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SOL (MSHA) V. JEWELL SMOKELESS COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. VA 91-596 A.C. No. 44-00649-03537
v.	Coronet Jewell Prep Plant #2
JEWELL SMOKELESS COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Joseph W. Bowman, Esq., Street, Street, Scott & Bowman, Grundy, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks a civil penalty assessment in the amount of $50 for an alleged violation of mandatory reporting standard 30 C.F.R. 50.20(a). The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Grundy, Virginia. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty, and (2) the appropriate civil penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act. 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; Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 50.20(a).

4. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5):

1. The respondent is the owner and operator of the Coronet Jewell Preparation Plant #2, and is subject to the jurisdiction of the Act.

2. The Commission has jurisdiction in this matter and the presiding judge has jurisdiction to hear and decide this case.

3. A copy of the contested citation was duly served on the respondent or its agent.

4. The payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

Discussion

The contested section 104(a) non "S&S" Citation No. 3509275, March 20, 1991, cites an alleged violation of mandatory reporting regulation 30 C.F.R. 50.20(a), and the cited condition or practice states as follows:

> The operator did not report to MSHA on Form 7000-1 an occupational illness within ten working days after being notified of the illness. The operator was notified in September 1986 and did not report it until 9-6-88. This citation was issued as the result of a Part 50 audit.

Petitioner's Testimony and Evidence

MSHA Surface Mine Inspector James R. Smith testified that he has inspected the respondent's mining operations for several years, including the No. 2 Preparation plant. He confirmed that he conducted an "audit type of inspection" of the respondent's accident, medical, and compensation reports in March 1991.

Safety Director Gerald Kendrick made the records available, and Mr. Smith found a copy of an accident report Form 7000-1, pertaining to mine employee Woodrow Stacy which reflected that the company had been notified of an accident on November 11, 1985, and that Mr. Kendrick did not report it to MSHA until September 6, 1988. (Exhibit P-1; Tr. 11-18).

Mr. Smith confirmed that he issued the contested citation in question (Exhibit P-3), citing a violation of section 50.20(a), because Mr. Stacy's pneumoconiosis condition was diagnosed on November 2, 1985, and it was not reported to MSHA until the form was submitted on September 6, 1988. The regulation required it to be reported within 10 days of the diagnosis. Mr. Smith stated that he discussed the matter with Mr. Kendrick, and that Mr. Kendrick acknowledged that he was aware of the need to report the matter in 1986 but that company management told him to wait until the case went to court and was settled. Mr. Smith confirmed that he based his "high negligence" finding on the fact that 2 years had past from the time the company was first notified and the time it was reported to MSHA (Tr. 19-22).

On cross-examination, Mr. Smith confirmed that he received instructions on Part 50 audits from his supervisor Larry Worrell "several years ago", and that he was also instructed "on all parts of Part 50" (Tr. 23). Mr. Smith confirmed that he first saw the form submitted by Mr. Kendrick during the audit, and he had no doubt that it was submitted on September 6, 1988. Based on his construction of the regulation, the report should have been submitted within 10 days of November 2, 1985. Mr. Smith confirmed that the citation he issued states that the respondent failed to report Mr. Stacy's alleged black lung condition within ten days of being notified of the illness, and he believed that the cited regulation uses that term. He further confirmed that he interpreted the November 2, 1985, notification date to be the date of diagnosis of the illness (Tr. 24-28).

MSHA Supervisory Mine Inspector Larry J. Worrell testified that a mine operator must retain accident and illness reporting records for a 5-year period, and he explained the purpose of an audit of these records and the procedures followed in conducting an audit (Tr. 31-37). He confirmed that he was present for part of the time during Mr. Smith's audit for the purpose of monitoring his inspection, and he reviewed some of the report forms to insure that Mr. Smith was making the correct decision with respect to the reporting requirements. Mr. Worrell stated that Mr. Smith showed him the report form submitted by Mr. Kendrick and he concurred in Mr. Smith's decision to issue a citation (Tr. 40).

Based on his review of the report form in question, Mr. Worrell agreed with Mr. Smith's finding of a violation of section 50.20(a). Mr. Worrell explained that the form reflects

that the respondent was notified on November 2, 1985, that a diagnosis of black lung was delivered to the company on that date, and it was not reported until September 6, 1988, more than the 10 working days required by the regulation (Tr. 41). Mr. Worrell agreed with Mr. Smith's high negligence finding and he believed that the respondent knew or should have known about the reporting requirement and there were no mitigating circumstances (Tr. 43).

Mr. Worrell stated that based on his interpretation of the regulation, the time frame within which a mine operator must report an illness such as black lung begins to run on the day the employee notifies the operator that he has been diagnosed as having black lung. He explained further as follows at (Tr. 44-45):

> Q. And why do you interpret it that way?
>
> A. Well, you can't hold a company responsible---. A guy . . . a person can make a . . . go to a doctor and have a x-ray and become diagnosed, he may not let the company know for two (2) months, or three (3) months, or whatever. So they're really not, in my opinion required to report until they become aware of this condition. Now after they become aware of this condition, then that's when they have to meet the ten (10) day reporting requirements.

On cross-examination, Mr. Worrell confirmed that regulatory section 50.20 does not contain the term "notification", and simply states that an illness must be reported within 10 working days of the diagnosis (Tr. 48). He confirmed that the only circumstances he was aware of to support the high negligence finding was the "accident" date of November 2, 1985, the fact that it was not reported until approximately 2 years later, and that the respondent knew or should have known about the reporting requirement found in section 50.20(a) (Tr. 50).

In response to several hypothetical questions concerning multiple x-rays and x-ray interpretations, Mr. Worrell stated that a mine operator is obliged to file a report with MSHA "when the company was notified. . . the first notified, the first diagnosis of pneumoconiosis. . . . " or "whenever the company is notified in however manner they want to be . . they are notified, when it comes that they have a diagnosis of pneumoconiosis, they are required to report it" (Tr. 54, 56). He confirmed that he had no knowledge that the respondent ever received a diagnosis of pneumoconiosis and stated that "I'm going with this 7000-1 that was submitted to our office" (Tr. 56).

In response to further questions, Mr. Worrell stated that most mine operators will state on the MSHA form that an employee

"alleges" an injury or illness until the claim is either settled or a compensation award is made. He agreed that section 50.20(a) does not require an operator to submit a report within 10 days of notification of an illness or injury, and that the regulation only uses the term "diagnosis". He confirmed that he did not know whether or not Mr. Stacy presented the respondent with any x-rays or any diagnosis of his alleged black lung condition.

Mr. Worrell believed that Inspector Smith interpreted Mr. Stacy's allegation that he had black lung to be a diagnosis. Mr. Worrell identified a copy of a report which was sent to the Virginia Industrial Commission and which was in the mine file reviewed by Mr. Smith during his audit (Exhibit P-4). Mr. Worrell stated that he was with Mr. Smith when he reviewed the file and that the respondent made a copy of the report for him. Mr. Worrell explained that this form is filed by the company with the state compensation commission and that it was in the company file with the MSHA 7000-1 form (Tr. 62-63). The report reflects that it was submitted on February 23, 1987, and it states that Mr. Stacy alleged that he contacted pneumoconiosis (Tr. 64).

Respondent's Testimony and Evidence

Michael G. Prater testified that he is employed by the respondent and serves as the manager of workers' compensation, compliance and assessment officer, and personnel officer. He confirmed that he was aware of Mr. Stacy's compensation claim filed against the respondent alleging that he had received a diagnosis of an occupational disease (Tr. 82). He confirmed that he received a copy of a hearing application (Exhibit P-5) filed by Mr. Stacy with the Industrial Commission of Virginia in connection with his black lung claim. The document was mailed on April 25, 1986. He obtained the November 2, 1985, date from that document and used it when he filed reports with MSHA and the state agency (Exhibits P-1 and P-4; 83-84).

Mr. Prater confirmed that the letter he received from the Virginia Industrial Commission, dated April 25, 1986, was the first notice he received that Mr. Stacy was alleging that he had received a diagnosis of an occupational lung disease (Tr. 85). Mr. Prater stated that he never received the x-ray film upon which Mr. Stacy's claim was based, but he did receive copies of two interpretation reports from two doctors which were included with the copy of the hearing application and letter received from the Virginia Industrial Commission (Exhibits P-5 through P-7; Tr. 86-87). Mr. Prater further confirmed that he requested Mr. Stacy's chest x-ray from his attorney, but was advised that the film had been lost and he was never able to obtain it (Tr. 88).

Mr. Prater stated that he received another x-ray film of Mr. Stacy in September, 1986, and he identified a copy of the radiology report dated September 30, 1986, interpreting that film (Exhibit R-1; Tr. 90). He confirmed that he had requested the doctor to read the x-ray and give him a report. He further confirmed that 10 additional doctors were asked to review the film and to give the respondent their reports, and he produced copies of those reports from his files (Exhibit R-3; Tr. 92-93). Mr. Prater stated that Mr. Stacy's claim was scheduled for a hearing on August 31, 1988, before the Virginia Industrial Commission, but a settlement was reached with Mr. Stacy on August 31, 1988, and it was ultimately approved by the Commission on September 19, 1988 (Exhibit P-8; Tr. 94-95).

Mr. Prater stated that after Mr. Stacy's claim was settled, he sent a Form 7000-1 and the state "First Report of Accident" form to safety director Gerald Kendrick and told him that since Mr. Stacy's claim had been settled a report needed to be filed with MSHA (Exhibits P-1, P-4, Tr. 96). Mr. Prater confirmed that he always handled the reporting of alleged diagnoses of occupational illnesses to MSHA in this same way in the past, and he explained his usual practice in this regard (Tr. 96-98). He stated that the respondent has never considered a disease or illness to be reportable to MSHA until such time that a decision is received from the Industrial Commission of Virginia, and this is what was done in Mr. Stacy's case (Tr. 99).

Mr. Prater stated that he receives approximately twenty to forty state occupational disease claims a year. He confirmed that there were 20 interpretations or readings made of the x-ray film actually received in Mr. Stacy's case, and three of them were lost (Tr. 100).

On cross-examination, Mr. Prater confirmed that respondent's practice has been to wait for the state disposition of a compensation claim before reporting an occupational incident to MSHA (Tr. 100). He further explained his position as follows at (Tr. 101-102):

Q. And you have a background in health?

A. Yes, ma'am.

Q. In your opinion, do you think that a judicial decision or settlement agreement could ever be considered a diagnosis?

A. Well, I think that a judicial . . . well, considering the difference in opinion as to black lung diagnosis, I think it's as good as any.

Q. You think that you could call a judicial decision or settlement a diagnosis?

A. I could say that the judge that. . . that rules on these claims has an understanding and has a knowledge of black lung as good as anybody and he could take before him readings, x-ray readings, from so called, or whatever, B-readers, and he could make a determination as to where the preponderance of that evidence lies, and that's exactly what we rely on.

Q. Are you saying that you think a judge can make a diagnosis?

A. I . . . I . . . they do in the State of Virginia. I mean, not a diagnosis, but they make a decision as to whether or not a man has black lung.

Q. So the judge is not making a diagnosis, is he?

A. No. No, he's not.

Mr. Prater conceded that regulatory section 50.20, refers to a diagnosis of occupational injury or illness and does not refer to any judicial decisions or settlements (Tr. 102). He also confirmed that the regulation does not further define the term "diagnosis" (Tr. 103). He believed that he was following the correct procedure in this case, and he stated that "the way we interpreted it to mean was when you got a decisive decision as to whether or not a man had a disease or diagnosis was when we reported it" (Tr. 104). Mr. Prater confirmed that as of the latter part of April, 1986, he was aware of Mr. Stacy's state application for a hearing and the x-ray interpretations made by two doctors (Tr. 110).

Gerald E. Kendrick, respondent's coordinator of health and safety, stated that one of his responsibilities is to file MSHA report Form 7000-1. He stated that he prepared the MSHA Form 7000-1 (Exhibit P-1), from the information provided on the state First Report of Accident (Exhibit P-4). He confirmed that these forms were sent to him by Mr. Prater, with a note attached, on August 31, 1988, and that prior to this time he was not aware of any allegation or diagnosis that Mr. Stacy had an occupational lung disease (Tr. 115-116).

Mr. Kendrick stated that he gave Mr. Stacy's file to Inspector Smith during the audit in question and he explained his discussion with Mr. Smith as follows at (Tr. 117-118):

A. With this, he asked me if I was aware of what the regulations required, that pneumoconiosis be reported, claims . . . not claims, but people with pneumoconiosis be

reported, and I told him that I did. And if in fact that this gentlemen had pneumoconiosis in 1986, then it probably should have been reported. So then I said, "But in the meantime, Gary Prater handles all the compensation claims and I'll let him come down and explain that to you." So Gary came to our office and explained the compensation case with him and Mr. Worrell.

Q. Okay. Let me ask you . . . there's been . . . did you ever indicate to Mr. Smith that you . . . uh . . . were aware, or that it was your interpretation of that regulation that you had to report this injury . . . or this within ten (10) days of learning of the man's claim, or within ten (10) days of the diagnosis, but that you had been instructed to do otherwise by management?

A. That's a good question. I don't remember specifically what was said. I don't recall . . . I don't recall discussing that with him, no. The only thing I do recall is that we were talking about this black lung claim and . . . uh . . . I what I referred to him was that I thought that all confirmed black lung cases should be reported. And in those cases, when they were confirmed was when Gary and them took them to court, or settled them, or whatever the case may be with the Commission.

On cross-examination, Mr. Kendrick stated that his purported statement to Inspector Smith that he was aware of the need to report Mr. Stacy's alleged black lung condition in 1986 was taken out of context. Mr. Kendrick explained that "I did make a statement that I was aware that black lung case are to be reported . . . confirmed. That was my understanding with what the regulations say, or aware of compensation had been made" (Tr. 119). He stated that he would not have known about Mr. Stacy's conditions in 1986 because he did not receive the report from Mr. Prater until 1988, which was the first time he saw a report on a black lung case. He believed that the "date of injury" date of November 2, 1985, shown on the report form, was inappropriate, and that the date on which an illness or injury is totally confirmed should be used because "about any doctor in this county will, and in most cases have diagnosed people with black lung and they never had it" (Tr. 121). Mr. Kendrick agreed that the November 2, 1985, x-ray report would be the date of diagnosis (Tr. 121).

Petitioner's Arguments

Petitioner states that in the course of an audit conducted on March 20, 1991, MSHA Inspector Smith and his supervisor, Inspector Worrell, met with the respondent's safety coordinator Kendrick who provided them with the necessary mine reporting files. The inspectors began checking the respondent's records

against MSHA's records, to confirm that it had reported all reportable injuries and illnesses of which the respondent was aware during the audit period. While examing these records, Inspector Smith discovered an MSHA 7000-1 report form that had been completed by Mr. Kendrick (Exhibit P-1). The subject of this form was mine employee Woodrow Stacy who had filed a state workers compensation claim for pneumoconiosis. The form caught the inspector's attention because the "date of accident" (illness) indicated was November 2, 1985, the date of the first x-ray report that stated that Mr. Stacy had pneumoconiosis, and Mr. Kendrick had not completed the form until nearly three years later, on September 6, 1988. The inspector was aware that section 50.20(a), required the form to be filed with MSHA within 10 working days after an operator has been notified that an occupational illness has been diagnosed. MSHA points out that although section 50.20(a) appears to require reporting within 10 days of a diagnosis, the inspectors testified that MSHA requires that an operator report an occupational illness within 10 days of becoming aware of such a diagnosis, and that Inspector Worrell testified that it would be unreasonable to attempt to hold an operator liable for not reporting a diagnosis of which it is unaware.

The petitioner asserts that Mr. Kendrick confirmed that the required report form had not been filed with MSHA within ten days after the company became aware of Mr. Stacy's diagnosis, and that it was the company's practice to wait until an employee had filed a state worker's compensation claim for pneumoconiosis, and the company either had lost or settled the case, before the company would file a report with MSHA. In addition, petitioner points out that the inspectors also found in the company's files a note attached to an Industrial Commission report regarding Mr. Stacy from Mr. Prater to Mr. Kendrick directing him to "please file accident report on this O.D. claim as it was settled on 8/31/88" (Exhibit P-4). Petitioner concludes that this confirmed for the inspectors the company's practice to wait more than 10 days after being notified of an occupational disease diagnosis before filing a report with MSHA. Under all of these circumstances, the inspectors concluded that a violation of section 50.20 had occurred, and although they did not know the exact date on which the respondent had been notified of the diagnosis, it was obvious to the inspectors that more than 10 days had elapsed between the date on which the company was notified of the diagnosis, and the date on which it filled out the form.

The petitioner cites the hearing testimony of the respondent's worker's compensation specialist Prater verifying that the respondent was aware, well before September 6, 1988, that a doctor had determined that Mr. Stacy had pneumoconiosis, Petitioner states that Mr. Prater confirmed that the respondent received a letter dated April 25, 1986, from the Virginia Industrial Commission notifying the respondent that Mr. Stacy had

filed a claim for worker's compensation and had requested a hearing, and that included with the letter were two x-ray reading reports from two doctors (Ermaz and Fisher), of Mr. Stacy's x-ray film. The reading by Dr. Ermaz was of the film dated November 2, 1985, and the reading by Dr. Fisher was a March 13, 1986, rereading of the November 2, 1985, film. In both instances, the doctor's reported that Mr. Stacy had pneumoconiosis. Under these circumstances, the petitioner concludes that there is no question that the respondent was notified in April 1986, that Mr. Stacy had pneumoconiosis.

The petitioner asserts that after proceeding to defend against Mr. Stacy's compensation claim, a settlement was reached on August 31, 1988, (Exhibit P-8), and Mr. Prater instructed Mr. Kendrick to report the diagnosis of pneumoconiosis to MSHA. Mr. Prater filled out the form on September 6, 1988, and filled in the date of November 2, 1985, in the space provided as the "date of accident", which is the date of the first x-ray report concluding that Mr. Stacy had pneumoconiosis.

The petitioner points out that section 50.20 provides that if an occupational illness is diagnosed as one of those listed in section 50.20-6(b)(7), it must be reported to MSHA. Since pneumoconiosis is listed as an occupational disease, it must be reported. The petitioner argues that the definition of "occupational illness" found in section 50.2(f), does not help the respondent's case. "Occupational illness" is defined as "an illness or disease of a miner which may have resulted from work at a mine or for which an award of compensation is made". The petitioner concludes that it is clear that whenever either of these factors occurs--an employee has an illness which may have resulted from work at a mine, or, an award of compensation is made--an operator must report the existence of a diagnosis to MSHA. The petitioner points out that if the regulations had defined occupational illness as "an illness or disease of a miner which may have resulted from work at a mine and for which an award of compensation is made", then the respondent would be justified in waiting for the outcome of a state claim before reporting. However, on the facts of this case, once the respondent was aware that Mr. Stacy had been diagnosed with pneumoconiosis, a disease that clearly may have arisen from work in a mine, it did not have the option of waiting for several years for Mr. Stacy's compensation claim to be resolved before reporting to MSHA.

Citing a dictionary definition of the term "diagnosis", the petitioner maintains that there is no doubt that each of the x-ray reports that the respondent received in April 1986, constitutes a diagnosis of pneumoconiosis. The petitioner points out that a diagnosis is not necessarily a declaration that has been proven definitively, but rather, a diagnosis is a statement made in the process of determining the nature of a disorder.

Petitioner concludes that the possibility that another doctor subsequently could conclude that a patient does not in fact have pneumoconiosis does not negate the fact that an earlier statement concluding that the patient does have the disease is a diagnosis. In any event, petitioner points out that the respondent's witnesses have not denied that the x-ray reports received in April 1986 are diagnoses of pneumoconiosis, and that Mr. Prater made it clear in his request for a civil penalty conference that he views the two x-ray reports as diagnoses of pneumoconiosis, and stated that "Jewell Smokeless does not feel that this citation is justified because a diagnosis of an illness without an award of compensation from the Industrial Commission, is not proof of illness." (Exhibit P-10). Petitioner concludes that it appears that the respondent does not dispute that the x-ray reports are diagnoses of pneumoconiosis; but rather, the respondent does not feel that it should be required to report a diagnosis.

The petitioner maintains that section 50.20(a) specifically provides that operators must report each occupational illness that is diagnosed, and that there is no regulatory basis for the respondent's practice of waiting for the outcome of a state worker's compensation case before deciding whether or not to report such an illness to MSHA. The petitioner points out that Mr. Prather testified that he is aware that a judge does not make a diagnosis, and that the regulations say nothing about reporting to MSHA each time that a state worker's compensation board decides that a claimant is entitled to an award of compensation, or each time that a company decides to settle a case with an employee.

Finally, the petitioner maintains that the respondent's stated reporting practice fails to advance MSHA's interest in collecting full and current information on the occurrence of pneumoconiosis. In response to the respondent's argument that it should be presented with more proof of pneumoconiosis before it should be required to file a report with MSHA, the petitioner points out that the respondent delayed reporting until after Mr. Stacy obtained a worker's compensation settlement, which is not a definitive statement that an employee has an occupational disease, and thus delayed reporting a diagnosis of pneumoconiosis for approximately 2 years, in violation of the regulations, for no valid reason. In response to Mr. Prater's testimony that the respondent would not report a diagnosis of pneumoconiosis unless an employee had filed a state claim, the petitioner points out that in practice, not every miner who obtains an X-ray reading diagnosing pneumoconiosis files a claim for compensation. Under the circumstances, the respondent's reporting method, if allowed to continue, would result in underreporting of pneumoconiosis.

Respondent's Arguments

In support of its case, the respondent states that this proceeding began when Woodrow Stacy, one of its employees, alleged that he had been given a diagnosis of an occupational lung disease on November 2, 1985, and in April of 1986, filed a claim with the Industrial Commission of Virginia alleging occupational lung disease. The chest X-ray upon which Mr. Stacy's alleged diagnosis was based was lost, and Mr. Stacy allegedly had another chest X-ray made on September 12, 1986, which was initially read as showing no evidence of an occupational lung disease (R-1). The September 12, 1986, chest X-ray was interpreted by numerous physicians, most of whom were of the opinion that the X-ray showed no evidence of an occupational lung disease (R-3). Nevertheless, the respondent settled the claim in which Mr. Stacy was alleging that he had contracted an occupational lung disease in order to avoid further litigation, and following that settlement reported to MSHA on September 6, 1988, the fact that Mr. Stacy had alleged that he had contracted coal worker's pneumoconiosis. Two and one-half years later, while performing an audit, Inspector Smith found a copy of the Form 7000-1 in the respondent's mine records and issued the contested violation on the ground that the respondent had failed to report an occupational illness within 10 working days after being notified of the illness.

The respondent asserts that according to its interpretation of the reporting requirements of sections 50.20 and 50.20-6, in a situation where an employee has filed a claim for monetary benefits under the Worker's Compensation Act based on an allegation of a diagnosis of an occupational lung disease, its obligation and past practice has been to report the claim to MSHA after it is either settled by the claimant and the operator or the State Industrial Commission finds that the evidence supports the claim of an occupational disease. Consistent with this interpretation, the respondent maintains that Mr. Stacy's allegation of an occupational lung disease was reported to MSHA on September 6, 1988, in a timely fashion within 10 days of the compromise settlement reached on August 31, 1988, and the Order of the Commission approving the settlement.

The respondent argues that since the cited reporting regulation is penal in nature, it should be strictly construed against MSHA, and that the issuance of the citation two and 1-1/2 years following the filing of its September 6, 1988, report makes it almost impossible to determine the construction MSHA placed on the regulations at the time the violation was issued. The respondent points out that the violation was issued because it allegedly was notified of Mr. Stacy's occupational illness in September, 1986, and did not report it until September of 1988. The respondent further points to the testimony of Inspector Smith

that based of his interpretation of section 50.20(a), the respondent was required to report to MSHA on or before November 12, 1985, 10 days after the November 2, 1985, date of the "Accident" (Illness), shown in item #6 of the MSHA reporting form submitted by safety director Kendrick (Exhibit P-1).

The respondent concludes that MSHA does not rely on a literal interpretation of section 50.20(a). The respondent points out that Mr. Stacy alleged that he had received a diagnosis of an occupational disease on November 2, 1985. Since it is uncontradicted that the respondent was unaware of the alleged diagnosis until late April or early May, 1986, respondent concludes that a literal application of the regulation would make it impossible for it to have reported the occupational illness within 10 days of the alleged diagnosis.

The respondent further concludes that the only way for a violation to materialize out of the regulations and circumstances of this case is for MSHA to read into the regulation a notice requirement. In support of this conclusion, the respondent asserts that even though the regulation does not require it to take any reporting action based on notification, Inspectors Smith and Worrell have interpreted it that way, but the respondent has not.

In response to Inspector Worrell's suggestion that the purpose of the cited reporting requirement is "to give MSHA a handle on how many illnesses and injuries are happening in the coal industry", the respondent asserts that no explanation is offered as to how an interpretation that requires the reporting of a notification of alleged diagnoses of occupational lung diseases helps in attaining that goal. Respondent concludes that the reporting of diagnoses of alleged occupational lung diseases could result in nothing but badly skewed "factual" data, and it submits that the information that is actually sought by the regulation is how many injuries or illnesses occur, and not how many employees allege that a doctor has given them a diagnosis of an occupational lung disease or how many doctors have allegedly given employees diagnoses of occupational lung diseases, without regard to the actual existence or non-existence of the disease process.

Finally, the respondent maintains that there is no reportable occupational illness under the circumstances of a claim such as Mr. Stacy's (where an employee is seeking monetary benefits based upon allegations that he has an occupational lung disease) until the conclusion of the compensation claim either by settlement or the entry of an award finding that the claimant does have an occupational disease. The respondent suggests that there is no reportable occurrence if an employee has no occupational disease, or it is found that he has no occupational disease. Further, if as suggested by MSHA, the alleged diagnosis

of an occupational disease by virtue of an alleged interpretation of a chest X-ray consistent with an occupational disease is all that is required to trigger the reporting requirements, then on he facts of Mr. Stacy's claim, respondent concludes that it was impossible for it to comply with the regulatory reporting time requirements, and in either event, the violation should be vacated.

Findings and Conclusions

The respondent is charged with an alleged violation of the reporting requirements found in 30 C.F.R. 50.20(a), which states in relevant part as follows:

> Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1 . . . . Each operator shall report each . . . occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which . . . an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in sections 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in section 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within 10 workings days after . . . an occupational illness is diagnosed . . . (Emphasis added).

Section 50.20-6(b)(7)(ii) states the criteria and instructions for completing MSHA Form 7000-1, and reporting an occupational illness, and it states in relevant part as follows:

> (7) Item 23. Occupational Illness. Circle the code from the list below which most accurately describes the illness. These are typical examples and are not to be considered the complete listing of the types of illnesses and disorders that should be included under each category. In cases where the time of onset of illness is in doubt, the day of diagnosis of illness will be considered as the first day of illness.
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> * * * *
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> (ii) Code 22-Dust Disease of the Lungs (Pneumoconioses). Examples: Silicosis, asbestosis, coal worker's pneumoconiosis, and other pneumoconioses.

In the course of pretrial discovery in this matter, the petitioner provided the respondent with a copy of an MSHA Policy

Letter No. P92-III-2, effective May 6, 1992, after the date of the issuance of the contested citation, clarifying the Part 50 "silicosis or other pneumoconioses" reporting policy. The letter states in relevant part as follows:

> Diagnosis of an occupational illness or disease under Part 50 does not automatically mean a disability or impairment for which the miner is eligible for compensation, nor does the Agency intend for an operator's compliance with Part 50 to be equated with an admission of liability for the reported illness or disease. MSHA views a disability as distinguishable from a diagnosis of silicosis or other pneumoconioses in that a diagnosis would be reportable to MSHA if there is evidence of exposure coupled with an X-ray reading of 1/0 or above, using the International Labor Office (ILO) classification system . . . (Emphasis added)
>
> MSHA's position is that any medical diagnosis of a dust disease or illness must be reported under 30 C.F.R. part 50 reporting procedures. A medical diagnosis may be made by a miner's personal physician, employer's physician, or a medical expert.
>
> If a chest x-ray for a miner with a history of exposure to silica or other pneumoconioses causing dusts is rated at 1/0 of above, utilizing the ILO classification system, it is MSHA's policy that such a finding is a diagnosis of an occupational illness, in the nature of silicosis or other pneumoconioses within the meaning of 30 C.F.R. Part 50 and, consequently, reportable to MSHA.

MSHA Program Policy Information Bulletin No. 87-4C and 87-2M, also produced during pretrial discovery, dated August 31, 1987, states in relevant part as follows:

> Title 30, Code of Federal Regulations, Part 50 requires mine operators to report occupational illnesses of miners. A miner is defined as "any individual working in a mine," and occupational illness is defined as "an illness or disease which may have resulted from work at a mine or for which an award of compensation is made." Illnesses that are reportable include . . . coal worker's pneumoconiosis (black lung), . . . Part 50 further requires that the operator mail a completed Form 7000-1 to the Mine Safety and Health Administration (MSHA) within 10 working days after a miner is diagnosed as having an occupational illness.

> Industry reporting activity for occupational illness suggests there is operator uncertainty about the relationship between Part 50 reporting obligations and the information provided to the operator through Federal and State occupational illness compensation programs.
>
> In order to ensure that data reported by mine operators reflects the incidence of occupational illnesses associated with the mining industry, the reporting requirements of Part 50 apply when compensation programs provide an operator notice that an individual has been awarded compensation for or is diagnosed as having an occupational illness resulting from employment in a mine, regardless of whether the individual is currently working as a miner. Thus within 10 days of becoming aware of any such compensation award or diagnosis, the operator must report the occurrence by completing and mailing a Form 7000-1 to MSHA. (Emphasis added)

Section 50.20(a) requires the reporting of an "occupational illness". As defined by section 50.2(f), an "occupational illness" is an illness or disease (1) which may have resulted from work at a mine, or (2) for which an award of compensation is made. If such an occupational illness or disease is diagnosed as one of those listed in 50.20-6(b)(7), section 50.20(a) requires that it be reported to MSHA on Report Form 7000-1. Coal worker's pneumoconiosis (black lung) is among those listed illnesses or diseases which must be reported. The time frame for reporting a diagnosed case of black lung is within 10 days of the diagnosis.

On the facts of this case, the respondent apparently views its compromise settlement of Mr. Stacy's black lung compensation claim as an "award of compensation", and it relies on the "award of compensation" definition found in section 50.2(f), to support its belief that it was only obliged to file a report with MSHA after that award (compromise settlement) was approved and made. However, section 50.20(a) provides no time frame for the reporting of black lung compensation awards, nor does it contain any language which directly, or by reasonable inference, permits a mine operator to wait until such an award is made before reporting to MSHA.

The regulatory time frame for reporting a diagnosed black lung illness or disease is within 10 working days after such a condition is diagnosed. Although it is true that it would have been impossible for the respondent to have reported Mr. Stacy's black lung diagnosis of November 5, 1985, within 10 working days because it did not become aware of it until 1986, I take note of the fact that the respondent is charged with a violation for its failure to report Mr. Stacy's illness when it received

notification of a black lung diagnosis in September, 1986, and not when the initial diagnosis was made on November 2, 1985.

