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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-300-M
A.C. No. 05-03211-05502

v.

Breezy Mine

URRALBURU MINING COMPANY,
RESPONDENT

DECISION

Appearances: Jim D. Rogers, Esq., Robert J. Murphy, Esq., Office
of the Solicitor, U.S. Department of Labor, Denver,
Colorado,
for Petitioner.

Before: Judge Lasher

This matter arises upon the filing of a proposal for penalty
by the Secretary of Labor on September 26, 1988, seeking
assessment of a civil penalty against Respondent for a violation
of 30 C.F.R. 57.5039 contained in Citation No. 2640417, dated May
4, 1988. The subject citation was issued by Inspector Dennis J.
Tobin pursuant to the provisions of Section 104(a) of the Federal
Mine Safety and Health Act of 1977, 30 U.S.C. 815(d) (1977),
and charged the Respondent with the following violative condition
or practice:

"The two miners working in the heading were exposed to 5.78
W.L. radon in the 3004 haulage and 1.38 W.L. radon in the
incline. The maximum allowable exposure is 1.0 W.L. radon. A
re-sample indicated 2.72 W.L. at the bottom of the incline and
1.13 W.L. in the 3003 haulage. Levels in the incline were
measured at nil. A close examination of the ventilation indicated
recirculation of the mine air at the fan."

At the hearing in this matter in Denver, Colorado on April
26, 1989, Petitioner, as above indicated, was represented by
legal counsel. Respondent, which the record shows received actual
notice of the hearing (a Postal Service green card attached to
the notice of hearing in the Commission's official case file
reflects receipt of the notice of hearing by certified mail on
March 27, 1989), neither appeared nor advised the Presiding Judge
or counsel for Petitioner of its intent not to

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appear. In such circumstances, the testimony of the issuing inspector, Dennis J. Tobin, was submitted on the record under oath in support of the Petitioner's position together with certain documentary evidence. Based thereon, at the close of hearing, this bench decision was issued.

Turning specifically to Citation No. 2640417, the record indicates that the citation in question was issued by Inspector Tobin on May 4, 1988, during an inspection of Respondent's Breezy Mine. At this time, Inspector Tobin went underground at Respondent's uranium mine and observed two miners picking up broken ore. Inspector Tobin took three radon samples on three calibrated devices for measuring such, all in accordance with his prior training related to the detection of airborne contaminants and matters involving toxicology. Inspector Tobin, whose experience in mining generally and in the field involved here specifically is impressive, testified that upon returning to the surface he encountered Mr. Urralburu, the operator of the mine, and that Mr. Urralburu was alarmed at his readings which indicated high radiation. The inspector returned underground with Mr. Urralburu and "resampled" in his presence the readings, all of which are reflected in the citation.

The regulation charged by MSHA to have been infringed in this instance, 30 C.F.R. 57.5039, entitled Maximum Permissible Concentration, provides: "Except as provided by standard Section 57.5005, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 W.L. in active workings."

In his only communication in this matter, a letter dated October 21, 1988, Mr. Urralburu indicated that he felt a penalty was not called for since there had been a cave-in the night prior to the inspection and that because of the cave-in the exhaust fan in the mine had been restricted to a half flow "in the borehole." Mr. Urralburu went on to point out that the cave-in was repaired and ventilation was properly restored. Inspector Tobin, who testified under oath, indicated that the explanation for the violation, if such it be, contained in Mr. Urralburu's letter was not meritorious because the violation would have continued if the excessive radon levels had not been detected during his inspection and Inspector Tobin was of the opinion that it was as a result of his radon sampling that Respondent became aware of the excessive radon levels cited. It does appear, and Petitioner concedes, as Mr. Urralburu indicates in his letter that abatement of the violative condition was achieved and that Respondent proceeded in good faith to achieve rapid compliance with the violated standard after notification of the violation.

Accordingly, it is found that the violation cited in Citation No. 2640417 occurred as charged and that an appropriate

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penalty must be assessed. Based on information in this record, it is concluded that this mine operator was found to be a small mine operator who had operated the subject Breezy Mine for a period of at least 15 years. Looking at the Respondent as a specific individual, that is, Mr. Ben Urralburu, it is found based on the inspector's testimony that he has a limited education and that this was the first time he had been cited for this specific type of violation. These factors entered the inspector's judgment in attributing a "moderate" degree of negligence to the violation, and I agree. This violation is found to be serious in deference to the inspector's opinion as to the propriety of this characterization and also his evidence indicating that inhalation of radioactive radon gases at the levels detected and documented by him exposed the two miners who were present on May 4, 1988, to the hazard of lung cancer.

The record does not reflect, and Respondent has not established, of course, at the hearing, or in pre-trial submissions prior to the hearing, that assessment of penalties at the level sought by Petitioner would jeopardize its ability to continue in business. The Respondent mine operator has a history of two previous violations (Exhibit P-1).

In the premises, Petitioner's initial assessment of \$20.00 for this violation is found appropriate and is here assessed.

ORDER

Citation No. 2640417 is affirmed.

Respondent is ordered to pay to the Secretary of Labor within 30 days the sum of \$20.00.

Michael A. Lasher, Jr.
Administrative Law Judge