CCASE:
CONSOLIDATION COAL V. SOL (MSHA)
DDATE:
19870824
TTEXT:

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

CONSOLIDATION COAL COMPANY, COMPLAINANT	CONTEST PROCEEDING
	Docket No. WEVA 86-409-R
v.	Order No. 2703894; 7/14/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Ireland Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-454 A.C. No. 46-01438-03651
v.	Ireland Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Complainant/Respondent; David T. Bush, Esq. and Mark Swirsky, Esq., (on the Brief), Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Operator (Respondent) seeks to challenge a citation issued to it by the Secretary (Petitioner) for an alleged violation of 30 C.F.R. 70.207(c)(7). The Secretary seeks a Civil Penalty for an alleged violation by the Operator of Section 70.207(e)(7), supra. Pursuant to notice, the cases were heard in Wheeling, West Virginia on May 12, 1987. John Dower testified for Petitioner, and John Russell and Steve Perkins testified for the Respondent. Petitioner and Respondent filed proposed Findings of Fact and Briefs on July 27, 1987 and July 29, 1987, respectively. No reply briefs were filed.

Regulatory Provision

30 C.F.R. 70.207(e)(7) provides for follows:

> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

Issues

1. Whether Respondent violated section 70.207(e)(7), supra.

2. If a violation of section 70.207(e)(7), supra, occurred, was it of such a nature as could have significantly and substantially contributed to the cause and effect of a safety hazard.

3. If the Respondent violated section 70.207(e)(7), what is the proper penalty to be assessed?

Findings of Fact and Conclusions of Law

The essential facts herein are not in dispute. In Respondent's Ireland Mine, in the 6D longwall section coal is mined by a shear which is operated by two miners who are called shear operators. There is no distinction, in terms of work assignments or pay, between the two shear operators.

In the extraction phase, when the shear is traveling from the headgate to the tailgate, one miner is assigned to operate the headgate drum of the shear and the other miner is positioned in the tailgate end of the shear and operates the tailgate drum. When the shear travels from the tailgate to the headgate, the two miners operating it remain at their positions until the shear reaches shield number 113, at that point, the miner who was working at the tail drum "floats out," and goes to the headgate in order to obtain fresh air, and take a break from working in the cramped quarters in proximity to the shear. The two miners working on the shear will alternate "floating out" to the headgate each time the shear, on its pass from the tailgate to the headgate, reaches shield number 113. The remaining miner will stay at the shear operating the controls of the head drum while the shear travels from shield number 113 to the headgate. During this phase of the operation, most of the coal is cut, and 90 to 95 percent of the dust is generated.

John Dower, a mining engineer for MSHA, testified on direct examination that "routinely" after the tailgate operator has "floated out" to the headgate, the headgate operator would have to go to the tail drum to readjust it because of face rolls. In

contrast, John Russell, Respondent's dust and noise supervisor of the Eastern Region, testified that it would be "very rare" for the headgate operator to move to the tail position after the tail operator has "floated out." This appear to be consistent with the testimony of Dower, on cross examination, that there is no need for the head drum operator to go to the tail position unless there is a "severe problem." However, Dower explained, on redirect examination, that such severe problems could occur if there are massive stones under the machine or if there is a mechanical malfunction of the drum. In the same connection, Russell indicated that if the shear comes in contract with a shield, the shear will stop and the head shear operator would then have to go the tailend to fix it. Based on the above, I conclude that, as part of the normal mining process, there are occasions when the head shear operator, after the tail operator has "floated out," would be required to go to the tail drum position.

Prior to May 1986, it was the policy of MSHA that a dust sampling device be given to the tail drum operator who wore it constantly even when he "floated out" to the headgate. In practice, Respondent conformed to this policy. On May 13, 1986, MSHA District Manager, Ronald L. Keaton, in response to an inquiry from William Schlaupitz, Respondent's Regional ManagerÄSafety, set forth a policy quoting from the Coal Mine Health and Safety Inspection Manual, for underground mines dated March 9, 1978, that "If the operator's mining procedures result in the changing of miners from one occupation to another during a production shift, the sampling device must remain on or at the "high risk' occupation." On July 14, 1986, Dower observed the tailgate shear operator wearing the dust sampling device on the entire shift, including the time when he "floated out" to the headgate on alternate passes.

Russell testified that after the May 13, 1986 letter from the District Manager was received, he talked to an MSHA employee, Ellis Mitchell, who informed him that when the tailgate shear operator "floated out" to the headgate, it was not to be considered a "rotation" as no one replaced the tailgate shear operator. Russell testified, in essence, that accordingly Respondent did not take any action to change its procedure of having the tailgate drum operator wear the dust testing device throughout the shift, even when "floating out."

The evidence is clear that the tailgate drum operator is exposed to a certain amount of coal dust from the cutting drums, conveyor chain, and debris falling from the ribs or roof. His exposure to the coal dust is considerably more than that of the headgate drum operator, as the former is nearest the return air side, and as such is in the path of the airborne coal dust. It

is also clear that most of the time he is the miner who works nearest the return air side of the longwall working face. However, on every other shift, when the tailgate operator "floats out" to the headgate, the headgate operator then becomes the miner working nearest the return air side. It would thus appear, from the plain reading of the language of section 70.207(e)(7), supra, that, accordingly, when the tailgate operator has "floated out" the remaining headgate operator is required to wear the dust testing device.

It is true that requiring the tailgate operator to continuously wear the dust sampling device would give an accurate reading of the dust exposure to this miner who, as noted above, is at a higher risk than the headgate shear operator. However, the time the operator spends in the fresh air of the headgate must be considered. This has the effect of reducing the amount of his average exposure to coal dust. Further, by having the tailgate shear operator wear the dust sampler, even in the headgate, has the effect of not providing an accurate indication of exposure of coal dust to the headgate operator who may, in the ordinary course of the mining operation, be required to perform some work in the tailgate position, thus enhancing his exposure to coal dust, as being in the path of the airborne coal dust. Hence, I hold, that section 70.207(e)(7), supra, requires that the headgate shear operator wear the testing device when the tailgate operator "floats out." Furthermore, I find that the policy statement of the MSHA District Manager, of May 13, 1986, does not contain any contrary direction. It is clearly the intent of the District Manager to protect the person in a "high risk" occupation by requiring him to wear the dust sampler. This policy would clearly be thwarted in not requiring the headgate operator to wear the dust sampler during portions of the pass when he is alone at the shear and may be required, in the normal course of mining operations, to go to the tail position and perform duties where there is a "high risks" of exposure to coal dust. For all the above reasons, I conclude that Respondent herein has violated section 70.207(e)(7), supra.

It was the uncontradicted testimony of Dower, in essence, that if there is coal dust in the subject section above the maximum permitted, and the coal dust is not being monitored because the testing device is on the tailgate operator, who is in the headgate area, then it is potentially likely that a miner could be exposed to dust which could result in black lung disease or a permanent disability of a very serious nature. Accordingly, based on this testimony, I find that Respondent's violation of section 77.207(e)(7), supra, was significant and substantial (See, Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, Slip. Op., July 24, 1987 (D.C.Cir.); Mathies Coal Co. 6 FMSHRC 1 (January 1984)).

I have considered all the factors set forth in Section 110 of the Act. Specifically I note that the Respondent was not negligent in violating Section 771207(e)(7), supra. I conclude that the proposed penalty of $112 is appropriate.

ORDER

It is ORDERED that the Notice of Contest filed July 28, 1986, be DISMISSED. It is further ORDERED that Respondent pay the sum of $112, within 30 days of the date of this decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge