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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.

BIG RIVER INDUSTRIES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 85-11-M
A.C. No. 16-00033-05510

Big River Industries, Inc.

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Kirby Bergeron, Big River Industries, Erwinville,
Louisiana,
for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed under section 110 of the Act by the Secretary against the operator on December 24, 1984. A hearing was held on September 11, 1985.

The subject citation which cites violations of both 30 C.F.R. 56.5-1(a) and 30 C.F.R. 56.5-5 reads as follows:

The "Burner Man" (Kiln Operator), located on the kiln floor of the surface plant, was exposed to a shift weighted average (SWA) of 1.63 mg/m³ of respirable silica bearing dust on June 27, 1984. The TLV (Permissible Limit) was 1.34 mg/m³.

The employee was not wearing an MSHA approved respirator. An air-conditioned control booth was provided for the kiln operator. The analytical results were determined and this citation was issued on July 23, 1984. This termination due date is for providing an approved dust respirator and institution of a personal protection program and will be extended for the establishment of engineering or administrative controls when the personal protection program is instituted.

30 C.F.R. 56.5-1(a) provides in pertinent part as follows:

(a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof.

* * *

30 C.F.R. 56.5-5 provides in pertinent part as follows:

56.5-5 Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

* * *

At the hearing the parties agreed to the following stipulations:

- (1) the operator is the owner and operator of the subject mine;
- (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

- (3) the administrative law judge has jurisdiction of this case;
- (4) the inspector who issued the subject citation was a duly authorized representative of the Secretary;
- (5) a true and correct copy of the subject citation was properly served upon the operator;
- (6) imposition of a penalty will not affect the operator's ability to continue in business;
- (7) the alleged violation was abated in good faith;
- (8) the operator's prior history of violations is good and it has no prior health violations;
- (9) the operator's size is medium;
- (10) this citation is the only time the operator has ever been cited for an excessive respirable dust violation (Tr. 16).

At the hearing an MSHA official testified that he was custodian of the dust records in this case and he identified the reports showing the cited excessive level of silica dust. The chain of custody for these documents was outlined (Tr. 7-8). Next, the inspector who issued the citation described the circumstances set forth in the citation (Tr. 12, 15). Finally, a MSHA expert explained how the tests for excessive silica are performed (Tr. 17-23). The operator declined to cross-examine any of MSHA's witnesses and offered no evidence of its own (Tr. 9, 16, 23). On the contrary, at the end of MSHA's case the operator stated that it did not contest the finding of excessive dust levels (Tr. 24). Nor did the operator disagree with the inspector's finding that the kiln operator exposed to the dust was not wearing an approved respirator (Tr. 27).

In light of the foregoing, the subject citation must be sustained. Indeed, in light of the position the operator took at the hearing, the Solicitor did far more than he had to in order to sustain the citation. Cf. 28 U.S.C.A. 1733(a) and Rule 803(8) of the Federal Rules of Evidence. However, since the case apparently was not amenable to settlement prior to hearing, the Solicitor acted responsibly in bringing his witnesses to the hearing. And he is to be commended for doing so.

The Solicitor agreed that the excessive silica dust level found here was an isolated instance. This rather unique circumstance distinguishes this case from others where the gravity of respirable dust violations has been considered. Therefore, I conclude it was of minimal gravity although the operator was negligent.

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The failure of the kiln operator to wear an MSHA approved respirator was serious, although here again, because excessive levels occurred only once the level of gravity is not great. The operator was negligent but negligence is reduced somewhat because the approved respirator was on order and the kiln operator was wearing a respirator, although not an approved one.

After consideration of the foregoing and in light of the statutory criteria stipulated to, a penalty of \$75 is assessed.

The operator is ORDERED TO PAY \$75 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge