FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

November 25, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-996
Petitioner	:	A. C. No. 15-07201-03644
	:	
v.	:	Docket No. KENT 94-997
HARLAN CUMBERLAND COAL,	:	A. C. No. 15-07201-03645
Respondent	:	
	:	Docket No. KENT 94-998
	:	A. C. No. 15-07201-03646
	:	
	:	Docket No. KENT 94-1024
	:	A. C. No. 15-07201-03647
	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 94-1307
	:	A. C. No. 15-08415-03624
	:	
	:	D-1 Mine

DECISION ON REMAND

Before: Judge Merlin

These cases are before me pursuant to the Commission=s decision dated September 25, 1997.

In these matters the Secretary of Labor filed a petition for assessment of civil penalties against the operator for not submitting respirable dust samples in accordance with applicable regulations. One citation charged a violation of 30 C.F.R. ' 70.207(a) which requires that an operator take five valid respirable dust samples during a bimonthly period from a designated occupation. Two citations charged violations of 30 C.F.R. ' 70.208(a) which requires that valid samples be taken bimonthly from designated areas.

In its decision dated September 25, 1997, the Commission held that the operator had violated the cited sections of the regulations. According to the Commission, in order to comply with the Act, the operator must collect samples and must submit them to the Mine Safety and Health Administration (hereafter referred to as "MSHA") in the manner specified by the regulations. In addition, the operator's samples must not be voided by MSHA for any reason. The Commission stated that MSHA cannot determine whether to void a sample unless it receives and examines the sample.

With respect to the appropriate amount of penalties the Commission found that the administrative law judge had made no findings with respect to size, good faith abatement, and history of prior violations. The parties had stipulated that a reasonable penalty would not affect the operator's ability to continue in business and the Commission directed that this should be taken into account when penalties were assessed.

The Commission stated that the judge made no gravity findings for the section 70.208(a) violations. In addition, the Commission pointed out that although the judge concluded the section 70.207(a) violation was serious, he offered no specific factual findings to support his conclusion.

The Commission then said that the judge offered no explanation to support his finding of moderate negligence for the violation of section 70.207(a) and an inadequate explanation of his moderate negligence finding for the violations of section 70.208(a). The Commission discussed the various findings that could be made with respect to negligence depending on the acceptance and interpretation of factual alternatives. The Commission remanded the cases for reassessment of penalties consistent with its decision.

On October 14, 1997, after a telephone conference call with counsel for both parties, I issued an order directing the parties to submit stipulations as had been discussed in the conference call. The parties now have submitted stipulations which provide as follows:

1. Harlan Cumberland Coal Company's C-2 Mine received 265 citations over 264 inspection days during the period from January 1991 to May 1994.

2. Harlan Cumberland Coal Company and its C-2 Mine abated the subject violations in good faith and in a timely manner.

3. Harlan Cumberland Coal Company's C-2 Mine produced 223,927.81 tons of coal from December 9, 1992 to December 9, 1993 and 245,125.35 tons of coal from January 14, 1993 to January 14, 1994.

4. Harlan Cumberland Coal Company produced a total of 428,001.70 tons of coal from December 9, 1992 to December 9, 1993 and a total of 436,517.47 tons of coal from January 14, 1993 to January 14, 1994.

1. Harlan Cumberland Coal Company states that Eddie Sargent's log book listing the subject dust cassettes was destroyed and, therefore, is not available for review in these cases.

5. The parties agree that a hearing and briefs are not necessary for the administrative law judge to issue a decision on remand in these cases.

I accept the stipulations.

Based upon the information in Stipulation No. 1, I find that the operator's overall history of prior violations was moderate.

Based upon Stipulation No. 2, I find that the violations were abated in good faith.

Based upon the information in Stipulation No. 4, I find that the mine was medium in size and that the operator was small.

At the hearing the judge accepted the stipulation that imposition of a reasonable penalty would not affect the operator's ability to continue in business. I also accept this stipulation and find that the operator's ability to continue in business will not be affected by imposition of a reasonable penalty.

