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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.

C.S.C. MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 85-92-M
A.C. No. 10-00189-05502

Star-Morning Unit

DECISION

Appearances: Faye von Wrangel, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington,
for Petitioner;
Axel Carlson, Safety Officer, C.S.C. Mining
Company, Wallace, Idaho, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent contested the proposed civil penalties, and pursuant to notice served on the parties, a hearing was held in Wallace, Idaho.

Issue

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed by the petitioner, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

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In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (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.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

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

Discussion

Section 104(a) Citation No. 2085690, was issued on October 9, 1984. The inspector cited a violation of 30 C.F.R. 57.5-37(a)(2), and the condition or practice cited is as follows: "This mine was sampled on October 4, 1984, and was found to be over exposed to Radon Daughters. The sample on the 1700 exhaust was 0.54 working level. Several employees were working in this mine."

Mandatory standard 30 C.F.R. 57.5-37(a), provides as follows:

(2) Where uranium is not mined--when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter. If concentrations of radon daughters are found in excess of 0.3 WL in an active working area radon daughter concentrations thereafter shall be determined at least weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.

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Section 104(a) Citation No. 2393304, was issued on March 6, 1985. The inspector cited a violation of 30 C.F.R. 57.3-22, and the condition or practice cited is as follows: "There was a loose slab approximately six feet by four feet by two feet approximately ten feet up on the left hand rib and the mucking machine operator was getting close to being directly beneath the slab."

Mandatory standard 30 C.F.R. 57.3-22, provides as follows:

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

MSHA's Testimony and Evidence

MSHA Inspector Donald L. Myers testified that he has been an inspector for 11 years, and prior to that worked in the mining industry in Climax, Colorado, for 10 1/2 years. His experience includes timbering and stope mining of Molybdenum. He described the respondent's mining operation as a cut and fill stope lead and silver mine, and mining takes place at different levels or raises.

Mr. Myers stated that he first inspected the mine during the first week of October, 1984, and there were approximately 15 people working there. He was accompanied by Company Safety Director Charlene Reister, and Mr. Myers confirmed that he informed Ms. Reister that he was there to take a radon daughters sample of the mine exhaust air. He and Ms. Reister travelled to the exhaust entry and Mr. Myers took his sample approximately 20 feet inside the tunnel opening at a level drift at the 1700 level portal. At that time, men were working hauling timbers in and out of the portal with a diesel motor, but Mr. Myers did not determine the extent of the work being performed inside the mine. Mr. Myers observed no ventilation fans in operation, and he believed that "natural ventilation" was being used. A normal flow of air was being coursed from the old Star Mine

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portal, up the shaft of the Star-Morning Unit, and through the 1700 level drift where he sampled.

Mr. Myers explained the procedures that he followed in taking his sample, and he identified the sampling pump as a Ludlum sampler. The sampler pumps two liters per minute, and he sampled for 5 minutes. He confirmed that he has received training in sampling procedures at MSHA's Mine Academy at Beckley, West Virginia, and also received on-the-job training in sampling procedures. He also confirmed that his sampling device is calibrated twice a year, that it was properly calibrated when he took his sample, and that he used the sampler battery as the power source for sampling. The sampling devices are maintained at his office, and they are available to the inspectors when they have a need to sample.

Mr. Myers stated that his initial sample reflected a 5 percent radon daughters exposure, that this was unusually high, and that it was the first time that he had ever registered a reading that high. He informed Ms. Reister that the mine either had a problem at the sample location or that his equipment was defective. In view of the high reading, Mr. Myers returned to the mine with MSHA technician Dick Sarginson from MSHA's Bellvue office, and they took additional samples.

