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SOL (MSHA) V. U.S.STEEL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 83-31
A.C. No. 46-01816-03504

Gary No. 50 Mine

UNITED STATES STEEL
MINING CO., INC.,
RESPONDENT

DECISION

Appearances: Howard K. Agran, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh,
Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for two violations of regulatory standards. At hearing, Petitioner requested to modify the pleadings by withdrawing Citation No. 2029554 from the case on the grounds that the citation had been vacated before the request for hearing had been filed. Under the circumstances, the Petitioner's request to withdraw the citation is granted. Commission Rule 11, 29 C.F.R. 2700.11.

The remaining citation at issue, Citation No. 9914230, charges a violation of the mandatory standard at 30 C.F.R. 70.100(a). Since the Respondent concedes the existence of the violation as charged, the only issues before me are whether the violation was "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), and the appropriate penalty to be assessed. The citation alleges that "[b]ased on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 028-0 was 3.6 milligrams [per cubic meter] which exceeded the applicable limit [set forth in 30 C.F.R. 70.100(a)] of 2.0 milligrams [per cubic meter]."

Under the National Gypsum test, "a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon 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." The Secretary contends that there is a reasonable likelihood that exposure to high concentrations of respirable coal dust will result in pneumoconiosis, massive fibrosis, emphysema, stomach cancer, and chronic bronchitis. It is not disputed that these are illnesses of a reasonably serious nature.

Respirable dust samples taken on three consecutive days in the July/August 1981 bi-monthly sampling cycle from the longwall tailgate operator at the Gary No. 50 Mine show an average exposure of 3.6 milligrams of respirable dust per cubic meter. In addition the 197 samples taken from that same designated occupation over a period of 3 1/2 years (August 14, 1979 to March 7, 1983), show an average exposure of 3.12 milligrams of respirable dust per cubic meter. It is conceded that the cited longwall unit has been unable to consistently meet the 2 milligram per cubic meter standard set forth in the regulations and it is considered by both parties to be technologically infeasible to operate that unit consistently within compliance of the standard.¹

According to Thomas K. Hodous, M.D., a board certified expert in internal and pulmonary medicine, evidence exists that demonstrates that continued exposure of coal miners to respirable coal dust increases the risk for at least five disease processes; namely stomach cancer, emphysema, chronic bronchitis, pneumoconiosis and massive fibrosis. While mortality studies have shown an increased incidence of stomach cancer in coal miners, Dr. Hodous

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acknowledged that the relationship between exposure to respirable dust and stomach cancer is yet unproven. In addition, while pathological evidence of "rather marked emphysema" among coal miners also exists, the relationship between dust exposure and this disease has similarly not been conclusively established. Dr. Hodous opined, however, that there is sufficient evidence to support the view that miners with individual susceptibilities have a higher risk of suffering stomach cancer and emphysema as a result of exposure to coal dust.

According to Dr. Hodous, chronic bronchitis can also result from dust exposure including exposure to non-respirable dust i.e. dust particles larger than 5 microns in size. According to the studies cited by Dr. Hodous, coal miners may suffer chronic bronchitis in a matter of 24 months. The disease leads to coughing and phlegm production and in some cases increased pulmonary infection. In severe cases, cough syncope may develop wherein the cough is so severe that the individual may faint.

The fourth illness described by Dr. Hodous as resulting from exposure to respirable coal dust is coal workers pneumoconiosis. More specifically, pneumoconiosis is a lung disease caused by the deposition of respirable coal dust on the lung and the body's reaction to it. Exposure to respirable dust over a period of years results in the accumulation of coal particles into what are called macules surrounding the spots of coal in the terminal airways and the air sacs of the lung. Continuous exposure to coal dust may cause the condition to spread and involve most parts of the lung. The condition may worsen to progressive massive fibrosis involving the destruction of alveoli and distortion of the remaining lung tissues. While simple coal workers pneumoconiosis is usually asymptomatic, progressive massive fibrosis or complicated coal workers pneumoconiosis ordinarily causes shortness of breath and cough. It can also cause severe pulmonary impairment and early death. There is no known treatment which can reverse the disease process of these impairments. However, in the case of simple pneumoconiosis, removing the afflicted person from the offending exposure will prevent further progression. In the case of massive fibrosis, however, lung deterioration may continue without continued exposure to coal dust.

