

CCASE:
SOL (MSHA) V. BRIDGER COAL
DDATE:
19941118
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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November 18, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-233
Petitioner : A.C. No. 48-00677-03523
:
v. : Jim Bridger
:
BRIDGER COAL COMPANY, :
Respondent :

DECISION

Appearances: Carl C. Charneski, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Henry Chajet, Esq., Jackson & Kelly,
Washington, D.C.,
for Respondent.

Before: Judge Cetti

I

The stay in this case is lifted. This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), seeks a civil penalty of \$192 from the Respondent for the alleged violation of 30 C.F.R. 71.101. This safety standard in relevant part provides:

When the respirable dust in the mine atmosphere of the active workings contains more than 5% quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner is exposed at or below a concentration of respirable dust computed by dividing the percent of quartz into the number 10.

The Respondent, Bridger Coal Company, filed a timely answer contesting the alleged violation. After due notice to the parties, a hearing was held in Denver, Colorado. At the hearing, the Petitioner presented the testimony of Thomas F. Tomb, chief

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of the Dust Division at the Department of Labor's Pittsburgh Health and Safety Technology Center and Joseph William Pavlovich, Subdistrict Manager of MSHA, Coal Mine Safety and Health, District 9. Respondent presented the testimony of Dr. Morton Corn. Dr. Corn since 1980 has been the John Hopkins University professor of Environmental Engineering and director of the division of the same name in the School of Hygiene and Public Health, which is a graduate school. Respondents also presented the testimony of Mr. Robert E. McCartney, the miner's representative of the miners employed at the Bridger Mine.

II

ISSUES

The issues presented at the hearing were whether Respondent violated the cited standard and if it did, was the violation S&S and the amount of the appropriate penalty. The underlying basic issue is the validity of using a single shift dust sample to set a reduced quartz standard under Section 71.101 and then using that reduced standard four years later to issue the citation in question.

III

STIPULATIONS

All the essential basic facts involved in this case are set forth in the stipulations which the parties entered into the record as follows:

1. Bridger Coal Company (Bridger) operates a surface coal mine in Sweetwater County, Wyoming.
2. Bridger is subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.
3. The Mine Safety and Health Administration (MSHA) issued Citation No. 2931949 to Bridger on October 11, 1990, through an authorized representative of the Secretary. Citation No. 2931949 alleges a violation of 30 C.F.R. 71.101. The citation narrative states:

Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated work position #384, Pit 001-0, was 0.7 mg/m³ which exceeds the applicable limit of 0.6 mg/m³, when quartz is present. Management shall take corrective steps/action to lower

the respirable dust, then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory.

4. Designated work position (DWP) 384 is located within the enclosed cab of a Drilltech D-60 drill.

5. Citation No. 2931949 was issued pursuant to Section 104(a) of the Mine Act. It charges that the violation of Section 71.101 was of a "significant and substantial" nature and that it was the result of Bridger's moderate negligence.

6. Bridger admits that the citation was issued by an authorized representative of the Secretary, denies that it violated Section 71.101, denies that it was negligent and denies that the alleged violation was significant and substantial.

7. The citation was abated on October 31, 1990.

8. The civil penalty proposed by MSHA will not affect Bridger's ability to continue its business operations.

9. The sampling results and silica analysis of DWP 384, Pit 001-0, are as follows:

(a) On September 16, 1986, MSHA established a .6 mg/m³ respirable dust standard for DWP 384 based on a single sample quartz analysis of 19%. (Underlining added).

(b) From September 16, 1986, through July 18, 1990, DWP 384 was the subject of 52 respirable dust samples collected by the operator and analyzed by MSHA.

(c) On July 18, 1990, an MSHA respirable dust sample of DWP 384 was analyzed at 10% quartz. Bridger was provided notice of the opportunity for it to take an optional sample for quartz analysis or to accept the MSHA result of 10%, which would have resulted in a 1.0 mg/m³ standard.

(d) Bridger elected to take an additional sample and did so on September 4, 1990. This sample was analyzed by MSHA at 14% quartz. Because Bridger's September 4, 1990, sample had a greater than 2% quartz difference from MSHA's July 18, 1990, sample, the operator

was provided with another opportunity to resample.

(e) Bridger took another respirable dust sample of DWP 384 on September 27, 1990. The results of this sampling showed the level of quartz at 15%.

(f) Based on the average of the quartz analysis for the July 18, 1990, MSHA sample (10%), and Bridger's samples of September 4 and 27, 1990 (14% and 15%, respectively), MSHA established a new respirable dust standard for DWP 384 of .8 mg. Bridger was notified of this new standard on October 2, 1990.

(g) On September 5, 1990, Bridger had submitted a bimonthly sample for DWP 384 pursuant to 30 C.F.R. 71.208(a). This sample was weighed by MSHA and reported to Bridger as resulting in a concentration of 1.2 mg/m³, thus triggering the requirements of 30 C.F.R. 71.208(c) for five respirable dust samples to determine compliance with 30 C.F.R. 71.101.

(h) Pursuant to 30 C.F.R. 71.308(c), Bridger submitted five samples for DWP 84. These samples were taken on September 27 and 30, 1990, and on October 1, 3, and 4, 1990.

(i) The average concentration for these five compliance samples submitted by Bridger was reported by MSHA as .7 mg/m³ and served as the basis for Citation No. 2931949 issued on October 11, 1990.

10. The Time Line attached as Exhibit A reflects the respirable dust sampling activities relative to DWP 384 described above. (Referenced in the briefs as stipulation no. 12).

