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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.

Contest of Citation

Docket No. WEVA 82-209-R
Citation NO. 864590 2/16/82

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

Blacksville No. 1 Mine

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

v.

Civil Penalty Proceeding

Docket No. WEVA 82-245
A.C. No. 46-01867-03102

Blacksville No. 1 Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

UNITED MINE WORKERS OF AMERICA,
REPRESENTATIVE OF THE MINERS

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, appeared for Consolidation Coal Company
Janine C. Gismondi, Esq., and Matthew J. Reider, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, appeared for the Secretary of Labor
The representative of the miners did not appear at the hearing A brief was filed on behalf of the miners representative by Mary Lu Jordan, Esq., Washington, D.C.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The Secretary issued a citation on February 16, 1982, under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a), charging a violation of 30 C.F.R. 100(a). The citation was based on samples of respirable dust collected by Consol (the operator) on 5 successive days - January 20 through January 24, 1982, which had an average concentration of respirable dust of 4.1 milligrams per cubic meter of air (4.1 mg/m³). The citation charged that the violation was of such nature as could significantly

and substantially contribute to the cause and effect of a mine safety or health hazard. The operator admits the violation of the standard but contests the propriety of the significant and substantial finding.

Pursuant to notice the case was heard in Washington, Pennsylvania, on November 9 and 10, 1982. Barry L. Ryan, Thomas K. Hodous, M.D., William Sutherland and Thomas Tomb testified on behalf of the Secretary of Labor. Earl Kennedy and Warfield Garson, M.D. testified on behalf of the operator. Post-hearing briefs have been filed by the Secretary, the operator and the Representative of the Miners.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Consolidation Coal Co. was the owner and operator of the Blacksville No. 1 Mine located in Monongalia County, West Virginia. The operation of the subject mine affects interstate commerce. Consol is a large operator.
2. The subject mine had a history of 554 paid violations of mandatory health and safety standards in the 2-year period from February 16, 1980 to February 15, 1982. Three hundred seventy three of these violations were designated significant and substantial.
3. Payment of the proposed penalties in this case will not impair Consol's ability to continue in business.
4. During the 12 months prior to February 16, 1982, MSHA did not issue any citations for respirable dust violations for section 026 (the section involved in this case) of the subject mine. No citations charging respirable dust violations were issued for the section between February 17, 1982 and November 9, 1982, the date of the hearing in this case.
5. During the 2 years prior to November 9, 1982, two citations were issued for alleged ventilation violations on section 026 of the subject mine.
6. The dust controls on section 026 including high pressure water sprays, and a new 40 horsepower auxiliary fan, were generally very effective.
7. The dust samples taken from section 026 during 18 months or 2 years prior to the citation contested herein averaged approximately .4 mg/m³ to .7 mg/m³. The section had one of the best dust control records of any working section in Northern West Virginia.
8. The five required samples for the bi-monthly period January and February 1982 for the continuous miner operator in

section 026 of the subject mine showed respirable dust levels of 8.1, 0.4, 5.1, 6.3 and 0.7 mg/m³ on January 20, 21, 22, 23 and 24. The average concentration for the five samples was thus 4.1 mg/m³.

9. The operator wrote a note on two of the samples asking MSHA to check for contamination, rock dust and oversized particles.

10. MSHA did not microscopically check any of the samples involved, based on MSHA policy of not microscopically examining samples with less than an MRE equivalent of 8.6 mg.

11. Citation No. 864590 was issued on February 16, 1982, charging a violation of 30 C.F.R. 70.100 because of the average respirable dust concentration of 4.1 mg/m³ in the samples submitted. The violation was cited as significant and substantial based on MSHA policy that violations charging overexposure to respirable coal mine dust are normally considered significant and substantial.

12. The citation was terminated when five valid samples were collected during five consecutive production shifts, and submitted to MSHA showing an average concentration of respirable dust of less than 2.0 mg/m³. The termination was issued on March 5, 1982. No changes were made in ventilation or mining procedures following the issuance of the citation. The samples showed respirable dust concentrations of 0.2, 0.5, 0.7, 0.8 and 0.2.

13. There is no evidence in this record concerning the mining employment history of the miner or miners whose environment was measured by the respirable dust samples which resulted in the citation involved herein.(FOOTNOTE 1)

14. The sampling device used by the operator is designed to collect the coal mine dust that will be deposited in the human lung. It is so designed that essentially no dust particles greater than 7.1 microns in size pass through the filter; approximately 50 percent of the particles 5 microns in size and 98 percent of the particles one micron in size pass through the filter. It collects all the dust in the atmosphere, including coal dust, rock dust (limestone), mica, kaolin and silica to the extent that any of these elements is present in the atmosphere being sampled. There is no evidence in this record concerning the nature of the dust in the samples involved herein. I am assuming that the samples contained coal dust, but am not able to assume they contained rock dust, mica, kaolin or silica.

15. The sampling devices are not foolproof however, and can pick up oversized non-respirable particles. They are subject to misuse, deliberate contamination, improper miner work habits, defective parts, etc. The operator is required to submit the samples to MSHA even if one of these potentially distorting factors is observed. There is no evidence in this record that the samples which resulted in the citation involved herein were affected by misuse, deliberate contamination, improper miner work habits, or defective equipment.

16. Some medical and mortality studies have suggested an increasing risk of stomach cancer among coal miners. The studies are inconclusive, however, and there is no present evidence linking this disease to exposure to respirable coal mine dust.

17. Coal miners who are exposed to silica dust, those whose jobs require cutting through rock or throwing sand on haulage tracks, have an increased risk of contracting silicosis. Some studies have shown that other coal miners have an increased risk of silicosis, but these are inconclusive.

18. Silicosis is an aggressive, serious lung disease which can result from short term exposure to high levels of silica dust. It can lead to tuberculosis, heart failure and death.

19. Chronic bronchitis is a chronic productive cough and can be caused by any bronchial and lung irritant. It most commonly results from cigarette smoking but can be caused by the deposition of coal dust in the larger or smaller airways of the lung. It results in some loss of lung function. It may be disabling to some degree though not in all people. It can result in increased susceptibility to colds or other respiratory infections. In susceptible individuals, bronchitis can result from relatively short term exposure to coal mine dust - that is from exposure of 6 to 12 months. Studies have indicated that approximately 3 or 4 percent of new miners subjected to respirable coal mine dust in the 2.0 mg/m³ range will develop symptoms of bronchitis in a 12-month period. After a 24-month period, approximately 12 percent of such miners showed symptoms of bronchitis. Exposure to respirable coal mine dust levels of 4.1 mg/m³ over a 5-day period would not in itself cause or significantly contribute to the development of chronic bronchitis.

20. Coal workers pneumoconiosis is a lung disease caused by the deposition of coal dust on the human lung and the body's reaction to it. The dust accumulates in the small airways and the macrophages of the lungs are unable to clear it. Continuous exposure to coal dust may cause the condition to spread and to involve most parts of the lung. In some individuals the condition may progress to progressive massive fibrosis which involves the destruction of alveoli and distortion of the remaining lung tissue.

21. Simple coal workers' pneumoconiosis usually is asymptomatic. It is diagnosed by x-ray examination. Progressive massive fibrosis or complicated coal workers' pneumoconiosis commonly causes symptoms of shortness of breath and cough. It can cause severe pulmonary impairment and early death.

22. Both simple coal workers' pneumoconiosis and progressive massive fibrosis are chronic diseases and there is no known treatment which can reverse the disease process. In the case of simple pneumoconiosis, removing the afflicted person from the offending exposure will prevent further progression. This is not true of progressive massive fibrosis which may cause further

lung deterioration without continued exposure to coal dust.

23. Approximately 11 percent of new miners with healthy lungs (category 0/0) who are exposed to respirable dust levels of 4.1 mg/m³ will contract simple coal workers' pneumoconiosis (category 1/0) if the exposure continues over a working life. Approximately 3 or 4 percent of such miners will develop category 2/1 pneumoconiosis, and approximately 1 percent will develop progressive massive fibrosis. A miner with category 1/0 pneumoconiosis who is exposed to respirable dust levels of 4.1 mg/m³ has approximately five times greater risk of progression than a miner with category 0/0. Approximately 8 percent of miners who have category 2/1 coal workers' pneumoconiosis will develop progressive massive fibrosis with continued exposure to coal mine dust.

24. Exposure to average respirable coal mine dust levels of 4.1 mg/m³ over a 5-day period would in itself not cause coal workers' pneumoconiosis and its effect on the development of the disease would be miniscule.

DISCUSSION

The medical evidence upon which Findings of Fact 16 through 24 are based is generally in agreement. Dr. Garson who testified on Consol's behalf was less positive on the relationship of bronchitis to exposure to respirable dust than was Dr. Hodous who testified for the government. But when Dr. Garson was asked:

Q. At the present time is there any accepted scientific or medical agreement that bronchitis is caused by excessive levels of respirable dust?

he answered:

A. I think most reasonable pulmonary physicians and occupational physicians suspect there is. They also know doggone well that there are many instances that you can clearly define that it isn't. Our problem is we really can't tell.

* * * * *

(Tr. 467-468).

Dr. Hodous testified that an exposure to respirable dust levels of 4.1 mg/m³ for a 2-month period "would significantly or at least play some role in increasing the chance of getting chronic bronchitis. How much that would be, would be very difficult to say." (Tr. 117).

Dr. Hodous and Dr. Garson were in general agreement on the question of the relationship of dust exposure to coal workers' pneumoconiosis.

STATUTORY PROVISIONS

Section 104(a) of the Mine Act provides:

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Section 104(d)(1) of the Act provides:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Section 104(e) of the Act provides:

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

Section 202 of the Act provides in part:

(a) 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 by the Secretary 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. Such samples shall be transmitted to the Secretary in a manner established by him, and analyzed and recorded by him in a manner that will assure application of the provisions of section 104(i) of this Act when the applicable limit on the concentration of respirable dust required to be maintained under this section is exceeded. The results of such samples shall also be made available to the operator. Each operator shall report and certify to the Secretary at such intervals as the Secretary may require as to the conditions in the active workings of the coal mine, including, but not limited to, the average number of working hours worked during each shift, the quantity and velocity of air regularly reaching the working faces, the method of mining, the amount and pressure of the water, if any, reaching the working faces, and the number, location, and type of sprays, if any, used.

(b) Except as otherwise provided in this subsection--

(1) Effective on the operative date of this title, 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 such mine is exposed at or below 3.0 milligrams of respirable dust per cubic meter of air.

(2) Effective three years after the date of enactment of this Act, 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 such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

REGULATORY PROVISIONS

30 C.F.R. 70.100(a) provides:

(a) 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).

30 C.F.R. 70.201 provides in part:

(a) Each operator shall take respirable dust samples of the concentration of respirable dust in the active workings of the mine as required by this part with a sampling device approved by the Secretary and the Secretary of Health, Education, and Welfare under Part 74 (Coal Mine Dust Personal Sampler Units) of this title.

(b) Sampling devices shall be worn or carried directly to and from the mechanized mining unit or designated area to be sampled and shall be operated portal to portal. Sampling devices shall remain operational during the entire shift or for 8 hours, whichever time is less.

30 C.F.R. 70.202 and 70.203 provide:

70.202 Certified person; sampling.

(a) The respirable dust sampling required by this part shall be done by a certified person.

(b) To be certified, a person shall pass the MSHA examination on sampling of respirable coal mine dust.

(c) A person may be temporarily certified by MSHA to take respirable dust samples if the person receives instruction from an authorized representative of the Secretary in the methods of collecting and submitting samples under this rule. The temporary certification shall be withdrawn if the person does not successfully complete the examination concluded by MSHA on sampling of respirable coal mine dust within six months from the issue date of the temporary certification.

70.203 Certified person; maintenance and calibration.

(a) Approved sampling devices shall be maintained and calibrated by a certified person.

(b) To be certified, a person shall pass the MSHA examination on maintenance and calibration procedures for respirable dust sampling equipment.