Mr. Myers stated that when he and Mr. Sarginson returned to the mine, Ms. Reister was contacted again, and accompanied them during their sampling. A small pre-determined sample was tested by his Ludlum sampling device in order to check the calibration, and the device checked out. He and Mr. Sarginson took samples at various locations in the mine on separate Ludlum sampling devices, and Mr. Myers identified exhibit C-1, as the results of their collective sampling. He indicated that the digital read-outs on their sampling devices were relatively similar, and he confirmed that any samples over .3 WL were out of compliance. Since it seemed obvious that the respondent had not conducted any monitoring or sampling of radon daughters exposure because they did not have the sampling equipment, Mr. Myers issued the citation in question and gave it to Ms. Reister and instructed her to give it to Mr. James Stricker, the company president. The 0.54 sample result of October 4, 1984, at the 1700 Level was the basis for the citation. Mr. Sarginson's sample result at that location was 0.55.

Mr. Myers stated that when he issued the citation, there were seven miners working in the mine, but he was not

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sure what they were doing. He also indicated that radon daughters contamination is primarily one of "decaying action," and that adequate ventilation is the proper procedure for staying in compliance. He confirmed that no fans were being used at the time he sampled, and he indicated that the mines in the area are relatively low in radon daughters exposure. He also indicated that radon daughters exposure above the .3 WL level present lung cancer and radiation hazards.

Mr. Myers stated that approximately 3 weeks after the sampling with Mr. Sarginson, he took additional samples in the main exhaust and found that the 0.54 WL radon daughters exposure was reduced to 0.14 WL. He modified the citation on November 16, 1984, to reflect that sampling would have to be conducted every 3 months until the exposure was less than 0.1 WL in the exhaust air.

Mr. Myers confirmed that he modified the citation on July 29, 1985, to delete his "S & S" finding, and he did so on the ground that MSHA's district policy that any "working level months" (WLM) exposure not in excess of 4 WLM should not be considered "significant and substantial." Mr. Myers' initial "S & S" finding was based on his 5.0 initial sample result. A copy of his modification was produced by the respondent's representative, exhibit R-2, and it is a matter of record (Tr. 9-29).

On cross-examination, Mr. Myers stated that MSHA C.A.C., or "courtesy compliance visits" do not include radon daughters exposure sampling. He confirmed that he did not issue any citations when he initially took samples at the mine because he was not sure that his sampling device was working properly. He issued the citation in question only after verifying through the sampling made with Mr. Sarginson that his equipment was operating properly. He reiterated his testing procedures, explained the filter numbers which appear on exhibit C-1, and confirmed that he did not know what the men in the mine were actually working on while he was there.

Mr. Myers indicated that when he met with Ms. Reister at the mine during his inspections, she appeared to be well informed as to what was required to insure compliance with the radon daughters sampling requirements, and he confirmed that he conducted a "close-out conference" with her at the mine. He also indicated that he suggested to Ms. Reister that fans be used to enhance the exhaust ventilation.

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Mr. Myers indicated that it was possible that his initial high radon daughters sampling readings may have been caused by radon exhausting from the old Star Mine workings. Although he confirmed that the sampling devices used by him and Mr. Sarginson were calibrated, he did not know when they were last calibrated. While he did not know the actual temperature on the days he sampled, he confirmed that it was cloudy and that there was snow on the ground. He confirmed that respondent's sketch of his radon daughters sampling results, exhibit R-1, was accurate (Tr. 29-51; 55-63).

MSHA Inspector Jim Rinaldi testified as to his experience and background, and he confirmed that he has 26 years' of hardrock multi-level mining experience similar in nature to the type of mining conducted by the respondent. He confirmed that he inspected the mine on March 6, 1985, and that Company Safety Director Mr. Axel Carlson, accompanied him, and that mine foreman James Stricker, Jr., was present when he issued the citation.

Mr. Rinaldi stated that mining had reached the 1100 level in a drift approximately 8 to 9 feet high and wide and timbers were being removed in a raise area. The drift had stopped, and blasting had just taken place to begin another raise. A mucking machine and locomotive were in the area preparing to load out rock and timbers, and several mats and roof bolts had been installed for ground support.

Mr. Rinaldi stated that the ground areas in the mine are "basically incompetent and rotten." He observed a slab of ground rock approximately 4 feet thick, 2 feet wide, and 6 feet long located approximately 10 feet high in the area where the mucking machine was operating. He observed that the slab had "bellied out" and was fractured. Although a support mat had been installed against the bottom of the slab, and several roof bolts had been inserted to support the slab, Mr. Rinaldi did not believe that the slab was securely tied to the rock strata behind the slab. He was concerned over the fact that ground of the type found in the mine was known to sometimes break loose under its own weight.

