

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

27 JUN 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 80-150
Petitioner : A.O. No. 46-02843-03026
v. :
KANAWHA COAL COMPANY, : Madison No. 1 Mine
: :
BECKLEY COAL MINING COMPANY, : Docket No. WEVA 80-154
: A.O. No. 46-03092-03033
Respondents :
: Beckley Mine

DECISION AND ORDER

Appearances: David E. Street, Esq., U.S. Department of Labor, Office of
the Solicitor, Philadelphia, Pennsylvania, for Petitioner;
Harold S. Albertson, Jr., Esq., Hall, Albertson & Jones,
for Respondents.

Before: Judge Kennedy

Statement of the Proceedings

In the interest of a just, speedy and inexpensive determination of these matters the parties waived an evidentiary hearing and filed cross motions for summary decision together with a stipulation of material facts not in dispute. The common question of law presented is whether evidence of two respirable dust violations gathered through the use of a personal sampler approved by the Secretary of the Interior and the Secretary of Health, Education and Welfare under the 1969 Coal Act (30 C.F.R. Part 74) is admissible to prove a violation of the mandatory health standard set forth in section 202(b), 30 U.S.C. § 842(b), in an enforcement proceeding brought under section 110(a), 30 U.S.C. § 820(a), of the 1977 Mine Health and Safety Act.

I

Coal workers' pneumoconiosis--black lung disease--affects a high percentage of **American** coal miners with severe, chronic, and crippling respiratory **impairment**. The disease, which in its advanced form is inevitably fatal is caused by long-term inhalation of respirable mine dust, including coal dust. **Me** tiically speaking, respirable dust consists of **particulates** of dust small enough to be taken into the terminal airways of the lungs, and large enough to trigger the replacement of healthy lung tissue with hard nodules formed in the scarring reaction of the body. As the disease progresses the lungs lose volume and breathing becomes progressively more difficult. In its advanced stages, the disease becomes a massive fibrosis that continues to **grow** even after the worker is removed from exposure. The complicated form of the disease produces lesions that gradually constrict the flow of blood through the pulmonary vessels, first causing enlargement of the right side of **the** heart and later causing death from congestive cardiac arrest .

Black lung disease is an occupational disease that **afflicts** the lives of thousands of miners and **their** families. Various studies show that between 10 and 30 percent of all working bituminous coal miners have some form of the disease. Every miner lives **under** the threat of black lung and thousands die of it every **year**. While 161 **miners** died in on-the-job accidents last year, the **UMWA** estimates approximately 4,000 miners died of black lung disease. Thus, more than 11 miners each day wheeze away their final breath as a **result** of black lung.

The Federal Coal Mine Health and Safety Act of 1969 recognized for the first time that black Lung is an occupational disease. 1/ It mandated allowable dust concentrations and provided for compensation of disabled miners. Over 400,000 miners are presently receiving black lung benefits. 2/

In an effort to curb the incidence of black lung, Congress provided in Titles II and III of the Coal Act for limits on the amounts of dust to be permitted in the ambient air of coal mines. Thus, sections 202(b)(2), 202(e), and 318(k) of the Coal Act, 30 U.S.C. §§ 842(b)(2), (e), 878(k), provided that effective December 30, 1972, each operator of an underground coal mine was obligated to keep the weight of dust 5 microns or less in "size" in each cubic meter of air at or below 2 milligrams. Section 202(a) of the Coal Act further provided that:

Each operator of a coal mine shall take accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed. Such samples shall be taken by any device, approved

1/ Recognizing the epidemic proportions to which the disease had grown in the nation's mines, Congress developed a mandatory health standard the purpose of which was:

"* * * 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." Section 201(b), 30 U.S.C. § 841(b).

2/ See, President's Commission on Coal, The American Coal Miner, March 1980, at 125. Although the level of dust in the nation's mines has significantly decreased since the passage of the 1969 Act, the epidemiological studies, being conducted by the National Institute of Occupational Safety and Health evaluating the effectiveness of dust suppression programs in preventing or lessening the progression of pneumoconiosis will not yield preliminary results until 1981.

by the Secretary [of Interior] and the Secretary of Health Education and Welfare and in accordance with such methods, at such locations, at such intervals, and in such manner as the Secretaries shall prescribe in the Federal Register within sixty days from the date of enactment of this Act and from time to time thereafter.

