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NEW WARWICK MINING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NEW WARWICK MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 93-199R
	:	Order No. 3658608; 2/25/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Mine ID 36-02374
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 93-308
	:	A.C. No. 36-02374-03863
v.	:	
	:	
	:	
NEW WARWICK MINING COMPANY Respondent	:	Warwick Mine

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U. S. Department of Labor, for the Secretary of Labor;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for New Warwick Mining Company.

Before: Judge Amchan

Overview of the Case

On February 8, 9, and 10, 1993, at its Warwick mine in Greene county, Pennsylvania, New Warwick Mining Company took its bimonthly respirable dust samples underneath the face shield of RACAL airstream helmets worn by its employees working on the longwall section of the mine. The RACAL airstream helmet is power air-purified respirator.

On February 25, 1993, MSHA issued New Warwick order number 3658608 alleging a violation of section 104(d)(1) of the Act and 30 C.F.R. 70.207(a) for sampling inside the RACAL helmet. The unwarrantable failure allegation of the order was based on conversations between Rod Rodavich, the mine's safety director, and MSHA personnel about taking such samples which occurred prior to the sampling. Subsequent to the commencement of litigation before the Commission, the Secretary amended the order to allege

also that the samples were taken with a sampling device that was

non-approved due to modifications made by Mr. Rodavich. A $800 civil penalty was proposed by the Secretary.

For the reasons stated below, I affirm the 104(d)(1) order with regard to sampling inside the RACAL helmet. I also find a violation of the Act with regard to the use of a modified nonapproved sampling device. However, I find that the use of such device did not constitute an unwarrantable failure to comply with the Act, as did sampling underneath the helmet. I assess a $500 civil penalty.

Statement of Facts

On January 15, 1993, Rod Rodavich, the safety director at the Warwick mine, attended a meeting of company safety directors in Western Pennsylvania, at which he inquired as to whether respirable dust sampling could be conducted underneath the RACAL airstream helmet (Tr. 203). After the meeting Rodavich and Gary Klinefelter, another safety director, stopped at the MSHA Field Office in Waynesburg, Pennsylvania, seeking to discuss the matter with Thomas Light, the supervisory coal mine inspector in that office who had responsibility for the Warwick mine (Tr. 74, 204, 250).

Mr. Light was unavailable and therefore Rodavich and Klinefelter spoke instead with Robert Newhouse, a field office supervisor (Tr. 114, 204). Newhouse told the two safety directors that samples taken inside a respirator had not been acceptable to MSHA in the past, but when pressed by Rodavich and Klinefelter for a specific regulation that forbid this practice, Newhouse was unable to cite one (Tr. 117-118, 204).(Footnote 1)

Sometime later in January, 1993, Mr. Rodavich also discussed the issue of sampling inside the RACAL helmet with MSHA inspector William Wilson (Tr. 14-15, 229-231). Like Mr. Newhouse, Mr. Wilson was unable to point to a specific regulation that would be violated by such sampling (Tr. 15). However, he did indicate to

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1Mr. Rodavich's account of his conversation with Newhouse is that Newhouse said nothing other than he couldn't find anything prohibiting sampling inside the respirator (Tr. 235-238). While I find it unnecessary to resolve all the differences in the testimony of the two men, I find that Mr. Newhouse did indicate that such sampling was not permitted by MSHA and that he gave no indication that the agency would consider samples taken inside the RACAL as complying with the Act (Tr. 117-119).

Mr. Rodavich that sampling inside the RACAL helmet was not acceptable to MSHA (Tr. 15).(Footnote 2)

On February 5, 1993, Supervisory inspector Light accompanied inspector Wilson to the Warwick mine (Tr. 79). Light and Wilson began their inspection by going to Mr. Rodavich's office. While they were in his office Mr. Rodavich again raised the question of respiratory dust sampling inside the RACAL helmet. Light told Rodavich that such samples were against MSHA policy and that he would be cited if he took such samples for compliance purposes.

Like Mr. Newhouse and Mr. Wilson, Light was unable to specify the regulation for which the citation would be issued. However, he did tell Rodavich that the MSHA regulations require sampling in the mine atmosphere and that samples taken underneath the RACAL helmet were not samples taken in the mine atmosphere (Tr. 79-80, 104).(Footnote 3) Inspector Light also suggested that Rodavich read the preamble to MSHA's Part 70 regulations (Tr. 80-81).

