CCASE:
MSHA V. PEABODY COAL
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-691
Petitioner	:	A.C. No. 11-00585-03796
v.	:	
	:	No. 10 Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) with one violation of the mandatory standard at 30 C.F.R. 70.100(a). The general issue before me is whether Peabod violated the cited standard and, if so, what is the appropriate civil penalty to be assessed.

The citation at bar, No. 9941679 charges as follows:

> The results of five (5) respirable dust samples collected by the operator as shown by computer message No. 001 dated April 15, 1991, indicates the average concentration of respirable dust in the working environment of the designated occupation and mechanized mining unit No. 003-0 (036) was 2.1 milligrams per cubic meter which exceeded the applicable limit of 2.0 milligrams per cubic meter.

The cited standard provides as follows:

> 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).

The Secretary's evidence is undisputed. Lewis Raymond, Chief of the Weighing Branch and supervisory physical scientist at the Pittsburgh Technical Support Center of the Federal Mine Safety and Health Administration (MSHA) testified concerning the quality control procedures followed by MSHA in handling respirable dust samples. According to Raymond under the MSHA respirable dust measurement program the operator is required to collect dust samples for high risk occupations. The operator or its agent also completes a data card and sends it along with the sealed respirable dust cassette and filter to MSHA for weighing and analysis. The cassettes are opened by MSHA lab personnel, the filter is removed, and the weight of the filter is recorded. The data is electronically transmitted to the MSHA Information Systems Center in Denver, Colorado. When the average concentration of the five (5) samples exceeds 2.0 milligrams per cubic meter of air (mg/m3) a notice of non-compliance is generated.

Thomas Tomb is Chief of the Dust Division at the MSHA Health and Safety Technology Laboratory in Pittsburgh. He has a Bachelor of Science degree in physics and a master's degree in Industrial Hygiene. According to Tomb, given a finding by the MSHA lab of an average concentration of 2.1 mg/m3 based on five samples, there is an 86 percent confidence level that the amount of respirable dust in the mine atmosphere is above the 2.0 mg/m3 level allowed by the regulations.

As previously noted, Peabody does not challenge the admissibility of this evidence but maintains that such evidence, based upon an 86 percent confidence level that the actual respirable dust concentration exceeded the legal limit of 2.0 mg/m3, is insufficient to establish a violation of the cited standard. The issue as framed by Peabody is whether a violation of the 2.0 mg/m3 standard can be proven by five samples with an average weight of 2.1 mg/m3, when it is conceded that there is only an 86 percent probability that an average 2.1 mg/m3 actually represents a violation of the standard. Respondent maintains that at the 86 percent confidence level, more than one out of 10 results would falsely show a non-existent violation, and that this Commission should establish as a "matter of policy" that such proof is not sufficient.

The only support for Respondent's position however are cases involving statistical epidemiological studies where courts have held as inadmissible those epidemiological studies having less

than a 95 percent confidence level. See Deluca v. Merrell-Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) and Whelan v. Merrell-Dow Pharmaceuticals, Inc., 117 FRD 299 (D.D.C. 1987). In the case at bar however, there is no evidence indicating that an 86 percent level of confidence applied to respirable dust sampling is not the generally accepted criterion for reliability in this field. Indeed the only expert testimony in this regard is to the contrary. Under the circumstances I find that the Secretary has proven by a preponderance of the evidence through credible expert testimony applying statistical analysis establishing that from the average weight of 2.1 mg/m3 of the five respirable dust samples taken in this case it can be inferred that the samples exceeded the 2.0 mg/m3 standard. There is sufficient connection between the evidentiary facts at an 86 percent confidence level and the ultimate fact sought by Secretary to be inferred. Secretary v. Garden Creek Pocahontas Co., 11 FMSHRC 2148 (1989); Secretary v. Mid Continent Resources, 6 FMSHRC 1132 (1984). See also Curtis and Wilson, The Use of Statistics and Statisticians in the Litigation Process, 20 Jurimetrics Journal 109 (Winter (1979). The violation is therefore proven as charged.

Considering the minute differences herein between a violative and nonviolative condition and considering all of the criteria under section 110(i) of the Act, I find that a civil penalty of $100 is appropriate.

ORDER

Citation No. 9941679 is affirmed. Peabody Coal Company is hereby directed to pay a civil penalty of $100 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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