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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
FALLS CHURCH, VA
July 28, 1988

SOUTHERN OHIO COAL COMPANY Contestant	CONTEST PROCEEDING
v.	Docket No. LAKE 87-95-R Citation No. 2945843; 7/22/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Meigs No. 2 Mine Mine ID 33-01173
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 88-26 A. C. No. 33-01173-03743
v.	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	

DECISION

Appearances: David A. Laing, Esq., Porter, Wright, Morris & Arthur Columbus, Ohio, for the Operator Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, 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 $ 70.100, and the Secretary seeks a civil penalty for the alleged violation by the operator of section 70.100, supra. Pursuant to notice, these cases were heard in Wheeling, West Virginia, on April 19 20, 1988. Patrick Lester McMahor, Marion D. Beck, and Judith Irene Johnson testified for Petitioner, and David George Zatezalo, Jon Merrifield, and Mark Randall Hatten testified for Respondent.

At the hearing, at the conclusion of Petitioner's case, Respondent made a motion for summary decision, which was denied. Petitioner filed its Post Trial Brief and Proposed Findings of Fact on June 13, 1988, and Respondent filed its Proposed Findings of Fact and Brief on June 10, 1988. Reply Briefs were filed by both Parties on June 27, 1988.

Issues

The issues are whether Respondent violated 30 C.F.R. $ 75.100, and if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. If section 75.100, supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977.

Stipulations

The Parties have stipulated as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. The Southern Ohio Coal Company is a large operator.

3. The Meigs No. 2 Mine is owned and operated by the Southern Ohio Coal Company.

4. The Southern Ohio Coal Company is an operator as defined by section 3(d) of the Act.

5. The Meigs No. 2 Mine is a mine as defined by section 3(h) of the Act.

6. The Southern Ohio Coal Company and the Meigs No. 2. Mine are subject to the jurisdiction of this Court and the 1977 Mine Act.

7. The size of the proposed penalty, if any assessed, will not affect the operator's ability to continue in business.

Findings of Fact and Conclusions of Law

I.

The essential facts are not in dispute. Patrick Lester McMahon, a MSHA Inspector who is a health specialist, made a technical inspection at Respondent's Meigs No. 2 Mine, at the southwest block third panel. On July 15, 1987, at that time, the longwall panel was only in its third shift. Inspector McMahon testified at length as to the procedures he used in setting up the test equipment and as to the equipment itself. No evidence was adduced to either contradict McMahon's testimony as to the procedures he used in setting up the equipment, nor was any

evidence adduced which would tend to impeach either the reliability of McMahon's methods, or the reliability of the equipment he used. McMahon furnished the test equipment to be worn, for 8 hours, by miners with the following occupations: headgate operator intake, 040; jack operator intake, 041; shear operator intake (head), 064; shear operator return (tail), 044; jack setter return, 041. The shear operator return was considered to be the "designated" occupation in this group as being exposed to the most dust on the longwall operation. At the end of the shift, McMahon collected the equipment containing the dust samples and returned to the MSHA Office. McMahon testified in detail concerning the nature of the equipment used to test the dust samples, the procedures that he used in setting up the equipment, and in testing the samples. No evidence was adduced which contradicted McMahon's testimony as to the procedures he performed. Nor was any evidence adduced which would tend to impeach the reliability of either the procedures or equipment used by McMahon in testing the samples. Accordingly, I find that the dust sample results obtained by McMahon on July 15 to be reliable. These indicate the following milligrams of dust per cubic meter for the following occupations in the section:

shear operator intake	2.2
headgate operator intake	0.3
jack operator intake	1.5
jack operator return	2.5

The sample for the designated occupation of shear operator return was voided as the sample contained oversize particles. The average for the section was 1.5 milligrams per cubic meter. McMahon decided, to return for additional testing, because the sampling for the high risk occupation was void, and because sampling for the shear operator intake and jack setter return yielded samples which exceeded the maximum set forth in section 70.100, supra, of 2.0 milligram per cubic meter.

On the following day, testing was performed by MSHA Inspector Marion D. Beck. In essence, the procedures and equipment used by Beck were the same as those used by McMahon. 1/ (Beck had inadvertently placed the wrong occupation number on the equipment.

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1/ Respondent, in essence, argues, in paragraph B of its Brief, that 30 C.F.R. $$ 70.201(c), 205(b), and 207(d), containing requirements for dust sampling by Operators should be imposed on the Secretary, and that these Sections were violated by Beck. I find that I do not have any authority to essentially crate a regulatory obligation on the Secretary where none exists.

However, inasmuch as this error did not change the overall average for the section, and inasmuch as the error is corrected by reversing the dust concentrations for the shear operator return and shear operator intake, the error was found to be inconsequential.) Beck, at the conclusion of the 8 hour shift on July 16, 1987, obtained the dust samples from the miners tested, and took them to the MSHA Laboratory. Judith Irene Johnson, a MSHA Lab Technician, testified, in essence, that she tested the samples on July 16, using the same equipment procedures and methods as testified to by McMahon. She also reweighed her results the following day with no change in the results. Also, McMahon testified that on July 20 he verified the results obtained by Johnson on July 16. Accordingly, I find, that on July 16, the following occupations were tested with the following concentration of dust in milligrams per cubic centimeter:

shear operator intake	void due to oversize particles
shear operator return	7.1
headgate operator intake	1.7
jack operator intake	0.1
jack setter return	7.1

The average for the section was 4 on July 16, and the cumulative 2 day average was 2.7.

McMahon testified that because two occupations sampled were above the limit of 2.0 milligram per cubic meter on July 16, he had to return for additional testing. McMahon further testified that pursuant to MSHA policy, which indicates that an occupation with an average dust concentration of 1.6 or less after the second day of testing may be dropped from further testing. McMahon decided not to test the headgate operator intake on the third day as the 2 day average for this occupation was only 0.9, and there was no reason to continue testing that occupation. However, according to McMahon, inasmuch as there were two occupations whose test results on July 16 exceeded the regulatory maximum of 2.0, he decided to return on July 21 for additional testing. McMahon's testimony with regard to the procedures and equipment used in testing on July 21 was not contradicted. Accordingly, I find, that on July 21 when tested, the following occupations in the sections had the following concentration of dust per cubic meter:

shear operator intake	1.7
shear operator return	1.1
jack operator intake	0.2
jack setter return	0.2

I further find that the average for the section based upon the cumulative results for the 3 days of testing, to be 2.1 milligrams per cubic meter.

Inspector McMahon, when presented with these results, issued a citation for a violation of section 70.100, supra, which provides, in essence, that the average concentration of respirable dust during each shift, to which each miner in the active workings of the mine is exposed, shall be at or below 2.0 milligrams per cubic meter. Inasmuch as the third panel had been in existence for two shifts prior to the inspection on July 15, and was actively engaged in the mining of coal, I conclude that the panel in question was a "active workings," as referred to in section 70.100, supra, (see also 30 C.F.R. $ 70.2_. Further, inasmuch as the cumulative average for the occupations tested in the section in question on July 15, 16, and 21, 1987, produced a cumulative average of dust concentration for the section of 2.1 milligrams per cubic feet, I conclude that section 70.100, supra, has been violated.

II.

It appears to be the position of Respondent that the Petitioner has the burden of establishing that the method used in sampling the dust herein was reasonable. In this connection, it is Respondent's further argument, that the omission by McMahon of the headgate operator intake from the testing on July 21, was arbitrary, and that accordingly the cumulative average of 2.1 was not arrived at reasonably. In this connection, Respondent makes reference to uncontradicted testimony that the headgate operator intake, being closest to the source of the intake air, normally has the lowest exposure to dust of the five occupations in the section which were subject to the testing. Thus, Respondent argues that it is likely that had the headgate operator intake been tested on July 21, the result would have been a dust concentration equal to or less than that of 0.2, which was the dust concentration yield for the two occupations whose result was the lowest in the section on July 21. Respondent argues that had the headgate operator intake not been dropped from the testing on July 21, 1987, it is very likely that he would have been subject to dust concentration of equal or less than 0.2, hence bringing the 3 day cumulative average to 2.0 or less and thus being within the regulatory standard. Respondent, in essence, also argues that omitting a previously sampled occupation when computing a section average, is not rational. Further, Respondent argues that when policy which provides for the omission of those occupations with previous tested concentrations of less than or equal to 1.6 results in the section average based on greater samples from "dustier" occupations, the test results are irrationally detrimental to the operator.

I find however that there is no evidence that McMahon dropped the headgate operator intake from the testing on July 21, 1987, in order not to have the average for the section decreased. Indeed, it is to be noted that McMahon retained for testing on the July 21 the jack operator intake whose test result of 0.1 on July 16 was even less than the result of 1.7 yielded for the headgate operator intake. Moreover, since it is manifest that the purpose of section 70.100(a), supra, is to protect miners from excessive exposure to the hazards of dust, it is not irrational, per se, to discontinue testing an occupation (040) which had evidenced exposure to dust concentration in 2 previous days of testing substantially below the regulatory ceiling. If the resulting section average will be then based on greater samples from dusty occupations, the section average will thus realistically reflect the hazards to the section.

Accordingly, I find that Petitioner herein acted reasonably in its method of testing, and that there was insignificant evidence that it acted arbitrarily. 2/

III.

McMahon testified that he considered the violation herein to be significant and substantial, inasmuch as exposure to dust concentrations of more than 2.0 milligram per cubic meter contributes to the hazard of a pulmonary disease which is a disease of reasonably serious nature. Respondent indicated at the hearing that it did not dispute the significant and substantial aspect of this case. Accordingly, I find that the violation herein was significant and substantial.

IV.

In assessing a penalty herein, I have the adopted the uncontradicted testimony of McMahon with regard to Respondent's negligence and find that Respondent acted with a low degree of negligence. I further find that the Respondent herein acted in good faith in abating the violation, and I find that, based upon the testimony of McMahon, the violation herein was of a moderately serious nature as exposure to excessive respirable dust is likely to contribute to the hazard of pulmonary disease.

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2/ Respondent, in its Brief, has argued that the manner in which abatement was required was unlawful. I find this argument to be irrelevant in evaluating the validity of the citation that is at issue herein. I also nota that Respondent does not seek any relief for the Petitioner's allegedly unlawful manner of abatement.

Further, I have adopted the stipulations of the Parties and the factual data on GX 14, with regard to the remaining factors in section 110(i) of the Act. Accordingly, I find that a penalty herein of $259 as proposed is appropriate.

ORDER

It is ORDERED that Respondent shall pay, within 30 days of this decision, a civil penalty of $259 for the violation found herein.

Avram Weisberger
Administrative Law Judge

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