

CCASE:
WEBSTER COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WEBSTER COUNTY COAL CORP.,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. KENT 87-9-R
Citation No. 9897010; 9/19/86

Dotiki Mine

DECISION

Appearances: Susan E. Chetlin, Esq., and Timothy Biddle, Esq.,
Crowell and Moring, Washington, D.C. for
Contestant; Edward H. Fitch, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant filed a notice of contest of a 104(a) citation issued September 19, 1986 charging a violation of 30 C.F.R. 70.100(a). The citation was issued following analyses of five dust samples in September 1986 taken from the working environment of a cutting machine operator. The concentration of respirable dust in the five samples was 1.4 mg/m³, 3.5 mg/m³, 2.0 mg/m³, 2.4 mg/m³ and 1.5 mg/m³, giving an average concentration of 2.1 mg/m³. On November 25, 1986, Contestant filed a Motion for Summary Decision, seeking a ruling that the special finding on the citation that the violation was significant and substantial is invalid. On December 24, 1986, the Secretary filed a Response to the Motion and a Cross Motion for Summary Decision, seeking a ruling that the significant and substantial designation of the violation is valid. Contestant does not dispute the fact of a violation, but only the significant and substantial finding. The Secretary accepts the statement of facts in Contestant's motion as being accurate. Therefore, since there is no issue as to any material fact, the case may be decided on the cross motions for summary decision.

FINDINGS OF FACT

In compliance with 30 C.F.R. 70.207, Contestant submitted five respirable dust samples of the working environment of the cutting machine operator collected during a bimonthly period in the Dotiki Mine to MSHA for analysis. The concentrations of respirable dust in the samples were 1.4 mg/m³, 3.5mg/m³, 2.0 mg/m³, 2.4 mg/m³ and 3.5 mg/m³, giving an average concentration of 2.1 mg/m³.

CONCLUSIONS OF LAW

30 C.F.R. 70.100(a) requires coal mine operators to continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner is exposed at or below 2.0 milligrams per cubic meter of air. The facts here establish that Contestant failed to comply with this requirement. It therefore was in violation of the mandatory standard. The issue is whether that violation was significant and substantial.

The Commission determined in *Consolidation Coal Company v. Secretary*, 8 FMSHRC 890 (1986) that a health standard violation may be denominated significant and substantial if four "elements" are present: (1) an underlying violation of a health standard; (2) a discrete health hazard contributed to by the violation; (3) a reasonable likelihood that the health hazard will result in an illness; and (4) a reasonable likelihood that the illness will be of a reasonably serious nature. The decision went on to state that any exposure to respirable dust above the 2.0 mg/m³ level would satisfy the second element. The third element is presumed by the establishment of a violation. The fourth element was established by medical facts concerning pneumoconiosis which "support a conclusion that there is a reasonable likelihood that illness from overexposure to respirable dust will be of a reasonably serious nature." 8 FMSHRC at 899.

Following its analysis of these elements, the Commission concluded: "Therefore, rather than requiring the Secretary to prove anew all four elements in each case, we hold that when the Secretary proves that a violation of 30 C.F.R. 70.100(a), based on excessive designated occupational samples, has occurred, a presumption that the violation is a significant and substantial violation is appropriate." *id.* The presumption may be rebutted if the operator establishes that the miner or miners involved were not exposed to the hazard posed by the excessive dust, for example, through the use of personal protective equipment. There is no evidence in this record which would tend to show that the miners were not exposed to the hazard. The presumption is therefore un rebutted.

~190

The Commission's Consolidation Coal decision refers to portions of the legislative history of the Act tending to show that Congress recognized that exposure to respirable dust below approximately 2.2 mg/m³ would not pose any danger of "disabling disease" or "complicated coal workers pneumoconiosis."

Nevertheless, it is clear that the holding in the Consolidation Coal case, by which I am bound, is that exposure to respirable dust in excess of 2.0 mg/m³ creates a presumption that the violation is significant and substantial. Since the presumption has not been rebutted here, I hold that the violation is significant and substantial.

ORDER

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

(1) The Notice of Contest filed herein is DENIED.

(2) Citation 9897010 issued September 19, 1986 including its special finding that the violation charged was significant and substantial is AFFIRMED.

(3) This proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge