "Secretary" meant "the Secretary of the Interior or his delegate."

Section 307 of the Amendments Act stated:

> Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the date of enactment of this Act * * *. The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective on the date of enactment.

Thus, although the amendments in Section 202 of the 1977 legislation were made effective immediately, the change in definition of "Secretary" from "Secretary of the Interior" to "Secretary of Labor," as well as the balance of the Act, did not become effective until 120 days later. When Section 202(e) was enacted, the "Secretary" was the Secretary of the Interior and not the Secretary of Labor and, as indicated, the Secretary of the Interior had approved the device involved in this case. The fact that the effective date of all other sections of the Act was delayed 120 days, while this section was made effective immediately, further convinces me that Congress intended that there be a valid and enforceable respirable dust program immediately upon enactment of the statute.

A further indication of Congress' intent to avoid the "lapse situation" urged by Respondent is Section 301(c)(2) of the Amendments Act. That provision preserves all "orders, decisions, determinations, rules, regulations,

permits, contracts, certificates, licenses, and privileges" which were in effect when the enforcement functions were transferred from the Department of the Interior to the Department of Labor. I do not feel that this provision could have been drafted with any greater clarity, breadth, or decisiveness. This savings clause preserved the approvals of dust devices which were made under the 1969 Act until MSHA ruled otherwise.

Therefore, I find that there is, and has been since the enactment of the Amendments Act, an enforceable respirable dust program. The Bendix Environmental Science Division Micron Air II in this case was "approved by the Secretary and the Secretary of Health, Education, and Welfare" when the citations were issued.

Respondent violated 30 C.F.R. § 70.100(b) with respect to each citation. As indicated in Stipulation No. 9, in Citation No. 9911086, the average concentration of respirable dust was 2.49 milligrams per cubic meter of air based upon a cumulative concentration of 24.9 milligrams in 10 samples; in Citation No. 9911223, the average concentration was 3.5 milligrams, based upon a cumulative concentration of 24.5 milligrams in seven samples; and in Citation No. 9911015, the average concentration was 2.57 milligrams, based upon a cumulative concentration of 25.7 milligrams in 10 samples. Thus, with respect to each citation, Respondent exceeded the allowable average concentration of 2.0 milligrams.

I further find (1) Respondent is a large operator; (2) its actions constituted ordinary negligence; (3) payment of an appropriate penalty will not effect its ability to continue in business; (4) Respondent

exercised ordinary good faith in abating all citations within the time set for abatement or a reasonable time thereafter; (5) it had a large number of previous violations; and (6) the gravity was small in that the possible occurrence which could reasonably be expected is lost work days if exposure continued to exceed the statutory minimum. Upon consideration of the foregoing, I assess a penalty of $150 for each violation.

ORDER

Respondent is ORDERED to pay $450 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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