FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

April 29, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2001-30
Petitioner	:	A.C. No. 15-17008-03563
v.	:	Road Creek Mine No. 1
	:	
BRANHAM AND BAKER COAL	:	Docket No. KENT 2001-31
COMPANY, INC.,	:	A.C. No. 15-18041-03510
Respondent	:	
	:	Docket No. KENT 2001-267
	:	A.C. No. 15-18041-03508
	:	Elswick Fork Mine No. 1

DECISION

Appearances: Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Petitioner; Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Schroeder

Introduction

These cases are before me on Petitions by the Secretary for the assessment of Civil Penalties under Section 110(a) of the Mine Safety and Health Act of 1977 (30 U.S.C. § 820(a)). The three Petitions together sought a total Civil Penalty of $6,007.00 in connection with four (4) citations by mine safety inspectors of alleged violations of regulations dealing with respirable dust standards.[1] The general issue is whether the respirable dust requirements of a designated work position (DWP) terminate upon the removal from the mine of a piece of mining equipment subjected to a DWP. After these cases were consolidated, a hearing was held on August 14, 2001, in Louisa, Kentucky. Both sides filed post hearing briefs.

[1] One of the four citations, No. 19982417, was settled just prior to the hearing. Nothing in the settlement of this citation changes the issues on the remaining citations.

Background

These cases involve the application of regulations on the very important subject of respirable dust in the work area of miners. These regulations are found at 30 C. F. R. Part 71, Subparts B, C and D. Respirable dust is a problem which must be evaluated from the perspectives of both concentration of dust during the work day and the type of material included in the dust. The standard's established in the regulation limit the amount of any dust and the amount of particularly harmful dust that a miner may encounter in a work day. Monitoring of exposure to dust is conducted by a meter operated in the work space of a miner to sample the air. Sampling is done initially on a spot basis and, if problem areas are identified, on a specific work station basis. This sampling of respirable dust at a specific work station is the gist of the present controversy.

MSHA has regulations on the subject of monitoring for compliance with respirable dust standards at a specific work station. These regulations are found at 30 C.F.R. §71.208. It is clear from even a quick reading of the regulation that MSHA intended the District Manager to have substantial authority and discretion in imposing a sampling plan for individual mines to suit the particular conditions encountered. The limits of the District Managers authority and discretion define the outcome of this case.

Before turning to the particular District Manager's actions which are the subject of this case, it is necessary to examine in greater detail the language of the regulations under which the District Manager must act. The regulations provide in pertinent part as follows:

> 71.208(c) Upon notification from MSHA that any respirable dust sample . . . exceeds the applicable standard . . . the operator shall take five valid respirable dust samples from that designated work position within 15 calendar days. . . .
>
> 71.208(e) The District Manager shall designate the work positions at each surface coal mine and surface work area of an underground coal mine for respirable dust sampling under this section. . . .
>
> 71.208(f) The District Manager shall withdraw the designation of a work position for sampling upon finding that the operator is able to maintain continuing compliance with the applicable respirable dust standard . . . .
>
> 71.208(g) Unless otherwise directed by the District Manager, designated work position samples shall be taken by placing the sampling device as follows: . . .
>
> 71.220(b)(3)(iii)Status Change Reports - Designated work Position: Abandoned - the dust generating source has been withdrawn and activity has ceased.
>
> My task is to determine whether the record created at the hearing supports a conclusion

that the Respondent violated one or more of these regulations and, if so what the appropriate penalty should be for such violation.

Factual Findings

Respondent operates a surface mine in Eastern Kentucky known as Elswick Fork Mine #1. The mine is subject to MSHA regulations concerning concentrations of respirable dust in the workplace. Compliance with these regulations begins with a process of sampling air in the workplace with small vacuum pumps worn by workers. These pumps take in a known quantity of air in a prescribed period, typically an eight hour work day. The air is filtered by media that can be sent in a sealed cassette to a laboratory for testing. The media should contain all the dust that was in the air pumped by the meter. The laboratory results are compared to criteria established in the regulations. There are several stages in the process of determining whether the air meets these health related criteria. There is periodic sampling (biannual) to determine whether a dust problem is present, and there is follow-up sampling to determine whether the problem has been solved. It is undisputed that the dust samples conducted on equipment substituted by the Respondent on demand by the Secretary complied with the applicable standard.

