FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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October 16, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 97-90
Petitioner	:	A.C. No. 15-14492-03725
v.	:	
	:	Docket No. KENT 97-131
COSTAIN COAL INCORPORATED,	:	A.C. No. 15-14492-03726
Respondent	:	
	:	Docket No. KENT 97-132
	:	A.C. No. 15-14492-03727
	:	
	:	Baker Mine
	:	
	:	Docket No. KENT 97-160
	:	A.C. No. 15-16020-03530
	:	
	:	Smith Underground No. 1

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Charles E. Lowther, Esq., Mitchell, Joiner, Hardesty & Lowther, Madisonville, Kentucky for the Respondent in Docket No. KENT 97-160;
Carl B. Boyd, Jr., Esq., Sheffer-Hoffman, Henderson, Kentucky, for the Respondent in Docket Nos. KENT 97-90, KENT 97-131 and KENT 97-132.

Before: Judge Feldman

These consolidated proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). These consolidated matters were called for hearing on July 22, 1997, in Owensboro, Kentucky. At trial, the parties moved for the approval to settle Docket No. Kent 97-90 in its entirety by reducing the proposed civil penalty from $937.00 to $381.00 for the two citations in issue. The parties also moved for the approval of their settlement agreement with respect to a reduced civil penalty from $957.00 to $100.00 for two citations in Docket No. KENT 97-131; and a reduction in civil penalty from $1,643.00 to $1,430 for three citations in Docket No. KENT 97-132. The settlement terms were approved on the record as consistent with the statutory penalty criteria and will be summarized at the end of this decision.

A. Background

There are four remaining citations to be resolved through this hearing process. Three of these citations involve excessive respirable dust concentrations in violation of section 70.100(a), 30 C.F.R. ' 70.100(a), that were detected as a result of bimonthly respirable dust samples obtained from a designated occupation in several of the respondent=s mechanized mining units (MMU).

The mandatory safety standard in section 70.100(a) provides:

> 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 . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . .

In order to ensure that miners are exposed to less than 2.0 milligrams per cubic meter of air (2.0 mg/m^3) section 70.207(a), 30 C.F.R. ' 70.207(a), provides, in pertinent part:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days. The bimonthly periods are: January 1-February 28 (29), March 1-April 30, May 1-June 30, July 1-August 31.

The designated occupation in a given mechanized unit is the work position determined to have exposure to the highest respirable dust concentration. Section 70.2(f), 30 U.S.C. ' 70.2(f). The five valid samples are obtained from Mine Safety and Health Administration (MSHA) approved filter cassettes contained in an air sampling unit worn by the miner in the designated occupation. In accordance with section 70.207(a), these five cassette dust samples are sent by the operator to MSHA=s laboratory where the filter is removed and weighed to determine if the average respirable dust concentration is in compliance with the 2.0 milligram standard in section 70.100(a). If violations of section 70.100 (a) are detected by the MSHA laboratory, an MSHA inspector issues a citation that establishes a deadline for abatement. The citation and abatement commonly occur without a mine facility visit or an inspection by MSHA personnel.

During the time fixed for abatement, the operator must take corrective action to lower the concentration of respirable dust to within a permissible concentration and then sample each production shift until five valid respirable dust samples are taken. 30 C.F.R. ' 70.201(d).

Citation Nos. 9898430, 9898420 and 9898402, issued during the period October through December 1996, concern violative respirable dust samples, based on the average of five samples, taken from the designated occupation, *i.e.*, the continuous miner operator, in several different

mechanized mining units at the respondent=s Smith and Baker mines. The citations were issued by Robert G. Smith, an MSHA District Industrial Hygienist. Each of the citations was issued after the bimonthly sample submitted by the respondent for MSHA=s laboratory analysis revealed average respirable dust concentrations in excess of 2.0 mg/m^3 obtained from five samples. Specifically, the violative average respirable dust concentrations for Citation Nos. 9898430, 9898420 and 9898402 were 2.2, 4.4 and 3.4 mg/m^3, respectively.

Consistent with MSHA=s normal respirable dust monitoring procedures, Smith did not inspect the subject MMU and has no personal knowledge concerning the circumstances surrounding each violative dust sample. However, Smith concluded the respondent=s degree of negligence was moderate for Citation No. 9898430 issued at the Smith Underground Mine, and high for Citation Nos. 9898420 and 9898402 issued at the Baker Mine. The high negligence was based on the Baker Mine=s general history of generating large quantities of coal dust. Smith also concluded the entire MMU crew was affected (the foreman, shuttle car operators and roof bolt operators) based on the respirable dust exposure of the miner in the designated occupation (continuous miner operator).

The fact of the violations cited in these MMU citations, as well as the violations= significant and substantial (S&S) characterizations, are not in dispute. What is disputed is the number of persons affected by the violations and the degree of culpability (negligence) attributable to the respondent. Thus, in essence, the issue is the application of the penalty criteria to the respirable dust violations in issue. Consequently, each penalty criterion with respect to each MMU citation will be discussed in turn.

However, consideration of the statutory penalty criteria must be viewed in the context of the unique circumstances and issues concerning excessive respirable dust concentrations. In this regard, the Commission has concluded, Ain the particular context of the control of respirable dust in coal mines some departure [from normal enforcement considerations] is justified because of fundamental differences between a typical safety hazard and the respirable dust exposure-related health hazard at issue.@ *(Emphasis added). Consolidation Coal Company*, 8 FMSHRC 890, 895 (June 1986), *aff=d sub nom. Consol. Coal v. Fed. Mine Safety & H. Rev. Com=n.*, 824 F.2d 1071 (D.C. Cir. 1987). Thus, the D.C. Circuit agreed with the Commission that, given the insidious nature of respirable dust exposure:

> Congress clearly intended the full use of the panoply of the Act=s enforcement mechanisms to effectuate [the goal of preventing respiratory disease], including the designation of a violation as a significant and substantial violation. 824 F.2d at 1086, *quoting* 8 FMSHRC at 897.

B. Civil Penalty Criteria - MMU Violations

1. Previous History of Violations

Although the Commission has stated that an operator=s general history of violations is a relevant consideration in assessing a civil penalty, it is well settled that a history of similar violations serves as a significant basis for imposition of a higher civil sanction. *Sec=y of Labor o/b/o James Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 841, 850 (June 1996); *But see AMAX Coal Company*, 19 FMSHRC 1542, 1551 (dissenting opinion) (September 1997), *citing Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992). Thus, an important inquiry is whether an operator=s history of similar violations placed that operator on notice that greater compliance efforts were required. *AMAX, 19 FMSHRC at 1551*. However, this routine inquiry is not so simple to apply in respirable dust cases.

Respirable dust concentrations vary from shift to shift and are affected by the level of coal production as well as other varying factors, such as temperature and humidity. Unlike most mine hazards caused by violative conditions, excessive respirable dust concentrations ordinarily cannot be observed. Thus, the only method of ascertaining the existence of excessive respirable dust is through MSHA=s bimonthly sampling process. Moreover, excessive dust problems are MMU specific. In other words, a history of excessive dust in MMU-007 would not place an operator on notice that there was a potential dust problem in MMU-009, particulary if prior bimonthly sample results from MMU-009 were compliant.

Of course, there may be instances where a pattern of an operator=s failure to abide by its dust control plan, such as a history of a failure to maintain sprayers, is an important inculpating factor, regardless of the respirable dust history of a specific MMU. However, such circumstances are not reflected in the record evidence. Although there are approximately 29 MMU violations of 70.100(a) at the Baker Mine during the two year period preceding January 1997, Smith testified the respondent had no history of violations for failure to follow its dust control plan. (Gov. Ex. 8; Tr. 154). Although Smith testified that the respondent was required, on several occasions, to increase the amount of sprayers required by its dust control plan, there is no evidence of the respondent=s failure to comply. (Tr. 114-15).

With respect to the specific citations, Citation No. 9898430 cites MMU-002 at the Smith Underground No. 1 facility. There is no evidence of previous section 70.100(a) violation in this MMU. Therefore, I must conclude that prior bimonthly samples for MMU-002 did not provide notice that greater dust control efforts were called for.

Citation No. 9898420 cites MMU-009 at the Baker facility. Smith testified that MMU-009 was a relatively new mechanized mining unit with no history of pertinent violations. (Tr. 106).

Citation No. 9898402 cites MMU-007 at the Baker facility. This citation illustrates the difficulty in applying the traditional notice test based on a history of similar violations. MMU-007 was cited for excessive respirable dust in October 1994, October 1995, and

Citation No. 9898402 was issued in October 1996. After the October 1994 citation, presumably, there were five compliant bimonthly samples before the October 1995 citation. Similarly, the October 1995 citation was followed by five compliant bimonthly samples prior to the issuance of Citation No. 9898402. Thus, in each prior instance, the respondent believed it had corrected the dust control problem in view of the series of compliant bimonthly samples.