In addition, section **202(e)** of the Act provided that the weight per unit volume of the respirable dust collected in the approved devices was to be measured by equating it with that which would be obtained if the dust were collected with an MRE instrument. An MRE instrument was defined as "the gravimetric dust sampler with **[a]** four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England." (See Appendix A).

With reference to the **MRE** instrument, the House Report on the Coal Act, **3/** stated:

When reference in this report is made **to** dust readings which yielded results in terms of milligrams per cubic meter of air (**mg/m³**) such determinations are measured with an **MRE** instrument. As used in this title "**MRE** instrument" means the gravimetric dust sampler with four channel horizontal **elutria-**tor developed by the Mining Research Establishment of the National Coal Board, London, England.

Because the Board of Mine Operations Appeals ignored this definition it failed to appreciate that the particle size limitation, "**5** micron⁶ or less in size," as found in section 318(k) was meaningless unless "size" was defined **in** terms of the weight of dust **particulates** aerodynamically separated and

3/H. Rep. 91-563, **91st** Cong., 1st Sess. at 15 (**1969**); Legislative **History** of the Coal Mine Health and Safety Act of 1969 (Public Law **91-173**) as amended through 1974 **including** **Black** Lung Amendments of 1972, Subcommittee on Labor of Senate Committee on **Labor** and Public Welfare, 94th Cong., 1st **Sess.**, Part I at 1045 (1975).

collected by the MRE sampler. Assuming that the "5 microns or less in size" definition referred only to static or "linear" size, the Board found that definition to be incompatible with the gravimetric method of "size" measurement mandated by the statutory standard. 4/

4/ As the legislative history of the standard shows, the particle count per cubic centimeter system which the Board contended for was not only slow and tedious but unreliable because of the subjectivity involved in making the "size" and "count" determinations. Because of this and because recent medical evidence showed that the mass or weight of the dust sample, i.e., the "size" of the dust sample per cubic meter of air was the controlling causative factor, the MRE instrument which ultimately records the weight in milligrams per cubic meter of air was developed. The MRE instrument separates out (elutriates) and weights (gravimetrically) dust in the minus-7 micron equivalent aerodynamic size range. Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, pp. 576-579, 91st Cong., 1st Sess. (1969). The aerodynamic equivalency factor which the Board never understood is explained as follows. The MRE design is based on particle selection principles which simulate the behavior of the human respiratory tract in a dust cloud. Empirically speaking, respirable dust is any dust that can penetrate the respiratory system and deposit in the terminal airways of the lungs. Most commonly this is dust with a particle size of 5 microns or less in diameter, but may include particles as large as 200 microns where such particles have aerodynamic characteristics that cause them to behave in the pulmonary air flow like 5 micron dust. Eastern Associated Coal Corp., 7 IBMA 133, 140-142 (1976). It is important to understand exactly what the MRE device measures. The four channel horizontal elutriator removes from the airstream all particles with an aerodynamic equivalent diameter greater than 7.1 microns, lets pass approximately 50 percent of particles with an aerodynamic equivalent diameter of 5 microns, and lets pass approximately 98 percent of particles with an aerodynamic equivalent diameter of 2 microns. The term aerodynamic equivalent diameter refers to "the diameter of a spherical particle of unit density having the same falling velocity as the particle in question," See, Sampling and Evaluating Respirable Coal Mine Dust, Bureau of Mines, IC 8503, February 1971, at 3. A particle of unit density, or a density of one, has the same density as water, i.e., 1 gram per cubic centimeter. See, Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, 1968, at 312. Thus, the MRE device sorts particles based on their aerodynamic performance characteristics rather than on their "linear size." Both the density and shape of particles affect their aerodynamic characteristics. For example, a sphere of dust 5 microns in diameter as measured with a microscope but with a density twice that of water would be removed from the airstream significantly sooner than a similar sphere of unit density, and would have an equivalent aerodynamic diameter in excess of 5 microns even though its "linear size" is only 5 microns. Similarly, the shape of a

This erroneous interpretation of the Congressional intent led the Board to declare the standard invalid and unenforceable. Eastern Associated Coal Corporation, 7 IBMA 14, 133 (1976). To prevent the complete repeal of the vital dust suppressant program, the Secretary of the Interior took the unprecedented step of personally intervening in the matter to stay the effectiveness of the Board's nullification order. Decision and Order of the Secretary of the Interior Staying Board of Mine Operations Appeals Decision, dated January 19, 1977.

