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FMC WYOMING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FMC WYOMING CORPORATION,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. WEST 85-4-RM
Citation No. 2084591; 9/17/84

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

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 85-41-M
A.C. No. 48-00152-05525

v.

FMC Trona Mine

FMC WYOMING CORPORATION,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Respondent/Petitioner;
John A. Snow, Esq., VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah,
for Contestant/Respondent.

Before: Judge Lasher

This matter is comprised of a contest proceeding filed by FMC Corporation (herein FMC) on October 9, 1984, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., (herein the Act), and a civil penalty proceeding initiated by the Secretary of Labor on February 25, 1985, by the filing of a Proposal for Penalty pursuant to Section 110 of the Act.

A hearing on the record was held in Salt Lake City, Utah, on March 6 and 7, 1985, at which both parties were represented by counsel. The two dockets comprising this proceeding were consolidated for hearing on March 6, 1985 (Tr. 2) since the subject of both is Citation No. 2084591 issued by MSHA Inspector Ronald L. Beason on September 17, 1984, at FMC's trona mine located near Green River, Wyoming. This Citation was issued under Section 104(d)(1) of the Act, and alleges that the violation of the

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safety and health standard cited, 30 C.F.R. 57.2011 (FOOTNOTE 1) was caused by the "unwarrantable failure" of FMC to comply with such standard.

The violative condition (or practice) was described in the Citation as follows, to wit:

"The old MCC Motor Control room (Baby Sesqui) was insulated with a material which contained chrysotile asbestos. The insulation had deteriorated and had fallen from the roof and portions of the wall. The material was 2 1/2 inches thick and had fallen from the south wall. The lower measures 4 feet x 2 1/2 feet. The upper section which had fallen measured 2 feet x 3 feet. The motor control room measured 9 feet x 12 feet and the insulation had fell from the roof. Loose insulation hanging on railings and electrical conduit measured approximately 2 1/2 inches thick by 2 feet wide by 3 feet long. Another section was approximately 10 x 10 inches. Apparently the roof section and wall sections of insulation had fallen to the floor and had been swept up. Fresh signs of cleaning were apparent. Recently employees had disconnected the electrical switchgear in the room, except three panels for lighting & heating etc.

Asbestos has been determined to be a health hazard and is associated with asbestosis, lung cancer and cancer of the gastrointestinal tract. When suspended fibrous dust particles do not readily settle, but remain suspended for long periods of time, therefore they continue to present an hazard to the employees which worked inside the control room.

On 3/20/1981 the operators records indicated that a sample of the insulation had been taken and found to contain asbestos. The operator failed to barricade the area or post warning signs which displayed the nature of the hazard and the respiratory protection required. Due to the association of asbestos to lung disorders, the obvious work completed in an enclosed room, the unknown contamination, this is an unwarrantable failure of the

operator to take the appropriate safety measures to insure that the employees were adequately protected while working in this area."

The Secretary initially proposed a penalty of \$400.00 for the alleged violation but at the hearing and in his post-hearing brief urged the maximum penalty authorized in the Act, \$10,000.

The Secretary contends that the presence of a potent carcinogen, asbestos, in a working environment in and of itself is a hazard which requires the mine operator to comply with the subject regulation by either barricading or posting warning signs.

FMC contends that the Secretary (MSHA) has determined and officially advised the mining industry what is a safe or accepted level of asbestos by the promulgation of 30 C.F.R. 57.5Å1 which provides:

57.5 Air quality, ventilation, radiation, and physical agents.

Air Quality
GeneralÅSurface and Underground

57.5Å1 Mandatory. Except as permitted by 57.5Å5: (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 73 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. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the SecretaryÅTreasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference. (b) The 8Åhour time-weighted average airborne concentration of asbestos dust to which employees are exposed shall not exceed 2 fibers per milliliter greater than 5 microns in length, as determined by the membrane filter method at 400Å450 magnification (4 millimeter objective) phase con

trast illumination. No employees shall be exposed at any time to airborne concentrations of asbestos fibers in excess of 10 fibers longer than 5 micrometers, per milliliter of air, as determined by the membrane filter method over a minimum sampling time of 15 minutes. "Asbestos" is a generic term for a number of hydrated silicates that, when crushed or processed, separate into flexible fibers made up of fibrils. Although there are many asbestos minerals, the term "asbestos" as used herein is limited to the following minerals: chrysotile, amosite, crocidolite, anthophyllite asbestos, tremolite asbestos, and actinolite asbestos.

The subject Citation was issued on September 17, 1984, during an ongoing regular inspection which was nearing completion. The alleged violation occurred in an 11' by 12' room called the "old Motor Control Center" located in the so-called "Baby Sesqui" complex at the mine. This room is located on the ground floor of the complex which is approximately five or six floors high (Tr. 120) and at the times material herein it housed the electrical controls for the complex (Tr. 107). The Baby Sesqui complex contains part of FMC's milling process (Tr. 99). The room itself is also known as the "Baby Sesqui control room," "The old MC" and the "MCC" (Tr. 30). It will be referred to herein as the MCC.

The MCC, as previously noted, is approximately 11 feet by 12 feet and has but one door and no windows (Tr. 30, 116, 171). There is no ventilation system for the room (Tr. 70). The door opens from the outside and there is no entry into the Baby Sesqui from the MCC (Tr. 121, 142). The Baby Sesqui, even though part of the milling area, is essentially dust free because the product-trona-is brought in in a liquid state (Tr. 142, 183, 214).

The insulation in the MCC, which was 2 1/2 inches thick (Tr. 50, 57, 58) contained 20% asbestos (Exs. SÄ12 and SÄ13; Tr. 25, 40, 48, 61, 66, 240, 265). FMC concedes it was aware of the asbestos content of the insulation (Tr. 59Ä62, 63) and that during a time certain work was performed in 1983/1984 airborne asbestos fibers would have been present in the MCC (Tr. 345).

Inspector Beason credibly described the pertinent part of his inspection as follows:

Q. Okay. When you entered the motor control center, what did you observe?

A. Well, I observed this insulation that was on the walls. It was deteriorated, fallen down. It was on top of the control boxes, electrical switches. I went over and looked at the electrical switches. It was on top of them. There was a piece off on the rightÄ Äthe south wallÄ Äthat I took a piece off and got to fooling

with

it and talking about it.

Q. It was some kind of insulation, you assumed?

A. Uh-huh (affirmative).

Q. What was the texture of this?

here;

A. It was brittle. There was shiny parts in it that I got it in

looked

and with my glasses I've got the cheater glasses I got up and

at it. And it looked sort of brittle.

Q. Did you know what that material was at that time?

A. No, ma'am. I asked Mr. Hatt 2 what it was at that time.

Q. And what did Mr. Hatt tell you?

A. He refused to answer me.

Q. How did you find out what that material was?

A. Well, I went to him several times. I had it, and I went to him several times and asked him what it was. And he refused to answer. I asked him if I could get a sample of the material. He said that I could. And I went next door to another place there and asked him if I could take a bottle. And he said yes.

And I put it in. And I asked him was that asbestos, at that time I asked him. And he said he wouldn't tell me, I'd have to talk to the environmentalist.

Q. Who is the environmentalist?

A. I've got his A A

Q. Could that be Mr. Watson?

THE WITNESS: Carl Watson (FOOTNOTE 3)

(Tr. 31A33)

XXXX

XXXX

XXXX

XXXX

"Q. Did you ever see the results of the material sample which you put in the bottle and turned in?

A. Yes, sir.

Q. Is that this Exhibit 12?

A. Yes, sir.

Q. And does it indicate on there what the material was?

A. Yes, sir.

Q. What was it?

A. Twenty percent asbestos."

(Tr. 40).

The sample of insulation material taken was representative of the insulation found around the MCC (Tr. 31, 41-43), which had fallen from the walls and roof of the room (Tr. 44, 56) and was observed (1) on top of a conduit, control boxes, electrical switches, (2) hanging from the rafters (Tr. 31, 43-45), (3) on the handles of a control panel (Tr. 45), (4) inside the control panel (Tr. 48), and (5) on the floor mats and other areas (Tr. 52). This insulation material was deteriorating and falling down from the walls and roof (Tr. 31, 58, 44).

The record in this case provides adequate information as to the general characteristics and hazardous nature of asbestos. Asbestos is the generic name for a number of hydrated silicates (Tr. 244). Chrysotile is one such silicate (Tr. 244, 30 C.F.R. 57.5). Asbestos is composed of fibers which are bundled together to form larger fibers which in turn are bundled together to form still larger fibers (Tr. 245). The result is that as asbestos is broken down it does not break down into pieces but rather as each fiber is broken down it releases many more fibers which in turn, if broken down, release still more fibers (Tr. 245). Asbestos fibers 5 microns or larger in size are clearly hazardous (Tr. 247, 30 C.F.R. 57.5-1). Five microns is approximately one-tenth the size of a particle visible to the unaided eye (Tr. 247). A visible cloud of airborne asbestos contains harmful fibers that are invisible (Tr. 246-249) and will take approximately 30 minutes to fall one-foot in perfectly still air and longer if there is any air current present. Such a fiber can become airborne simply by the air currents created by a person walking (Tr. 247-248). Asbestos can be liberated and suspended in the air easily and by slight movement, such as a person walking by it (Tr. 67).

Richard L. Durand, an MSHA District Industrial Hygienist, testified concerning the invisible (non-obvious) nature of asbestos:

"Q. If you can see a cloud of dust of asbestos, is it possible to have more asbestos that you can't see that is suspended in the air?

A. Definitely. You'll have a range of dust particles from that you can't see on up to very large particles. You have a whole gamut of sizes.

Q. And would those particles that you can't see present a health hazard?

A. Yes, even above five microns, what the standard is based on. So from five to fifty are particles that you can't see. And they will definitely pose a health hazard." (Tr. 249).

Various diseases can result from inhalation of asbestos. One disease, asbestosis, is directly related to the amount of asbestos inhaled. The disease can be contracted whether the amount of asbestos is inhaled over a short period or over a long period of time. It results when fibers are inhaled directly into the lungs. As the fibers are retained by the lungs they are coated with cells rich in iron called "asbestos bodies" discernible by x-ray. The symptoms therefrom may appear from 4 to 15 years after exposure. Such symptoms are shortness of breath, coughing, tightening of the chest, difficulty in breathing and a hampering of the lungs to exchange oxygen. Death can occur 10 to 15 years after the onset of symptoms (Tr. 250, 251).

A second disease resulting from asbestos inhalation is bronchi carcinoma or bronchial cancer. Asbestos, when inhaled into the bronchial area, can lead to the development of cancer.

Mesothelioma is a cancer of the lining of the lung. It is a non-treatable, non-operable and always fatal disease. Death generally results in less than one year after the onset of symptoms (Tr. 253). This disease can result from the inhalation of a single fiber. As little as one occupational exposure to asbestos can cause this cancer (Tr. 254). It is estimated that 7% to 10% of those who work with asbestos develop this disease (Tr. 254).

Cancer of the esophagus, stomach and colon can also be caused by asbestos. These cancers are generally brought about by coughing up sputum containing asbestos which is swallowed, thereby transmitting the asbestos fibers to the esophagus, stomach and colon (Tr. 254).

FMC's Environmental Safety Engineer, Watson, unequivocally admitted on the record that asbestos is a "hazardous material" having the potential to cause death (Tr. 309, 311, 312), that it is a known health hazard (Tr. 312) and that FMC did not either barricade the MCC or post warning signs as required by 57.20Ä11 (Tr. 114, 237, 296, 313).

Substantial evidence in the record establishes that FMC became aware that the insulation in the MCC contained asbestos in March, 1983, when Mr. Watson removed a piece of the material and forwarded it to FMC's laboratory in Princeton, New Jersey for analysis with the notation to "Please Rush" on the forwarding form. Watson said that he sent the sample to the laboratory at the request of an unidentified employee and that he did not know who made the "Please Rush" notation on the form. Watson also denied writing on the form the statement "Suspected asbestos insulation." (Ex. SÄ13; Tr. 229Ä232).

FMC's analysis of the insulation material from the MCC (dated 3/27/81) indicates that the material "contains chrysotile, an asbestos mineral and calcium carbonate, probably a binder.

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These components were determined by X-ray diffraction procedure." (Ex. SÄ13, Tr. 237). (FOOTNOTE 4) FMC failed thereafter to definitely determine if the calcium carbonate was a binder (Tr. 317).

The Secretary established that a significant number of FMC miners without prior notice or warning were exposed to the hazardous conditions prevalent in the MCC. Thus, for periods ranging from two to three weeks to four months in the latter part of 1983 and early 1984, at least four FMC miners, who were engaged in the performance of various and sundry duties and functions, worked in the MCC where they were engaged in the removal of the control center located there to another location (Tr. 107, 108, 150Ä157, 170Ä193, 199Ä219). The actions of those employees, particularly in taking down the insulation material from the walls and ceiling, created airborne dust composed of particles of the insulation taken down (Tr. 115Ä119, 153Ä158, 166, 206, 208). The record does not indicate that FMC ever sampled the composition of the air during this period. Since the material itself was composed of 20% asbestos I find therefrom-and from expert opinion of recordÄ Äthat at least a proportionate part of the airborne dust was composed of asbestos particles in sufficient quantity to (1) be subject to inhalation and (2) be hazardous. (Tr. 111, 193, 249, 255Ä259, 260, 266, 277Ä282, 290, 345).

It is also found that the "dust" described by the workmen was not attributable to the welding or use of a cutting board (Tr. 285). Thus, the four workmen in question testified that in the process of their work they "tore" insulation from the walls, pulled it from the ceiling, threw the insulation to the floor, swept it up, emptied it, and traumatized it in various ways which resulted in dust so heavy their visibility was impaired at times beyond 4 or 5 feet (Tr. 111Ä119, 153Ä157, 166, 173Ä177, 199Ä208).

While there was evidence that the dust got into their mouths, eyes and noses, there was no probative or reliable evidence that the coughing and other symptoms described by them was attributable to inhalation or other ingestion of asbestos fibers (Tr. 282, 349). Such evidence might have been obtainable through sputum analysis or other forms of testing at the time. Even though it is a fair inference that such evidence was not

secured because of the failure of FMC to notify those imperiled of the conditions prevalent in the MCC, no adverse inference is taken in the absence of more specific evidence. That is, it is not inferred that the physical symptoms expressed were caused in whole or in part by the presence of airborne asbestos in the atmosphere.

In addition to the employees engaged in the special project of removing the controls from the MCC in 1983-1984, the Secretary also showed that various other employees, such as maintenance men and electricians, routinely went in and out of the MCC and worked there without benefit of respirators or warning (Tr. 99-103, 149, 333-335).

As previously noted, FMC contends that no violation can be established absent a showing of the presence of exposure to airborne contaminants at the levels provided in 30 C.F.R. 57.5-1. From the standpoint of the obligations imposed on the mine operator by the two regulations respectively relied on by the parties, it is first noted that testing the MCC in a passive state for its airborne asbestos level might not have revealed a level in violation of 57.5-1. A violative level of airborne asbestos might not have manifested itself until miners actually worked in the area. The record in this case well documents the different types of work activities which did result in raising dust from asbestos-constituted insulation into the air.

Section 57.5-1 is specific. It relates to exposure to airborne contaminants, in this case, asbestos. It presumes testing "which FMC in any event apparently did not perform" for a protracted period and with some regularity: "The 8-hour time-weighted average airborne concentration of asbestos dust to which employees are exposed shall not exceed 2 fibers per milliliter greater than 5 microns in length, etc." MSHA did not establish, nor did it seek to, the presence of airborne concentrations of asbestos dust in the quantity, fiber lengths, and sampling time durations required to establish a violation of 30 C.F.R. 57.5 (Tr. 19-26, 71-77, 78, 79; Exs. S-12 and S-13). See *Secretary v. Tammsco, Inc., & Harold Schmarje*, 7 FMSHRC 2006, 2009 (1985).

On the other hand, the regulation the Secretary charges was infringed, 57.20-11, is less specific in delineating the factors or environment which must be present to trigger the standard's coverage. It requires simply that (1) a "health or safety hazard" must exist which (2) is not "immediately obvious". From the mine operator's standpoint, 57.20-11 requires barricades or posting of warning signs telling of the nature of the hazard and protective action required. Section 57.5-1 makes it a violation to permit miner exposure to a specified level of asbestos and it mandates testing to ascertain if this level has been achieved. Can a mine operator by not testing when employees work in an area where there is asbestos present (as FMC failed to

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do in this case) evade responsibility for exposing its employees to asbestos, the hazardous nature of which is well-established in this record? Both logic and evidence of record suggest the conclusion that the airborne level of asbestos fluctuates with the activities and movement of miners and the nature of the chores they are performing. Adopting FMC's argument that the protections provided in 57.20Ä11 are not operable until the Secretary first tests and determines that the airborne asbestos concentration level equates with the level provided in 57.5Ä1 would leave miners unprotected-as they were in the instant caseÄ Äand most emphatically where an operator directs them to work in an area it knows contains asbestos but does no testing while they are there. Hence, FMC's miners, were not aware of the presence of asbestos in the insulation material, and thus had no opportunity to take precautions to alleviate the threat posed to them, such as (1) by limiting their movement and activities, (2) by handling the material more cautiously and gently, (3) by refusing to perform certain work unless ongoing testing is conducted, (4) by altering their techniques and methods, (5) by wearing suitable, effective respirators, or (6) by reporting the situation to interested authority such as MSHA, their union, and/or the mine operator's safety personnel.

Analysis of the record and happenings in this matter readily demonstrates the differences in the purposes of and protections provided by the two regulations and the reasons for not grafting one on the other. There is no indication in the Act or the regulations themselves that the two regulations should be read together as FMC urges. Section 57.20Ä11 does not cross-reference 57.5Ä1. It provides a different, separate, and independent measure of protection for miners. It is not dependent on the mine operator's diligent, good faith sampling of the air in the working environment. The position advanced by FMC is found to lack merit.

Based on the preponderant evidence, and admissions of record, it is concluded that a hazardous condition prevailed in the MCC during the period in question, that such health hazard was not immediately obvious to numerous employees who worked there, and that neither barricades or appropriate warning signs were posted at any time by FMC at any approach to the MCC. A violation of 30 C.F.R. 57.20Ä11 is thus found to have occurred.

FMC also challenges the special findings required under Section 104(d), that is the so-called "unwarrantable failure" and "significant and substantial" findings. It is first noted the insidious potential of asbestos to cause some of mankind's most fearsome diseases is well-documented in this record. (FOOT-NOTE 5) It is

equally clear, and I have hereinabove found, that the mine operator's Environmental Safety Engineer, Carl L. Watson, and other high level management personnel were aware that the MCC's wall and ceiling insulation contained asbestos as early as March, 1981, when a bulk sample was sent for laboratory analysis. I conclude from the urgency surrounding the taking of this sample, the prompt notification to higher management of the results of the laboratory analysis and the testimony of Mr. Watson as to the high potential for serious disease that asbestos exposure carries, that FMC was acutely aware of the hazard posed by non-compliance with 30 C.F.R. 57.2011. Indeed, the circumstances and hazard addressed by 57.2011 actually came to fruition in the 1983-1984 period when several employees were engaged in the removal of the control center inside the MCC without benefit of the various protections previously listed. These evidentiary considerations coincide with the requirement of section 104(d) of the Act that the violation must be "caused by the unwarrantable failure of (the) operator to comply" with the pertinent mandatory safety or health standard. The Commission in numerous cases has tacitly approved and has not changed the long-standing definition of unwarrantable failure found in Zeigler Coal Company, 7 IBMA 280 (1977) which was decided under the Federal Coal Mine Health and Safety Act of 1969:

"In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care."

The record indicates also that FMC was aware that other employees were working in the area routinely (Tr. 296, 333-335) and that those employees who were working in the MCC to remove the control center were suffering substantial symptoms (Tr. 193, 234) even though this record does not permit any de-determination that such were wholly or partly related to asbestos exposure. Nevertheless, no further testing on the material was conducted by FMC to determine if the asbestos was adequately contained in binding material after March 1981, (Ex. S-13; Tr. 317, 329), nor does it appear that FMC tested the air during the removal of the control center in 1983/1984.

It is concluded that FMC was grossly negligent in allowing the MCC to remain unposted, if not barricaded, in the above circumstances and in view of the latent threat posed by the presence of asbestos in such significant quantity in the walls and ceiling of the MCC. Such high degree of negligence surpasses the Zeigler culpability concepts of "lack of due diligence", "indifference" and "lack of reasonable care," and clearly meets the "unwarrantable failure" requirement of section 104(d).

The question remains whether the subject section 104(d)(1) Citation cited a violation which was "of such nature as could significantly and substantially (FOOTNOTE 6) contribute to the cause and effect of a ... mine safety or health hazard" as that phrase is used in the Act.

Section 104(d)(1) of the Mine Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act....

30 U.S.C. 814(d)(1) (emphasis added). Section 104(e) of the Act, 30 U.S.C. 814(e), contains similar "S & S" language.

The Commission first interpreted this statutory language in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), holding:

... [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 on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825 (emphasis added). In Mathies Coal Company, 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄ Äthat is, a measure of danger to safetyÄ Äcontributed to by the violation; (3)

reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3Ä4 (footnote omitted). Accord Consolidation Coal Company, 6 FMSHRC 189, 193 (February 1984).

As to the four elements set forth in Mathies, the Commission, in Secretary v. U.S. Steel Mining Corp., 6 FMSHRC 1834 (1984), noted that the reference to "hazard" in the second element was simply a recognition that the violation must be more than a mere technical violationÄ i.e., that the violation present a measure of danger. See National Gypsum, supra, 3 FMSHRC at 827. It also noted that the reference to "hazard" in the third element in Mathies contemplates the possibility of a subsequent event. This requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. The fourth element in Mathies requires that the potential injury be of a reasonably serious nature. Finally, in U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984), (1984), the Commission reemphasized its holding in National Gypsum that the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial.

The record reveals that from the middle of 1981 at least through early 1984, FMC employees worked routinely in the MCC, an asbestos-laden, unventilated room, and for the latter part of this period other employees were required to work there while removing controls. This latter group, four of whom testified in this proceeding, in ignorance of the risk and the need for care, removed the asbestos insulation without caution, thus placing their health in considerable jeopardy.

Mr. Watson's own description of the risk posed by asbestos exposure is incisive:

"Q. Do you recognize any danger in exposure to asbestos?

A. Sure.

Q. I mean, do you personally believe that is is a hazardous industrial material?

A. Sure.

Q. Do you believe that it has the potential to cause death?

A. Yeah, I believe that."

(Tr. 308, 309, 312).

It has previously been concluded that a violation of the safety standard occurred. In no sense, was this a technical violation. Here, the mine operator apparently performed no testing of the air in the working environment during the removal of the control center. This eliminated the possibility of any determination of the asbestos fiber levels in the MCC when work was being performed there. By not posting the area with warning signs, FMC deprived the workmen of the opportunity to evaluate the danger and take various steps to protect themselves—a remedy not directly afforded by 30 C.F.R. 57.51. Such failure clearly contributed a considerable measure of danger to their safety.

In the absence of any affirmative measures by FMC to prevent its miners' exposure to the asbestos hazard found to have existed in the MCC, their resultant contraction of various asbestos-related diseases remains a reasonable possibility for many years to come.

The factual findings heretofore made concerning the nature of asbestos, the ease with which it becomes airborne, the conditions prevalent in the MCC working environment, the exposure of uninformed miners, the various health problems which can result from such exposure, the percentage of exposed workers who contract such, and the lengthy period they will remain in jeopardy after such exposure, mandate the conclusion that there was a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury in the form of a disease. Lastly, there is little doubt on this record that any disease so resulting would be of a reasonably serious nature in view of FMC's admissions that such could result in death. Accordingly, it is concluded that this was a "significant and substantial" violation.

The prerequisite special findings of the 104(d)(1) Citation herein are found to have substantial support in the record.

A violation having been found in this consolidated contest/penalty proceeding, assessment of a civil penalty is required. The parties have stipulated that FMC had an "average" history of previous violations, presumably in the customary 2-year period preceding the occurrence of the violation (Tr. 293). The parties also stipulated on the record that FMC is a large mine operator, that it proceeded in good faith to achieve rapid compliance after notification of the violation, and that any penalty amount would not jeopardize FMC's ability to continue in business. Section 110(i) of the Act requires evaluation of two additional, and critical, penalty assessment criteria—the seriousness of the violation and the negligence of the mine operator in the commission thereof. I have previously determined that FMC was grossly negligent in the commission of this violation and that the same was of a high degree of seriousness in view of the tragic, possibly fatal diseases which can result therefrom. The workmen exposed will live in the shadow of asbestos-related disease for many years to come. In view of these latter two

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determinations and the size of the operator, there is little to mitigate the amount of the penalty warranted. It is concluded that a penalty of \$2,500.00 is appropriate under the circumstances.

ORDER

1. Citation No. 2084591 is affirmed in all respects.

2. Respondent FMC shall pay the Secretary of Labor the sum of \$2,500.00 as and for a civil penalty within 30 days from the date of issuance of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

FOOTNOTES START HERE

1 This regulation provides:

"Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required."

2 Bud Hatt, FMC safety supervisor.

3 Carl L. Watson, Environmental/Safety Engineer (Tr. 227).

4 In addition to analyses of the "bulk" samples taken by Inspector Beason and Mr. Watson referred to above, a third set of laboratory analyses of samples taken from the MCC was made part of the evidence in this matter. Thus, in September 1984, FMC took samples of the air (Exs. RÄ3, 4, 5 and 6; Tr. 267, 268, 300). I find that these analyses have little probative value since no one was working in the area at the time the samples were gathered (Tr. 267, 268, 321, 322). Even so, these samples did show there was some airborne asbestos present in the MCC (Tr. 268).

5 See also Disability Compensation for AsbestosÄAssociated Disease in the United States, Irving J. Selikoff, M.D., (Environmental Sciences Laboratory, Mount Sinai School of Medicine, undated), a collection of leading studies on the subject published in approximately 1981.

6 Herein "S & S".