

CCASE:

KEYSTONE COAL MINING V. SOL (MSHA)

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

KEYSTONE COAL MINING CORP.,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 84-193-R  
Citation No. 9951311;  
6/20/84

Urling No. 3 Mine

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

v.

KEYSTONE COAL MINING CORP.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 85-29  
A.C. No. 36-05658-03541

Urling No. 3 Mine

ATTACHMENT

July 9, 1985

TENTATIVE DECISION

The following decision is issued subject to the right of the parties to file objections or argument with me within 20 days from the date of its issuance.

STATEMENT OF THE CASE

The contest proceeding involves a challenge to a citation issued for a violation of 30 C.F.R. 70.100. The civil penalty proceeding seeks a penalty for the violation charged in that citation and for another violation charged in a withdrawal order. Pursuant to notice the case was called for hearing in Pittsburgh, Pennsylvania on June 4, 1985. The parties proposed to settle the violation charged in the withdrawal order by the payment of the penalty originally assessed, \$650. I stated on the record that I would approve the settlement. With respect to the contested citation, the operator conceded that the violation occurred, but contested the special finding that it was caused by the operator's unwarrantable failure to comply with the standard

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Paul S. Parobeck, Robert Davis, Paul Bizich, Jr. and George M. Szalankiewicz testified on behalf of the Secretary. Raymond Wygonik and Dennis Malcolm testified on behalf of Keystone. At the conclusion of the hearing, I stated on the record that I concluded that the evidence did not establish that the violation was caused by Keystone's unwarrantable failure to comply with the standard.

#### ISSUES

1. Was the violation the result of Keystone's unwarrantable failure to comply with the standard?

2. What is the appropriate penalty for the violation?

#### FINDINGS AND CONCLUSIONS

I have considered the entire record and the contentions of the parties in making the following decision.

The parties stipulated that Keystone is subject to the Mine Safety Act and that I have jurisdiction over the parties and the subject matter of this proceeding. Keystone is a "medium to large" operator, producing over 6 million tons of coal annual, 557,000 at the subject mine. The imposition of a penalty in this case will have no effect on Keystone's ability to continue in business. In the 24 months prior to the citation being considered here, Keystone had a history of more than 1700 violations, including 66 violations of respirable dust standards. This is a significant history of prior violations and the penalty hereafter assessed will reflect that fact. The parties agreed that the violation charged in the contested citation occurred. It was terminated promptly in good faith.

#### UNWARRANTABLE FAILURE

Keystone's Dust Control Plan requires that a minimum of 3200 cubic feet of air be maintained at the end of the line brattice, and a minimum of 9000 cubic feet at the last open crosscut. Fourteen water sprays (later increased to 16) operating at 60 psi were required. Keystone and its affiliated companies have been leaders in developing the fan spray system for removing respirable dust.

Technical inspections were carried out on June 1, 1983, on November 14, 1983 and on October 17, 1984. The quantity of air at the end of the line curtain varied from 3540 to 4430 cubic feet. Dust samples collected ranged from 0.1 to 1.1 mg/m<sup>3</sup>. These inspections demonstrated that the plan was

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more than adequate in controlling respirable dust. Despite this fact, however, dust samples submitted by Keystone for the designated occupation 036 for the MMV section showed that it was out of compliance during the following bi-monthly sampling periods:

May-June 1983	2.2 mg/m <sup>3</sup>
July-Aug. 1983	2.7 mg/m <sup>3</sup>
Nov.-Dec. 1983	2.6 mg/m <sup>3</sup>
Jan.-Feb. 1984	3.1 mg/m <sup>3</sup>

In each case compliance was effected and the citations terminated when secondary samples were taken. The samples submitted for September-October 1983 showed an average of 1.7 mg/m<sup>3</sup>, and for March-April 1984 showed an average of 1.7 mg/m<sup>3</sup>.

