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SOL (MSHA) V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-798
	:	A.C. No. 46-01968-03980
v.	:	Blacksville No. 2
CONSOLIDATION COAL COMPANY, Respondent	:	

SUMMARY DECISION

Appearances: Caryl L. Casden, Esq., U.S. Department of Labor Office of the Solicitor, Arlington, Virginia for Petitioner;
Daniel Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Feldman

A hearing in this proceeding was held on November 17, 1992, in Morgantown, West Virginia. At trial the parties moved to settle one of the two citations in issue. The parties also sought to stay this matter with respect to remaining Citation No. 3720751.(Footnote 1) This citation was issued on December 19, 1991, for violation of 30 C.F.R. 70.201(d) as a result of the respondent's alleged failure to correct a respirable dust concentration condition that exceeded the permissible respirable dust levels specified in the mandatory health and safety standard contained in 30 C.F.R. 70.100(a). The underlying violation of

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1 Citation No. 3720751 was initially issued as a 104(d)(2) order. It was modified to a 104(a) citation as a result of a MSHA health and safety conference conducted on February 12, 1992. At that time it was decided that the respondent's degree of negligence associated with this citation should be reduced from high to moderate. The Secretary now seeks to ignore MSHA's conference findings and urges me to reinstate the unwarrantable failure order. However, the record fails to support any reckless or conscious disregard on the part of the respondent. I also believe that, absent new and material information, it is inappropriate to ignore MSHA's conference findings to the detriment of the respondent. Therefore, as noted herein, Citation No. 3720751 is affirmed as modified with the significant and substantial designation deleted.

the Section 70.100(a) dust concentration standard was cited in Citation No. 3720747 which is not a subject of this proceeding.(Footnote 2)

In the case at bar, the violation of Section 70.201(d) cited in Citation No. 3720751 allegedly occurred because the respondent failed to take remedial action by December 18, 1991, to ameliorate the underlying excessive dust condition that was identified on December 11, 1991, during the course of the Secretary's spot inspection program.(Footnote 3) Pursuant to this program,(Footnote 4) the alleged excessive dust level was determined by a single respirable dust sample taken during one shift rather than the customary averaging of five dust samples collected on consecutive shifts.(Footnote 5) See Secretary's Motion for Summary Judgment, p.4.

At the hearing the respondent acknowledged its responsibility to timely correct the alleged excessive dust concentration. However, the parties noted that the significant and substantial issue and the appropriate civil penalty

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2 Citation No. 3720747 is before Judge Weisberger. This citation involves the identical issues in Keystone Coal Mining Corp., 14 FMSHRC 2017 (December 1992), appeal pending. Further action on Citation No. 3720747 was stayed by Judge Weisberger on July 6, 1992, pending the outcome of the Keystone case.

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3 Section 70.201(d) requires the operator to take corrective action to lower the respirable dust concentration to permissible levels within the abatement period set forth in a citation for violation of Section 70.100(a). In the instant case, Citation No. 3720747 set December 16, 1991, as the termination of the abatement period. This period was subsequently extended through December 18, 1991, because additional time was required for MSHA to weigh and evaluate the five dust samples required by Section 70.201(d) in order to establish whether corrective action had been taken.

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4 The Secretary's spot inspection program is based upon the proposition that a single shift sample measuring 2.5 milligrams per cubic meter of air (mg/m3) or higher provides the equivalent degree of confidence as five samples averaging over 2.0 mg/m3 that the 2.0 mg/m3 respirable dust concentration standard in Section 70.100(a) is violated.

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5 Citation No. 3720747 was issued on December 11, 1991, for alleged exposure to excessive respirable dust concentration by the non-designated occupation, 041 (Longwall Jack Setter). The citation was based upon the results of single samples taken the previous days on the December 9 afternoon shift and the December 10 midnight shift. The results revealed dust concentrations of 2.5 and 3.1 mg/m3, respectively. Thus, the December 9, 1991,

sample barely satisfied the Secretary's 2.5 mg/m3 spot inspection level threshold.

assessment were dependent upon the validity of the Secretary's single shift spot inspection procedure which was pending consideration by Judge Weisberger in Keystone Coal Mining Corp., supra. Consequently, the parties motion to stay further consideration of Citation No. 3720751 pending the outcome of Keystone was granted on the record and formalized in my December 4, 1992, Partial Decision Approving Settlement and Stay Order, 14 FMSHRC 2133.

On December 7, 1992, Judge Weisberger invalidated the Secretary's single shift spot inspection procedure.(Footnote 6) See Keystone Coal Mining Corp., 14 FMSHRC at 2029. Thereafter, I lifted the stay and set this case for hearing. In so doing, I noted that the contested citation involves the respondent's efforts to correct an excessive respirable dust condition determined by a single shift sample rather than the condition itself. I also noted that Judge Weisberger's disposition in Keystone is of substantive value with regard to the issue of mitigating circumstances. See Order Lifting Stay and Notice of Consolidated Hearing Proceedings, February 16, 1993.

