FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 5, 1992

KEYSTONE COAL MINING CORP., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 91-1480-R Citation No. 3687890; 8/21/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Emilie No. 1 Mine Mine ID 36-00821
	:	Docket No. PENN 91-1454-R Citation No. 3687888; 8/14/91
	:	Margaret No. 11 Mine Portal # 2 Mine ID 36-08139
	:	Docket No. PENN 92-54-R Citation No. 3687895: 9/20/91
	:	Emily No. 1 Mine Mine ID 36-00821

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 92-114 A.C. No. 36-00821-03761
v.	:	Emilie No. 1 Mine
KEYSTONE COAL MINING CORP., Respondent	:	Docket No. PENN 92-119 A. C. No. 36-08139-03512 Margaret No. 11 Mine No. 2 Portal

<u>Order Denying Motion for Summary Decision</u>

<u>I.</u>

At issue in these consolidated contests and civil penalty proceedings are three citations issued by MSHA Inspector Brady cousins alleging violations of 30 C.F.R. § 70.100(a). These citations were issued pursuant to a "spot inspector" program whereby five different occupations were tested for dust samples during one production shift. On February 7, 1992 the Operator filed a Motion for Summary Decision which was replied to by the Secretary on March 27, 1992, In a telephone conference call between the undersigned and counsel for both parties on April 9, 1992, counsel were requested to provide proper citations in the record to certain assertions set forth in their respective memorandum submitted in connection with the Operator's Motion. In response thereto, the Secretary, on April 10, 1992, submitted certain exhibits which are referred to in the depositions taken by the Operator of Thomas T. Tomb and Brady Cousins, and referenced by the Operator in connection with its Motion.

II.

The citations at issue allege violations of 30 C.F.R. § 70.100(a) which provides, as pertinent, that an operator "...shall continuously maintain the <u>average concentration</u> of respirable dust in the mine atmosphere during each shift to which each miner in the active working of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air... ." The regulations do not define the term "average concentration", but that term is defined in Section 202(f) of the Federal Mine Safety and Health Act of 1977 as follows:

> For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) <u>as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of this Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.</u> (Emphasis supplied.)

The Mine Safety and Health Administration (MSHA) in promulgating respirable dust standards, (which include section 70.100(a) <u>supra</u>), set forth the following language under

the heading Discussion of Maior Issues:

> The Secretary of the Interior and Secretary of Health, Education, and Welfare conducted continuous multi-shift sampling and single-shift sampling and, after applying valid statistical techniques, determined that a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m3. Accordingly, the Secretary of Interior and Secretary of Health, Education, and Welfare prescribed consecutive multi-shift samples to enforce the respirable dust standard. (45 Fed. Reg. 23997 (April 8, 1980)

In July 1991, the Secretary commenced a "spot inspection" program sampling the mine atmosphere for respirable dust for only one eight hour production shift.

III.

In essence, it is the Operator's argument that, pursuant to Section 202(f), supra, once the Secretary makes a finding that a single shift would not accurately represent atmospheric condition during a shift, it cannot cite an Operator for a violation of a dust standard based on a single shift sample. The Operator argues that such a finding was made by the Secretary in connection with the promulgation of the dust standards (45 Fed. Reg., sunra,) and that, having found that a single shift sample is unreliable, the Secretary cannot depart from such a finding without similar resort to the normal rule making 'procedures referred to in section 101 of the Act.

According to the clear language of Section 202(f) supra, the "average concentration" of respirable dust is measured only over a single shift, unless the Secretary makes a finding, pursuant to the rule making procedures of the Administrative Procedures Act, that single shift measurement will not @'accurately represent such atmosphere conditions during such shift." The finding of the Secretary relied on by the Operator, 45 Fed. Reg. supra, does not explicitly conclude that a single shift'measurement per se, will not accurately reflect conditions during the shift. To the contrary, the finding of the Secretary is based on a determination that a single shift sample should not be relied upon only "...when the respirable dust concentration being measured was near 2.0 mg/m3." (emphasis added.) The Secretary did not make any explicit finding subject to the rule making procedures of the Administrative Procedure Act as to what dust

concentrations are to be considered "near" 2.0 mg/m3.[1] I thus find that it has not been established that the Secretary has made a finding, in accordance with section 101(f) of the Act concerning the unreliability of single shift samples in general.

IV.

In addition, the Operator argues that dust samples taken during only one shift are violative of the Secretary's policy and hence are invalid. In this connection the Operator apparently refers to the following statement by the Secretary as indicative of her policy not to take samples based only on one shift:

> Compliance determinations will generally be based on the average concentration of respirable dust measured by five valid respirable dust samples taken by the operator during five consecutive shifts, or five shifts worked on consecutive days. Therefore, the sampling results upon which compliance determinations are made will more accurately represent the dust in the mine atmosphere than would the results of only a single sample taken on a single shift. (45 Fed. Reg. supra at 23997)

The Operator also refers to a handbook issued on February 15, 1989, setting forth procedures for MSHA personnel to follow in conducting inspections pertaining to respirable dust, which contains the following language: "A Decision of Non-compliance Cannot be Made on One Sample." (Exhibit 18, table 1 page 1.12).

The Secretary in her Response to Motion for Summary Decision, does not contest the Operator's assertions that, prior to the implementation of the present policy, the policy was to take samples over five shifts. Instead, the Secretary argues, in essence, that the shift to single shift sampling does not change the Operator's obligation ". ..to continuously maintain an average concentration of respirable dust in active working at no greater than 2.0 mg/m3", and that the only change has been "the manner in which the Secretary will prove a violation of Section 70.100(a)."

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[1]A document entitled, Resoirable Dust Spot Inspection and Monitorinq Program for Underqround Mines, provided to inspector Cousins when he was trained in connection with the spot inspection program in July 1991, appears to provide that citations for accumulations of dust measured during a single shift shall not be issued where the concentrations are below 2.5 mg. This would appear to indicate the Secretary's intention to limit the finding that single shift dust samples are not reliable, to those situations where the concentrations are at or less than 2.5 mg. In the citations at issue the dust concentrations found were at least 2.8 mg.

The record before me does not contain a sufficiently clear presentation of evidentiary facts to allow me to reach a conclusion as to whether the shift to a single shift sampling procedure affects the Operator's substantive rights, or whether it is merely a change in a scientific method for determining whether the standard has been exceeded. An evidentiary hearing is thus necessary to resolve this issue.

V.

The Operator also refers to 30 C.F.R. § 70.2(p) which defines a valid respirable dust sample as one that is "collected and submitted as required by this part, and not voided by MSHA". In this connection, references are made to the Self-Study Technician Manual ("the Manual") which requires samples having a net weight gain of 1.8 mg or greater to be checked for oversized materials (Exhibit 20). Although Cousins did not check for oversized particles, there is no clear indication that the manual sets forth procedures that unequivically pertain to the responsibilities of an inspector. Hence, I cannot find the presence of a definite MSHA policy mandating an inspector to check for oversized particles. However, there remains a factual issue as to whether Cousins should have voided the samples taken. This issue can be resolved only by a full examination of all the facts in existence at the time the samples were taken. As pointed out by the Secretary in her response, there are differences between the version of Cousins set forth in his deposition, and factual assertions contained in the affidavits of James Manuel (Exhibit 4) and Dennis R. Malcolm (Exhibit 10). As such a hearing is necessary to resolve these conflicts (See, 29 C.F.R. § 2700.64(b))

Therefore, for all the above reasons, the Motion for Summary Decision is DENIED and a hearing in this matter will be held, as previously scheduled, on June 2, 3 and 4.

Avram Weisberger
Administrative Law Judge

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