FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 2, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-105 A. C. No. 46-01438-03872
v.	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty filed under sections 105(d) and 110(i) of the Federal Mine Safety and Health Act, 30 U.S.C. § 815(d) and § 820(i), (hereafter referred to as the "Act"), by the Secretary of Labor against Consolidation Coal Company for a violation of 30 C.F.R. § 70.100(a) which is a restatement of section 202(b)(2) of the Act, 30 U.S.C. § 842(b)(2).

30 C.F.R. § 70.100(a) provides as follows:

> (a) 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).

Citation No. 3327204 dated October 29, 1990, charges a violation of 30 C.F.R. § 70.100(a) for the following condition or practice.

> Computer message 0321-002, advisory No. 0203, dated October 22, 1990, shows the average concentration of respirable dust in the working environment of the 044, longwall operator (tailgate side), for MMU 005-0, was 2.1 milligrams which

exceeds the applicable standard of 2.0 mgm/^{3} (sic). First the mine operator shall take corrective measures to lower the respirable dust, then sample the 044 occupation the following production shifts until five (5) valid samples are submitted to MSHA, St. Clairville, Ohio 43950 (Mailing Labels Included).

Stipulations

Each of the parties has submitted the case for decision on the basis of stipulations which are in agreement except for a few matters. The stipulations are adopted to the extent they are in agreement as follows:

(1) The Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission has jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977;

(2) The operator has an average history of prior violations for a mine operator of its size. There were at least six (6) violations of 30 C.F.R. § 70.100(a) at the Ireland Mine prior to October 29, 1990:

(3) Citation No. 3327204, the current violation, was issued on October 29, 1990, for a violation of 30 C.F.R. § 70.100(a). The respirable dust average of 2.1 milligrams is correct and is based on an average of five respirable dust test results of 1.1, 0.8, 3.1, 2.7, and 3.0;

(4) The only issue to be determined is whether the violation constituted a significant and substantial violation as defined by the Act;

(5) Inspector Ted Zitko was acting in his duly authorized and official capacity as a Mine Safety and Health Administration Inspector when Citation No. 3327204 was issued on October 29, 1990;

(6) Citation No. 3131217 was issued on March 13, 1990, for a previous violation of 30 C.F.R. § 70.100(a) based on the average of five (5) respirable dust tests that were performed in February 1990;

(7) Citation No. 3131217 was issued for a violation that occurred on the 044 longwall MMU-005-0 section, which is the same section as the current alleged violation. The average respirable dust level in Citation No. 3131217 was 2.7 milligrams:

(8) The information contained in Citation No. 3131217 that was issued for the previous violation of March 13, 1990, is accurate and is a final Commission decision. The Court may take judicial notice of the contents of the file of that case which were attached and identified by the Secretary as Document A.

(9) The operator is considered a large mine operator for purposes of 30 U.S.C. § 820(i);

(10) The operator has demonstrated good faith in achieving compliance after notice of the violation in both Citation Nos. 3327204 and 3131217;

(11) If a hazard existed, at least two (2) miners were exposed;

(12) Ireland Mine had no fatal injuries in 1989 or in 1990. As of January 1991, the disabling injury frequency rate for the Ireland Mine is 3.45 and the disabling injury frequency rate for the coal industry is 10.87;

(13) The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. § 820(a) will not affect the ability of the operator to remain in business.

Statement of the Issue

As set forth in the stipulations, the violation is admitted. The issue presented for determination is whether the violation was "significant and substantial" within the purview of Commission and judicial precedents.

Precedents

In Consolidation Coal Company, 8 FMSHRC 890 (June 1986), the Commission decided that a respirable dust concentration of 4.1 mg/m^3 constituted a significant and substantial violation. In so holding the Commission adopted principles which appropriately serve as a guide for resolution of the present matter. Similarly, the Court of Appeals which affirmed the Commission in Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, 824 F.2d 1071 (D. C. Cir. 1987), further elucidated the precepts which govern this inquiry.

