

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
SKYLINE TOWERS NO. 2, 10TH FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

27 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. SOLAR FUEL COMPANY, v. SOLAR FUEL COMPANY, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA),	Petitioner  Respondent  Contestant  Respondent	: Civil Penalty Proceedings : : Docket No. PENN 80-96 : A/O No. 36-02617-02009 : : Solar No. 5 Mine : : Docket No. PENN 80-128 : A/O No. 36-06100-03007 : : Solar No. 9 Mine : : Notice of Contest : : Docket No. PENN 80-111-R : : Order No. <b>9,904,456</b> : December 5, 1979 : : Solar No. 9 Mine
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DECISION

Appearances: Catherine Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner-Respondent; Eugene E. Fike II, Esq., Pike, **Cascio & Boose, P.C.**, Somerset, Pennsylvania, for Respondent-Contestant.

Before: Judge Stewart

These are proceedings brought under section 105(d) and section 110 1/ of the Federal Mine Safety and Health Act of 1977, 20 U.S.C. § 820 et seq. Thereinafter the Act).

1/ Section 105(d) provides in part:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a **notification** of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof Issued under section 104, or

When an automatic data processing (ADP) printout failed to indicate the submission of respirable dust samples from the mine atmosphere to which two miners had been exposed, the inspector issued Citation No. 9,004,332. Order of Withdrawal No. 9,004,456 was issued on December 5, 1979. Solar Fuel Company (Solar) filed a contest of the order and the Secretary of Labor, Mine Safety and Health Administration (MSHA) filed a petition for assessment of a civil penalty. The notice of contest filed by Solar states in pertinent part as follows:

In fact, valid respirable dust samples were taken of the two (2) employees, identified in the above-mentioned citation as Social Security Nos. 168-56-9215 and 183-46-9842.

The employee identified as Social Security No. 168-56-9215 is a certain David Matkoskey, who in fact was sampled as required, and a cassette containing said sample was sent by Solar Fuel Company as required by law, but which sample, however, apparently was lost in the mail.

The employee identified as Social Security No. 183-46-9842 is a certain Terry Smith, who in fact was sampled as required, but whose Social Security number has incorrectly been listed

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**fn. 1** (continued)

any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing \* \* \*."

Section 110(a) provides:

"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

Section 110(i) provides:.

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

as 183-46-9842, when his Social Security number is actually 183-46-9824. The required sample of Mr. Smith was actually sent in and recorded under Social Security No. 183-46-9824.

Solar Fuel Company, the operator, did, therefore, actually perform valid respirable dust samples for said two (2) employees, as required by law and regulation.

The subject citation and Withdrawal Order, therefore, should not have been issued, since no violations existed.

Answers were timely filed by the parties. After a prehearing order was issued on March 7, 1980. **MSHA**, on March 27, 1980, issued a citation modifying the original citation to correct the section of the regulations cited as 70.260. The original citation had alleged a violation of 30 C.F.R. § 75.250 which requires that one sample of respirable dust be taken from the mine atmosphere to which each individual miner is exposed, except those miners already sampled in sampling cycles. The modification alleged a violation of 30 C.F.R. § 70.260 which requires that at the conclusion of each production shift in a sampling cycle the operator shall promptly collect and transmit the samples to **MSHA**.

On April 7, 1980, Solar filed a motion to strike the attempted modification of the citation and to allow additional time, stating in part as follows:

The attempted modifications, by changing the Citation of regulations allegedly violated by Solar Fuel Company, substantially change the nature of the alleged violation, and is substantially different from the alleged violation cited in the above-mentioned subject Citation and Withdrawal Order.

Solar Fuel Company is not sufficiently informed of the nature of the violation of 30 CFR 70.260 alleged to have been committed.

It is not lawful or proper for the Secretary of Labor to change the nature of the alleged violation, and charge Solar Fuel Company with alleged violations of regulations different from the alleged violation cited in the above-referenced subject Citation and Withdrawal Order.

