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SOL (MSHA) v. TWENTYMILE COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 91-449 A.C. No. 05-03836-03539
v.	
TWENTYMILE COAL COMPANY, RESPONDENT	Foidel Creek

DECISION

Before: Judge Lasher

In this proceeding the Secretary of Labor (MSHA) originally sought assessment of penalties for a total of five alleged violations pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.SC. 820(a) (1977). Thereafter, on March 2, 1992, the parties filed a Motion to Approve Settlement of four of the five Citations involved in this docket and such is being approved in my Decision Approving Partial Settlement issued simultaneously herewith. The fifth and remaining Citation, No. 9996580, is being submitted on the basis of a written "Stipulation" submitted by the parties on March 2, 1992, which I conclude is sufficient upon which to base this decision since the sole issue is (1) legal rather than factual and (2) is one on one which I have previously ruled in this matter in denying Respondent's motion for summary decision.

The Stipulation in pertinent part provides:

1. On October 10, 1990, Citation No. 9996580 was issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Act").

2. The Citation alleged a violation of 30 C.F.R. 70.100A as follows:

> Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation, Code 036 in mechanized mining unit 006-0 was 2.1 milligrams which exceeded the applicable limit of 2.0 milligrams. See attached computer printout dated

> October 5, 1990. Management will take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.

3. The Citation alleged that the condition significantly and substantially contributed to the cause and effect of a mine safety or health hazard.

4. The miners, who were the subject of the sampling on which the Citation was based, were not wearing respirators at the time the sampling was conducted.

5. The average concentration of respirable dust on which the Citation was based was 2.1 mg/m3.

6. On September 4, 1991, Twentymile filed a Motion for Summary Decision as to the issue of the appropriateness of the "Significant and Substantial" designation.

7. On October 2, 1991, the Administrative Law Judge denied such motion.

8. A hearing in this matter is scheduled for March 20, 1992.

9. The parties agree and stipulate that the only issue for hearing in this matter is whether a citation based upon an average respirable dust concentration of 2.1 mg/m3 may properly be designated as "Significant and Substantial." Twentymile wishes to seek review of such issue by the Commission. The parties believe that a hearing is not necessary on such issue, since the issue is a legal one based upon the Congressional findings contained in the legislative history of the Federal Mine Safety and Health Act and the regulatory history.

10. To that end, the parties agree and stipulate that a violation of the cited standard existed and that, if the citation is designated "Significant and Substantial," the appropriate penalty is $276.00, the full proposed penalty.

11. The parties further agree and stipulate that the decision of the Administrative Law Judge on partial summary decision regarding the issue of the designation of the citation as significant and substantial may be incorporated in the order of the Judge so that review may be sought at this time.

In paragraph 10 of the Stipulation, Respondent concedes the violation charged of 30 C.F.R. 70.1000(a) which provides:

> (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).

In my Order Denying Motion for partial summary decision dated October 2, 1991, referred to in paragraph 11 of the Stipulation and re-adopted here, I found the position of the Secretary in opposition to the motion meritorious and adopted it, citing the decision of Commission Chief Administrative Law Judge Merlin in Consolidation Coal Company, 13 FMSHRC 1076 (July 1991) as dispositive of the issue. Footnote 1)

Judge Merlin's opinion, relying on prior Commission and Federal Circuit Court precedents, is incisive on the question posed here and the holdings and rationale contained therein are, as suggested in my Order Denying Motion referred to paragraph 11 of the Stipulation, incorporated here by reference. In particular, I note and quote from Judge Merlin's decision the section thereof entitled "Precedents," to wit:

> In Consolidation Coal Company, 8 FMSHRC 890 (June 1986), the Commission decided that a respirable dust concentration of 4.1 mg/m3 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/m3 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 1 (1984). The respirable dust violation was admitted (first step) and the Commission held that any exposure above the 2.0 mg/m3 level established a measure of danger to health (second step). 8 FMSHRC at 898. In finding a reasonble 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 over-exposure 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 harm from a violation of an exposurebased 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 required that the same findings be made in each individual case in which a violation occurs. * * *
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> * * * * *
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> The Commission's adoption of the presumption at issue here is consistent with the 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.

Current precedents sustain the validity of the presumption that exposures above the 2.0 mg/m3 limit set forth in Section 70.100(a) are significant and substantial. Accordingly, in terms of the issue presented, it is held that a citation based upon an average respirable dust concentration of 2.1 mg/m3 may properly be designated as "Significant and Substantial." (Footnote 2)

ORDER

1. Citation No. 9996580, including the "Significant and Substantial" designation in Section 10c thereof, is AFFIRMED.

2. Respondent SHALL within 40 days from the date hereof PAY the stipulated penalty3 of $276 to the Secretary of Labor.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. As the parties have stipulated, the only issue here is whether a "citation based upon an average respirable dust concentration of 2.1 mg/m3 may properly be designated as "Significant and Substantial'." In the instant case and in the Consolidation case before Judge Merlin, the dust concentration was the same-- 2.1 mg/m3.

2. The presumption being rebuttable it is further noted that there is no evidence to rebut the same, such as the wearing of protective equipment by employees otherwise exposed. See Stipulation, paragraph 4.

3. See Stipulation, paragraph 10.