

CCASE:
JIM WALKER RESOURCES V. MSHA
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JIM WALTER RESOURCES, INC. : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 91-714-R
: Citation No. 9883187;
SECRETARY OF LABOR, : 7/8/91
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : No. 7 Mine
Respondent :
: Mine No. 01-01401
and :
:
UNITED MINE WORKERS OF :
AMERICA (UMWA), :
Intervenor :

DECISION

Appearances: H. Thomas Wells, Jr., Esq., and J. Alan Truitt,
Esq., MAYNARD, COOPER, FRIERSON & GALE,
Birmingham, Alabama, for the Contestant;
William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama, for
the Respondent;
Patrick K. Nakamura, Esq., and George Davis, Esq.
LONGSHORE, NAKAMURA & QUINN, Birmingham, Alabama,
for the Intervenor.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the
contestant (JWR) against the respondent (MSHA) challenging the
validity of an "S&S" Citation No. 9883187, issued on July 8,
1991, pursuant to section 104(a) of the Federal Mine Safety and
Health Act of 1977. The citation charges JWR with an alleged
violation of the mandatory respirable dust requirements found in
30 C.F.R. 70.100(a). The respondent filed a timely answer
asserting that the citation was properly issued and a hearing was
held in Birmingham, Alabama. The parties filed posthearing
briefs, and I have considered their respective arguments in the
course of my adjudication of this matter. They also presented
oral arguments during the course of the hearing, and I have
considered these arguments.

Issues

The issues in this case are (1) whether the contestant violated the requirements of 30 C.F.R. 70.100(a), and (2) whether MSHA acted arbitrarily and unreasonably when it mandated a change in the "designated occupation" required to be sampled pursuant to MSHA's respirable dust regulations from code 044 to code 060 on the mechanized mining unit, MMU 016-0, the No. 2 Longwall, at JWR's No. 7 Mine. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.
2. Commission Rules, 29 C.F.R. 2700.1, et seq.
3. Mandatory respirable dust standards, Part 70, Code of Federal Regulations.

Stipulations

The parties stipulated to the following (Tr. 5-6; 22-23):

1. JWR and the No. 7 Mine are subject to the jurisdiction of the Mine Act and the Commission.
2. The respirable dust sample results which reflect an average concentration of 2.6 Mg/M3 of air in the working environment of the cited longwall mechanized mining unit (MMU) constitutes a violaton of 30 C.F.R. 100(a).
3. MSHA's procedures for processing the respirable dust samples collected and submitted by JWR, including the chain of custody, were properly followed.
4. There is a presumption that the respirable dust violaton in question, if affirmed in this case, is a significant and substantial (S&S) violation.
5. JWR is currently in compliance with MSHA's respirable dust requirements on the cited MMU, and it came into compliance prior to the September 15, 1991, extended abatement date. The citation has been terminated.

Discussion

The contested section 104(a) "S&S" Citation No. 9883187, is signed by MSHA Inspector Judy A. McCormick, and it is dated July 8, 1991. It reflects that it was served on JWR by mail, and it cites an alleged violation of the mandatory respirable dust requirements found in 30 C.F.R. 70.100(a). The cited conditions or practices are described as follows:

Based on the results of 5 samples reported on the attached advisory number 0290, the average concentration of respirable dust in the working environment of mechanized mining unit (MMU) I.D. #016-0 was 2.6 mg/m³ of air. The operator shall take corrective action to lower the concentration of respirable dust to within the permissible limit of 2.0 mg/m³ and then sample each production shift until 5 valid samples are taken. Samples shall be submitted 4800-D Forbes Avenue. Pittsburgh, PA 15213

JWR does not dispute the fact of violation, nor does it challenge the fact that the five samples which it took indicates noncompliance with the dust concentration limits found in regulatory section 70.100(a). The thrust of JWR's contest lies in its challenge to MSHA's decision to change the designated occupation on which respirable dust sampling is required on the No. 2 longwall (MMU 016-0), from designated occupation 044 (tailgate shear operator), to designated occupation 060 (miner who works nearest the return side of the longwall face). The change was communicated to JWR by MSHA Form 2000-96, dated May 7, 1991, and signed by the District No. 7 Manager (Exhibit G-4). In a follow-up letter of June 3, 1991, the district manager advised JWR as follows (Exhibit C-2):

* * * * When sampling occupation 060 (miner who works nearest the return side of the longwall face), the dust sampling instrument shall be alternated from person to person according to who is nearest the return side of the face (tailgate). For example, when the pump is being worn by the tailgate shear operator and the tail jacksetter goes on the downwind side of this shear operator, the tail jacksetter shall take the dust pump from the shear operator and shall wear the dust pump for as long as he is the miner working nearest the return. The pump shall be alternated from person to person following the above procedure.

MSHA's Testimony and Evidence

Kenneth Martin, MSHA Supervisory Health Specialist since 1974, testified that his duties include the review of health

plans, dust sampling, and coordinating and monitoring dust inspection, sampling, and compliance activities. He confirmed that the term "high risk occupation" means "an area that has the highest concentration of dust that miners could be exposed to", and that this is similar to the term "designated occupation". The rationale for requiring sampling for both of these is the same, and if there is compliance with the dust limits in those environments where there is the highest concentration of dust, one can assume that the other areas will also be in compliance (Tr. 23-27).