The materials previously transmitted by Solar Fuel Company to the Secretary of Labor, established that Solar Fuel Company had not violated the regulation for which it was cited, or any other provision of the law or regulations, and it is not lawful or proper for the Secretary of Labor now to attempt to find a different alleged violation of regulation of which to **charge Solar** Fuel Company.

On April 14, 1980, MSHA filed a motion to amend its petition and to consolidate Docket No. PENN 870-111-R with Docket No. PENN 80-128. On April 24, 1980, Solar filed an answer to the motions stating in pertinent part as follows:

The Secretary attempted to amend its citation and petition by filing documents, copies of which are attached hereto as Exhibits A and B, but did not ask for leave to amend until Solar filed its Motion to Strike, copy of which is attached hereto as Exhibit "C".

The original citation No. 9,904,322 states that "ADP Printout No. 0042 dated October 2, 1979 indicated valid respirable dust samples were not received for the working environment of two employees, and that "samples shall be taken and submitted immediately upon receipt of this citation." It is further averred, however, that such original citation stated that Solar had allegedly violated 30 CFR 70.250 and that upon investigation, Solar knew it had not violated such regulation or any other regulation, and that, therefore, there was nothing to abate.

The language of the original citation did not indicate that a violation of 30 CFR 70.260 had occurred and if the inspector and Secretary had intended to indicate a violation of 30 CFR 70.260, the citation and petition would have so indicated specifically, by reference to 30 CFR 70.260.

In fact, Solar had discussed the alleged violation of 30 CFR 70.250 with representatives of the Secretary and his attorneys, and submitted information to the Secretary and his attorneys showing that Solar did not violate 30 CFR 70.250 or any other regulation, and that Solar had, in fact, taken and sent the samples which the Secretary alleges were required.

The Secretary now is attempting to find some other violation with which to charge Solar, and the Secretary now, therefore, alleges Solar has violated 30 CFR 70.260, since apparently the government did not receive, or lost, one of the samples transmitted by Solar.

It is prejudicial and unfair to Solar, a violation of Solar's rights, detrimental to the administration of the Federal Mine Safety and Health Act and a deterrent to voluntary communication between operators and the government, to permit the Secretary, after discovering through information submitted by the operator that a violation has not taken place, to amend its citation and petition in an attempt to find another violation with which to charge the operator.

In fact, Solar has not violated any regulation, and Solar avers further that although Solar did take and transmit the subject samples, taking of such samples was not required by the regulations.

The original citation did advise Solar of the alleged violation of 30 CFR 70.250 and the information already submitted by Solar to the Secretary and his attorneys shows that Solar did not violate 30 CFR 70.250 or any other regulations.

By a **notice issued** on April 17, 1980, Solar's motion to strike was denied, its motion for an extension of time was granted, **MSHA's** motion to amend its petition was granted, and **MSHA's** motion to consolidate was granted.

At the hearing at Somerset, Pennsylvania, on May 30, 1980, the evidence established that Solar did not fail to take and transmit respirable dust samples as required by the regulations and a decision in substance as follows was rendered from the bench vacating Citation No. 9904322.

The first document issued in the chain of events leading to the two proceedings which have been heard today was a document entitled "Reminder of Employee Sample Due." This was Government Exhibit D bearing the date July 12, 1979, Mine 36-06100, Somerset.

It states, "According to the Mining Safety and Health Administration records, the following individuals were scheduled to be sampled during the following month. This is in order that you may comply with 70.250 of Title 30, Code of Federal Regulation."

"If any Social Security numbers appear incorrectly or valid reasons exist why such miners will not be sampled, please reply on the miner status change notice cards and return to the respective coal subdistrict office within 21 calendar days."

"If all Social Security numbers have not been accounted for by the last day of August, a notice of violation will be issued."

This document is addressed to Solar Fuel Company, a subsidiary of Gulf & Western Company. Solar No. 9 Mine, Attention: Allen Custer foreman, P.O. Box 488, Somerset, PA 15501. This document bears five Social Security numbers. Alongside two of these Social Security numbers there are names. These names are Larry **D.** Custer and Barry Calvin **Carlson.**

These Social Security numbers and one other Social Security number do not relate to this case. The Social Security numbers relating to this case as shown on this document are 168-56-9215, with the required sampling date shown as 08-08-79, and the Social Security number listed as 183-46-9842, showing the required sampling date as 08-05-79.

Citation No. 9904322 was issued on 10/2/79 by MSHA inspector David B. Alsop. The condition or practice listed on the citation, which has been admitted as Government Exhibit A, is as follows: A.D.P. printout No. 0042 dated October 2, 1979 indicated valid respirable dust samples were not received for the working environment of the employees Social Security Nos. 168-56-9215 and 183-46-9842. Samples shall be taken and submitted immediately upon receipt of this citation.

The automatic data processing printout No. 0042, which bears the date October 1, 1979, has been admitted as Government Exhibit B. The text of this document is as follows: In accordance with Section 70.250 of the Mandatory Health Standards, underground coal mines, additional samples are required for the following employees.

Under the column listed Social Security number, the document bears the following numbers: 168-56-9215 and 183-46-9842.

There are no entries under the column headed "Employee Name." As reflected by the citation, the samples were required on 8/8/79 and 8/5/79.

30 CFR 70.250 is found under the heading "Sampling of Individual Miners." The subheading is "Individual Sampling Procedures, at least once every 180 days." The format and text of § 70.250 are as follows:

#### SAMPLING OF INDIVIDUAL MINERS

§ 70.250 Individual sampling procedures; at least once every 180 days.

(a) Except as provided in paragraphs (b) and (c) of this section, one sample of respirable dust shall be taken from the mine atmosphere to which each individual miner is exposed at least once every 180 days, except those miners already sampled during such 180-day period in sampling cycles conducted under the provisions of §§ 70.210, 70.220, and 70.230.

(b) One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner assigned

to a working section is exposed at least once every 120 days, except those miners already sampled during such **120-day** period in sampling cycles conducted under the provisions of §§ 70.210, 70.220, and 70.230 of this part.

(c) One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner who has exercised his option to transfer in accordance with the provisions of section **203(b)(1)** of the Act is exposed at least once every 90 days.

(d) The samples required under the provisions of this section shall be taken during any shift where the miner is employed in his usual occupation or in the occupation to which he was transferred.

In a subsequent action by MSHA, a citation was issued on **3/27/80**, which stated: This citation is being modified to correct the section of regulations cited to 70.260. Section 70.260 is found in Title 30, Code of Federal Regulations under the heading "Transmission and Analysis of Samples." The subheading under that section is "Respirable Dust Samples Transmission." The format and text of § 70.260 are as follows:

TRANSMISSION AND ANALYSIS OF  
SAMPLES

§ 70.260 Respirable dust samples; transmission.

(a) At the conclusion of each production shift in a sampling cycle, the operator shall promptly collect and transmit all samples in a container provided by the manufacturer of the filter to:

Pittsburgh Health and Safety Technical Support  
Center, Mine Safety and Health Administration,  
Department of Labor, Pittsburgh, PA. 15213.

(b) Each sample shall be accompanied by a completed 3 x 5 inch white data card identical to the card contained in Figure 1 of this Part 70, provided for this purpose by the cassette manufacturer. The card shall have an **identification** number identical to that on the **cassette** used to take the sample, and the name and Social Security number of the miner whose environment was being sampled. The data card shall be initialed by the miner whose environment was being sampled and the representative of the company responsible for the dust sampling procedure.

An order of withdrawal was subsequently issued to Solar by MSHA inspector Ronald J. Gossard on 12/5/79. The condition or practice listed on an order of withdrawal No. 9904456 was as follows: Valid respirable dust samples have not been received for the working environment of employees Social Security Nos. 168-56-9215 and 183-46-9842. Due to an obvious lack of effort by the operator to submit the respirable dust samples, the citation is not extended.

Before dealing with the strictly legal Issues as to whether the violation should be charged under 30 CFR 70.260, I will deal with the factual matters in this case.

MSHA has in effect alleged that the company has failed to take valid samples from two miners and to transmit those samples to MSHA in the manner required by regulations. Without more, it is possible that the evidence submitted by MSHA did establish such a failure by the operator.