In determining whether the violations here are serious, the decision of the Commission in Consolidation Coal Company, 8 FMSHRC 890 (June 1986), is instructive. The Commission held in that case that each instance where the permissible level of respirable dust is exceeded, constitutes a violation that is presumptively significant and substantial. The Commission stated that Congress recognized the direct relationship between reductions of respirable dust in mine atmosphere and corresponding reductions in the incidence of disabling respiratory disease. Id. at 896. In the Mine Act the Commission found an unambiguous legislative declaration in favor of preventing disability from pneumoconiosis or any other occupation related disease. Id. at 897. The Commission recognized that the onset of respirable dust disease was incapable of precise prediction, proof of a single incident of overexposure did not conclusively establish the reasonable likelihood of respirable disease, and the development and progress of respiratory disease was due to the cumulative dosage of dust a miner inhales. Accordingly, the Commission decided that if the Secretary proves a violative overexposure to respirable dust, a presumption arises that there is a reasonable likelihood that the hazard created by the violation will result in illness, i.e. the violation is presumed to be significant and substantial. The Commission's decision was affirmed by the Court of Appeals in Consolidation Coal Company v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987).

In these cases the Commission's mandate is to determine the existence and extent of gravity attributable to the violations. As already set forth, the operator violated the Act by not submitting respirable dust samples that were not voided by MSHA. These samples are used to test whether the respirable dust levels in the mine are within permissible limits. Without samples, the levels of respirable dust cannot be measured and it cannot be determined whether miners have been exposed to excessive dust levels. The taking and submitting

of valid samples therefore, constitute an indispensable part of the process whereby compliance with permissible dust levels is determined. As the Commission recognized in Consolidation Coal Company, the prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act. Id. at 895. It is not possible to determine the effect of a single instance, or a few instances, where valid samples are not submitted. However, like dust levels, gravity may be gauged by the cumulative effect of absent valid samples. Because the absence of valid samples inhibits the testing process and compromises the ascertainment of respirable dust levels which must be known in order to prevent respirable illness, the failure to submit such samples has a distinct element of gravity. I do bear in mind, however, that the absence of samples does not, in and of itself,
show that there was overexposure, rather only that the level of exposure could not be tested. Accordingly, I conclude the violations were of ordinary gravity.

Since the Commission did not disturb the judge=s finding that the operator took the samples, I find there was no negligence with respect to this aspect of the operator=s responsibilities. The Commission stated that if the operator mailed the samples it was not negligent, but that any failure to place the samples in the mail would constitute some degree of negligence. As now appears from Stipulation No. 5, the operator has no proof that the samples were mailed. The unsupported allegations of the operator=s witnesses are insufficient to establish mailing and consequently, I find that there was no mailing and that the operator was negligent.[1] In addition, the record shows that in 1993 the operator received seven previous citations for absent samples. A citation was issued in four of the five months preceding December 1993 when the first two citations in these cases were issued. All but one of the prior citations were issued to other mines of the operator, but it appears from the record that samples from the operator=s various mines were handled by the same individuals and were mailed from the same office (Tr. 123, 138-142). In light of these circumstances, I find that the prior citations for other mines placed the operator on notice that a problem existed with its mailing of respirable samples. The operator should have taken

[1] Even if the operator=s assertions with respect to record keeping and mailing were accepted, the operator would be guilty of negligence for destroying the records.

corrective action. The number of prior citations and their proximity in time to the ones in this case compels a finding that negligence was high. Lion Mining Company, 19 FMSHRC _____, No. PENN 94-71-R (November 20, 1997).

Based upon the prior citations, I find that the operator had a significant history of prior violations with respect to the mandatory standards involved in these cases.

As the Commission stated in its decision of remand, the determination of the amount of penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the statutory criteria of section 110(i) of the Act. In addition, it is well established that penalty proceedings before the Commission and its judges are de novo and that the Secretary=s proposed penalties are not binding on the Commission and its judges. Sellersburg Stone Company, 5 FMSHRC 287, 290-29 (March 1983), aff=d, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., 6 FMSHRC 1148, 1150 (May 1984); Missouri Rock, Inc., 11 FMSHRC 136, 140 (February 1989); Doss Fork Coal Company, 18 FMSHRC 122, 130 (February 1996); Wallace Brothers Inc., 18 FMSHRC 481, 483-484 (April 1996); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 881 (June 1996).

As set forth herein, I have considered and made findings with respect to the six criteria. It is my reasoned judgment that a penalty of $850 is appropriate for each of the violations. I believe these amounts are consistent with the ordinary degree of gravity and high degree of negligence. They are also consistent with the operator=s small size. In addition, in reaching these amounts I have taken into account the operator=s overall and specific history of previous violations, its good faith abatement and the fact that imposition of a reasonable penalty will not affect its ability to continue in business. In my opinion these substantial penalties are sufficient to have the desired deterrent effect.

ORDER

It is **ORDERED** that a penalty of $850 be assessed for each of the violations involved for a total penalty of $2, 550.

It is further **ORDERED** that the operator **PAY** these penalties within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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