Mr. Martin stated that MSHA's dust sampling scheme is aimed at measuring the respirable dust in the working atmosphere environment at a particular location, and not to measure the dust exposure of an individual. He identified an MSHA memorandum dated April 4, 1988, and an excerpt from MSHA's policy manual which explains the sampling procedures (Tr. 29; Exhibits G-2 and G-3). The policy explanation of section 70.207(e)(7), is that "if individuals rotate out of a position that's the designated area, that the sampling unit would remain with that position and not with the individual" (Tr. 30).

Mr. Martin confirmed that he is generally familiar with longwall mining procedures, and he explained the types of miner occupations associated with a longwall, and with the use of a sketch, he explained the operation of a longwall mining system (Tr. 32-38; Tr. 40-47; Exhibit G-6). He confirmed that longwall operations, including the location of employees, vary from mine operator to mine operator and they are all not identical (Tr. 38). He confirmed that he would expect to find the greatest concentration of respirable dust at the tailgate side of the longwall face because "the dust that is generated upwind from that location should all be represented at that location from all your other generation sources". The mine intake air ventilation travels through or by all of these sources and then exits through the return (Tr. 48).

Mr. Martin identified exhibit G-4, as the May 7, 1991, MSHA notification to JWR that the designated occupation for dust sampling was changed from 044, the shearer operator on the tailgate side, to 060, the person working nearest the return side of the longwall face. He confirmed that he was involved in this determination and he indicated that the language describing the newly designation occupation code is basically the language found in section 70.207(e)(7) (Tr. 56). Although this was the first change for JWR in his district, he cited two other mine operators in the district who also received changes to code 060 from MSHA, and he indicated that operators in district No. 5 have also received changes. All of these changes have occurred as early as 1988, and MSHA is presently implementing further changes on a mine-by-mine basis. He acknowledged that some longwall mine operators do not have the same designated changes as JWR and he

explained that a decision was made in his district that the designated occupation would be changed from 044 to 060 only in those instances where the mine operator is out of compliance with the dust standard. At the present time, those mines which are in compliance are not required to make the change to the 060 occupation or area designation (Tr. 5).

Mr. Martin confirmed that pursuant to the previously designated 044 designation, the tailgate shear operator would have to leave his sampling device with his replacement operator in the event there was a change in the persons operating the tailgate shear drum. However, since the change to the 060 designated occupation, the miner working nearest the return air side of the longwall working face would be required to wear the sampling device regardless of whether he is a shear operator, jacket setter, mechanic, or electrician. This is because MSHA desires a sampling of the employee who works closest to the return air side of the face, and that location should represent the highest concentration of dust that any miner would be exposed to on the longwall face based on the various dust generation sources and the manner in which the face is ventilated. He identified the location by placing a red "X" mark on the sketch, and he confirmed that this is the last location on the face before the air enters the return (Tr. 60-64).

Mr. Martin stated that MSHA implemented the designation change in light of the wider longwall face areas being mined and increased production, and MSHA's belief that the sampling of the 044 occupation was not representative of the highest dust concentration and miner exposure (Tr. 64). Mr. Martin confirmed that MSHA's technical support division has conducted an environmental dust control investigation at the JWR No. 4 Mine, and he identified Exhibit G-5, as a copy of the report (Tr. 68). He further confirmed that the basic manner in which longwalls are mined and ventilated, including the route of intake air traveling through the dust generation sources and existing out of the returns, is basically the same in all longwall operations (Tr. 72). The MSHA report in question recommended that MSHA consider changing the designated occupations in the No. 4 longwall because the 044 occupation did not always have the highest dust concentration. Sampling was done at fixed points in that mine, and the dust concentrations at these fixed points were higher than the 044 designated occupations (Tr. 74). In his view, the report supported the decision to change the designated occupation to the person working furthest downwind or within 48 inches of the corner of the longwall face, and where the dust concentrations are higher at the fixed point near the return side of the longwall face (Tr. 75).

Mr. Martin confirmed that pursuant to the designated occupation change required of JWR, the sampling scheme in question is sampling the environment and not the individual miner exposure, and that section 70.207(e)(7) of MSHA's regulations permits sampling the environment at the "worst location" where all of the "bad air" ends up on its way out of the return (Tr. 79).

On cross-examination, Mr. Martin stated that prior to 1988 there was no 060 code designated for the miner working nearest the return side of the face, and the typical and common MSHA practice at that time was to designate the 044 occupation code, which is the tailgate shear operator, and this was the typical designation for all longwalls in District No. 7 (Tr. 93). The reason for this was that the 044 occupation was the occupation normally closest to the return side of the longwall face. However, since longwall mining has changed over the years, more people are working downwind and with remote control, people move about on the face more, and it has become obvious that the 044 occupation was not the proper occupation for sampling on a longwall operation (Tr. 94).

Mr. Martin confirmed that in making the change to the new occupation code, MSHA did not rely on dust samples collected at the cited MMU pursuant to MSHA's policy manual (Tr. 98). He explained the failure to sample as follows at (Tr. 99).

A. In order for them to change the designated occupation from what's specified in the regulations, this is saying that we need the results of samples to make that change. And since we were only changing back to what the regulations specified, it's my interpretation that samples were not required to make that change.

JUDGE KOUTRAS: So you determined you didn't need any samples. You would just make the change without them.