The February 16, 1993, notice scheduling this matter for hearing was followed by another request for stay by the Secretary. During the course of a telephone conference with the parties, I expressed my disinclination to grant another stay. However, the parties convinced me that this matter could be disposed of by summary decision as there are no outstanding unresolved issues of material fact. Therefore, the parties were ordered to file pertinent motions specifying the number of dust samples necessary to establish that a violative dust condition has been corrected, and whether the respondent's failure to correct the alleged condition from December 18, 1991, (the extended termination due date in Citation No. 3720747) until December 19, 1991, (when Citation No. 3720751 was issued) contributed to a hazard that was reasonably likely to result in injury or illness of a serious nature consistent with the Commission's Mathies test.(Footnote 7)

As the respondent has stipulated to the fact of the occurrence of the violation, the only remaining issues are whether the violation was properly designated as significant and substantial and the appropriate penalty to be assessed. As a threshold matter, the propriety of the significant and

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6 Judge Weisberger ruled that the single shift sample procedure was invalid because it was not implemented pursuant to a rulemaking proceeding.

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7 This test is set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). See also Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

substantial designation for Citation No. 3720751 must be viewed in the context of the Keystone decision and in the context of the provisions of Section 70.201(d), the cited mandatory safety and health standard in this case. While it would be inappropriate to relitigate the issues in Keystone which are now on appeal before the Commission, it is clear that the procedural and substantive merits of the Secretary's single shift sample procedure are in doubt.

While Judge Weisberger addressed the procedural problems associated with the lack of a rulemaking proceeding implementing the Secretary's single shift sample policy, the substantive value of this procedure is suspect in that Section 70.201(d) does not recognize a single shift sample as a valid method for establishing that corrective action has been taken.(Footnote 8) Thus, Section 70.201(d) of the regulations, promulgated by the Secretary, undermines the reliability of the single sample method. Consequently, I conclude that the uncertainties associated with the underlying respirable dust standard citation violation cited in Citation No. 3720747 create mitigating circumstances warranting the deletion of the significant and substantial characterization in Citation No. 3720751.(Footnote 9)

Notwithstanding the above sample method issues, the traditional Mathies test provides an independent basis for concluding that Citation No. 3720751 does not establish a significant and substantial violation. As previously noted, this citation was issued on December 19, 1991, for the respondent's failure to take corrective action by December 18, 1991. The Secretary's motion for summary decision, citing Secretary of Labor v. Halfway, Inc., 8 FMSHRC 8, 12 (1986), and, U.S. Steel Mining, 6 FMSHRC 1573, 1574 (July 1984), asserts that the potential for serious illness or injury must be viewed in the context of continued mining operations. In effect, therefore, the Secretary contends that there is a presumption that the

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8 Section 70.201(d) provides, in pertinent part:

"...the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken (emphasis added)."

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9 The Secretary points out that the average of five samples taken from December 12 through December 16, 1991, was 2.9 mg/m3 which confirms the single shift results. Secretary's Motion for Summary Judgment, p. 14. However, this after the fact confirmation process is not dispositive of whether there was a basis for the issuance of Citation No. 3720747 on December 11, 1991. Moreover, this approach of relying on multi-sample results is inconsistent with the Secretary's confidence in the single sample procedure.

failure to timely correct a significant and substantial violation is itself significant and substantial. I reject this approach. Rather, each violation should be evaluated independently within the context of the statutory provisions and the Congressional intent of the Mine Act. In this regard, the underlying excessive respirable dust concentration provides the vehicle for the imposition of a civil penalty for a significant and substantial violation. Moreover, the inspector has the option of issuing a 104(b) order in order to achieve compliance.(Footnote 10) Therefore, a non-significant and substantial finding with respect to a citation issued for the failure to timely correct a violation, particularly in this case where the failure to take remedial action was cited shortly after the abatement period expired, does not undermine the Mine Act's fundamental goal of encouraging mine safety. Accordingly, I conclude that the respondent's failure to timely correct the alleged underlying violation one day after the time established for abatement does not constitute a significant and substantial violation.

Turning to the question of the appropriate civil penalty in this matter, I note that the Secretary, in his motion for summary decision, has amended the proposed penalty from $1,155 to $350.(Footnote 11) Significantly, a plan to correct the underlying dust condition was submitted to the MSHA District Manager on December 23, 1991. The plan was approved on the following day and implemented by the respondent on December 26, 1991, when Citation No. 3720751 was terminated. In view of the respondent's abatement efforts, belated as they may be, and the other pertinent statutory criteria in Section 110(i) of the Mine Act, I am assessing a civil penalty of $100 for the cited violation of Section 70.201(d).

ORDER

Consistent with this decision, summary decision in favor of the respondent IS GRANTED. Accordingly, the significant and substantial designation SHALL BE DELETED from Citation No. 3720751.

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10 In fact, 104(b) Withdrawal Order No. 3720750 was issued in this case on December 19, 1991. Secretary's Motion for Summary Judgment, Ex. F. This order is also not a subject of this proceeding.

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11 I note, parenthetically, that this reduction in the proposed assessment is inconsistent with the Secretary's attempt to resurrect the unwarrantable failure charge in this matter. See fn. 1, supra.

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IT IS ORDERED that the respondent pay a civil penalty of $100 within 30 days of the date of this decision. Upon receipt of payment, this matter IS DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

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