(c) A person may be temporarily certified by MSHA to maintain and calibrate approved sampling devices if the person received instruction from an authorized representative of the Secretary in the maintenance and calibration procedures for respirable dust sampling equipment under this rule. The temporary certification shall be withdrawn if the person does not successfully complete the examination conducted by MSHA on maintenance and calibration procedures within six months from the issue date of the temporary

certification.

30 C.F.R. 70.207(a) provides:

(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

ISSUES

1. May a citation issued under section 104(a) of the Act properly contain a finding that the violation is significant and substantial?

2. Was the violation which occurred in this case of a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard?

(a) Do the surrounding facts and circumstances concerning the taking of respirable dust samples preclude a finding of a "significant and substantial" violation?

(b) Does the medical evidence support a finding of a significant and substantial violation under the National Gypsum(FOOTNOTE 2) test?

3. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Consolidation Coal Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Blacksville No. 1 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

2. Consolidation Coal Company was in violation of the mandatory standard in 30 C.F.R. 70.100(a) by reason of the fact that it failed to maintain an average concentration of respirable dust in the mine atmosphere to which its continuous miner operator was exposed in January and February 1982 at or below 2.0 milligrams of respirable dust per cubic meter of air.

DISCUSSION

Although the operator raised questions in its evidence and its cross-examination of government witnesses concerning the accuracy and reliability of the dust sampling procedures followed by MSHA, it does not contest the fact of violation.

3. It is appropriate where warranted by the factual circumstances for an inspector to find a significant and substantial violation when he issues a citation under section 104(a).

DISCUSSION

The operator argues that the Mine Act "does not permit the designation 'significant and substantial' to be applied to" a citation issued under section 104(a). The argument is based on the fact that the terms significant and substantial are not contained in section 104(a) but are contained in 104(d). However, in order that a citation be issued under section 104(d), it must be "significant and substantial" and be caused by the operator's unwarrantable failure to comply. If a violation is in fact significant and substantial and not caused by unwarrantable failure, I find nothing in the Act which prohibits a citation from indicating the significant and substantial character of the violation. Section 104(e) which refers to a pattern of significant and substantial violations does not refer to unwarrantable failure, and I conclude that citations issued under section 104(a) may be part of a pattern if they are significant and substantial.

It does not appear that the issue was raised, but I note that each of the citations challenged in *Secretary v. Cement Division, National Gypsum Company*, supra was issued under section 104(a) of the Act. In discussing the test for significant and substantial, the Commission did not indicate that such a finding was prohibited in a citation issued under 104(a).

4. The violation found in conclusion of law No. 2 was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine health hazard.

DISCUSSION

A. The National Gypsum test

In *Secretary v. Cement Division, National Gypsum Company*, supra, the Commission seems to have enunciated two tests for determining whether a violation is significant and substantial. At 4 FMSHRC 825, it states that "a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Emphasis added). On page 827 the Commission states

that "a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health." (Emphasis added). The first test focuses on the hazard which the violation "contributes to"; the second on the causal relationship between the violation and a danger to safety or health. Each of the nine citations before the Commission in National Gypsum charged a safety violation. There is no indication in the Commission decision that it considered whether health hazards related to long term exposure would fit its definition (the dissenting opinion, however, did allude to the difficulty of applying the test to health hazards. Id, 834).

B. The Medical Evidence

It is clear that the exposure covered by the dust samples which resulted in the citation herein in itself would neither cause nor significantly contribute to chronic bronchitis (Finding of Fact No. 19) or coal workers pneumoconiosis. (Finding of Fact No. 24). It is also clear that longer exposure to the same dust levels can in a significant number of instances cause or significantly contribute to chronic bronchitis (6 to 12 months. See Finding of Fact No. 19) or to coal workers pneumoconiosis (a working life. See Finding of Fact No. 23). There is no question that chronic bronchitis and coal workers' pneumoconiosis are illnesses "of a reasonably serious nature." There is no question that each unit of exposure time is important in contributing to the disease. I think it would be illogical and unrealistic to hold that a serious disease results from a long series of insignificant and unsubstantial exposures. Dr. Hodous testified that the disease results from "an aggressive accumulation of dust and every drop in the bucket hurts." How much the drop will hurt may depend in part on the status of the bucket when the drop falls. If the bucket is full or nearly full, the drop may cause it to overflow. If a miner has worked 20 or 30 years in an underground coal mine, a 2 month exposure(FOOTNOTE 3) to excessive dust(FOOTNOTE 4) may be enough to cause the first signs of coal workers' pneumoconiosis,(FOOTNOTE 5) or to transform simple pneumoconiosis to a complicated form of the disease and possibly lead to progressive massive fibrosis. If the bucket is empty when the drop falls, in itself it won't mean much. If the miner exposed to excessive dust for a 2-month period is a new miner with healthy lungs, he probably will not be adversely affected, if his exposure stops. But if the exposure continues for 20 years (6 2-month periods each year), that miner too will be at risk to contract black lung. (Tr. 167).

I conclude that every drop in the bucket, every two month sampling period where excessive dust is present, significantly and substantially contributes to a health hazard--the hazard of contracting chronic bronchitis or coal workers' pneumoconiosis. To the extent that this conclusion is inconsistent with the National Gypsum decision, I am persuaded the inconsistency results from the Commission's failure to consider the impact of the decision on occupational health hazards due to long term exposure.(FOOTNOTE 6)

C. The Legislative History of the Coal Act and the Mine Act

The 1969 Coal Act was prompted by a 1968 mine disaster in Farmington, West Virginia and by the "countless thousands (who) have suffered or died or presently suffer and die from the ravages of coal workers' pneumoconiosis - the dread miners disease caused by the inhalation of excessive amounts of coal dust." House Report No. 91-563, 91st Cong. 1st Sess. (1969) reprinted in LEGISLATIVE HISTORY FEDERAL COAL MINE HEALTH AND SAFETY ACT, 558 (1970). The comprehensive scheme for reducing dust exposure in coal mines in section 201 through 205 of the Coal Act and in compensating miners who have become disabled because of pneumoconiosis and their survivors in sections 401 through 424 of the Coal Act show beyond argument that Congress considered overexposure to coal mine dust to be a very serious national problem. It would be impossible to reconcile this fact with an interpretation of the statute finding such over-exposure other than significant and substantial. The 1977 Mine Act repeated the emphasis on reducing respirable dust levels with minor changes. The declaration of purposes of the Act in Section 2 states in subsection (e) that "there is an urgent need to provide more effective means ... for improving working conditions ... in mines in order to prevent occupational diseases originating in such mines." One of the means provided in the 1977 Act is the pattern of violations provision in section 104(e). This provision can be made effective to prevent occupational pneumoconiosis only if violations of dust standards can be cited as significant and substantial.

5. The violation was serious. The foregoing discussion demonstrates that the violation was serious.

6. There is no evidence that the violation resulted from the negligence of the operator.

7. The operator's history of prior violations is moderate.

8. The payment of a penalty in this case will not affect the ability of the operator to continue in business.

9. An appropriate penalty for the violation is \$150.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the notice of contest is DENIED. IT IS FURTHER ORDERED that the citation No. 864590 issued on February 16, 1982, and charging a significant and substantial violation of 30 C.F.R. 70.100 is AFFIRMED.

IT IS FURTHER ORDERED that the operator, Consolidation Coal Company shall within 30 days of the date of this order pay a penalty in the amount of \$150 for the violation found herein.

James A. Broderick
Administrative Law Judge

FOOTNOTES START HERE-

1 "Still we know how Day the Dyer works, in dims and deeps and dusks and darks." J. JOYCE, FINNEGANS WAKE, 226 (1939).

2 Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

3 It must be assumed that the samples represent the average dust levels for the 2-month sampling period. So the dust exposure charged in the citation is not 3 days or 5 days but 2 months.

4 4.1 mg/m³ is more than twice the allowable maximum dust level. It is a substantial overexposure.

5 The fact that simple coal workers' pneumoconiosis is in general asymptomatic does not mean that it is not a serious disease. As Dr. Hodous pointed out, lung cancer is asymptomatic in most people for about 5 years.

6 See Secretary v. U.S. Steel, %y(5)6D FMSHRC %y(5)6D (issued January 13, 1983) (Judge Kennedy) and the cases cited therein.