A. Changing to what the regulation specified.

Referring to a page from the inspector's handbook, which was included as part of his deposition, and which mentions sample results, Mr. Martin explained that this requirement applied when MSHA was changing its sample procedures to deviate from what was required under the regulation (Tr. 100).

Mr. Martin stated that the tailgate shear operator is not necessarily the only occupation normally closest to the longwall face return over the course of an eight-hour shift, and that jack setters, mechanics, electricians, and others may be present downwind closer to the return side than the shear operator (Tr. 102). He confirmed that MSHA's current sampling scheme is to sample the environment that has all of the air contaminant's passing by at any given time during the shift, and if the

environment of that unit is not in compliance, everyone would likely also not be in compliance (Tr. 105-106).

Mr. Martin stated that pursuant to MSHA's current designation of the 060 occupation and the instructions given to JWR, the dust sampler pump must be passed to the individual who at any given time is closest to the "X" location shown on the sketch and he explained how this was to be done when different people are in that area during the course of a working shift (Tr. 107-111). He confirmed that under this sampling procedure, the environment, rather than individual miner exposure, is being sampled (Tr. 111).

Mr. Martin confirmed that the mishandling of a pump, by turning it upside down, could possibly cause oversized particles, but he believed that following proper sampling procedures in changing and repositioning the pump should not cause problems (Tr. 115). He agreed, however, that mishandling a pump could create a sampling problem "depending on how it's mishandled" (Tr. 116).

Mr. Martin confirmed that MSHA did not rely on the study at the No. 4 Mine in making the designated occupation change at the No. 7 Mine, and he had no personal knowledge as whether the longwall mining practices in the two mines are the same (Tr. 117). He confirmed that some longwall sections in his district have the 060 designation, and that once a 044 designation out of compliance changes will be made to the new 060 designation. In the event any 044 designations never goes out of compliance, MSHA may consider changing them all to 060 (Tr. 120).

Mr. Martin stated that the newly designated 060 occupation does not identify any particular individual or occupation, and it could apply to any employee who comes within the definition found in section 70.207(e)(7). The 060 computer code actually refers to anyone to who is in the area closest to the return on any given work shift for whatever period of time they are there (Tr. 126). He confirmed that a 060 sample over a working shift would be a sample of the area where people were working furthest downwind (Tr. 126).

Mr. Martin stated that there was no way to determine whether the five sample cassettes supporting the violation in this case were worn by five different individuals unless one were to learn who was wearing the specific devices on the sampling days in questions. He confirmed that the five cassettes found their way into the "060 occupational zone of hazard", and the sampling results indicated noncompliance (Tr. 127). He confirmed that each cassette represents a different sampling day, but the cassette may have been worn by any number of people on each of those days (Tr. 128-129). The sampling results "tells me the

area of where people were working downwind, what dust level was in the environment" (Tr. 130). The intent of MSHA's sampling scheme is to control the dust in the environment (Tr. 131).

In response to questions from the intervenor, Mr. Martin stated that the concept of measuring the designated occupation with the most dust exposure did not originate with the change to JWR's 060 designated occupation, and that it had its origins in 1980 when the "high risk" designated occupation method was placed in the regulations. The current procedure allows JWR to use one pump rather than putting a pump on everyone on the shift all of the time. The regulations do not require that an individual miner be sampled, and they only require sampling of the person exposed to the most dust, and this is the designated occupation. He explained why the pump is required to be placed on the person closest to the return (Tr. 144-146).

Mr. Martin confirmed that the 060 designation has also been required in his district at Arch of Kentucky's No. 37 Mine and U.S. Steel's Oak Grove Mine (Tr. 147). He confirmed that the decision to place any miner downwind of the longwall shearer lies with the mine operator and JWR is free to submit a dust plan that does not require any miner to work downwind of the shearer (Tr. 149). He further confirmed that the decision to implement the change at the JWR mine in question was based on MSHA's belief that the old 044 occupation was not the proper occupation that should be sampled as the designated occupation because of the people working downwind, the wider faces, and the higher producing machinery. Consideration was also given to the comments of miners during the dust plan review that miners were working downwind (Tr. 162-163).

MSHA Inspector Judy McCormick testified that she is assigned to the health group and that her duties include working with operator and MSHA coal dust samples, and answering questions regarding sampling and sampling procedures. She identified a copy of a June 3, 1991, letter from MSHA's district manager to JWR regarding the change in the sampling occupation designation and she confirmed that she drafted the letter in response to an inquiry from Jerry Kimes and Jack Stevenson, who are employed by JWR's safety department (Tr. 187-191; Exhibit C-2). Mrs. McCormick confirmed that prior to the date of the letter, she had discussed the sampling requirements with Mr. Kimes and Mr. Stevenson, and she believed that they understood what was required (Tr. 192).

JWR's testimony and evidence.

Gerald Kimes, safety supervisor, No. 7 Mine, testified that his duties include dust control, and he confirmed that he was familiar with the cited 016 MMU, which is the No. 2 Longwall. He confirmed that Exhibit G-6, generally depicts the longwall set-

up, and that prior to the receipt of the change notice sampling was conducted on the tailgate shear operator. This had been a longstanding standard practice on all longwall units, and the change in the designated occupation is the first one that he was aware of. He explained the operation of the sampling dust pump device, and although the pump itself is fairly rugged, he indicated that the cassette assembly can be mishandled. If the entire assembly were turned upside down, oversized particles could find their way to the cassette filter, and if the assembly is struck sharply, the dust that has already been collected may be dislodged (Tr. 193-200).