11. On February 10, 1992, MSHA Subdistrict Manager Joseph W. Pavlovich sent a letter (attached as Exhibit B) to Bridger removing DWP 384 from bimonthly sampling status because the samples taken by the operator and MSHA were below the applicable .8 mg/m³ standard for a one-year period. (Referenced in the briefs as stipulation no. 13).

12. Bridger had not been cited for a violation of 30 C.F.R. 71.101 for five years prior to the citation at issue. (Referenced in the briefs as stipulation no. 14).

Dr. Morton Corn of John Hopkin's University, professor of Environmental Engineering was Respondent's expert witness. Dr. Corn testified at the hearing in this matter that a single shift sample, such as that taken in this case in September 1986 to establish the reduced dust standard, "is practically meaningless." Thomas Tomb, chief of the Dust Division at the Pittsburgh Health and Technology Center, Respondent's expert, agreed that "one sample doesn't do the job for either an enforcement purpose or health risk in terms of understanding exposure of miners" The Commission in its recent decision, Keystone Coal Mining Corporation, 16 FMSHRC 6 (January 4, 1994) held that MSHA's program for issuing citations for excessive levels of respirable dust based on a single shift sample is invalid in view of the 1971 "legislative type" rule that compliance determinations may not be based on a single sample. Notice of that rule published in the Federal Register and states in part:

Notice is hereby given that, in accordance with section 101 of the Act, and based on the data summarized ..., the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2.179 working sections in compliance with the dust standard on the data of the analysis.... [R]esults of the comparisons ... [show] that a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971).

The Commission decision in Keystone affirming the vacating of a citation based on a single shift sample, demonstrates that single shift sampling such as used in this case to establish the reduced dust standard in September 1986 does not approximate exposure with reasonable accuracy, and logically mandates dismissal of the citation in this case.

The basic fundamental respirable dust standard required by the Mine Act [Section 202(b)(2)] and codified as part of MSHA's regulations at 30 C.F.R. 70.100(a) is that the average concentration of dust be continuously maintained at or below 2 milligrams per cubic meter of air (2.0 mg/m³).

It is only "where" (Section 205 of the Act) and "when" (30 C.F.R. 70.101) the respirable dust in the mine atmosphere of the active workings contain more than 5 percent quartz that the 2 milligram standard must be lowered and the operator required to maintain the respirable dust below the 2.0 milligram average concentration. "When" the mine atmosphere of the active workings contains more than 5 percent quartz, the operator is required to maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below the respirable dust standard computed under the formula set forth in 30 C.F.R. 70.101.

In, Southern Ohio Coal Co., 16 FMSHRC 1096 (May 13, 1994), Judge Koutras vacated the citation alleging a violation of Section 70.101 stating that MSHA's policy of having a reduced dust standard follow the mechanized mining units when it moves to a different part of the mine, regardless of reduced quartz levels at the new location, was not logical or rational. An operator should not be held liable for failing to comply with a reduced dust standard at a location "based upon a quartz exposure that may not exist."

In the present case I agree with Respondent's contention that if the Secretary cannot determine compliance with the dust standards through single shift sampling, it surely cannot set a reduced standard based on a single shift sample. Furthermore, the Secretary should not be permitted to ignore concurrent 1990 quartz analysis and use the outdated 1986 reduced dust standard based on a single shift sample to issue the citation in question. I am satisfied from the record that the best indicator of the quartz content during the time frame of this citation is the average of the three samples taken in July and September 1990 which established a new respirable dust standard for DWP 384 of .8 mg.

CONCLUSION

Based upon the stipulations which I accept as established facts and the testimony of the expert witnesses, particularly the testimony of Dr. Morton Corn, I find and conclude that the citation in question should be vacated.

ORDER

In view of the foregoing findings and conclusions Citation No. 02931949 citing an alleged violation of 30 C.F.R. 70.101 is VACATED and the related proposed civil penalty is set aside.

August F. Cetti
Administrative Law Judge

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EXHIBIT A

MSHA sample triggers 2 operator quartz samples and a new standard set by MSHA

.6mg/ml
std. in
effect

| | | | | | | |
|---------|---------|---------|----------|---------|---------|---------|
| 7/18/90 | 9/4/90 | 9/5/90 | 9/27/90 | 9/27/90 | 9/30/90 | 10/1/90 |
| 10/2/90 | 10/3/90 | 10/4/90 | 10/11/90 | | | |

| | | | | | | |
|---|--|--|--|--|---|--|
| MSHA New Std samples for set by Quartz at MSHA of D-60 Drill .8 mg/m3 "DWP" (MSHA (analyzed weight at 10% .5 mg/m3) Quartz) of .7 mg/m3 for 5 samples | Bridger Sample 4 (of 5) samples taken by for Quartz Bridger at D-60 (MSHA Drill weight (MSHA analyzed at 14% Quartz) | Bridger Sample 5 (of 5) sample at taken by D-60 Drill Bridger "DWP" based (MSHA analysis average equals 1.2 mg/m3 | Bridger MSHA Coal Citation sample for #2931949 Quartz at Issued D-60 Drill (MSHA analyzed at 15% Quartz) | Sample 1 (of 5) taken by Bridger (MSHA weight .1 mg/m3 | Sample 2 (of 5) taken by Bridger (MSHA weight 1.1 mg/m3) | Sample 3 (of 5) taken by Bridger (MSHA weight 1.2 mg/m3 |
|---|--|--|--|--|---|--|

71.208(c)

Triggers 5 compliance samples pursuant to 30 C.F.R.