According to Dr. Hodous, several studies from British pneumoconiosis field research correlate the degree of exposure experienced by coal miners with the probability of contracting pneumoconiosis. The first is a study entitled "The Relation Between Pneumoconiosis and Dust Exposure in British Coal Mines" authored by Jacobsen, Rae, Walton and Rogan, (Exhibit G-6). The second is a follow-up study

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entitled "Coal Worker's Simple Pneumoconiosis and Exposure to Coal Dust at Ten British Coal Mines" published in 1982, by the British Journal of Industrial Medicine (Exhibit G-8). From these studies a graph was developed depicting the probabilities of developing Category 2/1 or higher pneumoconiosis after exposure to various mean dust concentrations over an average working lifetime of 35 years.² The studies have shown that 15 percent of the miners who have contracted 2/1 pneumoconiosis can also be expected to develop progressive massive fibrosis over the subsequent 10 years. Based on these studies, Dr. Hodous calculated that among healthy miners exposed over a working lifetime to the dust levels evidenced in this case 1.7 percent to 2.4 percent will develop Category 2/1 or greater pneumoconiosis. As previously noted, a miner with 2/1 pneumoconiosis with continuing dust exposure has a greatly increased risk of developing progressive massive fibrosis, a disease that can result in severe pulmonary impairment and early death.

Respondent challenges the probability assessment in this case on the grounds that it is based upon unreliable data in the cited British studies. There is no evidentiary basis, however, for the challenged reliability. It is no more than a bald unsupported allegation. Moreover the expert testimony of Dr. Hodous affirmatively corroborates the reliability of the studies. Respondent also argues that Dr. Hodous' conclusions are based on invalid assumptions regarding future work experience of miners in the Gary No. 50 Mine. While the specific longwall mining unit cited in this case may not be in continuous operation and may not continuously expose the same miners to the same excessive levels of respirable dust evidenced in this case, I find that the evidence is sufficient from which probability estimates may reasonably be inferred for the limited purpose of determining whether or not the cited over-exposure is "significant and substantial."

Finally, Respondent argues that Dr. Hodous' projections do not take into consideration that 50 percent of the miners at the cited mine were wearing personal protective equipment. Even assuming, however, that this representation was correct and that the alleged protective equipment brought actual exposure levels to the prescribed limits, it is apparent that the remaining 50 percent of the miners

were nevertheless unprotected. More particularly there is no evidence that the miners in the cited high risk occupation wore such protective equipment.

Accordingly I am satisfied that under the particular facts surrounding the violation cited in this case, including a long history of over-exposure to respirable dust and the expectation of future over-exposures in conjunction with the studies demonstrating a correlation between long term exposure to respirable dust and pneumoconiosis, I find that there does indeed exist a reasonable likelihood that the cited exposures in this case significantly and substantially contribute to the reasonably serious illness coal worker's pneumoconiosis. The uncontested testimony of Dr. Hodous that continuing coal dust exposure increases the risk of chronic bronchitis and, for susceptible individuals, of emphysema and stomach cancer also supports the inference that it is reasonably likely that the cited exposure significantly and substantially contributes to these reasonably serious illnesses. The violation herein is accordingly "significant and substantial." within the meaning of the National Gypsum decision. See also Secretary v. Consolidation Coal Co., 5 FMSHRC 378 (1983), (Judge Broderick) pet. for review granted April, 1983; and Secretary v. U.S. Steel Mining Co., 5 FMSHRC 46 (1983) (Judge Kennedy).

In determining the amount of penalty to be assessed in this case, I consider that the violation was serious as demonstrated by the above discussion. Based on the long history of excessive dust levels in this section of the Gary No. 50 Mine, and the inability of the Respondent to operate the cited longwall unit in continuous compliance with the respirable dust standard, I must find that the Respondent fully expected to operate in violation of that standard. At the same time, I recognize that the Respondent has been working with MSHA technical support staff and has been making extraordinary efforts at some expense to bring this and other longwall units into compliance with the regulation. The Respondent has also, in recognition of its inability to bring the longwall unit into compliance, furnished personal protective equipment for the mining crew. Under all the circumstances, I find that a penalty of \$250 is appropriate.

ORDER

The U.S. Steel Mining Company, Inc., is hereby ordered to pay a civil penalty of \$250 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

1 In light of this evidence one must wonder why this longwall unit had not long ago been closed down by MSHA under available statutory procedures. See e.g. 104(b), 104(d) and 104(e) of the Act. When asked at hearing why closure orders had not been effectuated (even after two years of noncompliance) the MSHA witness could only respond "That was what I didn't want you to ask." While MSHA urges in this case a finding that the dust violations are "significant and substantial" the only real significance of such a finding is its effect on triggering withdrawal order sequences under sections 104(d) and 104(e) of the Act. The finding is accordingly of little value unless MSHA is willing to enforce closure procedure a willingness it has not so far shown.

2 The International Labor Organization classifies x-ray evidence of simple pneumoconiosis based on the profusion of dots appearing on the lung films. There are four major categories from 0 to 3 each further subdivided into three categories 0 to 2. Category 0 would be a normal film and Category 3 would show a high profusion of dots indicating a severe disease process.