Mr. Rinaldi stated that he observed workers in the area of the slab, and that the mucking machine operator was working toward the area and would have been directly under the slab within a matter of minutes. In his opinion, it was reasonably likely that part of the rock below the protective mat could have come down and seriously injured or killed someone. Mr. Rinaldi confirmed that the cited condition was

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abated by the next morning by the scaling down of some of the rock and the installation of additional support (Tr. 64-69).

Respondent's Testimony and Evidence

Edward P. Hunter, testified that at the time the loose slab rock citation was issued he was the lead miner in the areas. He stated that he checked the slab in question at least two or three times a day. He was responsible for installing the ground support in the area, and he indicated that support mats and bolts were installed over an area of some 10 feet by 20 feet. A mat and bolts were installed over the slab to support it, and he believed that before the slab would come down, it would first show signs of fractures and slacking (Tr. 77-78).

On cross-examination, Mr. Hunter stated his agreement with Mr. Rinaldi's estimates with regard to the size of the slab in question, and he confirmed that small fractures could be found in all of the rock in the area. He stated that the matting material is approximately 12 inches wide, and that the mat was "centered" over the slab. He confirmed that additional support timbers were installed after the citation was issued and that the slab is still in the area and has not fallen. He confirmed that it is normal practice to scale down loose rock, and that scaling took place before and after the issuance of the citation. He did not believe that the scaling conducted after the citation was issued had anything to do with the violation (Tr. 79-82).

Axel Carlson, respondent's safety director, testified that he was not at the mine when Mr. Myers and Mr. Sarginson conducted their radon daughters sampling. He stated that Ms. Reister is no longer employed by the respondent and has left the area. He suggested that she was not totally familiar with the testing requirements, and he expressed concern over the fact that sampling was not conducted during MSHA's initial "C.A.V." visit. He also expressed some doubt over the accuracy and dependability of MSHA's testing devices, but conceded that he could not prove that the sampling was done improperly or inaccurately. Mr. Carlson speculated that diesel fumes from machinery in the mine may have had a "false reading" impact on the samples, but conceded that he could not establish this.

Mr. Carlson confirmed that the respondent does not conduct its own radon daughters sampling because the testing equipment is expensive and the respondent can not afford to

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purchase it. He stated that fans are used to increase ventilation when high exposure levels of radon may be suspected, but that the respondent relies primarily on natural ventilation to exhaust and remove contaminants from the mine.

Mr. Carlson indicated that at the time the radon daughters citation was issued, the men who were working were "breaking through" in order to increase the ventilation. The radon daughters sampling exposure results came after this occurred, and he believed that any miners passing through the 1700 level where the high samples were taken were exposed for no more than 1 or 2 minutes.

Mr. Carlson stated that he would have preferred to go to a conference with MSHA on both of the citations, but he could not explain why this was not done, and he indicated that the matter was simply not followed up by the respondent (Tr 83-88).

James Stricker, confirmed that he is the president of the C.S.C. Mining Company. He stated that he began mining in other areas in 1982, and that he began the development of the Star-Morning unit during the end of April, 1984, when the milling operation was started. Rehabilitation of the underground upper 1200 level began in August, 1984, and crews began working there for several weeks during September and October of 1984, when production was first beginning. At the time the citation was issued, rehabilitation was still taking place and there was no real production (Tr. 88-89).

With regard to the loose rock slab citation, Mr. Stricker indicated that the two miners in the proximity of the slab were two of his most experienced miners and that they would have been alerted if they believed that it was hazardous. He believed that the cited condition was a "judgment call" on the part of Mr. Rinaldi (Tr. 71).

Findings and Conclusions

Fact of Violation

Although the respondent had apparently stipulated to the veracity and accuracy of the inspector's radon daughters testing procedures and equipment in advance of the hearing, Mr. Carlson asserted that he had some question about the accuracy of Inspector Myers' equipment. He also implied that the test results may have been influenced by the presence of diesel fumes. However, the respondent presented

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no evidence or testimony to support its assumptions, nor did it present any credible evidence to rebut MSHA's prima facie case.

