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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT-RESPONDENT	Contest of Citation
	Docket No. WEVA 82-30-R
v.	Citation No. 861598 9/24/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER-RESPONDENT	McElroy Mine
	Civil Penalty Proceeding
	Docket No. WEVA 82-120 A.O. No. 46-01437-03115
	McElroy Mine

DECISION

Appearances: Robert Vukas, Esquire, Pittsburgh, Pennsylvania, for Consolidation Coal Company; Janine C. Gismondi, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for MSHA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation issued by an MSHA inspector pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, charging the Consolidation Coal Company with an alleged violation of mandatory health or safety standard 30 CFR 70.207(a). Docket WEVA 82-30-R is the Contest filed by Consolidation Coal challenging the legality of the citation, and Docket WEVA 82-120, is the civil penalty proposal filed by MSHA seeking a civil penalty assessment for the alleged violation. The cases were consolidated for trial in Washington, Pennsylvania, on July 14, 1982, and the parties appeared and participated fully therein. Consolidation Coal filed a post-hearing brief, but MSHA did not. However, I have considered the oral arguments made by both counsel during the course of the trial, as well as Consolidation Coal's written brief, in the course of these decisions.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1077 Act, 30 U.S.C. 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

The issues presented in these proceedings includes the following: (1) whether the conditions or practices cited by the inspector on the face of the citation constituted a violation of the cited mandatory safety standard, (2) whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other safety or health hazard, and if such violation was caused by the unwarrantable failure of the operator to comply with the mandatory health or safety standard, (3) the appropriate civil penalty which should be assessed against the operator for the alleged violation based upon the criteria set forth in section 110 of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The McElroy Mine is owned and operated by the Consolidation Coal Company.

2. The respondent and the mine are subject to the jurisdiction of the Act and the Commission.

3. Citation No. 871598 was properly served on the respondent by a duly authorized representative of the Secretary of Labor.

4. The McElroy mine produces approximately 1,419,120 tons of coal annually.

5. The assessment of a civil penalty in this case will not adversely affect the respondent's ability to continue in business.

Discussion

The citation issued by the inspector in this case, No. 861598, September 24, 1981, (Exhibit G-1), describes the condition or practice cited as a violation as follows:

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> Only one of the five required valid respirable dust samples were taken by the operator from the 036 continuous miner operator designated occupation on the 079-0 4D mechanized mining unit for the July-August 1981 bimonthly sampling cycle, as evidenced by Advisory No. 0029 dated September 8, 1981. According to mine records, there were 65 production shifts from July 1 to August 18, 1981 when production on this section temporarily ceased. John Kulavik, Health and Safety Technician, stated that sampling for this section was scheduled for August 18-24, 1981, but after sampling on 8-19-81 was informed that this section was shut down immediately due to needing air for a new longwall on 1 South face section.

MSHA's testimony and evidence

John M. Dower, MSHA Mining Engineer, testified as to his mine training and experience, and he indicated that his duties include the inspection of mines. His current duties include the inspection and investigation of respirable dust and noise problems in underground mines in MSHA's District 3. Mr. Dower confirmed that he issued citation 861598 on September 24, 1981, and served it on John Kulavik, respondent's health and safety technician employed at the McElroy Mine (Tr. 8-12; Exhibit G-1).

Mr. Dower stated that he issued the citation on the basis of a September 8, 1981, MSHA "advisory" computer print-out which indicated that for the bi-monthly respirable dust sampling cycle period July through August 1981, only one sample had been received. The regulations require that five valid designated occupation samples be taken and submitted. The occupation samples required were for the 036 continuous miner operator, operating in the 079-0 mechanized mining unit (Tr. 12-15; Exhibit G-2).

Mr. Dower testified that when he spoke with Mr. Kulavik at the mine on September 24, 1981, he confirmed that only one respirable dust sample was taken of the miner operator in question during the July-August sampling period and that this sample is reflected on the "advisory" as cassette number 43877984. Mr. Dower stated further that according to the mine records there were 65 production shifts from July 1 to August 18, 1981, when production ceased on the 4-D section. He also indicated that the purpose of sampling is to assure that the mine ventilation methane and dust control systems are adequate to control any miners respirable dust exposure to a level at or below 2.0 milligrams per cubic meter in any 8-hour work shift (Tr. 15-16).

On cross-examination, Mr. Dower testified that his inspection confirmed that the 079-0 mechanized mining unit was located on the 4-D section. He also confirmed that during the time period in question the section was operating three shifts a day, and that Mr. Kulavik was the person performing dust sampling for the mine. Mr. Dower did not know when the 65 production shifts in question took place, and he did not check the records in this regard. He also stated that he did not check Mr.

Kulavik's dust sampling schedule to determine what he was doing during the shifts in question (Tr. 17-18).

Mr. Dower explained the procedures used to take the required dust samples, and he confirmed that MSHA's District Manager may require a mine operator to submit its proposed sampling procedures. Once the plan is placed in writing and submitted to MSHA, the operator must inform the district office of any mine operational change of status which may preclude the taking of samples. Mr. Dower confirmed that Mr. Kulavik advised him that he took only one sample on August 18, and took no others because the section in question was shut down for the remainder of the month of August. However, Mr. Dower did not know whether Mr. Kulavik submitted an operational status change form showing that it was going to be impossible to sample the section, nor could he recall checking MSHA's records to determine whether he did or not (Tr. 18-23).

Mr. Dower stated that he checked the mine operational records and confirmed that section 4-D was not a producing section for the period August 18 through 31, and he confirmed that the regulations require that five valid samples be taken only on a production shift (Tr. 24).

Consolidation Coal Company's testimony and evidence

John Kulavik, testified that during July and August 1981, he was responsible for the taking of respirable dust and noise samples at the mine. He stated that the first two weeks of July was the miner's vacation period, and that it ended on July 12. He was not at work during the subsequent week due to a death in his family. He started sampling the long wall section during the last week of July through August 11th. He indicated that he submitted an operational status change for the 4-D section after production on that section was shut down, and he stated that he started sampling on that section late because of vacations and personal reasons. During his nine years of taking samples, the citation issued in this case was the first one he has received for non-compliance (Tr. 77-80).

Mr. Kulavik explained that 40 of the 65 shifts noted by the inspector were shifts during the period after the miner's vacation to the end of July, and that he spent his time sampling the longwall section (Tr. 81). He also conducted noise surveys during May and June (Tr. 82).

In response to questions from the bench, Mr. Kulavik confirmed that he was first notified of mine management's decision that section 4-D was to be shut down after he came out of the mine on the midnight shift on August 18th, and at that time he had taken one dust sample on the morning shift (Tr. 86). The 4-D section was shut down until August 31, and it reopened on that day (Tr. 87), and it remained in production during the months of September and October. He sampled during these two months, and the section was in compliance (Tr. 88). The 4-D section was also in compliance during the months of May and June (Tr. 88).

Mr. Kulavik stated that he discussed the citation in

question with the inspector, and his understanding of the reason for the citation was

the inspector's belief that he should have sampled during the 65 shifts which had passed (Tr. 91). Mr. Kulavik indicated that had he known in advance that the 4-D section would be shut down he would have rearranged his sampling scheduled, but that he had no role in the decision to shut the section down (Tr. 91).

Consol's Arguments

Respondent-contestant Consolidation Coal Company (Consol), takes the position that the cited standard has not been violated in this case because Consol had two full months within which to take the required respirable dust samples. Since the 4-D Section was not in production after August 18, Consol argues that the inspector acted prematurely in issuing the citation, and that compliance was impossible because the section had been shut down (Tr. 24-28). In short, Consol takes the position that under the mandatory standard in question it has a full two months within which to take its samples, and that it has the discretion and option of scheduling sampling at anytime during the two months sampling period (Tr. 63-64; 67-68).

MSHA's Arguments

MSHA counsel conceded that the standard, on its face, allows a mine operator to schedule its respirable dust sampling at any time during any bi-monthly sampling period. However, counsel argued further that a mine operator must advance some legitimate reason for ceasing production on a section, thereby excusing itself from the requirement that it take and submit five valid respirable dust samples. Counsel also argued that any shut-down or cessation of production must be made in good faith and that a shut down in production for the purpose of avoiding compliance with the dust sampling requirements of the regulation should not be permitted (Tr. 28-34). On the facts of this case, MSHA's counsel takes the position that since 65 production shifts elapsed from July 1, 1981, to the day the section ceased production, Consol had ample time to take and submit the required respirable dust samples (Tr. 43).

