FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 19, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2007-153-M A.C. No. 39-01401-109634
v.	:	
WEATHERTON CONTRACTING CO., INC., Respondent	:	Cedar Rapids Plant

DECISION BASED ON THE RECORD

Before: Judge Manning

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). Weatherton Contracting was issued two citations on September 7, 2006, by MSHA Inspector Robert Lindeman under section 104(a) of the Act alleging violations of section 30 C.F.R. § 56.5001(a)/.5005. Citation No. 7939675 alleges that the front-end loader operator was exposed to a shift-weighted average of 2.63 mg/m^3 of respirable silica dust. Citation No. 7939676 alleges that the crusher operator was exposed to a shift-weighted average of 3.48 mg/m^3 of respirable silica dust. The exposures in both citations exceeded the threshold limit value. Feasible engineering controls were not in use to control employee dust exposure and there was no respiratory protection program in place. Water sprays were not in use at the plant. Inspector Lindeman designated each citation as significant and substantial ("S&S") and the Secretary proposed a penalty of $124.00 for each citation.

During a conference call, the safety director for Weatherton Contracting stated that the company does not dispute that the miners were overexposed to silica dust. It contends, however, that the violations should not have been designated as S&S. Weatherton has not received any other citations alleging an overexposure to silica dust. The parties asked me to decide this case based on the existing record and on their arguments. I agreed to this procedure and the previously scheduled hearing was canceled.

The Secretary states that Weatherton Contracting has four portable crushing operations in South Dakota. Apparently complaints have been filed with the Environmental Protection Agency and the U.S. Forest Service by citizens in the area about the amount of dust produced by the operations. The Secretary states that Weatherton Contracting was not using water sprays to control dust at its crusher because the clay soil turns to slick mud with the application of water.

The Secretary agrees that, for this reason, it is difficult for Weatherton Contracting to control dust at its plants.

The Secretary argues that Inspector Lindeman would testify that the sampling analysis indicated a 17% silica dust content. Both the loader and crusher operators were substantially overexposed to silica dust. During discovery the Secretary learned that the masks worn by employees at Weatherton Contracting are NIOSH approved but there was no indication that the employees had been fit tested. Inspector Lindeman would testify that fit tests are essential to ensure that the mask is working properly. He would also testify that the loader operator was not wearing any sort of mask and that the door for the loader was open during part of the shift.

The Secretary argues that the inspector's S&S determinations should be affirmed. She maintains that the citations should be presumed to be S&S based on the logic of the Commission's decision in *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986). Because the miners were not wearing fit-tested personal protective equipment, it can be assumed that they were breathing air that contained more than the permissible level of quartz dust. She also argues that the principles I set forth in *Spencer Quarries*, 28 FMSHRC 1005 (Nov. 2006) are applicable to the facts of this case. In addition, Weatherton Contracting did not have a program in place to monitor the exposure levels of its employees and, as a consequence, it would not have any way to determine if miners were being over-exposed to silica dust. This fact, "in combination with the non-use of a dust mask by the front-end loader operator and the failure to fit test employees, establishes that the overexposed miners suffered a discrete health hazard and that . . . there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature." (S. Submission at 3).

Weatherton did not submit a formal written argument but, during the conference call, stated that the Secretary failed to establish that the violations were S&S. It asks that I modify the citations to delete the S&S determinations.

I find that the Secretary established that the violations were S&S. Because the Commission's *Consolidation Coal* decision concerned the rather unique situation of underground coal mines, I decline to apply the S&S presumption to this case. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). In the case of a citation alleging a violation of a health standard, the Secretary must establish: (1) the underlying violation of the health standard; (2) a discrete health hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in

question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The parties do not dispute that the violations occurred. I find that the record establishes that there was a reasonable likelihood that the hazard *contributed to* by the violation would result in an illness of a reasonably serious nature. The equipment operators were significantly overexposed to silica dust. Neither miner was wearing a fit-tested respirator. Weatherton Contracting did not have in place a program for monitoring the silica dust exposure levels of its employees so it had no way of knowing whether they were being overexposed. Taking into consideration continuing mining operations, I find that the violations were S&S and serious.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Weatherton Contracting's plant had a history of one violation in the two years prior to September 7, 2006. Weatherton Contracting is a small, intermittent operator that employed about 10 people and worked about 13,000 hours in 2006. The violations were abated in good faith. Weatherton Contracting did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. The violations were the result of the company's moderate negligence. Based on the penalty criteria, I find that the Secretary's proposed penalty of $124.00 for each citation is appropriate.

ORDER

Accordingly, Citation Nos. 7939675 and 7939676 are **AFFIRMED** and Weatherton Contracting Co., Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $248.00 within 40 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning
Administrative Law Judge

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