fn. 4 (continued)

particle also affects its aerodynamic performance. A 5 micron cube of unit density material would have an equivalent aerodynamic diameter in excess of that of a 5 micron sphere of unit density since it would be removed from the airstream sooner than the sphere. Applying these principles to the measurement of mine dust, it can be determined that a 5 micron cube of coal dust, the lightest constituent of mine dust having a density of 1.3, has an equivalent aerodynamic diameter of approximately 6.8 microns, and therefore only approximately 5 percent of such 5 micron cube particles would be deposited on the MRE filter. A 5 micron cube of limestone, a common constituent of mine dust with a density of 2.6, has an equivalent aerodynamic diameter of approximately 8.5 microns, and therefore would not be deposited at all on the MRE filter; These relationships can be determined by using the following formula: $(\text{size in microns})^3 (\text{density}) = (\pi/6) (\text{size in microns})^3 (\text{unit density})$ where the left side of the equation describes the mass of the cube in question and the right side the size of an equivalent sphere of unit density. Thus, it is apparent that although the MRE device measures particles on the basis of their aerodynamic performance characteristics, it also effectively measures the respirable fraction of mine dust even if defined solely with regard to "linear size." This is the equivalency factor the Board could not understand. It is important to recognize, however, that the respirable dust standard was developed with reference to the MRE device and is expressed in terms consistent with the characteristics of that device. Any attempt to change the definition of respirable dust or the sampling method used would require a corresponding change in the standard. (See Appendix B).

After being made aware of the "Interior Board's misinterpretations of the respirable dust statutes," 5/ Congress took action to eliminate the "conflicting definitions * * * which have threatened to interfere with the civil penalty enforcement of the dust sampling program." 6/ Thus, section 202(b), 30 U.S.C. § 842(b), of the 1977 Mine Act repealed section 318(k) of the 1969 Coal Act, 30 U.S.C. § 878(k), which the Board had misconstrued, and amended section 202(e) so as to delete the reference to the MRE instrument. Section 202(a), 30 U.S.C. § 842(a), of the 1977 Mine Act. The latter was designed to ensure that the particle selection principle upon which the MRE instrument operates (separation of minus-7 micron dust particles from the dust cloud or atmosphere) could not be used to undermine once again the gravimetric method of measurement of deleterious concentrations of respirable dust. As the Senate Committee Report stated:

Section 318(k) 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 **particulates** 5 microns in size or less. 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, rather than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling. 7/

5/ Hearings Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., at 163 (March 1977).

6/ Conference Report on S. 717, S. Rep. 95-461, 95th Cong., 1st Sess. **633**; reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1341 (July 1978).

7/ S. Rep. 95-181, 95th Cong., 1st Sess. at 51, Leg. Hist., supra at 639.

To underscore the importance and urgency of this amendment the Mine Act further provided that the amendment to the definition of approved devices was to be effective on the date of enactment of the Mine Act (November 9, 1977), and not 120 days thereafter as was true of the remainder of the new Act. Section 307, 30 U.S.C. § 801, note.

Two months later, Secretary Andrus after tacitly accepting the Board's erroneous interpretation of the size particle definition of respirable dust undertook to vacate Secretary Kleppe's stay of a year earlier on the ground that the repeal of the 318(k) definition had mooted the issue for the future. 8/ This effectively compromised the enforcement of some 4,000 outstanding violations of the dust standard that occurred prior to November 9, 1977.

On March 24, 1978, some 4-1/2 months after Congress repealed section **318(k)** of the Mine Act, the Department of Labor deleted **30 C.F.R. 70.2(i)**, the counterpart of section 318(k) which appeared in the Code of Federal Regulations. **And** on April 8, 1980, the Department of Labor finally deleted the 318(k) definition from 30 C.F.R. 75.2(k) of the mandatory safety standards.

III

In each of these cases the operator concedes it had respirable dust concentrations in excess of the 2 milligram standard--3.0 milligrams in the

8/ Order of the Secretary of the Interior Dissolving Secretarial Stay **Order** of January 19, 1977, issued January 3, 1978.

case of Kanawha and 2.1 milligrams in the case of **Beckley**. Despite this, it moves for summary decision in its favor on the authority of Judge Moore's decisions in Alabama By-Products Corporation, SE 79-110 (February 12, 1980), appeal pending; and Olga Coal Co., HOPE 79-113-P (June 28, 1979), appeal pending.