In Consolidation Coal Company, the Commission recognized the unambiguous legislative purpose to prevent disability from pneumoconiosis or any other occupation-related disease. The Commission stated that Congress intended the 2.0 mg/m^3 standard to be the maximum permissible exposure level in order to achieve its goal of preventing disabling respiratory disease. 8 FMSHRC at 897. The respirable dust violation was then analyzed to

determine whether it was significant and substantial in accordance with the four step test enunciated by the Commission in National Gypsum Co 3 FMSHRC.822 (1981) and Mathies Coal Company, 6 FMSHRC The respirable dust violation was admitted (first step) and the Commission held that any exposure above the 2.0 mg/m^3 level established a measure of danger to health (second step). 8 FMSHRC at 898. In finding a reasonable likelihood that the hazard would result in illness (third step), the Commission stated that although a single incident of overexposure would not in and of itself establish a reasonable likelihood, the development of respiratory disease was due to cumulative overexposure with precise prediction of whether and when respiratory disease would develop being impossible. 4 FMSHRC at 898. Accordingly, the Commission held that if the Secretary proves an overexposure in violation of § 70.100(a) a presumption arises that there has been established a reasonable likelihood that the health hazard will result in illness. 8 FMSHRC at 899. Finally, the Commission found there was no serious dispute that the illness in question would be of a reasonably serious nature (fourth step). 8 FMSHRC at 899. Because the four elements of the significant and substantial test would be satisfied in any case where there was a violation of § 70.100(a), the Commission held that when the Secretary finds a violation of § 70.100(a), a presumption that the violation is significant and substantial is appropriate. The presumption may be rebutted by proof of non-exposure. 8 FMSHRC at 899.

Upon review, the Court of Appeals affirmed the Commission and upheld its adoption of the presumption that all respirable dust violations of § 70.100(a) are significant and substantial. The Court stated in pertinent part as follows:

> * * * The determination of the likelihood of ham from a violation of an exposure-based health standard necessarily rests on generalized medical evidence concerning the effects of exposure to the harmful substance, rather than on evidence specific to a particular violation.
>
> * * * Once the Commission had determined on the basis of medical evidence that any violation of the respirable dust standard should be considered significant and substantial, it would be meaningless to require that the same findings be made in each individual case in which a violation occurs. * * *
>
> * * * * * * *
>
> The Commission's adoption of the presumption at issue here is consistent with congressional

intent in enacting the Mine Act, and specifically with Congress's use of the "significant and substantial" language.

824 F.2d at 1084, 1085.

Analysis

I conclude that the foregoing decisions of the Commission and the Court of Appeals compel a finding that the violation in this case is significant and substantial. Admittedly, the average concentration in this case was 2.1 mg/m^3, whereas it was 4.1 mg/m^3 in Consolidation Coal Comnanv. However, as set forth above, the Commission in Consolidation Coal Company adopted a presumption that all exposures above the 2.0 mg/m^3 limit specified in § 70.100(a) are significant and substantial. In this case the operator has offered no evidence, such as non-exposure through the wearing of protective equipment, to rebut the presumption which is therefore, determinative.

In arguing that the violation here is not significant and substantial the operator relies upon the Commission's reference in consolidation Coal Company to statements in the legislative history of the 1969 Coal Act that in a dust environment below 2.2 mg/m^3 there would be virtually no probability of contracting pneumoconiosis even after 35 years of exposure at that level. 8 FMSHRC at 896-897. The operator's argument cannot be accepted. Although the Commission referred to the cited legislative history, it did not decide that overexposure violations of a certain magnitude could be considered non significant and substantial. On the contrary, as explained above, the Commission's analysis and holdings regarding the four elements necessary for an overexposure violation to be considered significant and substantial, are grounded solely upon the 2.0 mg/m^3 ceiling of § 70.100(a). So too, the Commission's creation of the presumption, that any overexposure violation is significant and substantial, is specifically cast in terms of all violations of § 70.100(a), i.e. 2.0 mg/m^3 as the maximum ceiling. It is well settled that absent a clearly expressed legislative intention to the contrary, the language of the statute itself must be regarded as conclusive. Burlinston Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987); Consumer Product Safety Commission v. GTE Svlvania Inc., 447 U.S. 102, 108 (1980).

Moreover, the Court of Appeals in Consolidation Coal Company specifically rejected the operator's suggestion that the standard for designating an overexposure violation as significant and substantial must be higher than 2.0 mg/m^3 required for a violation. The Court said it could not say that Congress intended that some concentration of respirable dust higher than 2.0 mg/m^3 be found before the violation could be designated as significant and substantial. 824 F.2d at 1084-1085. Rather it held that the Commission's adoption of the presumption of significant and

substantial was consistent with the Congressional intent in enacting the Mine Act. 824 F.2d at 1085.

In addition, the Court decided that in the legislative history the statements regarding non-probability of pneumoconiosis at a 2.2 mg/m^3 level did not provide a basis to reject the Commission's adoption of the significant and substantial presumption. 824 F.2d at 1085-1086. The Court held that the operator's arguments failed to consider the cumulative effects of repeated overexposure and that its position could not be reconciled with the Congressional intent to prevent respirable disease. 824 F.2d at 1086. Finally, the Court pointed out that Congress did not merely require dust concentrations be maintained below 2.0 mg/m^3 "over the long term" as the operator suggested, but mandated instead that the concentration be "continuously" maintained below the specified level "during each shift". 824 F.2d at 1086. Therefore, the reference in the legislative history to a "dust environment" of 2.2 mg/m^3 or less, relied upon by the operator is something quite different from the exacting requirements Congress actually placed in the law.

The arguments the operator advances in this case are the very ones it made in Consolidation Coal Company. And just as the Commission and the Court of Appeals rejected them previously, so they must be rejected here. The Commission's presumption that any respirable dust violation is significant and substantial applies here and determines the result. For me to carve out some intermediate and indeterminate zone in which a non significant and substantial violation exists would not only be contrary to the terms of the Act and underlying Congressional purposes, but also would be precluded by the decisions of the Commission and the Court of Appeals.

It should be noted that the record in this case further demonstrates that the instant violation was significant and substantial. Although the subject citation was issued for an average concentration of 2.1 mg/m^3, a citation issued seven months previously was for anaverage dust level of 2.7 mg/m^3 (Stipulation No. 7). Accordingly, even if the language in the legislative history regarding a dust environment below 2.2 mg/m^3 could otherwise be of comfort to the operator, the record shows that on the subject longwall section the dust environment was not anywhere near, much less below the 2.2 mg/m^3 level "continuously" and "during each shift".

In light of the foregoing, I find the cited violation was significant and substantial.

The Solicitor's Stipulation No. 4 proposes that an issue to be determined is whether the violation was due to moderate

negligence. The operator's proposed stipulations are silent on negligence. Because there is no evidence on the matter, I find the operator was not negligent. Cf. 824 F.2d at 1076.

I conclude the violation was serious and accept the stipulations of the parties with respect to the other criteria of section 110(i). Therefore, I conclude an appropriate penalty is $300.

I take note of the decision in Cyprus Empire Corporation, 11 FMSHRC 1795 September (1989), but for the reasons set forth herein, I decline to follow it.

The briefs of the parties have been reviewed. To the extent they are inconsistent with this decision they are rejected.

ORDER

It is ORDERED that the finding of significant and substantial in Citation No. 3327204 be AFFIRMED.

It is further ORDERED that the operator PAY $300 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Wanda M. Johnson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Walter J. Scheller, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Mr. Leo Conner, UMWA, RD 1, Box 192A, Glen Easton, WV 26039 (Certified Mail)

/gl