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CONSOLIDATION COAL V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,  
CONTESTANT

v.

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

CONTESTS OF CITATIONS

Docket No. WEVA 82-84-R  
Citation No. 861816 10/19/81

Four States No. 20 Mine

Docket No. WEVA 82-140-R  
Citation No. 864582 1/6/82

Humphrey No. 7 Mine

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

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 82-186  
A.C. No. 46-01431-03103

v.

Four States No. 20 Mine

CONSOLIDATION COAL COMPANY,  
RESPONDENT

Docket No. WEVA 82-246  
A.C. No. 46-01453-03151

Humphrey No. 7 Mine

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania,  
for Consolidation Coal Company;  
Aaron M. Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Secretary of Labor

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", to contest two citations issued to the Consolidation Coal Company (Consol) pursuant to section 104(a) of the Act and for review of civil penalties proposed by the Mine Safety

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and Health Administration (MSHA), for those citations. The general issues before me are whether Consol violated the regulatory standard at 30 C.F.R. 70.100(a) as alleged in the citations and, if so, whether those violations are "significant and substantial." Appropriate civil penalties must also be assessed for any violations found. Evidentiary hearings were held on these issues in Wheeling, West Virginia on June 29, 1982.

The cited regulatory standard, 30 C.F.R. 70.100(a), provides as follows:

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 each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations).

Citation No. 861816 reads as follows:

Based on the results of 5 samples collected by the operator on the designated occupation, 044, shear operator, on the mechanized mining unit I.D. No. 041-0 and indicated on advisory No. 0022 dated October 7, 1981, the average concentrations of respirable dust was 2.5 mg/m<sup>3</sup>. The operator shall take corrective action at once and then sample each production shift - 5 valid samples of respirable dust are taken as required under Section 70.201(d).

Citation No. 864582 reads as follows:

Based on the results of 5 samples collected by the operator on the designated occupation, 036, continuous miner operator on the mechanized mining unit ID No. 020-0 and indicated on Advisory No. 0056 dated December 28, 1981, the average concentration of respirable dust was 2.7 mg/m<sup>3</sup>. The operator shall take corrective action at once and then sample each production shift until 5 valid samples are taken as required under Section 70.201(d).

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At hearing the operator admitted that it was in violation of the cited standard as charged and argued only that the violations were not "significant and substantial." In determining whether the violations were "significant and substantial", I must consider whether these violations could be a major cause of a danger to safety or health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). The test essentially involves two considerations, (1) the probability of resulting injury or illness and (2) the seriousness of the resulting injury or illness.

In this case MSHA inspector Barry Ryan, a college graduate in business administration and mining engineering but with no medical expertise, testified that exposure to any level of respirable dust would at some point in time result in the permanently disabling condition known as pneumoconiosis. He admitted that this was a personal opinion and that he had no facts to support it. Moreover Ryan was unable to testify as to the length of exposure at the levels of respirable dust such as cited here that would result in pneumoconiosis. He admitted that the subject had never been studied fully and accordingly he did not "believe anybody would attempt to make a guess on that." He further admitted that he was relying in his testimony and opinions about the correlation between respirable dust and pneumoconiosis upon some unidentified scientific studies performed in Great Britain relating to the medical effects of quartz-bearing dust. He was unable to identify the name or author of those studies and counsel for the Secretary conceded that the studies were in any event not relevant.

In the absence of any medical, scientific evidence correlating the exposure of miners to the level of respirable dust found in these cases to the medical condition known as pneumoconiosis, I am unable to assess the probability of the alleged resulting condition. This is not to say that such a correlation cannot be established with the proper evidence. My determination herein is limited to the credible evidence presented in these cases. Accordingly, I do not find that the Secretary has sustained his burden of proving that the violations were "significant and substantial."

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Applying the same analysis I find that the Secretary has failed to establish that the violations were serious. However in light of repeated past violations of the standard here cited (two such violations at the Four States No. 20 Mine and five such violations at the Humphrey No. 7 Mine during the 24-month period preceding the issuance of the corresponding citations) I find that the operator failed to exercise reasonable care in preventing or correcting the violative conditions it should have known existed. Accordingly I find that the operator was negligent. Considering these factors in conjunction with the evidence that the operator is large in size, and that it apparently corrected the cited conditions in a timely manner leads me to the conclusion that the following penalties are appropriate: Citation No. 861816 (Four States No. 20 Mine) \$75, Citation No. 864582 (Humphrey No. 7 Mine) \$150.

ORDER

Citation Nos. 861816 and 864582 are affirmed, however the "significant and substantial" findings made therein are hereby stricken. The Consolidation Coal Company is ORDERED to pay civil penalties totalling \$225 for the cited violations within 30 days of the date of this decision.

Gary Melick  
Assistant Chief Administrative Law Judge