In Alabama By-Products Corporation and Olga Coal, Judge Moore concluded that (1) the repeal of the size particle definition by Congress in November 1977 was nullified by the failure of the Secretary of Labor to delete the definition from 30 C.F.R. § 75.2(k) of the mandatory safety standards and thus the standard was once again rendered unenforceable and (2) the failure of the Secretary of Labor and the Secretary of Health, Education and Welfare to issue a new Part 74 of the Code of Federal Regulations and thereby redefine respirable dust renders ineffective the gravimetric method of measurement reaffirmed in section 202(e) as amended in November 1977.

I must respectfully decline to follow the decisions of Judge Moore. First, I find it axiomatic that repeal of the statutory basis for the definitions set forth in 30 C.F.R. §§ 70.2(i) and 75.2(k) deprived them of all legal vitality and significance. In this connection, I note that in April 1980, the Department of Labor finally substituted the gravimetric definition set forth in section 202(e) 9/ for that in old 318(k). Despite the delay, I

9/ The gravimetric definition states:

"'Respirable dust' means dust collected with a sampling device approved by the Secretary and the Secretary of Health, Education and Welfare in accordance with Part 74 (Coal Mine Dust Personal Sampler Units) of this title. Sampling device approvals issued by the Secretary of Interior and Secretary of Health, Education and Welfare are continued in effect."
45 F.R. 24000, 24004.

find no rational basis for concluding the Department's laggardly approach to deletion of the so-called "linear" definition of respirable dust rendered unenforceable the mandatory health standard. 10/

I reject as unsound the view that an agency can administratively veto or render null, void and unenforceable an Act of Congress by allowing obsolete regulations to remain in the Code of Federal Regulations or that regulatory ineptitude is an acceptable alternative to effective enforcement of the Mine Safety Law. For these reasons, I conclude the "linear" definition of **respirable** dust has been a dead letter since at least November 9, 1977, and that the Secretary's failure to conform his regulations with the Congressional will was and is no bar to enforcement of the respirable dust standard set forth in Title II of the Mine Health and Safety Law. 30 C.F.R. Part 70, 30 U.S.C. § 841 et seq.

I further conclude that while the Board of Mine Operations Appeals never was able to comprehend the enforcement scheme mandated by the aerodynamic equivalency **test**, the fact is that the Bureau of Mines, MESA, MSHA and Congress always intended that for the purpose of enforcement of the respirable dust standard average concentrations were to be measured by whatever dust was collected by the MRE instrument or its equivalent as approved by the two Secretaries. 11/

10/ As we have seen the "linear" definition was deleted from the regulations implementing the Health Standards in March 1978. The violations here occurred in May and July 1979.

11/ Congress has never deviated from its statement that:

When reference in this report is made to dust reading! which yield results in terms of milligrams per cubic meter of air (**mg/m**) such **determinations** are measured with an MRE instrument." H. Rep. 91-563, **91st Cong.**, 1st Sess. at 15. See also 45 F.R. 23996 (**1980**).

Ever since April 3, 1970, 30 C.F.R. § 70.206 has provided that for the purpose of determining compliance, concentrations of respirable dust **collected** with an approved sampling device will be expressed in terms of "equivalent concentrations of respirable dust as measured with an MRE instrument." And ever since March 11, 1970, the approved sampling device has been a personal sampler unit, such as the Bendix Micron Air II units involved in these violations, built and maintained in accordance with the provisions of Part 74 of Title 30 of the Code of Federal Regulations. (See Appendix **C**).

Under Part 74, the National Institute of Occupational Safety and Health (vice the Secretary of HEW) is responsible for approving the efficiency and accuracy of the dust samplers and MSHA (vice MESA and the Secretaries of Interior and Labor) is responsible for approving the permissibility of the electric air pump. 12/ 30 C.F.R. § 74.3.

These permissibility standards are set forth in 30 C.F.R. § 18.68 and have been in effect since March 1968. 33 F.R. 4660. While they were initially promulgated by the Director of the Bureau of Mines they have been continued in effect ever since under successor authorities including section **301(c)(2)** of the 1977 Mine Health and Safety Act, 30 U.S.C. § **961(c)(2)**.

Both Judge Moore and the Board seemed to recognize that Part 74 is not a mandatory health standard. See, section **202(a)** of the Coal Act, 30 U.S.C.