On February 8, 9, and 10, 1993, pursuant to Mr. Rodavich's directions, sampling was conducted by Respondent of the respirable dust exposure of the longwall shear operator on the tailgate side (Tr. 23, G-8). These samples were collected underneath the visor of the RACAL airstream helmet worn by the operator (Jt. Exh. 1, p. 3, stipulations 11 and 12, Exh. G-15, Production number 5). Although Mr. Radovich had informed MSHA personnel that he intended to take such samples unless there were able to point him to the regulation that forbid them, he did not

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2While Mr. Wilson and Mr. Radovich disagree as to what was said in this conversation, I find that Mr. Wilson did in some manner communicate that Radovich's proposed sampling method was unacceptable to MSHA. There is nothing in record to indicate that he said anything that would have led Radovich to believe that such sampling would comply with the Act. As it is clear from the record that the subject was discussed, I find it very unlikely that Mr. Wilson did not offer an opinion as to the legality or acceptability of sampling inside the RACAL helmet and I find it very unlikely that he did not indicate some manner of disapproval (Tr. 15-16, 230-231).

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3Mr. Rodavich concedes that Light told him such sampling would be against MSHA policy (Tr. 220, 229). Although his testimony as to whether Light also said he would be cited is somewhat confusing (Tr. 220, 232-233), I find that Light specifically told Rodavich that he would get a citation and that sampling underneath the RACAL did not constitute sampling of the mine atmosphere (Tr. 104). Mr. Rodavich was also advised by Respondent's attorney that he would probably be cited if he sampled underneath the airstream helmet (Tr. 232-233).

advise any representative of MSHA that the sampling would be done on February 8-10 (Tr. 42, 80-81, 120, 228, 234, 247, 249).

In taking the samples Mr. Radovich modified the sampling mechanism from that he normally used so that it would fit inside the RACAL helmet. These modifications rendered invalid the approval given by the National Institute for Occupational Safety and Health (NIOSH) for both the sampling device and the RACAL helmet. (Tr. 132-133, Exh. G-11).

These modifications most likely resulted in the collection of less respirable dust than if an approved sampling assembly had been used (Tr. 157-160). Among the more significant differences between the device used by Respondent and an approved sampling device were the absence of a locking bracket which rigidly aligns and holds the major components of the sampling head (Tr. 138-139). Another was the addition to the sampling device of 14 inches of tubing which was bent inside the top of the helmet (Tr. 141-142, Exh. G-15, production 5). The bent tubing and other modifications would tend to result in some of the respirable dust adhering to the walls of the tubing, instead of reaching the sampling cassette (Tr. 143).

The cassette is also likely pick up less dust than that to which the sampled miner is exposed because it will pick up only that dust which is exhaled by the miner. It will not pick up the dust which sticks to his lungs when inhaled (Tr. 159-160).

A few days after the sampling was completed, MSHA inspector Wilson observed carbon copies of the dust data cards (Tr. 21-22). Because he suspected that these samples had been taken inside the RACAL helmet, Wilson wrote the numbers of the samples down. He then asked his supervisor Thomas Light to ask the MSHA laboratory in Pittsburgh for the results of the sampling (Tr. 25-26).

About a week later, Light informed Wilson of the results of the samples. The highest respirable dust reading was 0.5 milligrams (Tr. 33, Exh. G-9) Since these results were less than half what one would expect for a longwall shear operator at the levels of coal production recorded, Wilson's suspicion that the samples had been taken inside the helmet increased (Tr. 27).

On February 22, 1993, Wilson was informed by a non-supervisory employee at the mine that the samples had been taken underneath the airstream helmet (Tr. 28-29). This was confirmed by safety director Radovich on February 23 (Tr. 28-30). Therefore, on February 25, 1993, MSHA issued Respondent order

3658608 alleging that it violated section 70.207(a) in sampling inside the RACAL helmet.(Footnote 4)

On February 24, 1993, MSHA conducted its own sampling, with the filter cassette placed outside the RACAL helmet. The result of this sampling, which was reported several days later, was in excess of the permissible exposure limit of 2.0 milligrams per cubic meter (Tr. 32-34). The highest full-shift sample measured an exposure of 4.4 milligrams (Tr. 33, Exh. G-2, p. 3, G-8, p. 9).

MSHA then modified the section 104(d)(1) order at issue in this case to prohibit operation of the longwall shear until environmental dust control steps were taken which reduced the respirable dust concentrations sampled to levels below the 2.0 limit (Exh. G-2). New Warwick was able to reduce respirable dust levels below 2.0 mg/m3 and thus the order was terminated on April 7, 1993 (Exh G-2, p. 8). Months after the commencement of this litigation order 3658608 was amended to also allege a violation for Respondent's use of an unapproved sampling device.

Conclusions

Respondent's use of an unapproved sampling device violated 30 C.F.R. 70.207(a)

Even if MSHA regulations did not prohibit respirable dust sampling underneath the RACAL helmet, Respondent's samples in this case violated section 70.207(a) because they were not taken with an approved sampling device. Section 70.207(a) requires an operator to take 5 "valid respirable dust samples" from the designated occupation in each bi-monthly sampling period. A "valid respirable dust sample" is defined in section 70.2(p) as one collected and submitted as required by part 70 of the Code of Federal Regulations. "Respirable dust" is defined in 70.2(n) as dust collected with a sampling device that has been approved in accordance with 30 C. F. R. part 74.

Respondent concedes the modifications made to the dust sampling device by Mr. Rodavich rendered the approval of the device invalid (Respondent's brief, page 8). However, it contends that it had insufficient notice of this fact to sustain a violation of 30 C.F.R. 70.207. Although one must read through several regulations to ascertain what is required regarding sampling devices, MSHA's regulations make it abundantly clear that sampling with a modified sampling unit, which has not been

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4The immediate predicate for the section 104(d)(1) order in this case was a 104(d)(1) order issued on January 25, 1993 (Exh. G-6).

approved the National Institute for Occupational Safety and Health (NIOSH), violates 30 C. F. R. 70.207(a).

Section 74.10 requires an applicant, normally the manufacturer of the sampling device, to obtain the approval of NIOSH for a change to any feature of a certified coal mine sampling device. Therefore, I conclude that a person of ordinary intelligence who has read through MSHA's regulations pertaining to respirable dust sampling had a reasonable opportunity to ascertain that sampling with a modified sampling device violates section 70.207(a) if the modification had not been approved by NIOSH.

None of the MSHA personnel with whom Mr. Rodavich discussed his proposal to sample underneath the RACAL helmet, including inspector Wilson, to whom he showed a prototype of the device he used, informed Respondent's safety director of the fact that use of the device would violate the Act unless the modified device was approved by NIOSH. Moreover, MSHA apparently did not recognize that the use of the device violated its regulations until the discovery phase of this litigation.

These factors are appropriately considered in assessing the degree of negligence exhibited by Mr. Rodavich and the appropriate civil penalty, not in determining whether the regulation was violated. In view of the circumstances, I conclude that the degree of negligence on the part of Mr. Rodavich in using an unapproved sampling device was infinitesimal and worthy of a nominal penalty at best. However, as discussed later herein, I view the degree of negligence in proceeding with sampling underneath the RACAL helmet to be an entirely different question.

Respondent violated section 70.207 in taking respirable dust samples underneath the face shield of the RACAL airstream helmet

Although nothing in MSHA's regulations specifically states that an operator may not take respiratory dust samples underneath a RACAL helmet or other respirator, the practice is clearly prohibited by subpart A - D of 30 C.F.R. Part 70 when these regulations are considered in their totality. Section 70.100(a) requires each operator to maintain the average concentration of respirable dust in the mine atmosphere at or below 2.0 milligrams of respirable dust per cubic meter of air.

The sampling required by subpart C (30 C.F.R. 70.201-70.220) is required to determine whether the operator is in compliance with section 70.100(a). If an operator's samples provide no basis for determining compliance with 70.100(a) they cannot be considered to be valid respirable dust samples within the meaning of 70.2(p) or 70.207(a).

More specifically, the issue is whether a sample taken underneath a respirator can be considered a sample taken "in the mine atmosphere." If the answer is affirmative then a reading below 2.0 mg/m3 satisfies the requirements of section 70.100(a). MSHA's regulations regarding respiratory equipment make it clear that a sample taken underneath a respirator cannot establish compliance with 70.100(a) and also that such samples cannot comply with 70.207.

Section 70.300 provides that respiratory equipment shall be made available to person exposed to respirable dust in excess of the levels required to be maintained in 30 C.F.R. Part 70. That regulation also states," [u]se of respirators shall not be substituted for environmental control measures in the active workings." This provision makes it clear that an operator cannot comply with 70.100(a) by having miners use a respiratory device. It also makes it clear by implication that one cannot determine compliance with section 70.100 by sampling underneath a respirator.

An indication of what the regulations require is provided by the preamble to MSHA's regulations regarding respirable dust which appeared in the Federal Register when they were promulgated as a final rule in April, 1980. The agency addressed the issue of use of the airstream helmet as a substitute for engineering controls to achieve compliance with 2.0 mg/m3 standard.

> During the course of the public hearings, MSHA was urged to accept the use of a particular type of personal protective device as a means of compliance with the respirable dust standard in certain longwall mining operations. It was argued that in these operations it has not been proven feasible at this time to institute engineering controls adequate to reduce dust to within permissible concentrations without substantially impairing coal production. MSHA has begun a careful study of the device--known as the "airstream helmet"--to determine its potential usefulness under very limited circumstances. It is currently being field tested under close MSHA scrutiny in a coal mine in New Mexico. Until testing is completed and the results evaluated, MSHA will continue to require implementation of engineering controls in coal mines as the means of achieving compliance with the applicable dust standard. 45 Fed. Reg. 23993 (April 8, 1980)

While there is nothing in the record that indicates the results of the test performed on the airstream helmet in New Mexico, the record does establish that MSHA policy with regard to the substitution of the airstream helmet for environmental controls has not changed (Tr. 177-187, Exh. G-19).

As deference is due to MSHA's interpretation of its own regulation, I conclude that section 70.100(a) precludes compliance with 2.0 mg/m3 respirable dust limit through use of the airstream helmet Secretary of Labor v. Western Fuels-Utah, 900 F. 2d 318 (D. C. Dir. 1990). This being the case it would be patently illogical to conclude that one can sample to determine compliance with 70.100(a) by placing the sampling cassette underneath the airstream helmet.

Respondent contends that it had inadequate notice of the requirements of the 70.207(a). I find the notice provided is not inadequate simply because one must read a number of related sections of MSHA's regulations to determine the illegality of sampling inside the RACAL helmet. Moreover, additional notice was provided in the above cited portion of the Federal Register.

The fact that MSHA personnel could not point Mr. Rodavich to the precise provision prohibiting his proposed sampling technique does not establish that the regulations are impermissibly vague. Indeed, Mr. Light's response that the regulations require sampling of the mine atmosphere was in large part a satisfactory response to Respondent's inquiry. A more formal inquiry may well have elicited from MSHA a fuller explanation as to why the Agency does not regard sampling underneath a respirator to be sampling of the mine atmosphere.

Respondent's respirable dust sampling of February 9-10, 1993 constitutes an unwarrantable failure to comply with 30 C.F.R. 70.207(a)

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December, 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). In this case Respondent's violative act was not negligent, it was intentional. Mr. Rodavich did not accidently sample underneath the airstream helmet, he did so purposely. Intentional noncompliance in the absence of adequate mitigating circumstances constitutes unwarrantable failure Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991).

Respondent contends that safety director Rodavich's conduct does not constitute unwarrantable failure despite the fact that he conducted this sampling after being told by inspectors Wilson, Newhouse, and Light that it was contrary to MSHA policy. Whether Respondent's conduct was "aggravated" or "unwarrantable" turns on the reasonableness of Mr. Rodavich's conduct.

The first reason for Respondent's contention that its violation was not an "unwarrantable failure" is that Mr. Rodavich did not get a satisfactory response from MSHA to his inquiries.

More specifically, the argument implies that because MSHA personnel could not specify which regulation his sampling would violate, Respondent was entitled to sample underneath the airstream helmet. I find, however, that Mr. Rodavich's conduct was highly unreasonable under the circumstances.

Mr Rodavich was aware that his proposed sampling technique was a major departure from conventional practice (Tr. 217-218). Further, nothing in this record indicates that he followed up on Mr. Light's suggestion that he read the preamble to Part 70. Given this and the fact that three different inspectors told him that his proposal would not comply with MSHA policy, I find that Mr. Rodavich was under an obligation to proceed further with his inquiries before unilaterally deciding to conduct sampling underneath the RACAL helmet.

I conclude that Mr. Rodavich did not act reasonably in proceeding without contacting MSHA's District Office as he had on other matters (Tr. 243) When an operator essentially desires to "reinvent the wheel" on a matter as important as respirable dust sampling, I find that it is under an obligation to provide MSHA with an opportunity to focus on the issues involved and provide a comprehensive explanation as to why the operator's proposed departure from common practice and MSHA policy is or is not consistent with the Act and its regulations.

Had Mr. Rodavich proceeded up the MSHA hierarchy he may well have received a satisfactory explanation, including a more specific reference to the April 1980 preamble. He may also have been apprised of the inconsistency of the proposed method of sampling with the designated occupation concept inherent in the MSHA sampling scheme (Tr. 181-182)(Footnote 5). It was not at all reasonable for Rodavich to proceed simply because the local MSHA inspectors could not instantaneously cite persuasive authority for their position.

The second major reason for which Respondent contends that it conduct does not constitute an "unwarrantable failure' is the fact that Mr. Rodavich had informed several MSHA inspectors and the union safety committee (Tr. 206) of his intention to sample inside the airstream helmet. Respondent thus contends that its safety director was obviously not trying to hide anything from

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5An obvious shortcoming of Respondent's sampling is that it gave no indication of the respirable dust exposure of employees working in the longwall operation who were not sampled. For example, the sampling inside the helmet of the shear operator provides no basis for determining the respirable dust exposure of the section foreman, who spends close to 65% of his time near the shear operator and who was not wearing an airstream helmet (Tr. 241-242)

the agency and cannot therefore be deemed to have unwarrantably failed to comply with the regulation.

I have no reason to believe that Mr. Rodavich was trying to conceal his sampling by failing to inform MSHA as to the exact dates on which it would occur. However, I conclude that by proceeding with this sampling and submitting it as Respondent's bimonthly sample for the January-February 1993 period, his conduct was sufficiently aggravated to constitute an "unwarrantable failure."

The result of proceeding as Mr. Rodavich did is that New Warwick submitted no valid respirable dust sample for the January-February sampling period. Although it may be fortuitous, the valid samples taken by MSHA did indeed indicate significant overexposure. By taking the invalid samples after having been told that MSHA would not accept them, Mr. Rodavich delayed the corrective action required to reduce atmospheric dust.

The better course, and the only prudent way to test his theories of dust sampling, would have been for Mr. Rodavich to take his samples and immediately follow them with samples taken in accordance with MSHA policy. He could then have tested the validity of his sampling method without compromising employee health.(Footnote 6)

In conclusion, given the factual circumstances of this case, I find Respondent's submission of respirable dust samples taken inside the RACAL airstream helmet as its only bimonthly sample for the longwall operation to be an unwarrantable failure to comply with the provisions of section 70.207(a).

Assessment of the Civil Penalty

Considering the factors specified in section 110(i) of the Act I assess a $500 civil penalty for Respondent's violation of section 70.207(a) in taking its bimonthly respirable dust sample inside the RACAL airstream helmet. For the reasons set forth in finding the violation to be an unwarrantable failure, I find Respondent's negligence to be very high. I also find the gravity of the violation to be high given the fact that the sampling

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6Although this violation was cited as a non-significant and substantial violation because the shear operator was wearing a RACAL helmet, the standard assumes that employee health is not adequately protected by any respirator if respirable dust in the mine atmosphere exceeds 2.0 mg/m3. Moreover, given the fact that the section foreman was not wearing the airstream helmet, one could consider MSHA's characterization of the violation as non-significant and substantial to be somewhat generous to Respondent.

provided no basis for determining the exposure of the section foremen who were not wearing a positive pressure respirator(Footnote 7)

The parties have stipulated that payment of the proposed penalty will not affect the operator's ability to continue in business and that New Warwick demonstrated good faith in abating the order. A $500 penalty is also appropriate given Respondent's size and history of prior violations (Jt. Exh. 1, stipulations 6-9).

ORDER

Order number 3658608 is affirmed and a civil penalty of $500 is assessed. Respondent is ordered to pay said penalty within 30 days of this decision.

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

Distribution:

Mark A. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Joseph A. Yuhas, Esq., 1809 Chestnut Ave., P. O. Box 25, Barnesboro, PA 15714 (Certified Mail)

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7On February 8-10, 1993, section foremen Kevin Friday and Paul Wells wore the Dustfoe 88, a negative pressure respirator (Exh. G-13, p. 3, Responses to interrogatories 3 and 4).