Mr. Kimes stated that prior to the designation change the dust pump was given to the tailgate shear operator and then given to each shift supervisor to give to each shearer operator and it stayed with that operator for the entire shift. Pursuant to the current 060 designated change the pump is passed from one person to another over the course of the shift, and he assumed that four or five, and possibly more, people would wear it depending on the situation. However he stated that "I'm not a highly qualified longwallman so I can't say about every situation" (Tr. 202). He was trained in dust sampling in 1975, and his duties include the dust sampling at the mine, but he has never been a "dust technician" (Tr. 203).

Mr. Kimes disagreed with the change in question because he believes that JWR was singled out and that other longwall operators are not required to change, and the pumps are likely to be damaged when transferred from one person to another. He does not have the manpower to keep records as to who wears the pump at any given time or long it is worn. He was also of the opinion that the intent of the regulations is to monitor the individual exposure of unhealthy concentrations of dust, and that the 060 methodology does not give any accurate reading of the dust exposure of any individual miner. He could not state whether keeping the pump with the tailgate shearer operator was a better method of monitoring an individual's dust exposure (Tr. 207).

On cross-examination, Mr. Kimes confirmed that since changing to the 060 designation, there have been no problems in obtaining dust samples. He stated that he has never operated the longwall equipment and that he does not routinely observe the circumstances under which the sampling devices are rotated among employees. He acknowledged that mechanics and electricians occasionally work downwind of the shearer. He was generally familiar with MSHA's dust regulations, but he was not familiar with the regulatory definition of the designated occupation until it was pointed out to him. He was told that the designation to the 060 occupation was the result of the mine going out of compliance, and he had no prior knowledge that the No. 4 Mine had undergone a similar change (Tr. 208-215). He acknowledged that

one cannot assure that employees downwind of the shearer operator are not exposed to greater respirable dust concentrations than the shear operator (Tr. 228).

In response to further questions, Mr. Kimes confirmed that he was aware that JWR is now in compliance and that the violation has been abated. He acknowledged that compliance was achieved by five valid samples of the 060 designation taken at the No. 2 longwall and submitted by JWR, and that there was apparently no mishandling of the pump in those instances (Tr. 252). He confirmed that miners are supplied with personal dust protective devices and respirators if they request them (Tr. 256-258).

Deposition testimony.

In the course of the hearing, JWR's counsel moved for the admission of portions of the deposition testimony of Mr. Bobby Taylor and Mr. James Rivers, previously taken by the intervenor's attorney. These individuals were identified as associate safety supervisors who work for Mr. Kimes at the No. 7 Mine. The motion was granted, and without objections, the complete depositions were received as part of the record in this case (Tr. 261-263).

James Rivers disagreed with MSHA's requirement that JWR pass the pump to the miner who is most downwind because it was his opinion that the integrity of the sample is jeopardized when the pump is handled and exchanged by many people (Deposition pgs. 90-91).

Bobby Taylor believed that the passing of the pump was an unreasonable requirement because leaving the pump on the location all day while people are being switched out is not a representative sample of the dust exposure to a miner who may be in the area ten-to-fifteen minutes or an hour or two hours (Deposition pgs. 37-38).

Intervenor UMWA Testimony and Evidence

Ray Lee, JWR longwall mechanic, testified that he is responsible for the repair and maintenance of the longwall face equipment and that he works at the face every day. He has worked at the mine for over ten years, and has been a mechanic for over 8 years. He worked on the No. 2 longwall owl shift for seven years until July of 1991, and he is presently working on the No. 1 longwall. He described his duties downwind from the shearer, and indicated that he works an average of 3 to 4 hours a shift at that location. He stated that he wore a dust sampler only one time, but he was not allowed in by the shearer with the sampler (Tr. 264-271).

On cross-examination, Mr. Lee stated that sampling is not always done on the day shift, and he confirmed that samplers are

not hung on the mechanics who are not designated occupations. The shearer may or may not be down when he is working on it (Tr. 272).

Neil Young, shear operator, No. 7 Mine, stated that he has worked at the mine since December, 1979, and he described his duties, which also include shoveling along the beltline and under the shields and pans as assigned (Tr. 276-278). He stated that he may spend 6 to 10 hours a week shoveling, and that he uses a remote control which places him upwind for 15 feet or more. He has worked as a shearer operator since 1985, and at the No. 2 longwall since 1987 (Tr. 280).

Mr. Young stated that he had no trouble passing the pump to the next miner during the sampling process and he indicated that the pump weighs approximately one pound and can be passed in 15 to 20 seconds without any interruption to production (Tr. 283-284). He stated that on one occasion when he was sampled by MSHA in March 1991, everyone wore a pump for one week. However, he was the only one out of compliance, and after expressing concern about this, the longwall coordinator instructed him to sit in the dinner hole with the pump on from 8:30 to 2:00 without performing any duties (Tr. 286-287).

JWR's Arguments

As noted earlier, JWR does not dispute the fact that the five dust samples which it collected and submitted to MSHA pursuant to section 70.207, resulted in the issuance of the citation for noncompliance with section 70.100(a), and constitutes a violation of that section. JWR's contest focuses on several contentions which it believes amounts to an illegal, arbitrary, and unreasonable application of the dust standards to its mine.

JWR asserts that the newly designated "occupation" which requires sampling is really not an occupational designation to which any particular occupation will be exposed to respirable dust. JWR contends that sampling the newly designated 060 occupation does not reflect the individual exposure to any particular miner and that the sample is in fact a composite sample, rather than an individual sample (Tr. 9, 321).

JWR maintains that over the years MSHA has uniformly designated the tailgate shear operator (designated occupation 044) as the occupation required to be sampled by all mine operators. Relying on MSHA's argument that the change in the designated occupation required to be sampled (060 miner working nearest the return) is simply a reassertion of the mandate found in regulatory section 70.207(e)(7), JWR suggests that MSHA has admittedly improperly applied the regulation since it was promulgated in 1980. Conceding that MSHA is free to change the designated occupation required to be sampled, JWR nonetheless argues that in doing so MSHA must follow its own policies and procedures. Citing MSHA's policy manual and an

excerpt from the mine inspector's manual, JWR maintains that a change in the designated MMU occupation may only be considered after the results of samples collected by MSHA reflect a need for such a change. JWR points out that in this case MSHA has conceded that the mandated change in the designated occupation from 044 to 060 was not based on any MSHA respirable dust sampling of surveys supporting any conclusion that a change was needed or warranted (Tr. 11-12; 317-320).

JWR further contends that MSHA is not uniformly applying the change to the newly 060 designated occupation to all of its subdistricts, and that in district 5 the change has been applied to only three longwalls. JWR points out that Mr. Martin cited only one other MSHA district that is changing from the tailgate shear operator occupation to the newly designated 060 designation. Under these circumstances, JWR concludes that it has been singled out and treated unfairly by MSHA and that the mandated change, which has not been admittedly applied by MSHA "across the board" to all longwall mining systems is an arbitrary and unreasonable abuse of discretion (Tr. 11-12; 317-320).

With regard to the application of Judge Weisberger's decision in Consolidation Coal Company, 9 FMSHRC 1509 (August 1987), JWR asserted that while that case dealt with "passing the pump", it involved a specific occupation, namely the tailgate shearer, and the pump was required to be worn by whoever was in that location at any given time. In the instant case, however, JWR pointed out that it is difficult to determine that any particular person will be nearest the return side of the face at any given time, and that several different occupations may, at any given time during the course of the shift, come within the definition of "the miner who works nearest the return side of the longwall face. Under the circumstances, JWR concludes that this would result in a continual passing of the pump, and that each time the pump is passed, there is a risk of an invalid sample because the pump can be turned over or dropped (Tr. 14). JWR has expressed concern over the problems which may result from passing the dust sampling device from one miner to another (Tr. 321-322).

MSHA's Arguments.

MSHA asserts that its decision to change the previously applied occupation code 044 (longwall operator tailgate side) to the newly designated 060 occupation (miner who works nearest the return side of the longwall face), merely changed the designated occupation to coincide with the occupation set forth at 30 C.F.R. 70.207(e)(7), and that the district manager simply directed JW to sample the occupation on the longwall section as defined by

that mandatory regulatory standard. Citing the appropriate statutory language of the Mine Act, and the implementing regulations found in Part 70, Title 30, Code of Federal Regulations, MSHA concludes that it acted clearly within its statutory and regulatory authority when it directed JWR to sample the newly designated 060 occupation.

MSHA states that in terms of the actual mining process, the 060 designated occupation could include only one miner or rotate among several miners during the course of a regular work shift. If the same miner remains in the occupation which works nearest the return air side during the work shift, it is MSHA's position that the dust sampling device would remain on that one single individual. However, in the event JWR's work practices resulted in several miners performing, at different times, in the occupation which worked nearest the return side, then the 060 designation would require that the sampling device be alternated or passed to whomever is working nearest the return air side.

MSHA asserts that it has determined that the return air side of the cited longwall unit, which it has characterized as the 060 designated occupation for any miner who performs works in that area, is the area which has been deemed to have the greatest concentration of respirable dust. MSHA's position is that the miner who is closest to the return air side, or "designated occupation", is required to wear the dust pump during sampling regardless of who he may be. As noted above, if one miner stays at the location of the designated occupation, the sampling pump stays with him as long as he is there. However, if he leaves the area for any reason and someone else comes there to perform any work, the pump must be passed from the miner who leaves to the newly arrived miner in order to constantly monitor the atmospheric environment in that area (Tr. 10-11; 15-18).

In support of its position, MSHA asserts that the Mine Act clearly speaks in terms of "mine atmosphere" and requires mine operators to continuously maintain the quality of air to which miners are exposed within underground coal mines. MSHA argues that the regulations have consistently adopted a "high risk" occupation sampling approach which is based upon the rationale that if persons in high-risk occupations are found not to be overexposed to respirable dust, then it could be safely concluded that other miners, in less risky occupations, are protected from excessive concentrations of respirable dust.

Citing the preamble to its regulations, 45 Fed. Reg. 23,990, 23998 (April 8, 1980), which were affirmed in *American Mining Congress v. Marshall*, 671 F.2d 1251 (10th Cir. 1982), MSHA points out that samples for the high risk occupation measure the mine atmosphere in locations in the active workings, rather the exposure of any individual miner for the duration of a shift. MSHA concludes that such a sampling procedure measures the mine

atmosphere in the area of a work position, and that this method of sampling at the working face has been continued under the regulations by providing designated occupation sampling in each mechanized mining unit. MSHA emphasizes the fact that "designated occupation samples are taken in the environment of the occupation in the mechanized mining unit that s exposed to the greatest concentration of respirable dust".