I conclude and find that MSHA has established both violations by a preponderance of the evidence. The testimony of Inspector Myers and Inspector Rinaldi establish that the respondent failed to comply with the radon daughters monitoring and sampling requirements of 30 C.F.R. 5-37(a)(2), and failed to insure that the cited loose ground was adequately supported or taken down as required by 30 C.F.R. 57.3-22. Respondent has not rebutted MSHA's evidence and testimony in support of the violations. Accordingly, Citation Nos. 2085629 and 2393304 ARE AFFIRMED.

Significant and Substantial Violation

Inspector Rinaldi's testimony concerning his "S & S" finding with respect to Citation No. 2393304 is supported by his testimony. It seems clear to me that the condition of the cited slab rock in question presented a reasonable likelihood that an accident, with serious injuries, was likely, and the respondent has not rebutted this fact. Accordingly, Mr. Rinaldi's "S & S" finding IS AFFIRMED.

History of Prior Violations

MSHA's exhibit C-2 includes a summary of respondent's compliance record. It reflects that one prior citation was issued to the respondent in September, 1984. I conclude and find that the respondent has a good compliance record for the number of inspection days reflected in the report, and I have taken this into consideration in assessing the civil penalties for the citations which have been affirmed.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Company President James Stricker stated that he has approximately 35 employees on his payroll, and that his daily production ranges from 25 to 50 tons. He stated that he tries to maintain a 30 ton a day production level. MSHA's exhibit C-1 reflects an annual 1984 production of 21,465 tons. I conclude and find that the respondent is a small mine operator, and this fact has been considered by me in assessing the civil penalties in question.

Mr. Stricker conceded that the civil penalties assessed for the violations in question will not adversely affect his

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ability to continue in business. I adopt this as my finding.

Negligence

I conclude and find that both violations in question resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

I conclude that the respondent's failure to monitor or sample for radon daughters exposure was serious. Continued exposure to radon daughters in excess of the required levels, over a period of time without sampling, presented a possible risk of exposure to the miners in the mine. Further, the failure by the respondent to recognize the hazards presented by the rock slab which had evidence of fractures and "bellying out" posed a potential hazard to the mucking operator and constituted a serious hazard. I conclude and find that this violation was also serious.

Good Faith Abatement

The record establishes that the radon daughters Citation No. 2085629 was abated and terminated by MSHA Inspector Jim Rinaldi after subsequent radon daughters samples reflected that the exposures sampled at the 1700 level station, and the 1700 level exhaust air north and south of the decline were .01 WL, .04 WL, and .03 WL. I conclude and find that the citation was abated in good faith.

With regard to Citation No. 2393304, the record reflects that the loose ground conditions were timely abated by scaling down some of the rock slab and installing additional support. I conclude and find that this citation was abated in good faith.

Civil Penalty Assessments

During closing arguments, MSHA's counsel asserted that the essence of the radon daughters citation lies in the fact that the respondent failed to monitor or sample the mine radon daughters exposure levels after it was determined through initial sampling that the levels were high and in excess of those levels permitted by the cited standard. Counsel asserted that section 57.5-37(a)(2), required the respondent to make weekly determinations in the mine working areas to insure that radon exposures were 0.3 WL or less.

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Since this was not done, counsel concluded that the violation has been established and that the citation should be affirmed. Since the citation was non - "S & S," counsel asserted that a civil penalty assessment of \$20 is reasonable.

With regard to the loose ground citation, counsel asserted that MSHA has established a violation and that a civil penalty assessment of \$46 is reasonable.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed for the citations which have been affirmed:

Citation No.	Date	30 C.F.R.	
		Section	Assessment
2085690	10/09/84	57.5-37(a)(2)	\$20
2393304	03/06/85	57.3-22	\$46

ORDER

The respondent IS ORDERED to pay to the petitioner the civil penalties assessed by me in this proceeding within thirty (30) days of the date of the decision. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge