

CCASE:  
SOL (MSHA) V. JIM RESOURCES  
DDATE:  
19870522  
TTEXT:

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

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

v.

JIM WALTER RESOURCES, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. SE 87-38  
A.C. No. 01-00328-03613

Bessie Mine

Docket No. SE 87-39  
A.C. No. 01-00758-03684

No. 3 Mine

Docket No. SE 87-53  
A.C. No. 01-01322-03654

Docket No. SE 87-59  
A.C. No. 01-01322-03657

No. 5 Mine

Docket No. SE 87-60  
A.C. No. 01-01401-03657

No. 7 Mine

Docket No. SE 87-62  
A.C. No. 01-00758-03685

No. 3 Mine

Docket No. SE 87-63  
A.C. No. 01-00328-03616

Bessie Mine

Docket No. SE 87-66  
A.C. No. 01-01247-03756

No. 4 Mine

Docket No. SE 87-70  
A.C. No. 01-01322-03664

No. 5 Mine

Docket No. SE 87-71  
A.C. No. 01-00328-03618

Bessie Mine

SUMMARY DECISION

ORDER TO PAY

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Secretary against Jim Walter Resources, Inc. Each case involves a violation for excessive respirable dust.

Docket No. SE 87Ä38, Citation No. 9984247, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment of the mechanized mining unit was 3.3 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

Docket No. SE 87Ä39, Citation No. 2806429, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment of a designated occupation tailgate shearer operator on a longwall mechanized mining unit was 3.6 mg/m<sup>3</sup>. The permissible limit is 2.0 mg/m<sup>3</sup>.

Docket No. SE 87Ä53, Citation No. 9984269, cites a violation of 30 C.F.R. 70.101 because the average concentration of respirable dust in the working environment of the mechanized mining unit was 1.8 mg/m<sup>3</sup> of air. The permissible limit is 1.7 mg/m<sup>3</sup>.

Docket No. SE 87Ä59, Citation No. 9984270, cites a violation 30 C.F.R. 70.100(a) because the average concentration of respirable dust in a designated area was 2.5 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

All violations were designated as significant and substantial on the citations.

On May 4, 1987 the parties submitted the foregoing four cases for summary decision based upon a Joint Stipulation of Facts which reads as follows:

1. Jim Walter Resources, Inc., is the owner and operator of the subject mines;
2. The operator and the mines are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;
3. The Administrative Law Judge has jurisdiction of these cases;

4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary of Labor;
5. Copies of the subject citations were properly served upon the operator;
6. With respect to Citation Nos. 9984247, 9984269, 9984270, and 2806429, the facts and conditions described on the face of the respective citations are true and accurate and constitute violations of the cited sections of the Code of Federal Regulations;
7. Citation No. 9984247 was terminated on December 12, 1986; Citation No. 9984269 was terminated on December 30, 1986; Citation No. 9984270 was terminated on January 26, 1987; and Citation No. 2806429 was terminated on December 8, 1986;
8. The operator makes respirators available to its employees;
9. The operator submits that by providing respirators to its employees, the operator satisfies its burden of proof in rebutting the presumption that the cited violations are significant and substantial. The operator, therefore, offers no evidence as to whether respirators are actually worn;
10. The size of the operator is medium;
11. Imposition of penalties will not affect the operator's ability to continue in business;
12. The violations were abated in good faith;
13. The operator's history of prior violations is average for its size;
14. The negligence of the operator is moderate;
15. The gravity of the violations is serious.

Subsequently, the parties requested that six additional cases, Docket Numbers SE 87Ä60, SE 87Ä62, SE 87Ä63, SE 87Ä66, SE 87Ä70, and SE 87Ä71, all of which involved respirable dust violations, also be decided in this proceeding on the same basis as the first four. In a motion dated May 13, 1987, the parties stipulated as follows:

Additional cases have since arisen which present this identical issue. Accordingly, the parties now move to consolidate the following cases with those previously submitted to the Court [sic] on May 1.

\*\*\*\*\*

The operator stipulates that these seven additional citations also constitute violations of the cited regulatory provisions. The parties further adopt and incorporate herein the Joint Stipulation of Facts submitted in Docket Nos. SE 87Ä38, 87Ä39, 87Ä53, and 87Ä59, and the respective briefs filed therein.

Docket No. SE 87Ä60, Citation No. 2806388, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment on the longwall section was 3.3 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

Docket No. SE 87Ä62, Citation No. 9984275, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of dust in the working environment of the mechanized mining unit was 2.2 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

Docket No. SE 87Ä63, Citation No. 2811811, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment of the mechanized mining unit was 2.3 mg/m<sup>3</sup>. The permissible limit is 2.0 mg/m<sup>3</sup>.

Docket No. SE 87Ä66, Citation No. 2811809, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment on the longwall section was 3.5 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

Docket No. SE 87Ä70, Citation No. 9984296, cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment of a mechanized mining unit was 2.6 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

~961

Docket No. SE 87Å71, involves two violations. [footnote 1] Citation No. 9984297 cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment of a mechanized unit was 2.7 mg/m<sup>3</sup> of air. Citation No. 9984298 cites a violation of 30 C.F.R. 70.100(a) because the average concentration of respirable dust in the working environment of a mechanized mining unit was 2.2 mg/m<sup>3</sup> of air. The permissible limit is 2.0 mg/m<sup>3</sup>.

In these additional six cases the violations also were designated as significant and substantial on the citations.

The existence of the violations and other matters set forth in the stipulations having been admitted, the sole issue presented is whether the violations are significant and substantial in accordance with governing Commission precedent.

In Consolidation Coal Company, 8 FMSHRC 890 (1986), appeal docketed, No. 86Å1403 (D.C.Cir.1986) the Commission established a rebuttable presumption that all respirable dust violations are significant and substantial, stating in pertinent part:

we hold that when the Secretary proves that a violation of 30 C.F.R. 70.100(a), based upon excessive designated occupation samples, has occurred, a presumption that the violation is a significant and substantial violation is appropriate. We further hold this presumption that the violation is significant and substantial may be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the hazard posed by the excessive concentration of respirable dust, e.g., through the use of personal protective equipment.

8 FMSHRC at 899.

As noted above, Docket Number SE 87Å53 involves respirable dust with quartz. 30 C.F.R. 70.101. In U.S. Steel Mining Co., Inc., 8 FMSHRC 1274 (1986) the Commission applied the principles adopted in Consolidation Coal Company to respirable dust with quartz, explaining:

In Consol the Commission further held that, because analysis of the four elements of the

significant and substantial test would be essentially the same in each instance in which the Secretary proves a violation of 30 C.F.R. 70.100(a), proof of a violation gives rise to a presumption that the violation is significant and substantial. 8 FMSHRC at 899. We conclude that a similar presumption is appropriate when the Secretary proves a violation of 30 C.F.R. 70.101. We further hold that, as with a violation of section 70.100(a), the presumption can be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the excessive concentration of respirable dust, e.g., through the use of personal protective equipment. See 8 FMSHRC at 899. In the instant proceeding, there is no evidence that the miners placed at risk by the subject violations were not exposed to excessive levels of silica-bearing respirable dust. 8 FMSHRC at 1281.

The operator asserts that it rebuts the presumption of significant and substantial by making respirators available to the miners. "Available" means "suitable or ready for use; usable; at hand readily, obtainable; accessible " The Random House College Dictionary, Revised Edition (1980). The foregoing Commission precedent is not couched in terms of availability. Rather, the Commission holds that the presumption may be rebutted only when the operator establishes that the miners in fact were not exposed to excessive concentrations of respirable dust through the use of personal protective equipment. The distinction is clear. The Commission requires a showing that miners were not exposed because they used respirators. Merely making respirators available without any concern or interest in their actual use falls short of the evidentiary requirement established in Consolidation Coal. The standard of proof required to rebut the presumption of significant and substantial must be viewed in light of the dire consequences resulting from over-exposure to respirable dust. As the Commission noted:

Indeed, prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act. (emphasis in original).

Consolidation Coal Company, supra at 895.

The operator's reference to section 202(h) of the Act, 30 U.S.C. 842(h), which directs that approved respiratory

equipment shall be made available to miners exposed to excessive respirable dust concentrations, is misplaced. That requirement is separate and distinct from the issue of what evidence is sufficient to rebut the presumption that a respirable dust violation is significant and substantial. As the Solicitor's brief points out, if this argument were accepted, the presumption would always be rebutted by an operator's mere compliance with section 202(h).

In light of the foregoing, I conclude that the subject violations were significant and substantial.

As set forth above, the parties have stipulated to the six elements required to be considered by section 110(i) of the Act for assessment of a civil penalty. I accept the stipulations. In addition, the penalty amounts levied herein reflect the degree of gravity as evidenced in each instance by the amount of deviation from the required standard.

In accordance with the stipulations, the following civil penalties are assessed.

Docket No.	Citation No.	Penalty
SE 87Ä38	9984247	\$200.00
SE 87Ä39	2806429	\$250.00
SE 87Ä53	9984269	\$100.00
SE 87Ä59	9984270	\$150.00
SE 87Ä60	2806388	\$200.00
SE 87Ä62	9984275	\$100.00
SE 87Ä63	2811811	\$100.00
SE 87Ä66	2811809	\$250.00
SE 87Ä70	9984296	\$150.00
SE 87Ä71	9984297	\$150.00
SE 87Ä71	9984298	\$100.00

It is ORDERED that operator pay \$1,750.00 within 30 days from the date of this decision.

Paul Merlin  
Chief Administrative Law Judge



~964

AA

~FOOTNOTE\_ONE

1 In Docket Nos. SE 87Ä66, SE 87Ä70, and SE 87Ä71, I accept the Joint Motion dated May 13, 1987, as the operator's answers to the penalty petitions pursuant to 29 C.F.R. 2700.28.