FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 1996

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

DECISION ON REMAND

Before: Judge Amchan

The Commission Decision and Remand Order

On April 19, 1996, the Commission reversed and remanded my January 5, 1994 decision in these matters. I had found Peabody=s violations of the respirable dust limit in 30 C.F.R. '70.100(a) with regard to three of its six mechanized mining units to be due to an Aunwarrantable failure@ to comply the standard and due to high negligence. This Commission concluded:

> ... Peabody=s remedial measures clearly demonstrate a good faith, reasonable belief that it was taking steps necessary to solve its dust problems and this record cannot support a finding of high negligence or unwarrantable failure. (Slip opinion at page 6.)

This matter is now before me to reassess the civil penalties with regard to these violations.

Findings of Fact

Violative conditions and prior respirable dust violations

in the two years before the instant citation and orders

On January 6, 1993, MSHA inspector Arthur Ridley reviewed the results of Respondent=s bimonthly sampling for respirable dust for the period of November-December 1992 (Tr. 16-18). These records indicated that for the five samples taken in the sampling period, the average exposure of the continuous miner operator on mechanized mining unit (MMU) 044 was 2.4 mg/m3 (Jt. Exh. 4).

Ridley therefore issued Citation No. 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 ... .

The citation was issued pursuant to section 104(d)(1) of the Act in that it alleged that the violation was Asignificant and substantial@ (S&S) and due to the Aunwarrantable failureA of Peabody to comply with the standard. A $4,000 civil penalty was proposed for this alleged violation.

On January 6, 1993, the inspector also reviewed the results of the November-December 1992 sampling of the continuous miner operator on MMU 056. The five samples also averaged 2.4 mg/m3 (Tr. 58-59, 63). Ridley issued section 104(d)(1) Order No. 3551262. The Secretary subsequently proposed a $6,000 civil penalty.

Ridley returned to Camp 1 on January 20, 1993 and reviewed samples taken between January 4 and 6, 1993, on MMU 047 for the January-February 1993 bimonthly sampling period. These averaged 2.2 mg/m3. The inspector issued section 104(d)(2) Order No. 3551263. The proposed penalty for this order was $6,000.

While Peabody conceded that the violations were AS&S,@ it challenged the allegations of unwarrantable failure and high negligence. These allegations were predicated on the number of citations issued within the prior two years for violations of the respirable dust standard on each on the mechanized mining units cited in January, 1993 (Tr. 34-39, 65, 74-75, 83-85, 100-102).[1]

[1] At the time of the January 1993 citation and orders, Peabody had six mechanized mining units in operation at the Camp No. 1 mine.

These violations were considered only on a MMU-by-MMU basis; the Secretary did not consider Respondent=s compliance record as a whole (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 the respirable dust standard on four of these 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 year 1991 and 1992, mechanized mining Unit 056 was out of compliance with the respirable dust standard five 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 occurred in the November-December 1992 sampling period and is addressed by Order No. 3551262.

Mechanized mining Unit 047 was available for sampling in only four of the 12 bimonthly sampling periods of 1991-1992. In May 1991, a citation was issued because the March-April samples averaged 3.0 mg/m3. The next time Unit 047 was sampled was for the July-August 1992 sampling period when it was barely in compliance at 1.9 mg/m3 (Exhibit G-3, page 4). 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 November-December 1992 sampling period, then out of compliance again for the January-February 1993 period, which is covered by Order No. 3551263.

Measures Taken Prior to January 1993 to improve dust control

Beginning in January 1992, Peabody implemented a number of

measures to increase the water supply to its MMUs and thereby improve dust control. In January 1992, it began a 6-month project to install water flow gauges on its continuous miners. This allows the operator of the machine to monitor the amount of water coming through his machine (Tr. 179).

In February, Respondent began a six to seven month project to increase the size of the fittings on the water lines leading to the continuous miners from **2** inch to 2 inches (Tr. 181 - 82). 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, thus allowing it to use greater water pressure (Tr. 183). In March 1992, Peabody increased the size of the water lines going to the miners from 1 inch to 1 **2** inches (Tr. 184).

In July 1992, the company replaced its water pumps with pumps that allowed for increased water pressure (Tr. 188). Finally, over a six-week period in November and December, 1992, Peabody installed water sprays inside the ductwork of the scrubbers on the continuous miners to improve scrubber efficiency

(Tr. 185). Peabody also began working with the manufacturer of its continuous miners to reduce restrictions in the water line of these machines (Tr. 187).

Assessment of Civil Penalties

In my prior decision I assessed a $5,000 civil penalty for each of the three respirable dust violations cited by Inspector Ridley in January, 1993. Given the fact that the Commission has concluded that the record does not support a finding of Aunwarrantable failure@ or high negligence upon which these assessments were predicated, penalties of substantially less than $5,000 are clearly indicated by the remand order.

The Six Statutory Criteria for Assessing Civil Penalties

The effect on the operator=s ability to stay in business: The parties stipulated that penalties of the magnitude of those proposed would not effect Peabody=s ability to stay in business.

Size of the operator: Peabody produces in excess of 10,000,000 tons of coal a year and is thus a relatively large operator. Other things being equal, this would indicate that a somewhat larger penalty is more appropriate than for a smaller operator.

Good faith in attempting to achieve rapid compliance after notification of the violation: Peabody immediately acted upon Inspector Ridley=s suggested method to terminate (or abate) the violations. It assigned additional supervisory personnel to monitor its employees while they were being sampled for respirable dust exposure (Tr. 72-73, 96, 190). These supervisors insured that miners positioned themselves where they would minimize dust exposure and checked on ventilation and water pressure (Tr. 191). Respondent should be given credit for exercising good faith in terminating the citations even though implementation of the inspector=s suggestions may violate 30 C.F.R. ' 70.207, which requires that sampling be taken during a normal production shift. Sampling results obtained under conditions that are abnormal are likely to be unrepresentative of the miners= regular, daily exposure to respirable dust.

Gravity of the violations: The gravity of the violations is quite high. The parties have stipulated that the violations are AS&S.@ The record also suggests that Respondent=s miners have been regularly exposed to respirable dust levels above those allowed by the standard for a 2-year period.

Prior History and Negligence: These factors must be considered in unison when assessing a civil penalty in these matters. Citation No. 3551261 was the fifth respirable dust violation on MMU 044 in a 2-year period. Order No. 3551262 was the fifth on MMU 056. Order No. 3551263 was the third violation out of five sampling periods on MMU 047. Although MSHA appears to have considered each MMU in isolation, I believe one must consider that in January 1993, after numerous prior respirable dust violations, three of Respondent=s six mechanized mining units were in violation of the respirable dust standard. Although it is true that two of these violations were for one bimonthly sampling period and one was for another, I deem it significant that in the same month MSHA cited Respondent for respirable dust violations on half of its production units.

The Commission has found that this record does not support a finding of high negligence. Thus, the question becomes whether the violations were the result of negligence at all, or simply bad luck[2]. Since January 1993, Respondent=s management has watched its continuous miner operators while their dust exposure is being sampled (Tr. 214-15). Miner operators have been observed on several occasions improperly positioning the curtain or line brattice to direct air towards the working face, and positioning themselves in the exhaust current, rather than the intake current (Tr. 215-16).

---

[2] The Commission concluded that APeabody=s remedial measures clearly demonstrate a good faith, reasonable belief that it was taking the steps necessary to solve its dust problems and this record cannot support a finding of high negligence or unwarrantable failure.@ Slip opinion at page 6. I infer that the record may support a finding of ordinary negligence; otherwise the Commission would have concluded that it did not do so.

The Commission noted that employee work practices were also addressed before the issuance of the instant citations (slip opinion at page 6). The contents of the approved dust control plan were covered in annual refresher training and at least at some unspecified number of recurring safety meetings (Tr. 213). Additionally, in May, 1992, the Superintendent and chief mine manager of Camp No. 1 Mine went to employees in each working section and explained in detail Respondent=s dust control program (Tr. 213).

I conclude that the instant violations were the result of Respondent=s Aordinary@ negligence. Sampling by MSHA in 1991 and 1992 indicated that compliance with the standard was achievable with the equipment already on site, thus putting Peabody on notice that something else, such as improper work practices, was partially the cause of its excessive respirable dust readings (Tr. 48, 89). Moreover, the results of the company=s sampling in the latter part of 1992 was not such that it should have led Respondent to believe that it had solved the problem. For the three bimonthly sampling periods May-October 1992, the results of Peabody=s sampling on the three cited machines was as follows:

Sampling Period	MMU 044	MMU 056	MMU 047
May-June ›92	1.5mg/m3	1.3mg/m3	Non Producing
July-Aug ›92	Non Producing	1.2mg/m3	1.9mg/m3
Sept.-Oct. ›92	Non Producing	1.6mg/m3	2.4mg/m3(violation)

I conclude that these results were insufficient to give a reasonably prudent operator assurance that it had solved its respirable dust problem, and should have put it on notice that greater attention to employee work practices was necessary. Thus, I conclude that the violations found in the November-December 1992 sampling period on MMU 044 and 056, and the violation found on MMU 047 in the January-February 1993 sampling period, were the result of some degree of negligence.

Considering all six criteria in section 110(i) of the Act in unison, I conclude that a penalty of $1,500 is appropriate for each section 104(a) citation in this case.

ORDER

1. Citation Nos. 3551261, 3551262 and 3551263 are affirmed

as section 104(a) violations.

2. Peabody Coal Company shall, withing 30 days of the date of this decision, pay to the Secretary $4,500 for the violations found herein.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Anne T. Knauff, Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

David R. Joest, Esq., 1951 Barrett Court, P.O. Box 1990, Henderson, KY 42420-1990 (Certified Mail)

/lh