Although the submission of more frequent dust samples for analysis may be prudent for mine facilities that generate large quantities of dust, the Secretary has not alleged, nor does the record reflect, that operators are encouraged to submit dust samples to MSHA more frequently than on a bimonthly basis. In this regard, although Smith alleged the Baker Mine generated large amounts of coal dust, there is no evidence of heightened monitoring by MSHA.

In summary, I do not view the respondent=s history of section 70.100(a) violations, in view of Smith=s admission of no history of pertinent dust control plan violations, as a factor having a significant impact on the degree of the respondent=s civil penalty liability.

2. Appropriateness of the Size of the Penalty and Effect on Business Operations

Costain Coal Company is a large operator that produces over ten million tons of coal each year. Imposition of the civil penalties proposed in these matters is not inappropriate to the size of the respondent=s business and will no affect its ability to conduct its business.

3. Degree of Negligence

As noted above, traditional considerations used to evaluate degrees of negligence, such as the extent of the violative condition, the length of time that it existed, whether the violation was obvious, and, whether the operator was placed on notice that greater efforts for compliance were necessary, are not helpful in matters concerning excessive coal dust conditions. *AMAX Coal Company*, 19 FMSHRC at 1551.[1] Smith acknowledged excessive respirable dust conditions cannot be seen, even in situations where respirable dust concentrations are relatively high. Therefore, considerations of the extent of the violation, and how long it existed, in the context of an MMU with prior compliant bimonthly sample results, are not material.

[1] While *AMAX*, and the cases cited therein, concern the parameters for unwarrantable failure, which has not been charged in these matters, the guidelines discussed in *AMAX* are essential for determining the degree of an operator=s negligence.

As previously discussed, prior compliant bimonthly samples, in the absence of an identifiable equipment malfunction or other dust plan violation, do not suggest that greater compliance efforts are necessary. In fact, the Commission has vacated high negligence and unwarrantable failure findings for a section 70.100(a) MMU violation noting that the operator Ahad reason to believe its remedial efforts [controlling dust] were working@ because of a series of compliant bimonthly sampling results immediately prior to the violative sample that gave rise to the section 70.100(a) citation. *Peabody Coal Company*, 18 FMSHRC 494, 499 (April 1996).[2]

Thus, it is in the context of these unique circumstances that the issue of the degree of the respondent=s negligence for each of the MMU citations is discussed below. However, it must be noted that, although high negligence may provide a basis for an increased civil penalty, low negligence, or even a lack of negligence, is not a significant mitigating factor when considering respirable dust violations. The Mine Act is a strict liability statute. In the final analysis, who, if not the operator, is responsible for ensuring that miners are not exposed to excessive respirable dust? Mine operators must ensure that the maximum levels of permissible respirable dust concentrations are not exceeded. An operator=s failure to do so, regardless of fault, warrants the imposition of meaningful civil penalties.

The Secretary attributed the degrees of the respondent=s negligence for each of the MMU citations as follows:

Citation No. 9898430 - MMU-002 - Smith Underground - Moderate Negligence
Citation No. 9898420 - MMU-009 - Baker Mine - High Negligence
Citation No. 9898402 - MMU-007 - Baker Mine - High Negligence

Prior to the issuance of Citation No. 9898430, the approved dust control plan required 32 continuous miner sprayers, with a requirement that at least 26 of the 32 sprayers remain operative. As noted, Smith did not inspect the subject mine facilities before issuing the citations. Thus, there is no evidence to attribute the excessive dust sample to an identifiable dust control plan violation. To abate Citation No. 9898430, the respondent, pursuant to an amendment of its dust control plan, increased the number of sprayers on the continuous miner from 32 to 33, and increased the minimum number of operative sprayers from 26 to 27. There is no evidence of a

[2] To attribute high negligence to an operator for a section 70.100(a) violation in the absence of a pertinent identifiable dust control plan violation, or an MMU specific history of violative dust samples providing notice that greater dust control measures at that MMU were required, is tantamount to the presumption of high negligence approach rejected by the Commission in *Peabody Coal*, 18 FMSHRC at 498.

history of excessive respirable dust conditions at MMU-002. Accordingly, the negligence attributable to the respondent for Citation No. 9898430 is low.

Citation No. 9898420 concerns MMU-009, a new mechanized unit without a history of excessive dust violations. There is also no evidence of any specific equipment malfunction or inadequate dust control plan provision that contributed to the violative condition. Consequently, the record reflects the excessive dust conditions were transitory and resolved without significant abatement action.[3] Accordingly, the degree of negligence attributable to the respondent for Citation No. 9898420 is also low.

Citation No. 9898402 was abated by correcting a malfunction of the scrubber blade and housing on the MMU-007 continuous miner. Given the general history of previous violations concerning excessive dust at the Baker facility, the respondent was obligated to remain on a heightened state of awareness regarding potential dust control problems. The failure of the respondent to detect this malfunction, on balance, constitutes a high degree of negligence with regard to Citation No. 9898402.

4. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act requires an evaluation of the seriousness of the violation. *Consolidation Coal Company*, 18 FMSHRC 1541, 1549 (September 1996). Here, the respondent concedes the S&S nature of the MMU violations. The respondent, however, seeks to mitigate the gravity associated with the violations by attempting to limit the number of persons affected to the designated occupation. Specifically, the respondent asserts the excessive respirable dust concentrations taken from samples on the person performing the designated high risk occupation cannot be extrapolated to other personnel on the section. While it is true that other occupations on the section, by definition, ordinarily have less respirable dust exposure than the designated occupation, I fail to find this argument persuasive.

The purpose of section 70.100(a) is to limit the permissible concentration of respirable dust exposure by mine personnel in active workings. Section 70.2(b) defines active workings as Aany place in a coal mine where miners are normally required to work or travel.@ 30 C.F.R. ' 70.2(b). Thus, the purpose of MSHA=s high risk occupation bimonthly sampling program is to monitor the atmospheric conditions in active workings. Monitoring the high risk occupation ensures that, if the high risk miner is not overly exposed, no one on that MMU shift is exposed to impermissible levels of respirable dust. Put another way, monitoring the high risk continuous

[3] Respirable dust conditions are not static. They vary from shift to shift. In fact, it is not uncommon for individual shift dust samples within a bimonthly five shift sample to be above 2.0 milligrams although the five shift average is below the 2.0 milligram maximum permissible concentration. *See, eg.*, Gov. Ex. 7, p.2. Thus, excessive dust conditions may exist during a particular shift, although the condition resolves without remedial action by the operator.

miner occupation at the face provides the earliest warning of excessive respirable dust in the active workings atmosphere.

Virtually all MMU shift members, *e.g.*, shuttle car operators, scoop operators, roof bolt operators, are exposed to the face during the course of their duties. Consequently, the Secretary=s assertion that all shift members are effected by MMU dust violations is reasonable and entitled to deference, particularly in view of the respiratory hazards associated with cumulative pulmonary exposure. Consequently, the violations cited in the subject citations affect all shift members and are serious in gravity.

Accordingly, the number of persons effected - 12 persons in Citation Nos. 9898430 and 9898420, and 14 persons effected in Citation No. 9898402 - is affirmed. These numbers represent the total number of MMU members in each of the cited units multiplied by two daily shifts.

5. Good Faith Efforts to Achieve Rapid Compliance

The evidence reflects the respondent sought to modify its dust control plan where appropriate and made good faith efforts to achieve compliance.

C. Penalty Assessment - MMU Violations

In view of the serious gravity and the strict liability considerations related to the risk of severe pulmonary disease posed by the MMU citations, the Secretary=s proposed civil penalty of $595.00 for Citation No. 9898430 in Docket No. KENT 97-169 is affirmed. Although the Secretary proposes, apparently based on allegations of high negligence, a civil penalty of $2,384.00 for Citation No. 9898420 in Docket No. KENT 97-132, the reduction in negligence to low discussed above warrants a similar $595.00 civil penalty, consistent with the principle of strict liability.[4]

Finally, given the high negligence attributable to the respondent=s failure to adequately maintain the continuous miner scrubber in view of its history of coal dust problems, the $2,384.00 civil penalty proposed by the Secretary for Citation No. 9898402 in Docket No. KENT 97-131 is affirmed.

D. Civil Penalty Criteria - Designated Area Violation

[4] Although I have exercised restraint in these proceedings in the civil penalties imposed on the basis of strict liability, a continuing general pattern of additional respirable dust violations may subject the respondent to significantly higher civil penalties under strict liability in the future.

In addition to section 70.207(a) that specifies the bimonthly sampling requirements in mechanized mining units, Section 70.208, 30 U.S.C. ' 70.208, governs the bimonthly sampling requirements in designated areas capable of generating high dust concentrations that are identified in the operator=s MSHA approved dust control plan. This mandatory standard requires one bimonthly dust sample obtained from a sampling device placed at the specified location. If this single bimonthly sample exceeds 2.0 milligrams, the operator must furnish MSHA with a five dust sample, obtained from consecutive shifts, to determine if the 2.0 milligram standard in section 70.100(a) is violated.

Citation No. 9898431, issued by Smith on January 7, 1997, concerns a violative respirable dust sample of 2.2 mg/m^3, based on an average of five samples, obtained at designated area 200-1, inby the No. 5 belt transfer point at the respondent=s Baker Mine. Although the fact of the violation cited in Citation No. 9898431 is admitted, the degree of the respondent=s negligence, and whether the violation was properly designated as S&S, are contested.

Although Smith concluded the degree of the respondent=s negligence associated with this violation was high, there is no evidence of an identifiable dust control plan violation that contributed to this violation. Moreover, the violation resolved itself in a timely manner in that subsequent samples were compliant without any particular abatement action on the part of the respondent. Consequently consistent with the discussion above, I conclude the record does not support more than a finding of low negligence.

With respect to the S&S issue, Alan Shelton, the respondent=s Baker Mine belt foremen, testified there is a belt walker on each of the two shifts that travels along the entire 6,000 to 7,000 feet of beltline to detect hazards or malfunctions each day. There are also belt mechanics that routinely perform maintenance. If a problem were encountered downwind of the cited designated area that required cleanup or maintenance, Shelton opined that these employees could be exposed to the excessive respirable dust conditions for approximately 45 minutes.

It is well settled that the operative time period for considering whether a violation is properly designated as S&S includes the time that the violative condition existed prior to the citation, as well as the time it would have existed if normal mining operations had continued. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 884 (June 1996) (Citations omitted). Given the fact that Arespirable dust disease is insidious, furtive and incapable of precise prediction,@ the controlling case law concerning the presumptive S&S nature of section 70.100(a) violations that are based on excessive designated occupation samples, must also be applied to violations based on sampling devices at designated areas, particularly where employees are routinely exposed to such areas. *Consolidation Coal Company*, 8 FMSHRC at 898, 899. Accordingly, the S&S designation for Citation No. 9898431 is affirmed. Consistent with the gravity discussion for the MMU citations, the cited designated area violation is, likewise, serious in gravity.

E. <u>Penalty Assessment - Designated Area Violation</u>

The Secretary has proposed a civil penalty of $1,019.00 for this citation. In view of the statutory civil penalty criteria discussed above, a civil penalty of $595.00 is appropriate for the cited condition. This reduction in civil penalty is warranted due to a reduction in the respondent=s degree of negligence from high to low. Although the civil penalty is being reduced, it remains meaningful and is consistent with the strict liability imposed on operators in the event of their failure to maintain safe environmental working conditions.

F. Total Civil Penalties

Docket No. KENT 97-90 - The approved settlement agreement provides for a reduced civil penalty from $937.00 to $381.00 for the two citations in issue. The settlement terms include deleting the S&S designation from Citation No. 4067436.

Docket No. KENT 97-131 - The parties have settled two of the three citations in issue. The settlement terms include payment of a civil penalty of $50.00 each for Citation Nos. 4067875 and 4064262 as well as deletion of the S&S designations in these citations. A $2,384.00 civil penalty for Citation No. 9898402 has been imposed herein. Consequently the total civil penalty for Docket No. KENT 97-131 is $2,484.00.

Docket No. KENT 97-132 - The parties have agreed to settle three of the five citations in issue. The respondent has agreed to pay a total civil penalty of $1,430.00 for Citation Nos. 4063629, 4064265 and 4064268. Civil penalties of $595.00 for Citation No. 9898420, and $595.00 for Citation No. 9898431, have been imposed in this decision. Thus, the total civil penalty imposed for the subject five citations is $2,620.00.

Docket No. KENT 97-160 - This docket concerns only Citation No. 9898430. The $595.00 civil penalty proposed by the Secretary for Citation No. 9898430 is affirmed herein.

Thus, the total civil penalty for the four docketed cases is $6,080.00.

ORDER

In view of the above, **IT IS ORDERED** that the respondent **SHALL PAY** a total civil penalty of $6,080.00 in satisfaction of the citations in issue in these proceedings. Payment shall be remitted within 30 days of the date of this decision. Upon timely receipt of payment, Docket Nos. KENT 97- 90, KENT 97-131, KENT 97-132 and KENT 97-160 **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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