The respondent is correct in its assertion that the inspectors read a notification requirement into the reporting language found in section 50.20(a). The inspectors both confirmed that they had always construed the 10 days reporting time frame to begin when a mine operator is notified that an employee has black lung or has been diagnosed as having that disease (Tr. 26, 28, 41). The inspectors' interpretation and application of the reporting time frame is consistent with MSHA's Part 50 Policy Letter of August 31, 1987, which states that an operator must report to MSHA within 10 days of becoming aware of a compensation award for black lung or a diagnosis of black lung.

The fact that section 50.20(a) does not, on its face, impose a reporting requirement based on notification to a mine operator that an employee has been diagnosed as having black lung does not in my view warrant vacation of the contested citation in this case. I find MSHA's policy application, as stated in its August 31, 1987, policy bulletin, requiring an operator to report an occupational illness diagnosis within 10 days of becoming aware of such a diagnosis, and the inspector's similar interpretation and practice, to be reasonable. If it were otherwise, a mine operator would be placed in the rather arbitrary and untenable position of being held accountable for a reportable illness diagnosis which may never have been brought to its attention.

The respondent's suggestion that it is only required to report a proven case of black lung disease is rejected. I also reject the respondent's assertion that since Mr. Stacy was seeking monetary benefits based on his allegation that he was diagnosed as having black lung disease, its reporting obligation pursuant to section 50.20(a) would only begin when Mr. Stacy's compensation claim is either concluded by a settlement of his claim or he is awarded compensation based on a finding that he in fact had black lung.

I conclude and find that Mr. Stacy's diagnosis of black lung was in connection with a disease which one may reasonably conclude may have resulted from his work at a mine. The respondent does not dispute the fact that Mr. Stacy was one of its mine employees, and Mr. Prater the respondent's manager of worker's compensation, acknowledged that he filed a report with the State of Virginia on February 23, 1987, which states that Mr. Stacy "alleges to have contracted coal workers pneumoconiosis while employed at Jewell Smokeless Coal Corp." (Tr. 83; exhibit P-4). Mr. Prater also confirmed that he was aware at the time that report was filed that Mr. Stacy had supplied some evidence that he had black lung disease (Tr. 85).

Mr. Prater confirmed that in late April, 1986, he was made aware of Mr. Stacy's black lung claim, and the supporting x-ray reports of his doctors (Eryilmaz and Fisher) (Tr. 85-87; 110; Exhibits P-5 through P-7). Mr. Prater further confirmed that after learning from Mr. Stacy's attorney that the original x-ray film of November 2, 1985, had been lost, another x-ray film was sent to him or to the respondent's attorney on September 12, 1986. That film was reviewed by several doctors for the respondent, as well as Mr. Stacy's doctors, and following the submission of all of this evidence Mr. Stacy's claim was scheduled for a state hearing on August 31, 1988. However, the claim was settled, and the matter never proceeded to hearing (Tr. 89-92; 94-95; Exhibits R-1 and R-3). Notwithstanding the conflicting doctor's interpretations of Mr. Stacy's x-rays, I conclude and find that the readings made by Mr. Stacy's doctors in support of his claim constituted diagnoses of pneumoconiosis within the meaning of section 50.20(a).

I am not convinced that the respondent was ignorant or confused about its reporting obligations pursuant to section 50.20(a). Mr. Prater, the respondent's manager of worker's compensation, was aware of Mr. Stacy's compensation claim filed against the respondent alleging that he had received a diagnosis of an occupational disease (Tr. 82). Mr. Prater did not assert that he was unaware of the regulatory language of section 50.20(a) requiring a report to MSHA within 10 working days of a diagnosis of an occupational illness. His contention is that he was not aware of Mr. Stacy's diagnosis until it came to his attention in 1986, and he relied on his practice of not reporting an alleged diagnosis of an occupational illness until such time that a definitive decision is forthcoming from the state industrial commission upholding a compensation award.

Mr. Kendrick, the company official responsible for filing the MSHA Report Form 7000-1, acknowledged that the November 2, 1985, "date of injury" shown on the state workers compensation report, and on the MSHA report which he submitted, would be considered the date of diagnosis (Tr. 121; Exhibits P-1 and P-4).

Inspector Smith's testimony that Mr. Kendrick acknowledged at the time of the audit that he was aware of the need to report Mr. Stacy's alleged black lung diagnosis in 1986, but was told by company management to wait until the matter went to court and was settled before reporting it to MSHA, is memorialized in his inspection notes made at the time of his audit.

Mr. Kendrick made no notes of his conversation with Mr. Smith at the time of the audit. Mr. Kendrick testified on direct examination that he had no specific recollection of what was said during the conversation, and that he could not recall discussing the need to report within 10 days of learning about Mr. Stacy's black lung claim or within 10 days of the diagnosis.

Mr. Kendrick recalled that he told Mr. Smith that he thought that all confirmed cases of black lung which went to court, were settled, or were filed with the state commission, should be reported. He further contended that his purported statement that he was aware that a report was required to be made in 1986, was taken out of context, and that it was his understanding that MSHA's regulations required the reporting of confirmed cases of black lung or black lung cases in which compensation awards have been made. Mr. Kendrick also testified that he told Mr. Smith that if Mr. Stacy had pneumoconiosis in 1986, "it probably should have been reported" (Tr. 115-116).