12/ The National Bureau of Standards has found the personal sampler "is a 'state-of-the-art' instrument that has no proven peer in this application." See, An Evaluation of the Accuracy of the Coal Mine Dust Sampling Program Administered by the Department of the Interior, Report to the Senate Committee on Labor and Public Welfare, U.S. Department of Commerce, December 1975, at ii.

§ 842(a), as well as sections 202(e) and 508 of the Mine Act, 30 U.S.C. §§ 842(e), 957; Eastern Associated Coal Corp., 7 **IBMA** 14, 39-42 (1976). I agree. Consequently, the Solicitor's suggestion that the Commission and its judges are without power to review a claim of invalidity of Part 74 because of the provisions of section 101(d), 30 U.S.C. § 811(d), is not relevant or germane to this proceeding. 13/

What I find germane is the following:

1. Congress repealed section 318(k) and the reference to the MRE instrument not because the 5 micron size particle definition was incompatible with the particle selection principles of the MRE instrument but because the Board of Mine Operations Appeals could not understand that to the scientists who designed the MRE instrument and the medical doctors who deal with black lung "only 5 microns or less in size" means dust particles of unit density or those of aerodynamic equivalent diameter. The equivalent diameter of a particle is the diameter of a spherical particle of unit density having the same falling velocity in air as the particle being measured. IC 8458, 12-13 (1970); IC 8503, 3 (1971).
2. Congress repealed section 318(k) and the reference to the MRE instrument 120 days before the Secretary of the

13/ Part 74 which was promulgated on March 11, 1970 (35 F.R. 4326), is not only not an improved mandatory health or safety standard but was not promulgated under section 101, 30 U.S.C. § 811, of the Mine Safety Act, as amended in 1977. Because Part 74 only delegates to the administrative the authority to designate the devices approved for measuring compliance or noncompliance, use of an unapproved or impermissible device would be a violation of the Act or of the permissibility standard, a safety standard, but not a violation of the respirable dust health standard. The health standard is set forth in section 202(b)(1), (2) of the Mine Safety Act of 1969, as amended, 30 U.S.C. §§ 842(b)(1), (2), 30 C.F.R. § 70.100(b). While civil penalties may be imposed for violations of the Act, criminal penalties may be imposed only for violations of the mandatory health or safety standards. 30 U.S.C. §§ 820(a), (d). Compare, United States v. Consolidation Coal Co., 477 F. Supp. 283, 286-287 (S.D. Ohio 1979). It should be noted, however, that in section 303(b) of the Coal Act Congress authorized the Secretary to prescribe maximum respirable dust levels in intake air courses, 30 C.F.R. § 70.100(d), (e).

Interior's approval/enforcement authority was transferred to the Secretary of Labor. Section 307, 30 U.S.C. § 801 note.

3. Congress confirmed and ratified approvals of personal samplers that were outstanding on the effective date of its amendment of section 202(e) of the Coal Act, November 9, 1977. This occurred 120 days before the approval/enforcement authority was transferred to the Secretary of Labor at a time when the Secretary of the Interior was the only legal referent for the definition of "Secretary".
4. It is absurd to attribute to Congress an intent to validate use of the approved samplers on the one hand while suspending that approval for 120 days or until the Secretary of Labor could rubber stamp what Congress had decreed.
5. On March 9, 1978, the outstanding approvals of personal samplers under Part 74 were automatically continued in effect by virtue of the provisions of section 301(c)(2) of the 1977 Mine Act, 30 U.S.C. § 961.
6. There is no basis for concluding that by repealing section 318(k) and amending section 202(e) Congress intended to require the Secretary of Labor and the Secretary of HEW to "come up with a new definition" of respirable dust. Such an expectation would be fatuous and akin to expecting the administrative to repeal the law of gravity. 141

14/ The scientific, technical and medical facts relied upon in these findings and throughout this decision are derived from the official publications of the Bureau of Mines, MESA and MSHA that are cited, as well as the medical and scientific data set forth in the legislative history of Title II of the 1969 Coal Act. Section 7(d), 5 U.S.C. § 556(e), of the APA provides:

"* * * Where any agency decision rests on official notice of a material fact not appearing in evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." The Attorney General's Manual on the Administrative Procedure Act (1947) comments: "*** the process of official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge ... Agencies may take official notice of facts at any stage in a proceeding--even in the final decision--but the matters thus noticed should be specified and any party shall on timely request be afforded an opportunity to show the contrary. The matters thus noticed become a part of the record and, unless

Conclusion

I conclude that since all devices approved by the Secretaries and Congress measure respirable dust on the basis of weight, 15/ rather than particle size, the repeal of section 318(k) and the amendment of section 202(e) did not constitute a legislative repudiation of that method of measurement. or necessitate a "new" definition of respirable dust. What the legislative action did accomplish was a repudiation of the Board's interpretation of respirable dust as only 5 microns or less in "linear" diameter. 7 IBMA 142.

I am asked to choose between interpretations of Congressional intent that on the one hand makes impossible enforcement of the respirable dust standard and on the other breathes life and vitality into a standard crucial to the well-being and longevity of over 150,000 working miners. It is time the dead hand of the Board of Mine Operations Appeals was lifted from the lungs of America's miners.

Where there is a conflict between a statutory interpretation that promotes occupational health and an interpretation that endangers health, the first must be preferred. UMWA v. Kleppe, 562 F.2d 1260, 1265 (D.C. Cir. 1977); Secretary v. Old Ben Coal Company, 1 FMSHRC 1954, 1957 (1979).

fn. 14 (continued)

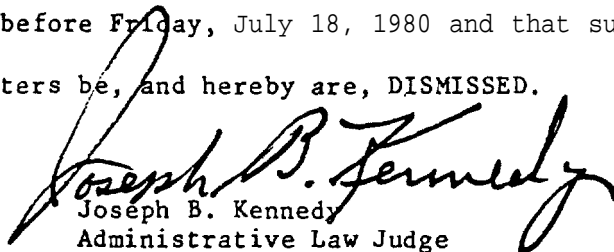
successfully controverted, furnish the same basis for findings of fact as does 'evidence' in the usual sense." (pp. 79-80). See also McDaniel v. Celebreeze, 331 F. 2d 426 (4th Cir. 1964); Rinaldi v. Ribicoff, 305 F. 2d 548 (2d Cir. 1962); Eastern Associated Coal Corporation, 5 IBMA 185, 204 (1975).

15/ Without use of the gravimetric devices measurement of respirable dust concentrations would be, practically speaking, impossible.

Accordingly, I find the respirable dust standard is enforceable and the evidence of noncompliance gathered by the personal samplers approved under Part 74 admissible to prove the fact of violation.

Based on the parties' stipulations as to the evidence of noncompliance I find the violations charged did, in fact, occur. After an independent evaluation and de novo review of the circumstances and after taking into consideration the other statutory criteria, I find the amount of the penalty warranted for the Kanawha violation is \$200 and for the Beckley violation \$100.

It is ORDERED, therefore, that the record in this matter remain open for 10 days to afford the parties an opportunity to request time to rebut the matters officially noticed. It is FURTHER ORDERED that if a timely request to rebut matters officially noticed is not received, the operators pay the penalties assessed on or before Friday, July 18, 1980 and that subject to payment the captioned matters be, and hereby are, DISMISSED.