MSHA's counsel argued further that the Act, as well as the cited regulation, imposes strict liability on a mine operator, and even though the standard permits an operator a full two months within which to take its respirable dust samples, when the operator decides to shut down production it must show that the shut down was made in good faith and not for the purpose of avoiding compliance, and that the shut down was occasioned by circumstances which were unforeseen and outside its control (Tr. 44). Even if it can establish these two factors, MSHA's counsel nonetheless takes the position that if the samples are not taken, a violation is established, but that the two factors may be considered in mitigation of any civil penalty which may be assessed for the violation (Tr. 45-46).

MSHA's counsel conceded that section 70.220 puts the burden on a mine operator to notify MSHA when there is a change in the operational

status of the mine. Assuming that an operator advised MSHA that it intended to take its dust samples during the last two weeks of August, counsel conceded further that a citation for failure to take samples could not be issued before the expiration of the full two month period (Tr. 73-74).

Findings and Conclusions

In this case Consol is charged with a violation of mandatory standard 30 CFR 70.207(a), which provides in pertinent part as follows:

> (a) Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days. The bimonthly periods are:
> January 1 - February 28 (29)
> March 1 - April 30
> May 1 - June 30
> July 1 - August 31
> September 1 - October 31
> November 1 - December 31

Inspector Dower testified that the mine in question has an excellent record and that the one respirable dust sample which was submitted, and which reflected 0.7, was well within the compliance range required by the standard (Tr. 38, 42). He also indicated that he did not know what Consol's past dust inspection routine practice was at the mine in question (Tr. 41). He also conceded that Mr. Kulavik advised him that he had no prior knowledge that the 4-D section would be shut down during the scheduled sampling period (Tr. 59). As for any MSHA policy guidelines concerning the application of section 70.207(a), MSHA's counsel confirmed that the existing policy does not address the issue of any possible extenuating circumstances that would permit an operator not to take the required dust samples without leaving itself open to a citation for noncompliance (Tr. 76).

The facts in this case show that the first dust sample taken by Mr. Kulavik was on August 18. The section was then shut down, and Inspector Dower confirmed that from August 18 through 31, which constituted the remainder of the sampling period, the section was not in production. Since it was not a producing section, the remaining four samples were not required to be taken.

On the facts of this case, MSHA has advanced no credible evidence to support a conclusion that mine management had arbitrarily shut down the

section simply to avoid the taking of the required samples. Mr. Kulavik impressed me as a competent respirable dust technician and I find him to be a completely straightforward and credible witness. I am particularly impressed with his unrebutted testimony that in the nine years he has been sampling dust in the mine, the instant citation for noncompliance was his first one, and the one sample which he did take indicated that the mine was in compliance.

MSHA's position of absolute liability even though an operator can establish that it acted in good faith by shutting down production and that the circumstances surrounding the shutdown were beyond its control is rejected. The fact that a number of working shifts had elapsed prior to the shut down is not persuasive, particularly where the standard itself allows an operator a full two months to take samples, and particularly where MSHA conceded that a citation may not issue before the expiration of the two month sampling cycle. In this case, Mr. Kulavik indicated that had he known in advance that the section would have been shut down, he would have arranged to take the required samples before the shut down. Since he had no control over the shut down and had no decision making authority in that regard, I conclude and find that he did act in good faith, and did not fail to take the samples simply to avoid compliance.

While it is true that section 70.220(a) requires a mine operator to report any operational changes that affects the respirable dust sampling requirements, Consol is not charged with a violation of that standard.

ORDER

In view of the foregoing findings and conclusions, I find that MSHA has failed to establish a violation of the standard cited in the section 104(a) Citation No. 861598, issued on September 24, 1981, and it IS VACATED and the civil penalty proposal filed against Consol in Docket No. WEVA 82-120 is DISMISSED. Further, Consol's Contest filed in Docket WEVA 82-30-R is sustained, but in view of my disposition of the civil penalty case that matter is terminated.

George A. Koutras
Administrative Law Judge