During the course of oral arguments at the hearing, MSHA's counsel pointed out that the designated occupation sampling is indeed area sampling, notwithstanding the use of the word "occupation", and that what is being sampled is the area closest to the longwall return airside, and if any miner is exposed to any dust in that area, he must wear the dust pump (Tr. 21). Counsel reiterated that MSHA's rationale in requiring sampling of the newly designated 060 occupation is that if one samples the area designated as having the greatest concentration of respirable dust, and it is in compliance, then everyone else outby that area would be in compliance (Tr. 83). Counsel stated that "you've got to maintain the environment in compliance", and that MSHA's theory is "the furthest he (miner) goes towards the return air side, he is going into greater concentrations of respirable dust" (Tr. 85-86).

MSHA takes the position that it has not deviated from the regulatory definition of the designated occupation and that it has complied with it. In response to JWR's contention that it failed to follow its policy guidelines when it mandated the change to the new designated occupation, MSHA's counsel pointed out that its policy manual explanation of section 70.207, is an interpretation of the regulations and that section 70.207(e), sets forth the procedure to be followed in the event MSHA is deviating from the regulation in designating an occupation for sampling. Since MSHA has not deviated from the regulation in this case, counsel concluded that there is no need for a comprehensive dust survey or analysis to support the mandated change in question.

Citing the court decisions in *American Mining Congress v. Marshall*, 671 F.2d 1251 (10th Cir. 1982), and *Consolidation Coal Company v. FMSHRC*, 824 F.2d 1071, 1086 (D.C. Cir. 1987), counsel further pointed out that the courts approved of MSHA's requirements regarding the sampling of the mine atmosphere, rather than an individual miner, as an appropriate method of achieving the intent of Congress in insuring compliance with the statutory and regulatory respirable dust requirements (Tr. 310-314).

In response to JWR's contention that it has been singled out for enforcement, MSHA's counsel pointed out that the section 70.207(e)(7) requirement for sampling the miner who works

nearest the return air side of the longwall working face has been in effect since 1980, and that designated occupation 060 has been in place in MSHA District No. 5 since 1988. Counsel asserted that JWR's mine is not the first mine subjected to the 060 designation, and that other mine operators nationwide have this designation. Counsel further argued that it is not disputed that the dustiest area on a longwall is the area nearest the return side of the longwall face. Since the entire purpose of the regulatory scheme is to monitor the mine atmosphere, counsel concludes that to measure anything else would be a disservice to miners and would be inconsistent with the statutory language (Tr. 314-315).

Citing Judge Weisberger's decision in Consolidation Coal Company v. Secretary of Labor, 9 FMSHRC (August 1987), MSHA asserts that the judge addressed the issue of who constitutes "the miner who works nearest the return air side", and looking to the plain language of section 70.207(e)(7), concluded that a violation of that section occurred since the respirable dust sampling device was not alternated between the two miner as they changed position on the longwall face. MSHA points out that the judge specifically noted that the failure to transfer the sampling device to the miner who worked in the tailgate position had "the effect of not providing an accurate indication of exposure of coal dust", Consolidation Coal Company, supra, at 1512.

The UMWA's Arguments

The UMWA has expressed its agreement with the position taken by MSHA in this case. The UMWA takes the position that "passing the pump" (dust sampling device), provides the safest not for all of the miners on the longwall face, and that if the pump is passed to the person closest to the return, and the dust sample is in compliance, then one can be sure that all of the miners working on the face will be exposed to dust which is within the legal limits (Tr. 12-13). The UMWA also believes that the redesignation of the occupation in question for sampling not only complies with MSHA's regulation, but it also provides a safeguard for mine operators who may "try to beat the system" (Tr. 299). Further, the UMWA believes that in order to measure the dust adequately, the pump should stay on the face (Tr. 300).

The UMWA's counsel asserted that the intent of sampling is to prevent miners from contracting black lung and that the regulatory scheme in issue in this case is fashioned to provide a safety net for miners and this is provided by sampling the miner with the highest dust concentration. Given the nature of longwalls, counsel asserted that the dust pump must be passed in order to determine the worst dust concentration. Only in this way can one determined that all miners are breathing clean air (Tr. 319-320).

Findings and Conclusions

Section 202(b)(2) of the Act, 30 U.S.C. 842(b)(2), provides in relevant part that:

. . . 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 such mine is exposed at or below 2.0 milligrams of respirable dust . . . (emphasis added).

The purpose of this respirable dust limitation is stated in section 201(b) of the Act, 30 U.S.C. 841(b), as follows:

. . . it is the purpose of this title to provide to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. (emphasis added).

The statutory limitation of 2.0 milligrams of respirable dust found in section 202(b)(2) of the Act is reiterated in the Secretary's regulations at 30 C.F.R. 70.100(a). JWR is charged with a violation of this regulatory standard, which 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).