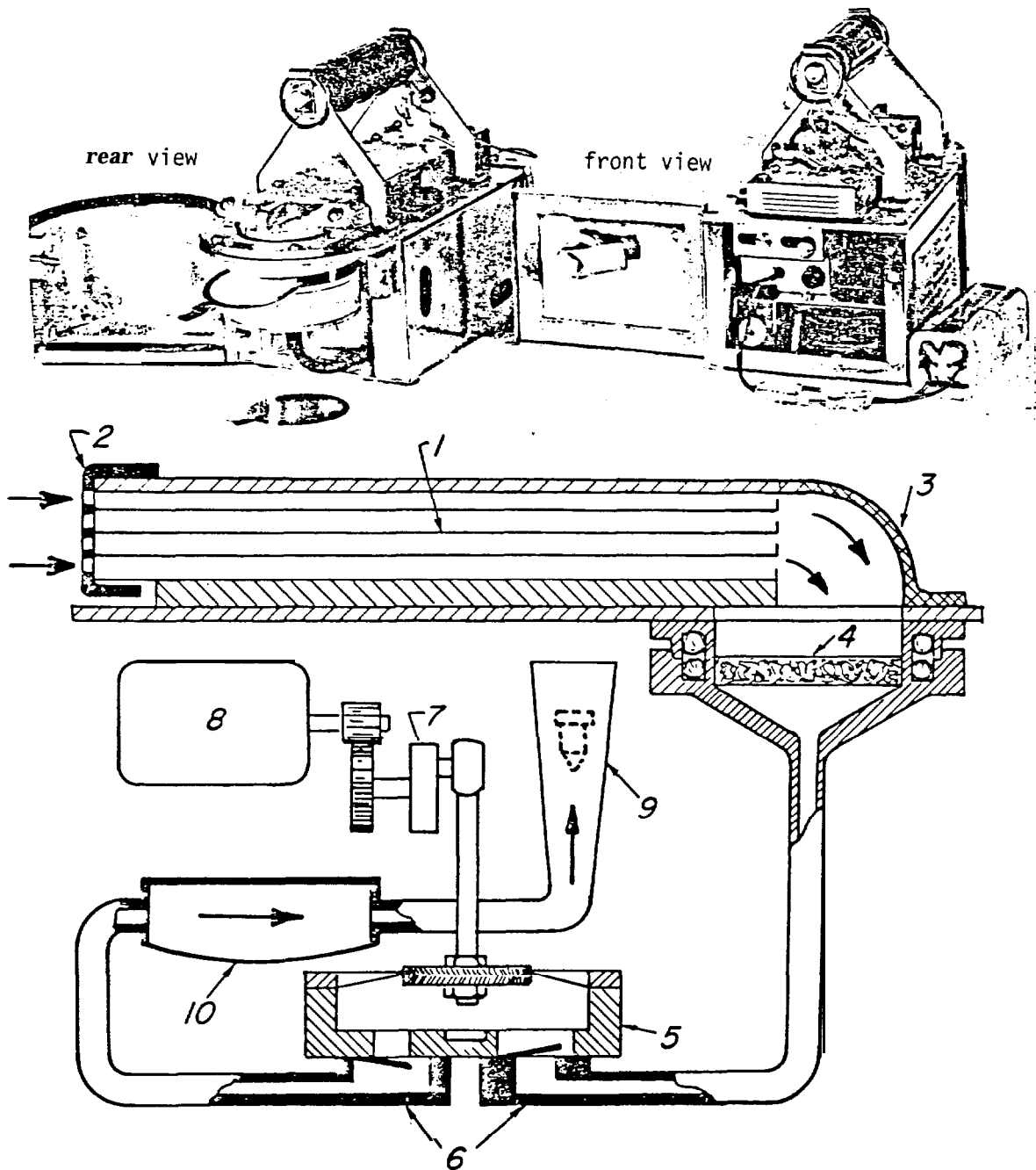

Joseph B. Kennedy
Administrative Law Judge

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APPENDIX I - the MRE Uevice

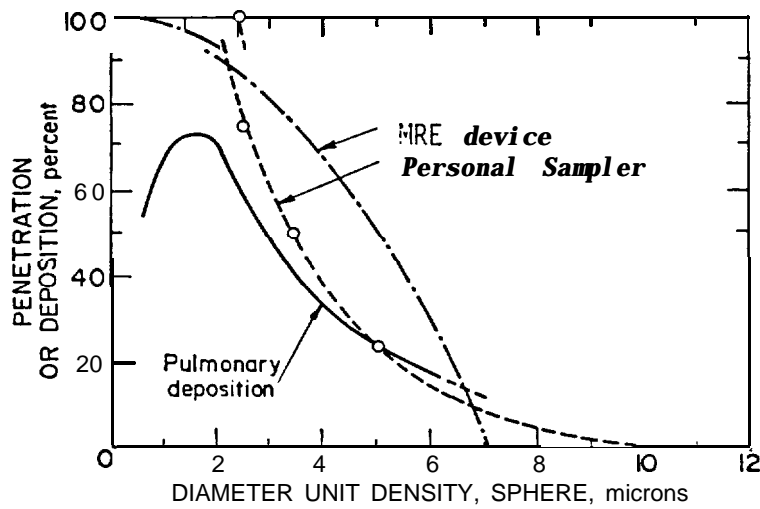


Schematic: (1) Four channel horizontal eleutriator; (2) nose restrictor; (3) transfer hood; (4) filter; (5) diaphragm pump; (6) flap valves; (7) pump output adjusting crank; (8) permissible electric motor; (9) flowmeter; (10) airflow smoothing device.