In regard to that issue, counsel for MSHA in argument has mentioned the Castle Valley case. The document submitted by counsel is entitled Castle Valley Mining Company, I.B.M.A. 73-53. decided **January the 25th**, 1974. Under the section headed Background of that decision, the United States Department of Interior Board of Mine Operations Appeals, stated in pertinent part as follows: Notice of Violation No. 1 **G.M.** was issued on December the **28th**, 1971, alleging that Section 003 of the Castle Valley Mining Company (Castle Valley) was in violation of the provisions of 30 CFR 70.100, which are as follows:

A, effective June 30, 1970, each operator shall continue to maintain the average concentration of respirable dust in the mine atmosphere during each shift to **which** each miner in active workings of such mine is exposed at or below 3.0 milligrams of respirable dust.

The issue in the case at hand is substantially different from a requirement that the milligrams of respirable dust must be kept to a prescribed level. The issue is also different from the issue in Judge Moore's case cited or mentioned by Solar in oral argument, which it identified only as the Alabama By-Products case, where it was held that there was no Instrument available capable of measuring respirable dust under 5 microns in size.

As background material, between these two cases there was a line of cases by the Board of Mine Operations Appeals concerning the requirements for maintaining respirable dust at required levels; however in view of the dissimilarity in



issues, there is no need at this time to further compare the cases and the issues. Although it is possible that a prima facie case had been presented by MSHA, the operator has adduced evidence which conclusively **establishes** that Terry Smith and Dave Matkoskey were sampled on July 19, 1979.

The dust book maintained by the operator was kept in an orderly fashion. This book shows that on July 19, 1979, three miners were sampled. These were Terry Smith, Dave Matkoskey, Rodney Smith. The latter is not involved in the instant case. A copy from one of the pages in the operator's dust book has been admitted as Operator's Exhibit 1. The headings and the entries concerning Terry Smith and Dave Matkoskey in this book are as follows: For Terry Smith, on July 19, 1979, the cassette number is listed as 43133082. The initial weight is listed as 2418. The tonnage is listed as 180. The concentrations and milligrams per cubic meter for the second shift is listed as **.4**.

It has been explained by the witness for the operator that the **.4** was added in this column after a discrepancy in the Social Security number of Terry Smith had been discovered and it was determined from MSHA that the concentration for that person was in fact **.4**. The section number is listed as 002. The name of the miner sampled is Terry Smith. The miner's Social Security number is listed as 183-46-9842.

Similar entries are made under the column headings for Dave Matkoskey as follows: Date, July 19, 1979. The cassette number is 43133080. The initial weight **is** 2526. Tonnage is 330. Under the concentrations and milligrams per cubic meter for the first shift for the miner sampled there **is** no entry.

It has been explained by a witness for the operator that this concentration was not entered because the analysis of the sample for miner Dave Matkoskey had never been received from MSHA. The section number is listed as 002, and for Dave Matkoskey the miner's Social Security number is listed as 168-56-9215.

Mr. Dave Matkoskey was one of **the** witnesses called by the operator. He testified that he remembered being sampled in July of 1979. He recalled that it was before he went on vacation in the last week of July. He testified that he signed the data card which was to accompany the cassette after the card had been prepared by the operator.

The record establishes that after the citation had been issued to the operator by MSHA, that MSHA had been contacted

and the cassette containing the sample of Terry Smith taken on July 19, 1979, was eventually found after it had been determined that the last two numbers of Mr. Smith's Social Security number had been transposed on the data card.

On December the **14th**, 1979, Solar submitted a miner status change notice to MSHA changing the miner's Social Security number 183-46-9842 to 183-46-9824. Solar had previously been able to contact MSHA by telephone and **have** any discrepancies concerning the respirable dust samples corrected. After the citation had been issued in this case, Solar did follow its established procedure in an attempt to determine what had happened to the missing sample reports for the two miners involved. As a result thereof, additional samples were not taken as directed by the citation, which resulted in an order of withdrawal being issued. Subsequent to the issuance of the order of withdrawal, there was a subsequent action on **12/10/79** which modified the order of withdrawal by stating this order is being modified to allow the operator to sample the working environment of employee Social Security numbers 168-56-9215 and 183-46-9842.

The **A.D.P.** printout, which was received before the issuance of the order of withdrawal, has been admitted as Operator's Exhibit No. 4. This printout is entitled "Employee Sample Extension." The text of this printout **is** as follows: The following are employees who have not submitted a sample **or** a reason for not sampling in the required time. Listed below this are the Social Security numbers of Mr. Terry Smith and **Mr.** David Matkoskey as follows: 168-56-9215 and 183-46-9842.

Solar has submitted a document entitled "Inspector's Statement" which was admitted as Operator's Exhibit 5 in which inspector Ronald **J.** Gossard stated that the occurrence of the events in which the cited standard was improbable. Under the heading which states this fact, the inspector made the following entry: Failure to submit a valid respirable dust sample does not mean the miners were exposed to high concentrations of respirable dust. The entry under the next heading contained the explanation, "Extended exposure to high levels of respirable dust may result in black lung disease."

The record establishes that Solar has maintained the level of respirable dust at or **below the** prescribed level and that it has received no recent violations for failure to comply with respirable dust standards. My finding that Terry Smith and Dave Matkoskey were sampled on July 19, 1979, was based on testimony of witnesses who remembered sampling on or about

these days, and on the basis of entries in the respirable dust book in which entries were made in the due course of business showing that the samples had in fact been taken.

As to the issue of whether or not the samples taken were in fact transmitted by Solar to **MSHA** in the prescribed manner, reliance must be placed on whether or not Solar had established an effective and reliable means to transmit those samples and to insure that they were transmitted properly. The testimony of the witnesses produced by Solar lead me to the **conclusion** that the operator had in fact established acceptable and reliable means to transmit samples in the manner prescribed by the regulation, and the two samples were in fact placed in the mail.

The sample from Terry Smith was in fact subsequently discovered under an erroneous Social Security number, and Solar was eventually given credit for this sample as one of the samples required to abate the violation. As counsel for Solar has stated in his closing argument, Solar had no reason to hide or to willfully fail to transmit samples taken since the record establishes that Solar had consistently maintained its atmosphere at or below the level of required respirable dust allowed by the regulations.

The record supports a finding that **MSHA's** case has been rebutted and that the record shows by a preponderance of the evidence that Solar, the operator, did in effect transmit the samples of Terry Smith and David Matkoskey to MSHA in an appropriate manner. I will note, however, that this is not a condemnation of the MSHA procedures in requiring respirable dust samples, analyzing them, and distributing the results. The evidence has established that although such mistakes are possible, that they are highly improbable.

My finding in this case is due to the strong case of Solar in rebuttal. In view of my findings that Solar did in fact sample the atmosphere of Terry Smith and Dave Matkoskey and did transmit those samples in the prescribed manner, the strictly legal questions as to whether a failure to do so would have been a violation of § 70.250 or whether it would have been a violation § 70.260 is not reached.

In view of my ruling, the remaining statutory **criteria** as to the amount of a civil penalty that should be assessed for a violation **is** irrelevant. Since the respirable dust samples were taken and were transmitted by Respondeent, there was no violation of either of the two sections of the Code of Federal Regulations by **MSHA**. Citation No. 9904322 is vacated. The part of the proceeding concerned with this citation is dismissed. Since citation No. 9904322 has been vacated for

failure to establish that Solar violated the applicable regulation, the order of withdrawal subsequently issued pursuant to the alleged failure of Solar to comply with the terms of the citation was improperly issued. The notice of contest filed by Solar is allowed. Order of Withdrawal No. 9904456 was improperly issued.

The bench decision rendered on May 20, 1980, is adopted and affirmed. On June 19, 1980, a written decision was issued approving settlement of Docket No. PENN 80-96 pursuant to a motion by MSHA and Solar was ordered to pay the sum of \$84, the amount originally proposed by MSHA's Office of Assessments.

ORDER

Order of Withdrawal No. 9,904,456 is VACATED and the civil penalty proceeding relating to that order is DISMISSED.



Forrest E. Stewart  
Administrative Law Judge

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