CCASE:
PEADODY COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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| PEABODY COAL COMPANY,<br>Contestant | : | CONTEST PROCEEDING<br><br>Docket No. KENT 93-318-R<br>Citation 3551261; 1/6/93<br><br>Docket No. KENT 93-319-R<br>Order 3551262; 1/6/93<br><br>Docket No. KENT 93-320-R<br>Order No. 3551263; 1/20/93 |
| v. | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | Camp No. 1 Mine<br>Mine ID 15-02709 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING |
| v. | : | |
| PEABODY COAL COMPANY,<br>Respondent | : | Docket No. KENT 93-437<br>A. C. No. 15-02709-03840<br><br>Camp No. 1 Mine<br>Mine ID 15-02709 |

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
David R. Joest, Esq., for Peabody Coal Company.

Before: Judge Amchan

Statement of the Case

On January 6, 1993, MSHA inspector Arthur Ridley went to the office of Respondent's Camp 1 mine and reviewed the results of Respondent's bimonthly sampling for respirable dust for the period November - December 1992 (Tr. 16 - 18). Respondent's

records indicated that for the 5 samples taken during this period, the average exposure of the continuous miner operator on mechanized mining unit 044 (MMU) was 2.4 mg/m3 (Jt. Exh. 4).

Upon review of these samples, Ridley issued citation 3551261 alleging a violation of 30 C.F.R. 70.100(a), which requires that:

> 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...

This citation was issued pursuant to section 104(d)(1) of the Act in that it alleged that the violation was "significant and substantial" and due to the unwarrantable failure of Respondent to comply with the standard. A $4,000 civil penalty was proposed for this alleged violation.

On January 6, 1993, Inspector Ridley also reviewed the results of Respondent's sampling of the continuous miner operator on mechanized mining unit 056 for the bimonthly sampling period of November - December 1992 (Tr. 58, 63). These 5 samples also averaged 2.4 mg/m3 (Tr. 63, Jt. Exh. 5). Ridley issued Respondent order number 3551262 pursuant to section 104(d)(1) of the Act. A $6,000 penalty was proposed for the alleged violation on MMU 056.

On January 20, 1993, Ridley returned to Camp 1 and reviewed the respirable dust samples taken between January 4, and January 6, for the January - February 1993 bimonthly sampling period on mechanized mining unit 047 (Tr. 77 - 78, Jt. Exh. 6). These samples averaged 2.2 mg/m3. The inspector then issued order 3551263 pursuant to section 104(d)(2) of the Act. The Secretary subsequently proposed another $6,000 penalty for the excessive respirable dust exposure on MMU 047.

Respondent in this case concedes that the violations occurred as alleged and that the violations were "significant and substantial" pursuant to presumptions enunciated in Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1084 (D. C. Cir. 1987). The issues in this case are whether the violations are due to Respondent's unwarrantable failure to comply with the standard, whether the violations were due to a high degree of negligence on the part of Respondent, and what are the appropriate penalties to be assessed for the violations. The Secretary's allegations of unwarrantable failure and high negligence are predicated on the number of citations issued within the prior 2 years for violation of the respirable dust standard with regard to each of the mechanized mining units cited in January, 1993 (Tr. 34 - 39, 65,

74 - 75, 83 - 85, 100 - 102).(Footnote 1) The Secretary did not consider Respondent's compliance record with regard to respirable dust as a whole in determining whether the January 1993 citation and orders should be deemed to have resulted from high negligence and "unwarrantable failure (Tr. 74 - 75, 100 - 102)."

In the two years prior to January 1993, Unit 044 had been sampled in 10 of the 12 bimonthly sampling periods. Respondent had been out of compliance with regard to the MMU 044 on 4 of those occasions. On February 8, 1991, Respondent received a citation because the samples on unit 044 averaged 3.3 mg/m3 for the January - February 1991 bimonthly sampling period (Exhibit G-1). On March 28, 1991, a section 104(b) order was issued because the samples for the March - April 1991 bimonthly period averaged 2.2 mg/m3. On December 2, 1991, a section 104(a) citation was issued because the samples for the November - December 1991 bimonthly period averaged 2.7 mg/m3 (Exhibit G-2, page 2). On February 11, 1992, another citation was issued because the samples for the January - February 1992 bimonthly period averaged 2.8 mg/m3 (Exhibit G-2, page 3).

In the 12 bimonthly sampling periods during calendar years 1991 and 1992, mechanized mining unit # 056 was out of compliance with 30 C.F.R. 70.100(a) 5 of the 12 times it was sampled. In February 1991, Respondent was cited because the January - February samples averaged 2.2 mg/m3 (Exhibit G-2).
In July 1991, Peabody was cited again because the May - June samples averaged 2.7 mg/m3. In February 1992, another citation was issued because the January - February samples averaged 2.9 mg/m3 (Exhibit G-2, page 3). In April 1992, MSHA cited Peabody again because the samples for the March - April period averaged 2.6 mg/m3. The fifth violation during 1991 - 1992 was in the November - December 1992 sampling period and is addressed by order number 3551262.

Mechanized mining unit 047 was available for sampling in only four of the 12 bimonthly sampling periods during calendar years 1991 and 1992. In May 1991, Respondent was cited because the March - April samples averaged 3.0 mg/m3 (Exhibit G-3). The next time it was sampled was for the July - August 1992 sampling period and it was barely in compliance with an average concentration of 1.9 mg/m3 (Exhibit G-3, page 3). For the September - October sampling period the average concentration was 2.4 mg/m3 precipitating another citation (Exhibit G-3, page 4). MMU 047 was in compliance for the period November - December 1992, and then out of compliance for the January - February 1993 sampling period, which is addressed by order number 3551263.

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1At the time of the January 1993 citation and orders, Respondent had 6 mechanized units in operation.

The Secretary's position is that the number of violations of the respirable dust standard on each of these machines during a two year period indicates more than ordinary negligence and is sufficiently "aggravated" to constitute an unwarrantable failure to comply with the standard. Peabody, on the other hand, points to a number of steps it took, beginning in January 1992, to improve dust control, which it contends establishes that it was not "highly negligent" and makes the characterization of unwarrantable failure inappropriate.

Respondent's evidence in this regard consists primarily of the uncontroverted testimony of Michael W. Kirtley, who came to Camp 1 in July 1992 to be Compliance Manager at this facility (Tr. 173-74). The steps taken to remedy the excessive dust problem at Camp 1 were as follows:

> Beginning in January 1992, Respondent installed water flow gauges on its continuous miners. This project, which took 6 months to complete, allows the miner operator to continuously monitor the amount of water coming through his machine (Tr. 179);
>
> In February 1992, Respondent began a 6 - 7 month project to increase the size of the fittings on the water lines leading to the continuous miners from 1/2 inch fittings to 2 inch fittings (Tr. 181 - 182);
>
> In March 1992, Peabody increased the water volume on its four continuous miners that are shuttle car units by 25 percent. The water volume of its two continuous miners that are continuous haulage units was increased by 50 percent (Tr. 182 - 83);
>
> Beginning in February 1992, Respondent replaced the 2-inch plastic pipe in its water lines with 2-inch metal pipe, which allows for the use of greater water pressure (Tr. 183);
>
> In March 1992, Peabody undertook to increase the size of the water lines going to the miners from 1 inch to 1 1/2 inches (Tr. 184);
>
> In a 6 week period during November and December 1992, Peabody installed water sprays inside the ductwork of the scrubbers on the continuous miners to improve scrubber efficiency (Tr. 185);
>
> In July 1992, the company replaced its water pumps with pumps that allowed for increased water pressure and, therefore, an increased volume of water (Tr. 188).

Peabody has also been working with Joy, the manufacturer of its continuous miners, since January 1992, to reduce the restrictions in the water lines on the mining machines (Tr. 187). Since the issuance of the citations at issue in this case, Peabody has acted upon a suggestion from inspector Ridley that it assign additional supervisory personnel to monitor its employees while they are being sampled for respirable dust exposure (Tr. 72 - 73, 96, 190). These supervisors insure that the sampled employee positions himself where he can minimize his dust exposure. The supervisor also checks on ventilation and water pressure (Tr. 191).

## Assessment of Civil Penalties

Section 110(i) requires the Commission to consider 6 factors in assessing penalties. Having considered these factors I conclude that a $5,000 penalty is appropriate for each of the violations at issue in this case.

The first factor, the operator's history of previous violations is the most important consideration is this case. Citation 3551261 was the fifth respirable dust violation on MMU 044 in a 2-year period. Order 3551262 was the fifth on MMU 056. Order 3551263 was the third of out 5 sampling periods on MMU 047. Although MSHA appears to have considered each MMU in isolation, I believe that consideration must be given to the fact that, in January 1993, after numerous prior respirable dust violations, 3 of Respondent's 6 mechanized mining units were in violation of the respirable dust standard. The number of violations of this standard, which in protecting miners from respiratory diseases, lies at the heart of the Act warrants a relatively high penalty, regardless of whether these violations meet the criteria of "unwarrantable failure."

By analogy, I would note that the Occupational Safety and Health Act, a statute with almost identical purposes to the Mine Safety and Health Act, provides for much higher civil penalties for repeated violations than for first time violations. Under the OSH Act, an employer may be penalized up to $7,000 for a "serious" or "other-than-serious" violation but may be assessed a penalty of up to $70,000 for a willful or repeated violation 29 U.S.C. 666 (a),(b), and (c). I would deem it contrary to the purposes of the Mine Act to assess a penalty in the instant case which did not impose a significantly higher penalty given the number of respirable dust violations on all of Respondent's mechanized mining units.

I find a $5,000 penalty for each violation in this case appropriate, given Peabody's size. Peabody produces in excess of $10,000,000 tons of coal a year and is, thus, a relatively large

mine operator. The parties have stipulated that penalties of this magnitude will not effect Peabody's ability to stay in

business.

The gravity of the violations in this case are quite high. The parties have stipulated that the violations are "significant and substantial." However, I would note that the record in this case suggests that Respondent's employees have been regularly exposed to respirable dust levels above those allowed by the standard for a 2 year period. A penalty of anything less than $5,000 would not be consistent with Congress' intent of using the full panoply of the Act's enforcement mechanisms to effectuate the goal of preventing respiratory disease Consolidated Coal Company v. FMSHRC, 824 F.2d 1071, 1086 (D.C. Cir. 1987).

Respondent demonstrated good faith in following the suggestions of inspector Ridley in terminating the instant violations and, thus, should not be penalized for not demonstrating such good faith. However, inspector Ridley's suggestions for abatement and Respondent's implementation of those suggestions leave something to be desired in terms of complying with the Act.

Section 70.100(a) requires that each operator shall continuously maintain the average concentration of respirable dust at or below 2.0 mg/m3. Pursuant to 30 C.F.R. 70.207, sampling is to be taken during a normal production shift. This suggests that the sampling is to be representative of an employee's regular, daily exposure to respirable dust (Compare OSHA's standards such as 29 C.F.R. 1910.1025(d)(iii)).

Sampling that is artificially low because supervisory personnel are constantly watching and directing the sampled employees would appear to be violative of section 70.207. If Respondent is taking other steps, such as frequent unannounced spot checks on the work practices of its continuous miner operators to assure that they minimize dust exposure as a regular practice, the company's abatement measures would appear to comply with the regulation. However, if the samples are under 2.0 mg/m3 only because Respondent is taking unusual steps while the bimonthly sampling is in progress, Peabody appears to be in violation of section 70.207.

On this record, it appears rather problematical that Peabody's current sampling techniques comply with the Act. While supervisors now make it a regular practice to watch employees during sampling, there is little indication that anything is being done to insure that employees follow the proper procedures when they are not being sampled. There is an indication that the requirements of Respondent's dust control plan has been discussed with employees at annual refresher training and on one other occasion (Tr. 213 - 215). However, nothing else indicates that Peabody has done anything to assure that employees on a regular and daily basis follow proper procedures with regard to

positioning themselves and using the line curtain or brattice to direct intake air to the working face (Tr. 213 - 215).

Degree of Negligence and Unwarrantable Failure

The sixth factor for penalty assessment is whether the operator was negligent. Inspector Ridley, when characterizing the instant violations as due to a high degree of negligence and Respondent's "unwarrantable failure" to comply with the standard, did so on the assumption that the company had failed to take any action to alleviate the situation (Tr. 39, 85, 141). Thus, the question is whether this record establishes a high degree of negligence and/or "unwarrantable failure" in light of measures testified to by Mr. Kirtley.

Analytically, I find the issues as to the degree of negligence and whether Respondent's conduct constitutes "unwarrantable failure" to be inseparable. I conclude that despite the measures taken by Peabody prior to the citation and orders in this case, Respondent's violations were due to more than ordinary negligence and that its conduct constitutes "unwarrantable failure."

First of all, it is unclear what, if any, relationship exists between the measures taken by Respondent to increase water supply to its working sections and the numerous citations issued to it for respirable dust violations. Given the numerous citations received, a prudent employer would undertake a comprehensive investigation of the reasons its sampling results exceeded the permissible exposure limit on a regular basis.

Had Respondent done this they would have discovered, as they discovered after the instant citation and orders, that the work practices of its employees were deficient. The recognition that its employees were not positioning themselves to minimize dust exposure and were improperly using line curtains could have been discovered (Tr. 213 - 215) before the issuance of the withdrawal orders.

Commission caselaw makes it quite clear that ordinary negligence does not constitute "unwarrantable failure." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991). However, when a company has repeated respirable dust violations on a number of mechanized mining units, its failure to do a comprehensive analysis of what is causing this problem is more than ordinary negligence. Given the importance in the statutory scheme of preventing respiratory diseases, the failure to leave any stone unturned in discovering the source of these violations is "aggravated." Finally, for Inspector Ridley to show up at Camp 1 in January 1993 and find 3 of the 6 mechanized mining units in violation of the respirable dust standard, should, in

light of Respondent's compliance record during 1991 and 1992, create a rebuttable presumption that the violations were due to an unwarrantable failure to comply.

Had Respondent established that it had taken every conceivable step to rectify the problem, I would be inclined to find that the company's negligence was of an ordinary nature--if that. However, from the sampling done by MSHA in 1991 and 1992, (Tr. 48, 89) which indicated that compliance with the standard was achievable with the equipment already on site, Respondent was on notice that something else, such as closer attention to proper work practices, was necessary.

ORDER

1. Citation 3551261 is affirmed as a section 104(d)(1) citation. Order 3551262 is affirmed. Order 3551263 is affirmed.

2. Peabody Coal Company shall, within 30 days of the date of this decision, pay to the Secretary $15,000 for the violations found herein.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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