Sources: IC 8503, IC 8528, February 1971.

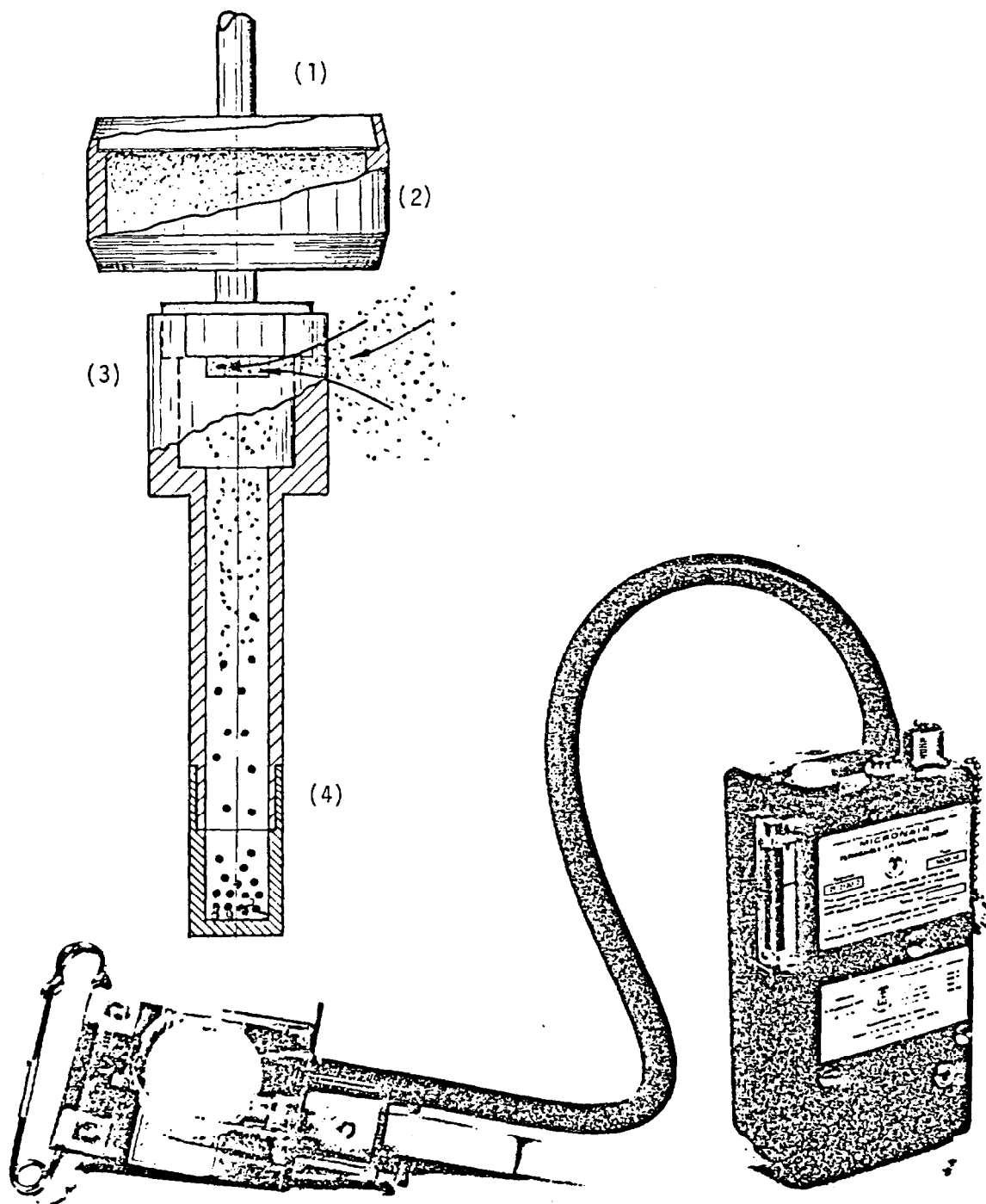
APPENDIX I I

Comparison of sampling characteristics of the MRE device and the Personal Sampler device with the pulmonary deposition curve.



Source: IC 8503, February 1971

APPENDIX III - *The Personal Sampler Unit*



Schematic: (1) hose connection to permissible air pump; (2) filter; (3) cyclone dust separator, (4) grit pot to collect large particles.

Sources: IC 8503, IC 8528, February 1971