MSHA's dust sampling procedures are found in Subpart C, Part 70, Code of Federal Regulations. Section 70.207(a) requires a mine operator to take five valid samples from the designated occupation in each mechanized mining unit on a bimonthly basis. The term "designated occupation" is defined by section 70.2(f), as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration". As correctly noted by MSHA in its pretrial memorandum, the regulations have consistently adopted a "high-risk" occupation sampling approach which is based upon the rationale that if persons in high-risk occupations are found not to be overexposed to respirable dust,

then it could be safely concluded that other miners, in less risky occupations, are protected from excessive concentrations of respirable dust. See: American Mining Congress ("AMC") v. Marshall 671 F.2d 1271 (10th Cir. 1982), where the court upheld MSHA's designated area respirable dust sampling regulations promulgated in 1980. In that case, the court noted that "the designated occupation sampling program is itself an an area sampling program", an stated as follows at 671 F.2d 1256:

The Secretary has demonstrated a rational basis for the designated area sampling program: if the atmosphere in the area of a known dust generation source is in compliance with the statutory standard, then it can safely be assumed that all miners are protected from overexposure to respirable dust. This assumption is justified since no one individual constantly works next to an outby dust generation source over the course of an enterie shift.

The designated occupations upon which the dust sampling device is to be place are identified in section 70.207(e)(1) through (10). The relevant section applicable to the cited mechanized mining unit (MMU), No. 2 Longwall, in this case is section 70.207(e)(7), which provides as follows:

(e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as 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;

MSHA's policy application with respect to the designated occupation sampling procedures pursuant to section 70.207, are found in the following:

1. CMS & H Memo No. HQ-88-44-H (6009), April 4, 1988, from MSHA's Administrator for Coal Mine Safety and Health to all District Mangers, which states as follows (Exhibit G-2):

Recently, it has come to our attention that both operator and inspector sampling of designated occupations (DO's), in some instances, may not be representative of the dust exposure of that occupation. This is because the sampling device is often kept with the individual miner who may not be

performing the duties of the DO during the entire shift. MSHA standards as set forth in 30 C.F.R. 70.207 require that dust samples be taken "from the designated occupation" in each mechanized mining unit (MMU). Under this rule and as established in policy (page II-105, Coal Mine Health and Safety Inspection manual), correct sampling procedures require the sampling device to remain at the DO rather than with the individual miner, even when miners change positions or alternate occupations during the shift. In this way, all miners on the MMU are assured of being protected from exposure to excessive levels of respirable dust if the DO's exposure is at or below the applicable dust standard. Conversely, the practice of keeping sampling devices with individual miners can result in measurements of dust exposure that significantly underestimate the actual exposure of the DO if the miner changes work positions during the shift and takes the sampling device with him to other occupations.

Improper sampling of DO's has been reported and observed particularly at longwall operations. Some specific examples of improper sampling procedures are described in Attachment 1. Section 70.207(e)(7) requires that, except as otherwise directed by the District Manger, longwall DO dust samples must be taken (1) on the miner who works nearest the return air side of the longwall working face, or (2) along the working face on the return side within 48 inches of the corner. Therefore, when sampling is to be done with respect to either (1) or (2), the particular sampling procedure employed should be identified in the operator's ventilation system and methane and dust control plan. In addition the following newly established codes should be entered in the Occupation Code box (Item 11) of the dust data card: case (1) 060-Longwall (Return-Side Face Worker); and, case (2) 061 - Longwall (Return-Side Fixed). For instance, when sampling is done on 060, the sampling device must remain with the miner working nearest the return air side of the longwall working face at all times, even when the miner who was being sampled earlier in the shift is no

longer the one working nearest the return air side.

In many cases, District Managers have directed sampling of DO's other than those specified in Section 70.207. The typical DO's being directed to be sampled are longwall shearer operators. When sampling is conducted at these other occupations, identified through MSHA sampling as being exposed to the highest dust concentration on the MMU, the sampling device must be kept with the DO being sampled during the shift. It is not to remain with the miner if duties or work positions change during the shift.

2) MSHA's Program Policy Manual, Vol. V, Part 70, July 1, 1988, which states in relevant part as follows (Exhibit G-3):

(e) 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 designated occupation (DO). For example, if an operator alternates the duties of the continuous operator on a one-half shift basis between the continuous miner operator and helper, the dust sampler shall be worn for one-half of a shift by the continuous miner operator and the other one-half of a shift by the helper, while each is operating the continuous mining machine, or the sampler shall remain on the machines required by this section.

A change in the designated occupation of an MMU will be considered after the results of samples collected by MSHA indicate that a work position other than those identified in this section should be designated for bimonthly sampling. When the results of a sampling inspection demonstrate appreciably higher respirable dust levels at a nondesignated occupation within an MMU, consideration should be given to changing the designated occupation.

JWR's assertion that requiring it to sample the newly designated 060 occupation, which may involve more than one miner while the sampling pump is passed, does not accurately measure the dust exposure of any one particular miner and is therefore flawed, is rejected. A similar contention was made in *American Mining Congress v. Marshall*, supra, where it was argued that the area sampling program did not provide an accurate measure of any individual miner's dust exposure. The court rejected this argument, concluding that the Secretary's sampling method provided reasonable approximation of actual exposure. Commenting

on the merits of area sampling and personal sampling, the court stated in relevant part as follows at 671 F.2d 1256-1257:

* * * * Nothing in the record supports the conclusion that either type of sampling provides a perfect measure of exposure to respirable dust. Since there is no perfect sampling method, the Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy. The Secretary is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust. On this record, the difference between area and personal sampling is not shown to be so great as to make the Secretary's choice of an area sampling program irrational. Keeping in mind that our task is not to determine which method is better, we hold that the Secretary's choice of area sampling over personal sampling is not legally arbitrary and capricious.