This case does not involve an issue of whether a dust problem is present. It is undisputed that the Elswick Fork Mine #1 was monitored sufficiently and appropriately to determine a dust problem is present so as to require further more specific dust monitoring to determine whether the problem was solved. It is interesting to note MSHA regulations do not specify what actions a mine operator must take to solve the dust problem but implicitly provide that the operator must take whatever steps are available to reach the safe dust level. The ultimate sanction for failing to find an appropriate solution to the dust problem is an order closing the mine.

The further sampling of dust levels is directed at determining whether the air in the place where miners work has a dust concentration greater than an established standard, in this instance more than 2.0 mg per cubic meter or greater than 5% silica quartz. The citations at issue in this case are not concerned with whether those standards were exceeded. The citations concern the appropriate place to conduct the sampling, an issue raising the question of what is a designated work position.

Under MSHA regulations, a designated work position (DWP) is an area with the potential to have dangerous working conditions for dust. The regulations are not more specifically helpful in understanding the precise method of identifying a DWP. The regulation in section 71.208(e), noted above, makes designation of a DWP the responsibility of the District Manager. The testimony described two different ways a DWP is created by MSHA.

The first way is the way most of the industry creates a DWP; the way most technicians in the field have been instructed. The second way is the way District 6 has developed to deal with

the perceived problem of wandering equipment; i.e. equipment on this job today and on a different job tomorrow.

General Procedure

The procedure begins with a visit to a mine by an MSHA inspector who places dust meters in appropriate work areas. The meters sample one days exposure to dust for a variety of employees. The meter cassettes are sent to a MSHA laboratory for analysis. When the samples are evaluated, a determination is made as to whether any of the samples show a potential for violation of the applicable dust standard. If a potential violation is found, the mine operator is directed to begin a more representative sampling process on designated work positions (DWP). The mine operator receives a letter from MSHA identifying the DWP as well as the specific mining equipment which is to be used for taking further samples. This step is also important for the creation of an entry in the MSHA computer database on dust standard compliance. This entry makes a connection between the mine, the DWP, and the identifying number for the associated mining equipment.

The mine operator first takes bimonthly samples for each DWP and submits the results to MSHA. If the samples still show a potential violation, the mine operator is required to take five samples in a 30 day period and submit the results. If the result of these samples is above the applicable dust standard, the consequence is a citation and potential penalty, along with a requirement for additional samples. Assuming the samples continue to show dust levels in excess of the standard, the operator will continue to be cited for violations with increasing levels of penalties. Each sample taken is submitted to MSHA , with the computer data points established at the time the DWP was created. Each mine is required to submit dust samples through a person trained by MSHA and certified as qualified to obtain and submit appropriate samples.

If the mining equipment identified as the location of the DWP is removed from the mine or otherwise ceases operation, the DWP is abandoned (cf. Section 71.220(b)(3)(iii)) and a new DWP is established based on the next round of dust sampling.

District 6 Procedure

This procedure also begins with a visit to a mine by an MSHA inspector who places dust meters in appropriate work areas. The meters sample one days exposure to dust for a variety of employees. The meter cassettes are sent to a MSHA laboratory for analysis. When the samples are evaluated, a determination is made as to whether any of the samples show a potential for violation of the applicable dust standard. If a potential violation is found, the mine operator is directed to begin a more representative sampling process on designated work positions (DWP). The mine operator receives a letter from MSHA identifying the DWP as well as the specific mining equipment which is to be used for taking further samples. This step is also important for the creation of an entry in the MSHA computer database on dust standard compliance. This

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If the mining equipment identified as the location of the DWP is removed from the mine or otherwise ceases operation, the District requests the Operator to identify a similar piece of equipment to continue testing for dust levels. The dust samples from the new equipment are considered in determining whether the original DWP is in compliance with the applicable standard. There is no evidence in the record as to a procedure for updating the computer record of the DWP to substitute the new machinery identifying number. There is no evidence in the record of any change in training classes to certify persons as qualified to submit appropriate dust samples.

Significance of Differences

The most notable way in which the two procedures differ is the concluding step which in one procedure results in a loop back to the beginning (General Procedure) while the other procedure continues with new equipment (District 6). Under the General Procedure, when the machine identified with a particular DWP leaves the mine, the DWP is considered abandoned. This result follows from a particular understanding of section 71.220(b)(3)(iii) under which a DWP can be abandoned without the entire mine ceasing operations.