Five samples taken on May 23, 24 and 25, 1984 showed the following MRE equivalents: 1.1, 2.5, 3.3, 0.5 and 4.0. The average concentration was thus 2.2 mg/m<sup>3</sup>, exceeding the allowable limits under 30 C.F.R. 70.100. When the computer printout was received, showing these concentrations, a citation was prepared and taken to the mine by MSHA Inspector Paul Bizich, Jr. Inspector Bizich was directed to serve the citation and make a spot inspection including sampling the section in question. However, the section was idle that day and for the 2 previous days. The inspector talked to the mine superintendent and the section foreman who both said the dust control plan had been followed. The inspector then requested the superintendent to voluntarily increase the requirements of the dust control plan. Superintendent Wygonik replied that he could not agree to this without consulting others. The inspector concluded that the fact that the unit had been out of compliance five times in the past 12 months (actually 14 months) indicated a lack of concern on the part of Keystone. He therefore found that the violation was due to the operator's unwarrantable failure and issued a citation under section 104(d)(1) of the Act. The citation was terminated on June 28, 1984 when the operator submitted 5 valid samples with an average concentration of 0.6 mg/m<sup>3</sup>.

Keystone was equipped and staffed to take and analyze dust samples itself, but did not do so between May 1983 and June 1984.

After the citations were issued in 1983 and early 1984, Keystone checked the sprays, the curtains and the mining machine. Maintenance people and technical support people

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were called in but found no problems with the equipment and could find no evidence that the dust control plan was not being followed. However, two miner operators expressed suspicions of the dust sampling program because they felt it might affect their rights to obtain black lung benefits.

Keystone measures the air at the end of the line curtain and at the last open crosscut every shift. It checks the water sprays every shift, and checks the water spray pressure occasionally. A dust technician gives annual refresher training to the miners during which he stresses the importance of the ventilation and dust control plan.

In the case of Zeigler Coal Co., 7 IBMA 280, 295-96 (1977) the Interior Board of Mine Operation Appeals stated that a violation is unwarrantable if the operator "has failed to abate the conditions or practices constituting [the] violation . . . [when it] knew or should have known existed or which it failed to abate because of a lack of reasonable care." In the case of United States Steel Corporation, 6 FMSHRC 1423 (1984), the Commission alluded to the Board's definition in Zeigler and stated that although it was not required "to examine every aspect of the Zeigler construction," it concurred with the Board "to the extent that an unwarrantable failure to comply may be proved by showing that the violative condition or practice" resulted from "indifference, willful intent, or a serious lack of reasonable care." (1437)

There is no evidence in this record that Keystone knew that the conditions constituting the violation cited here existed, and I conclude that it did not. Should it have known that such conditions (i.e., respirable dust in excess of 2.0 mg/m<sup>3</sup>) existed prior to the issuance of the citation? Since the plan was adequate to keep the dust level within allowable limits, MSHA concludes that it was not being followed. But Keystone has shown that it regularly checked the air and water spray systems, and that it had a regular program for training and retraining the miners concerning the ventilation and dust control plans. In January, 1984, and March, 1984, MSHA requested that it monitor the sampling program and Keystone agreed. However, the proposed monitoring was not done. In view of these facts, I cannot conclude that the violation resulted from indifference, willful intent or a serious lack of reasonable care. Nor (though this is a closer question) can I conclude that Keystone "should have known" that the condition existed. MSHA argues that the fact that Keystone had four prior violations establishes that it should have known of the violation charged here. This does not follow. There is no

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evidence that Keystone did anything or failed to do anything which would have put it on notice that the dust limits were exceeded in May, 1984. Therefore, I conclude that the violation did not result from the unwarrantable failure of Keystone to comply with the respirable dust standard. Therefore, the citation was improperly issued under section 104(d)(1), and should be modified to a 104(a) citation.

PENALTY

Exposure to more than 2.0 mg/m<sup>3</sup> of respirable dust over the working life of a miner is likely to result in coal miner's pneumoconiosis or black lung. This is a serious disease, and can result in disability and early death. The Coal Act of 1969 and the Mine Act of 1977 were both passed in part to deal with the serious problem of overexposure to coal dust. I conclude that the violation was serious. It was promptly terminated in good faith. The operator is medium large and has a significant history of prior violations. I conclude that, considering the criteria in section 110(e) of the Act, an appropriate penalty for the violation is \$450.

ORDER

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

(1) Citation 9951311 issued June 20, 1984, under section 104(d)(1) is MODIFIED to delete the finding that the violation was caused by the operator's unwarrantable failure to comply with the standard. The citation therefore is converted to one issued under section 104(a).

(2) Keystone shall pay the following penalties for the violations charged in this proceeding:

Citation 2252764	\$ 650
Citation 951311	450

Total \$1100

(3) The parties are granted 20 days from the date of issuance of this tentative decision to file objections thereto or arguments thereon.

James A. Broderick  
Administrative Law Judge