We are not unmindful that area sampling may effectively require lower dust levels than might be required under a personal sampling program. This is because an operator might conceivably be cited for a violation of the 2 mg./m³ standard on the basis of area samples even though no individual miner was exposed to more than 2 mg./m³ of respirable dust during a shift. The fact that in theory the regulation may require operators to maintain a dust level below 2 mg./m³ in its person-by-person impact does not render the regulation legally arbitrary and capricious. We repeat that all proposed sampling methods are less than perfect and are designed to provide only estimates of actual exposure. Since measurement error is inherent in all sampling, the very fact that Congress authorized a sampling program indicates that it intended some error to be tolerated in enforcement of the dust standard. The method selected by the Secretary, while perhaps more burdensome in its impact on mine operators than other methods, is not beyond the scope of his discretion.

* * * * Control of dust at the source will obviously contribute to reducing the level of personal exposure. By contrast, the results of personal samples do not allow identification of dust sources due to the movement of miners through various areas of the mine during the course of a working shift. *Id.* Thus, while a personal sampling system makes possible the identification of discrete individuals who have been overexposed, it does nothing to ensure reduction of dust generation because the source of the dust cannot be determined. Therefore, it clearly appears that area

sampling can rationally be found to be superior to personal sampling as a means of enforcing (as opposed to merely measuring) compliance with the 2 mg./m³ standard.

JWR's contention that the passing of the dust pump from miner to miner during the sampling cycle may jeopardize the integrity of the sample because of mishandling is rejected. JWR presented no evidence to support any conclusion that the five samples which it took and submitted to MSHA, and which reflected noncompliance, were in any way contaminated or otherwise invalid because of any abuse or mishandling. Indeed, JWR's safety supervisor Kimes acknowledged that the five samples subsequently taken to abate the violation were apparently not mishandled, and shearer operator Young, who works on the longwall, testified credibly that he has had no problems in passing the pump to other miners and that the pump can be passed rather quickly without any interruption to production. Further, as noted by the D.C. Circuit in *Consolidation Coal Company v. FMSHRC*, 824 F.2d 1071, 1088 (D.C. Cir. 1987), MSHA's Part 70 regulations contain detailed procedures for mine operators to follow in taking respirable dust samples, and that any risks resulting from misuse of sampling equipment or deliberate contamination of samples lies with the mine operator.

I find no merits in JWR's contention that MSHA has failed to follow its own policy in mandating the change in the designated occupation sampling requirement. I agree with MSHA's position that the policy references which mention sampling as a condition precedent to any change in the designated occupation applies in those instances where MSHA's district manager has directed a change in a designated occupation other than the one specifically referred to in section 70.207(e)(7). In other words, if the change involves an occupation other than 060 (miner who works on the return side of the longwall face), then the policy language seemingly would require sampling to justify that change. In the instant case, MSHA's mandated "change" was in effect an affirmation of the specific requirements found in section 70.207(e)(7), and JWR has not rebutted the fact that the regulatory designated occupation is in fact the one which has the highest concentration of respirable dust on the longwall unit in question.

I find some merit in JWR's arguments that MSHA has not applied the requirement for sampling the 060 designated occupation "across the board" to all mine operators. Since MSHA's position in this case with respect to the requirement that JWR sample the 060 occupation is based on its assertion that it is simply relying on the specific requirement found in section 70.207(e)(7), I find it somewhat contradictory that MSHA has not seen fit to apply the regulation to all mine operators. However,

on the facts of this case, I cannot conclude that JWR has been arbitrarily singled out for special treatment. Mr. Martin's credible and un rebutted testimony reflects that other mine operators in the JWR enforcement district, as well as in at least one other district, have also been required to sample the 060 designated occupation pursuant to section 70.207(e)(7). Mr. Martin confirmed that MSHA intends to implement further changes on a mine-by-mine basis as those mines are found to be out of compliance with the dust requirements based on sampling of occupations other than 060, and that these mines will in the future be required to sample the 060 occupation.

As noted earlier, JWR does not dispute the fact that the dust sample results relied on by Inspector McCormick in issuing respirable dust in the working environment of the cited George A. Koutras mechanized mining unit (MMU) was 2.6 milligrams of respirable dust per cubic meter of air, and that this exceeded the regulatory limit of 2.0 milligrams of respirable dust per cubic meter of air found in the cited section 70.100 (a).

JWR's contention that MSHA acted unreasonably and arbitrarily when it directed it to change the designated occupation from occupation code 044 to 060 for purposes of sampling to insure compliance with section 70.100 (a), is rejected. I agree with MSHA's position in this case, and I conclude and find that in mandating the change in the designated occupation, MSHA acted within its authority and in Strict compliance with the sampling procedures found in section 70.207 (e) (7), and in so doing, it acted reasonably in carrying out the intent of Congress and the Act to insure that miners are protected from excessive concentrations of respirable dust. Under the circumstances I further conclude and find that MSHA has established a violation in this case by a preponderance of the credible evidence, and the contested citation IS AFFIRMED.

ORDER

The contested "S&S" Citation NO. 9883187, July 8, 1991, cited a violation of 30 C.F.R. 70.100 (a), IS AFFIRMED. The contest filed by JWR is DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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