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SOL (MSHA) V. MID-CONTINENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 87-74 A.C. No. 05-00469-03598
v.	Dutch Creek No. 2 Mine
MIDÄCONTINENT RESOURCES, INC., RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Morris

The Secretary of labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating 30 C.F.R. 90.100, a regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et al., (the Act).

After notice to the parties a hearing on the merits commenced in Glenwood Springs, Colorado, on April 14, 1987. The parties did not file post-trial briefs but they orally argued their views.

Issues

The issues are whether respondent violated the regulation; if so, what penalty is appropriate.

Summary of the Case

Citation 9996024 alleges respondent violated 30 C.F.R. 90.100 which provides as follows:

> 90.100 Respirable dust standard
>
> After the twentieth calendar day following receipt of notification from MSHA that a Part 90 miner is employed at the mine, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner

in the active workings of the mine is exposed at or below 1.0 milligrams per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with 90.206 [Approved sampling devices; equivalent concentrations].

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The case involves miner Verlin F. Windedahl (Tr. 4).

2. After Windedahl received a work permit a chest x-ray disclosed that he was in the early stages of Black Lung (pneumoconiosis) (Tr. 4).

3. Under Part 90 regulations such a miner, at his request, may transfer to an atmosphere where there is less than one milligram of respirable dust per cubic meter of air (Tr. 5).

4. The operator was notified of Windedahl's Part 90 classification on March 24, 1986 (Tr. 5).

5. On April 16, 1986 Windedahl was transferred to what was believed to be a less dusty atmosphere.

6. After he was reassigned the operator took samples within the breathing zone of the miner. The samples were sent to MSHA for analysis. The results are set forth in Citation No. 9996024 infra. The results, received by the operator on May 12, 1986, are true and accurate as ascertained by the laboratory (Tr. 5, 6, Ex. P1(a)).

7. Other samples were taken from May 16, 1986 through June 30, 1986.

8. On June 30, 1986 a second group of samples indicated there was still an exposure to respirable dust that exceeded one milligram per cubic meter (Tr. 6).

9. The samples taken June 30, 1986 resulted in a 104(b) Order No. 2213912 issued by MSHA Inspector Michael Horbatko (Tr. 6).

10. The sampling results from the laboratory of miner Windedahl are true and correct (Tr. 6, 7).

The file reflects that the operator contested Citation No. 9996024 and the subsequent 104(b) Order No. 2213912.

Citation No. 9996024, issued May 7, 1986, provides in its relevant part as follows:

> Based on the results of 5 dust samples collected by the operator and reported on the attached teletype message, dated May 6, 1986, the average concentration of respirable dust in designated area sampling point 850Ä0 was 2.7 milligrams exceeding the applicable limit of 1.0 milligrams. Management is hereby required to take corrective action to lower the concentration of respirable dust to within the permissible concentrations of 1.0 milligrams per cubic meter of air and then sample each shift until five valid samples are taken and transmitted in accordance with Section 90.209. Approved respiratory equipment shall be made available to all persons working in the area. Based on the results of the company's sampling program, this Notice was issued in accordance with Section 104(A) of the Federal Mine Safety and Health Act of 1977. (Exhibit PÄ1(a))

Subsequently, three valid respirable dust samples were received for the Part 90 Miner within the required time. A citation, dated June 9, 1986 was issued for not submitting five valid samples within the required time. Time was granted to collect additional samples.

On July 1, 1986, Order No. 2213912 was issued under Section 104(b) of the Act. In its pertinent portion it provided as follows:

> The respirable dust concentration of the Part 90 Miner identified in Citation No. 9996024, dated 05/07/86, is still in excess of the applicable standard. Due to the obvious lack of effort by the operator to control respirable dust, the period of reasonable time for the abatement of this violation is not further extended. (Exhibit PÄ2(a))

Subsequently the order was modified and later terminated.

At the hearing the Secretary rested on the stipulation of the parties and the testimony of MSHA safety and health specialist Grant McDonald.

GRANT McDONALD is responsible for enforcing the respirable dust standards (Tr. 16, 17).

Respirable dust is measured in microns. A micron, which is invisible to the naked eye, measures 1/25,000th of an inch. Studies indicate that pneumoconiosis is caused by dust measuring five microns or less. This size causes massive fibrosis in the lungs. Eventually it can cause death. A dust pump will pickup particles of respirable size. It will also pickup particles from five to ten microns in size (Tr. 19).

An option under Part 90 permits the miner to transfer to a less dusty atmosphere. If he does transfer his new work position is designated. He is then subject to the special

sampling provided in Part 90 (Tr. 22, 23). MSHA was advised that miner Windedahl exercised his option and transferred to a less dusty atmosphere (Tr. 23). At that point MSHA checked to see if they have transferred the miner to a less dusty area. The new work area must contain less than one milligram of respirable dust (Tr. 24).

Windedahl was reassigned as a "Stopping Man" (Tr. 25). This position is in the intake air, which is usually clean air, i.e., one milligram or below (Tr. 26).

After transfer an operator has 15 calendar days to sample the transferee (Tr. 27).

Most operators and MSHA use a MSA respirable dust pump (Tr. 28). Each filter is weighed and sent to MSHA's Technical Support Office in Pittsburgh office for analysis (Tr. 29).

In most cases the miner either wears the pump within four feet of his working place. It basically samples the air of the breathing zone of the worker (Tr. 30).

Particles larger than 5 microns void any sample. The larger size cannot cause lung disease (Tr. 34).

If the sample shows an overexposure the sampling is continued (Tr. 35). When information comes to the Price, Utah office showing an overexposure a citation is issued.

A Part 90 Miner needs only be sampled bi-monthly if he hasn't been previously exposed. If the sampling shows the allowable limit has been exceeded then five additional samples are required. The actual sampling is done by duly certified mine personnel (Tr. 36Ä43).

Exhibit P(1)(a), a citation for five samples, shows an average concentration of 2.7 milligrams (Tr. 46, 47, 56).

After Windedahl exercised his option to transfer he became a stopping man. As such he works along the main haulage, the least dusty place in a coal mine (Tr. 57, 59). More dust is usually generated in the face area (Tr. 86).

Inspector McDonald issued Citation 9996024 but MSHA Inspector Horbatko issued the 104(b) Order (Tr. 62, 63). Some operators take six samples but MidÄContintent does not (Tr. 77).

Michael S. Horbatko, Donald E. Ford and David A. Powell testified for the operator.

MICHAEL S. HORBATKO, an MSHA mine safety and health specialist, issued the 104(b) order. He did not investigate at MidÄContinent but relied on the information of the dust samples relayed to him by Inspector McDonald (Tr. 87Ä91, Exhibit P1(b), P2(b).

DONALD E. FORD, safety inspector, also serves as noise and dust technician for MidÄContinent Resources. He was originally certified by MSHA as a dust technician in 1977.

The company uses a standard dust sampling device (Tr. 102, 103, Ex. R9, R10, R11).

Detailed information relating to the subject miner is submitted with the sampling cassette (Tr. 108Ä111, Ex. R12).

Verlin Windedahl started with MidÄContinent in November 1983. Notice that he was a Part 90 miner was received in March 1986 (Tr. 112, 113). Windedahl had worked as a hardrock miner but not as an underground miner (Tr. 113).

The witness prepared and color-coded Exhibit R13 (Tr. 113, 114, Ex. R13). After Windedahl was transferred none of his samples were in compliance. They all exceeded one milligram (Tr. 122). A stopping man could be anywhere in the mine (Tr. 123).

The operator offered various company records pertaining to dust sampling (Ex. R14, R15, R16).

The witness observed Windedahl 300 feet or more back from the face. At that position he would not have been exposed to the same dust environment as the people in the mechanized mining unit section where they were developing the slopes (Tr. 138, 139, Ex. R16).

The company received a notice for non-compliance on May 23 (dated May 19th) for an average concentration of 4.7 milligrams. This was caused by one sample cycle of 20.2 milligrams (Tr. 142). The witness later learned that a bunch of workers were "horsing around" and throwing rock dust at the sampler that day (Tr. 141Ä145, Ex. R16). However, Windedahl worked in the slope section when he was first recognized as a Part 90 miner. Windedahl was first reassigned as a stopping repairman in April 1986 (Tr. 148, Ex. R16).

The sampling results and the computer results (from Pittsburgh) concerning Windedahl cannot be reconciled. Windedahl was out-by the face and in the fresh in-take air. Except for one bad sample at the face the average would have averaged about one milligram (Tr. 150, 151). In the opinion of the witness, the worker out-by the face was inadvertently or advertently exposing himself to more dust. This could be an accident or on purpose (Tr. 152). Based on the witness' experience the face area where the coal is being produced is the more dusty area (Tr. 153). Higher dust readings out-by the face than in-by the producing section indicates that something not truly accurate was transpiring (Tr. 153).

The computer printouts of the samplings are mailed from Pittsburgh to the company's Carbondale office. The coal basin is 35 miles to the south so any correspondence would not be delivered to the witness until a day or two later (Tr. 154). The computer printout predicating Mr. Horbatko's order was received at the Carbondale office on June 30, 1986 (Tr. 155). The witness received it the same day Mr. Horbatko arrived on the property (Tr. 156).

Ford never talked to Windedahl about his excessively high ratings. No comment was made because he wasn't being accusatory (Tr. 161). Further, Ford didn't know if anyone else at MidÄContinent had talked to the miner. Windedahl is no longer employed by MidÄContinent, nor did Ford know his present whereabouts (Tr. 162). The pump that Windedahl returned each day to Ford appeared to be working properly (Tr. 172). Ford did not particularly observed Windedahl during any particular time of each day (Tr. 173).

A timberman sets timber in different sections of the mine. He installs wooden and fiber cribs (Tr. 177).

Windedahl's assignment in the slope section was anywhere from 300 to 1000 feet out-by where the coal was being mined (Tr. 180). He was also working on the intake, or fresh air side, of the stoppings. There is less dust there than in the return air (Tr. 186).

DAVID A. POWELL has been the safety director of MidÄContinent Resources for four years (Tr. 92).

In the spring of 1986 the company was advised that Verlin F. Windedahl qualified as a Part 90 miner (Tr. 93, Ex. R2).

The operator transferred Windedahl and designated an occupation code for him (Tr. 94, 95, Ex. R3, R4). The operator subsequently received a citation for failing to furnish five valid respirable dust samples within 15 days after the transfer (Tr. 96, Ex. R5) The citation was subsequently vacated (Tr. 97, Ex. R6).

The operator received a computer printout on May 12, 1986 (Tr. 98, Ex. R7). On June 30, 1986 the company received a duplicate copy of sample results on Windedahl (Tr. 99, Ex. R8).

Discussion

This case involves Citation No. 9996024 and Order No. 2213912. However, a penalty is proposed only for the citation.

The regulation requires that after being notified that a Part 90 miner has been exposed the operator must maintain the average concentrations of respirable dust at or below 1.0 such miner.

In the instant case the stipulation and the evidence establishes that the operator was notified on March 24, 1986 of Windedahl's status. The twentieth calendar day following notification is April 13, 1986 (a Sunday). On April 16, 1986, Windedahl was reassigned. The first sampling cycle took place April 14Ä21, 1986. On May 12, 1986 the first sample results resulted in the issuance of Citation No. 9996024 on May 7, 1986. The second sampling cycle took place May 16 Ä June 17, 1986. The May 22, 1986 sample was voided due to oversized particles. Further, sampling was done and the results were available on June 30, 1986. The samples exceeded 1.0 milligrams and the following day, July 1, 1986, a 104(b) Order was issued.

The foregoing facts establish that MidÄContinent violated 90.100 inasmuch as Windedahl was exposed to concentrations above 1.0 milligrams more than 20 days after MidÄContinent was notified of his status as a Part 90 miner.

MidÄContinent does not contend otherwise. It admits that it violated 90.100 and that a penalty should be assessed for Citation 9996024 (Tr. 9, 10, 203). The operator's principal attack is focused on the 104(b) Order.

To proceed to MidÄContinent's arguments: As a threshold matter it asserts that 90.100 conflicts with the Act. Specifically, MidÄContinent claims the Act provides an option that the regulation does not recognize.

30 U.S.C. 843(b)(2) provides as follows:

> (2) Effective three years after December 30, 1969, any miner who, in the judgment of the Secretary of Health and Human Services based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 1.0 millograms [sic] of dust per cubic meter of air, or if such level is not attainable in such mine, to a position in such mine where the concentration of respirable dust is the lowest attainable below 2.0 milligrams per cubic meter of air.

The option, referred to by MidÄContinent, and not incorporated in the regulation relates to the situation when the concentration of 1.0 milligrams is not attainable in the mine.

The operator's argument is without merit. It is true that the regulation does not address a situation where a level of 1.0 milligrams cannot be attained. However, in the instant situation the order was terminated when the atmosphere attained .06 milligrams. In sum, the operator has not presented a factual situation within the terms of the statute.

In addition, when one compares 30 C.F.R. 90.100 with the broader respirable dust regulation, 30 C.F.R. 70.100(a), (infra) it is apparent the Secretary insists on extra precautions when a Part 90 miner is involved.

MidÄContinent further argues that Windedahl's dust samplings do not square with reality. Specifically, it is asserted that Windedahl was out-by the face. In that location an anomaly occurred: he generated a greater concentration of dust than miners at the face.

I am not persuaded by the company's argument on the minimal record presented here. A timberman, who is moving about at his work stations, could generate more dust than miners at the working face. Further, no credible evidence supports the view that Windedahl "salted" his sampling cassette.

MidÄContinent further states that the 104(b) Order is invalid because Inspector Horbatko did not investigate the situation at the mine.

The evidence is uncontroverted that Inspector Horbatko relied on hearsay from Inspector McDonald as well as the Pittsburgh computer generated information as to the results of the dust sampling. It is apparent that the inspector did not conduct his own investigation.

The basic issues raised by MidÄContinent were considered by the Commission in a series of cases decided September 30, 1987. Nacco Mining Company, 9 FMSHRC 1541, White County Coal Company, 9 FMSHRC 1578, Emerald Mines Corporation, 9 FMSHRC 1590, Greenwich Collieries, 9 FMSHRC 1601. In view of the Commission's rulings, I overrule MidÄContinent's motion to dismiss.

Finally, MidÄContinent states that the first set of dust samples were an obvious aberration. Therefore, the company should have been entitled to a resampling.

I disagree. The regulation is explicit. It does not mandate any second sampling as is urged here.

The Secretary contends the violation is S & S, that is, significant and substantial within the meaning of the Act. I

agree. A violation of a similar dust standard (FOOTNOTE 1) for coal mines has been held to be S & S. Consolidation Coal Co., 5 FMSHRC 378 (1983); 8 FMSHRC 890, 899 (1986). The Commission's view was upheld on appeal in Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, et al, 824 F.2d 1071 (D.C.Cir.1987).

For the foregoing reasons, Citation 9996024 should be affirmed.

Civil Penalty

In the instant case the Secretary seeks to impose a civil penalty of $725 for the violation of Citation No. 9996024. The Secretary has not sought a penalty for the violation of the 104(b) Order. Accordingly, in imposing a penalty I will only address the evidence concerning Citation No. 9996024.

The statutory criteria to access such civil penalties is set forth in Section 110(i) of the Act, now codified at 30 U.S.C. 820(i).

I find from the evidence that the operator's history of previous violations is numerically high. Specifically, the evidence shows the following citations and orders have been issued to MidÄContinent:

Year	S & S	Non S & S	Total	Orders
1983	34	211	245	15
1984	185	280	465	14
1985	330	181	511	29
1986	473	141	614	59

The company offers evidence to show that its citations are only average in the industry (Exhibits R30, R31, R32, R33, R37, R38). I agree the evidence does show MidÄContinent's proportional increase in S & S violations generally corresponds to the national increase in the years 1983 through 1986. It is, however, still disturbing that the operator's S & S violations continue to increase from year to year. The operator was negligent in view of the time interval that elapsed between when it received the notice concerning Windedahl's status and when it completed sampling dust at the new work location. The record

does not present any evidence concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I conclude that the payment of a civil penalty as provided hereafter is appropriate considering the size of the operator and such penalty will not cause the company to discontinue in business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974); El Paso Rock Quarries, Inc., 5 FMSHRC 1056 (1983). The gravity of the violation is high since the violation is significant and substantial. I do not credit the operator with statutory good faith since the five samples were not taken within the prescribed period of time.

On balance, and in view of the statutory criteria, I consider a penalty of $300 to be appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R.   90.100.

3. Citation No. 9996024 should be affirmed and a civil penalty assessed therefor.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

Citation No. 9996024 is affirmed and a penalty of $300 is assessed.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 30 C.F.R.   70.100(a) which provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with   70.206 (Approved sampling devices; equivalent concentrations).