Under the District 6 procedure, when the machine identified with a particular DWP leaves the mine, the District simply requires the mine operator to substitute a similar machine in its place and continue to monitor dust levels as if the original machine were still operating. This result follows from a different understanding of section 71.220(b)(3)(iii) under which a DWP can be abandoned only when "all" activity ceases at a mine. It should be noted the record indicates that when the mine operator in this case finally substituted machines for those which had left the mine the dust measurements taken from the substituted machines were in compliance with the applicable dust standard. (TR 193). Thus if the mine operator had simply complied with the request for substitution instead of objecting and protesting the change in procedures, this case would not have existed. This case involves the alleged failure to perform the demanded dust monitoring at the initial request.

Fair Notice Implications

It is well settled that a regulation has no punitive effect until and unless regulated persons have appropriate notice of the regulation. This is known as the "fair notice" doctrine. With a few exceptions, the doctrine requires publication with opportunity for review and comment. This is the origin of the large collections of regulations such as the Code of Federal Regulations. The doctrine also extends to agency interpretation of a regulation where the interpretation is not obvious from the regulatory language. An agency is entitled to interpret it's own regulations but must give "fair notice" of it's interpretations to give the interpretation binding effect.

It is undisputed that District 6 never gave anyone formal, written notice of its interpretation of the regulation on abandonment of a DWP when mine equipment leaves a mine. It is also undisputed that MSHA has never given formal notice of an interpretation of the regulation to the effect that the issue is one of local management option.

The Secretary's position here appears to be that formal, written notice of this interpretation is not necessary in this case because the appropriate officials of Branham and Baker received actual notice of the interpretation through meetings and conversations with District 6 officials. The record does not reflect a particular meeting or the activities of particular officials through which this alleged action notice occurred. My understanding of the testimony is that District 6 witnesses were not certain whether Branham and Baker had been advised of this position prior to the inspector's initial visit. The witnesses were clear that discussion within District 6 of this position on abandonment of DWPs had occurred for some time prior to that visit to Branham and Baker. (TR 69 - 71, 89 - 90, 162).

The witnesses produced by the Respondent were clear that they, as working members of the mining industry, were not aware of a change in position in District 6 as to abandonment of a DWP until they were directed to choose substitute equipment for dust monitoring. There is no evidence to support a conclusion that the Respondent moved equipment from the mine for the purpose of evading dust sampling requirements.

Legal Conclusions

The test for relief under the doctrine of Fair Notice is well established. The Commission uses a "prudent miner" test to determine whether the regulated person had "fair notice" of the limitations or requirements that the Secretary seeks to enforce. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.,* 12 FMSHRC 2409, 2416 (Nov., 1990). The question is not one of whether the operator had the opportunity to read any particular piece of paper, but rather whether the operator (as a knowledgeable and responsible person in the mining business) had reason to know what conduct was expected for compliance with the regulations.

As a prelude to dealing with this "fair notice" issue, the Secretary notes a line of cases limiting the application of estoppel to government agencies where inconsistent positions have been taken in a series of enforcement actions. *U.S. Steel Mining Company,* 15 FMSHRC 1541 (Aug. 1993). These cases actually highlight the weakness of the Secretary's position in this case. In those cases the agency was taking inconsistent positions in succession, i.e. one after the other. The Commission held the Secretary was not precluded by estoppel from correcting a previous error.

This case is different in that the Secretary, through the District 6 Manager, is taking inconsistent positions at the same time but in different parts of the country. It is not a question of correction of error but of fitting interpretations to the needs of the local community. It perhaps would be possible to have such a patchwork system if the implementing regulation reserved this authority to the various District Managers. But I find nothing in the regulation making such a reservation of authority. The authority in §71.208(e) is not a means of transferring DWPs from one piece of equipment to another because it only authorizes creation of a DWP after a dust sampling program is completed. The District 6 transfer of a DWP is not related to a dust sampling program but is related to the movement of equipment on and off a mine.

It is clear to me that a reasonable, prudent person generally familiar with the mining industry would not have understood that a DWP would continue in a different piece of mining equipment after a previously designated piece of mining equipment was removed from the mine. The language of the regulation, as implemented and trained by MSHA, would support the conclusion that the DWP was abandoned (but could be recreated by appropriate testing and monitoring) with the departure of the designated equipment. A contrary position, that the DWP is abandoned only upon cessation of all activity of all equipment at the mine, was not communicated to the Respondent in this case by "fair notice". The attempt to enforce a regulation without "fair notice" is ineffective.

Order

For the reasons stated above, I find in favor of the Respondent. The Petitions are **DISMISSED.**

Irwin Schroeder
Administrative Law Judge

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