CCASE:

CONSOLIDATION COAL V. SOL (MSHA)

DDATE: 19820208 TTEXT: Federal Mine Safety and Health Review Commission Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
CONTESTANT

Contest of Citation

v.

Docket No. WEVA 81-222-R Citation No. 805557; 12/30/80

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

Blacksville No. 2 Mine

RESPONDENT

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

Civil Penalty Proceeding

PETITIONER

Docket No. WEVA 81-361 A/O No. 46-01968-03076

v.

Blacksville No. 2 Mine

CONSOLIDATION COAL COMPANY, RESPONDENT

DECISION AND ORDER

The captioned review-penalty proceeding is before me on reassignment from Judge Cook who held a consolided hearing in McHenry, Maryland on July 28, 1981.

There is no genuine dispute as to any of the materia (FOOTNOTE 1) facts.1 The dispositive issue is whether as a matter of law 30 C.F.R. 70.201(d) (FOOTNOTE 2) mandates corrective action dust sampling on each production shift during the time fixed for abatement.

The operator contends that the referent of the demonstrative pronoun "then" is any time during the time fixed for abatement. Where, as in this case, the time fixed for abatement was some 32 days, the operator's interpretation would permit several production shifts to be run without sampling prior to the time fixed for abatement.

Counsel for MSHA claims the proper interpretation is the "very first production shift" following the accomplishment of corrective adjustments to the operator's dust control system. The operator concedes it did not begin sampling until the second production shift after corrective action was taken.

Both interpretations are at variance with the statutory directive that underlies the improved standard. The standard issued in April 1980 is a paraphrase of section 104(f) of the Mine Safety Law, which is identical with old section 104(i) of the Coal Act, 30 U.S.C. | 814(f).(FOOTNOTE 3) The statute provides that after a notice of violation of the respirable dust standard issues "fixing a reasonable time for abatement of the violation," the operator "[d]uring such time," shall "cause samples . . . to be taken of the affected area during each production shift." Under the plain and unambiguous language of the statute it is clear that "during the time fixed for abatement," here the 32 days, the operator was obligated to take dust samples "during each production shift" and not just on the production shifts that came after corrective action was taken.

Since it would do violence to the Congressional intent and to established canons of construction of remedial legislation to construe the improved standard more narrowly than the statute, I find the phrase "and then" as used in the improved standard means "during the time fixed for abatement." (FOOTNOTE 4) For these reasons, I conclude the failure to sample on the first production shift after corrective action was taken was a violation of 30 C.F.R. 70.201(d).

Because the operator failed to sample during only one production shift after compliance was achieved the miners were not exposed to any

significant health hazard. On the other hand, the operator is chargeable with knowledge that sampling was required on each production shift during the period fixed for abatement. Any claimed ambiguity in the improved standard is resolved by reference to the statutory standard in effect since 1970. That ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation. United States v. International Minerals & Chemical Corp. 402 U.S. 558, 563 (1971).

For these reasons, and after considering the other statutory criteria, I conclude the amount of the penalty warranted for the violation found is \$150.00.

Accordingly, it is ORDERED that the operator pay the penalty assessed, \$150.00, on or before Friday, February 26, 1982, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy Administrative Law Judge

1 The operator's claim that inculpatory statements to Inspector Ryan by the operator's safety superintendent were inadmissible hearsay is without merit. FRE 801(d)(2)(C), (D). Under the Federal Rules of Evidence statements made to a declarant by an authorized agent of a party acting within the scope of his employment are excluded from the category of hearsay. As the Advisory Committee Note shows no guarantee of trustworthiness is required in the case of such an admission. The lack of merit in the objection was underscored when counsel for the operator chose to elicit the same inculpatory information from the operator's dust foreman, Mr. Reese (Tr. 67). This was later confirmed in questioning by the trial judge (Tr. 81).

~FOOTNOTE_TWO

2 The standard provides:

"During the time for abatement fixed in a citation for violation of [the respirable dust standards], the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken."

~FOOTNOTE_THREE

3 This provides:

"If, based upon samples taken, analyzed, and recorded pursuant to section 202(a), . . . the applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded and thereby violated, the Secretary or his authorized representative shall issue a citation fixing a reasonable time for the abatement of the violation. During such

time, the operator of the mine shall cause samples described in section 202(a) to be taken of the affected area during each production shift "

~FOOTNOTE_FOUR

4 Under section 101(a)(9), 30 U.S.C. | 811(a)(9), no improved standard can reduce the protection afforded miners by a statutory standard.