Mr. Kendrick did not contend that he was ignorant of the regulatory requirement found in section 50.20(a) requiring the reporting of a black lung diagnosis to MSHA within 10 working days. His defense, like Mr. Prater's, is that only proven cases of black lung need be reported to MSHA. Even though Mr. Kendrick agreed that the initial November 2, 1985, x-ray reports concerning Mr. Stacy would be considered the date of diagnosis, he took a contrary position when he contended that this date was "inappropriate", and that only the date on which an illness is "totally confirmed" should be used for reporting purposes.

Having viewed the witnesses in the course of the hearing, and after careful scrutiny of the testimony of Mr. Smith and Mr. Kendrick, I find Mr. Smith's testimony to be more credible, and I find Mr. Kendrick's testimony to be rather equivocal and unconvincing. As the responsible reporting company official, Mr. Kendrick is charged with the responsibility of familiarizing himself with the language found in section 50.20(a), particularly the requirement for reporting diagnosed cases of occupational illnesses to MSHA within 10 working days. I cannot conclude that Mr. Kendrick was oblivious of this requirement. I believe that he, like Mr. Parater, erroneously interpreted section 50.20(a), to require only the reporting of proven cases of black lung.

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence in this case, including the arguments advanced by the parties with respect to the interpretation and application of the reporting requirement of section 50.20(a), I conclude and find that the petitioner's position is correct. I also conclude and find that the petitioner has established by a preponderance of all of the credible and probative evidence in this case that the respondent failed to timely report Mr. Stacy's diagnosed case of black lung within 10 working days after being notified of that diagnosis in September 1986. Under the circumstances, I further conclude and find that the petitioner has established a violation of the cited reporting standard found at 30 C.F.R. 50.20(a). Accordingly, the contested citation IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The petitioner presented no additional evidence with respect to the size of the respondent's mining operation. However, a copy of the proposed assessment pleading (MSHA Form 1000-179) reflects that the respondent's total 1990 coal production was 23,317,212 tons, and that the subject preparation plant had no coal production. I conclude and find that the respondent is a large mine operator, and the parties have stipulated that the payment of the proposed civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

An MSHA computer print-out (Exhibit P-9), reflects that for the period March 20, 1989 to March 19, 1991, the respondent paid civil penalty assessments for fifteen (15) violations issued at the subject preparation plant. None of these prior violations concerned reporting violations. The petitioner's assertion at page 12 of its brief that the respondent's history of prior violations is "moderately high" IS REJECTED. For an operation of its size, I cannot conclude that the evidence presented by the petitioner supports any conclusion of a "moderately high" history of prior violations. In any event, I conclude and find that the respondent has a good compliance record and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

Gravity

The inspector found that the violation was non-"S&S", and in the absence of any evidence to the contrary, I conclude and find that it was non-serious,

Good Faith Compliance

The petitioner concedes that the respondent demonstrated good faith in abating the violation within the time constraints set by the inspector (Posthearing brief, pg. 12). I agree, and I, have taken this into consideration in this case.

Negligence

Inspector Smith's "high negligence" finding was based on his belief that the respondent was aware of the reporting requirements found in section 50.20(a), but waited approximately 2 years after being notified of Mr. Stacy's black lung diagnosis before reporting it to MSHA (Tr. 21-22). Supervisory Inspector Worrell concurred with Mr. Smith's finding, and he stated that the respondent knew or should have known about the reporting

requirements, and in the absence of any mitigating circumstances, Mr. Smith was required to find "high negligence" (Tr. 43, 50).

In a recently decided case, Consolidation Coal Company, 14 FMSHRC 956 (June 1992), the Commission affirmed Chief Judge Merlin's decision affirming several reporting violations issued pursuant to 30 C.F.R. 50.30-1(g)(3). The Commission also affirmed Judge Merlin's "high" negligence findings, notwithstanding its recognition of the ambiguous language of the cited standard, and it quoted with approval the following conclusion by Judge Merlin at 12 FMSHRC 1146, of his decision:

> Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.

I take note of the fact that Judge Merlin based his "high" negligence finding on his belief that the mine operator engaged in "egregious and clandestine conduct" and "chose to act in secret until the Secretary found out", 12 FMSHRC 1146. In the instant case, I find no evidence of such conduct on the part of the respondent. Although I have concluded that Mr. Prater and Mr. Kendrick's interpretation of the cited standard was erroneous, I find no evidence that they deliberately sought to avoid compliance. I take note of the fact that MSHA's August 31, 1987, policy bulletin acknowledges that it was issued in response to mine operator uncertainty concerning the reporting of an occupational illness. I also note that subsequent MSHA Part 50 reporting policy letters, which became effective on September 6, 1991, and May 6, 1992, do not contain any statements informing mine operators to report to MSHA within 10 days of becoming aware of a diagnosis of pneumoconisis. Under all of these circumstances, I conclude and find that the violation in this case was the result of the respondent's failure to exercise reasonable care to insure compliance and that this constitutes ordinary negligence.

Civil Penalty Assessment

Taking into consideration all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $20 is reasonable and appropriate for the violation which I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $20, for the section 104(a) non-"S&S" Citation No. 3509275, March 20, 1991, 30 C.F.R. 50.20(a). Payment is to

be made to MSHA within thirty (30) days of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge