

CCASE:  
SOL (MSHA) V. U.S. STEEL MINING  
DDATE:  
19830727  
TTEXT:

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

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 82-335  
A.C. No. 36-00970-03503

v.

Maple Creek No. 1 Mine

U.S. STEEL MINING COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, and Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

This is a civil penalty proceeding wherein the Secretary seeks penalties for five alleged violations of mandatory health and safety standards. Petitioner filed a motion for summary decision with respect to the violation charged in Citation No. 9901317 which was denied by an order issued April 6, 1983. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on April 27 and 28, 1983. During the course of the proceeding, Petitioner moved to withdraw the petition with respect to one citation - 9901316 - on the ground that it could not establish a violation, and to have the citation vacated. The motion was granted on the record. Respondent admitted that the violations charged occurred but challenged the designation of the violations as significant and substantial and contested the amount of the penalties proposed. Joe Garcia, Thomas K. Hodous, M.D., William H. Sutherland, William R. Brown, Alvin Shade and Gerald E. Davis testified for Petitioner. Samuel Cortis, Joseph G. Ritz, Paul Shipley and John Pecko testified for Respondent.

~1335

Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW COMMON TO ALL CITATIONS

1. At all times pertinent to this proceeding, Respondent owned and operated an underground mine in Washington County, Pennsylvania, known as Maple Creek No. 1 Mine.

2. Respondent has an annual production of coal of approximately 15 million tons. The subject mine has an annual production of approximately 540 thousand tons. Respondent is a large operator.

3. Between June 3, 1980 and June 2, 1982, Respondent's history shows 656 paid violations at the subject mine. Of these, four were violations of 30 C.F.R. 70.101, 71 were violations of 30 C.F.R. 75.200, and 73 were violations of 30 C.F.R. 75.503, the health and safety standards involved in this case. This is a moderate history of prior violations, and penalties otherwise appropriate will not be increased because of this history.

4. Each of the violations charged herein occurred except as otherwise found herein, and in each case the violation was abated promptly and in good faith.

5. The imposition of penalties for the violations will not affect Respondent's ability to continue in business.

6. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.

#### CITATION NO. 9901317 ISSUED MAY 27, 1982

1. On October 26, 1981, a respirable dust technical inspection was conducted on mechanized mining unit 010-0 in the subject mine. A sample collected at that time for occupation 036 showed 10 percent quartz. Based on this finding the respirable dust limit on the unit was reduced to 1.0 mg/m<sup>3</sup>. A sample taken on February 10, 1982, showed 8 percent quartz and the dust limit was raised to 1.2 mg/m<sup>3</sup>. In response to a request from Respondent, a technical investigation was conducted from February 22 to March 1, 1982. This showed an average dust concentration of 2.3 mg/m<sup>3</sup>. A citation was issued for a violation of the dust standard. The same investigation showed a quartz percentage of 7 and the respirable dust level was raised to 1.4 mg/m<sup>3</sup>. Between May 11 and 18, five respirable dust samples were taken which showed an average concentration of 1.8 mg/m<sup>3</sup> for which the citation with which we are here concerned was issued.

~1336

2. Exposure to excessive amounts of respirable dust with a quartz content in excess of five percent can contribute to silicosis and coal workers pneumoconiosis. The quartz content in the dust can be a factor in the progression of simple coal workers pneumoconiosis. It can also cause silicosis, a progressive, serious disease of the lungs resulting from deposition of silica in the lung and the body's reaction to it. Coal workers pneumoconiosis and silicosis are reasonably serious illnesses.

3. An exposure to 1.8 mg/m<sup>3</sup> of respirable dust which contains approximately seven percent quartz over a 2-month period, would not in itself cause silicosis but would contribute in a substantial way to the risk of acquiring silicosis. See *Secretary v. U.S. Steel Mining Co., Inc.*, 5 FMSHRC 46, 67-68 (1983) (ALJ).

4. The violation of 30 C.F.R. 70.101 which occurred in this case was reasonably likely to result in a reasonably serious disease. Therefore, it was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard. See *Secretary v. Cement Division, National Gypsum Company*, 3 FMSHRC 822 (1981); *Secretary v. U.S. Steel Mining Co., Inc.*, supra; I should note that the precise issue raised by Respondent in this case was raised by it in the case of *Secretary v. U.S. Steel Mining Co., Inc.*, supra, before Judge Kennedy. A decision by a tribunal of competent jurisdiction is res judicata in a subsequent proceeding between the same parties involving the same issue. 46 Am. Jur. Judgments 397 (1969); 1B Moore's Federal Practice 0.405 (1982). Factual differences not essential to the prior judgment do not render the doctrine inapplicable. *Montana v. United States*, 440 U.S. 147 (1979); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981). Respondent had a full and fair opportunity to litigate this issue before Judge Kennedy and to petition the Commission for review. Based on the doctrine of res judicata, it should be precluded from relitigating it here. The government, however, did not raise this issue, and the case was heard on the merits. My conclusion here is based on a consideration of the evidence in the case before me. Respondent should not be permitted to endlessly raise this issue, however. I accept and adopt the analysis and conclusions of Judge Kennedy that exposure to respirable dust with a quartz content that exceeds 100 micrograms per cubic meter of air constitutes a significant risk of a serious health hazard. See also *Consolidation Coal Co. v. Secretary*, 5 FMSHRC 378 (1983) (ALJ).

5. There is no evidence that the violation was the result of Respondent's negligence.

6. I conclude that an appropriate penalty for the violation is \$200.

~1337

CITATION NO. 1250101 ISSUED MAY 21, 1982

1. The subject citation was issued because the inspector found a broken torque wrench on the roof bolter. Roof bolting was being performed at the time. The torque wrench gauge had been damaged and could not be used to determine the torque of the bolts. The approved roof control plan requires that the first bolt be checked prior to removing any temporary supports. Only one bolt had been installed by the crew and no attempt to torque the bolt had been made prior to the citation being issued. The roof control plan is not violated by the fact that the torque wrench was defective, but only if the operator fails to torque the bolts in accordance with the plan. Despite the fact that Respondent at the commencement of the hearing admitted a violation, I conclude that the evidence does not show a violation of the roof control plan and will dismiss the petition with respect to this citation, and the citation will be vacated.

CITATION NO. 1249541 ISSUED JUNE 1, 1982

1. The subject citation was issued charging a violation of 30 C.F.R. 75.503 because of a permissibility violation in a shuttle car resulting from a conduit being pulled out of the packing gland. The violation was originally designated as significant and substantial but this designation was subsequently deleted.

2. The violation was not serious but it was the result of Respondent's negligence. Respondent had been cited for the same condition "quite a few times."

3. I conclude that an appropriate penalty for the violation is \$75 based on the criteria in section 110(i) of the Act.

CITATION NO. 1250107 ISSUED JUNE 3, 1981

1. The subject citation was issued because of a permissibility violation, 30 C.F.R. 75.503, resulting from the absence of a bolt on the control compartment on the foot switch of a shuttle car.

2. In the event of methane entering the control compartment, an internal explosion would be less likely to be contained within the compartment and could get into the mine atmosphere. The shuttle car was energized and was being prepared to load coal from the face.

3. The subject mine has been classified as a gassy mine. Ignitions have occurred in the subject mine.

4. I conclude that the violation was reasonably likely to cause an injury of a reasonably serious nature. The citation was properly designated significant and substantial. The violation was serious. The absence of the bolt should have been known to Respondent. The violation was the result of Respondent's negligence.

~1338

5. I conclude that an appropriate penalty for the violation is \$200 based on the criteria in section 110(i) of the Act.

ORDER

Based on the above findings of fact and conclusions of law  
IT IS ORDERED

(1) The penalty proceeding is DISMISSED with respect to the violations charged in Citation Nos. 9901316 issued May 27, 1982, and 1250101 issued May 21, 1982, and the citations are VACATED.

(2) Respondent shall pay within 30 days of the date of this decision civil penalties for the following violations:

Citation No.	Date	Penalty Amount
9901317	05/27/82	\$200
1249541	06/01/82	\$ 75
1250107	06/03/82	\$200
		\$475

(3) The citation Nos. 9901317 and 1250107 were properly designated "significant and substantial" and are AFFIRMED as issued.

(4) In Citation No. 1249541, the designation "significant and substantial" was deleted.

James A. Broderick  
Administrative Law Judge