FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
Washington, DC 20001-2021
January 8, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-102
Petitioner	:	A.C. No. 15-02709-71962
v.	:	
	:	
HIGHLAND MINING COMPANY,	:	
Respondent	:	Highland 9 Mine

DECISION

Appearances: Neil Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("The Secretary"), alleging that Highland Mining Company, LLC ("Highland") violated 30 C.F.R. § 70.100(a). Pursuant to notice, the matter was heard in Evansville, Indiana on September 6, 2006. Subsequent to the hearing, each party filed a post-hearing brief, and Highland filed a reply brief.

Violation of Section 70.100(a), *supra*

Highland operates an underground coal mine. On July 28, 2005, MSHA Inspector, Hubert Eugene Wright, issued Highland a citation alleging a violation of 30 C.F.R. § 70.100(a).[1] The citation was based on results of a respirable dust sampling conducted by MSHA of five occupations in the 063-0 MMU unit. These indicated an average concentration of respirable dust of 2.472 milligrams per cubic meter (mg/m3). Highland does not contest these facts or its violation of Section 70.100(a), *supra*. Nor does Highland contest the designation of the violation as significant and substantial. I thus find that Highland violated Section 70.100(a), *supra*, and that accordingly the violation was significant and substantial. *Consolidation Coal Co.,* 8 FMSHRC 890 (1986)

[1]Section 70.100(a), *supra*, provides as follows: "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 . . . ."

Penalty

The parties stipulated that Highland is a large operator, that the cited condition was abated "within a reasonable time", and that the proposed penalty "will not affect Highland's ability to remain in business." I accept the parties' stipulations, and so find.

There is not any factual issue with regard to Highland's assessed violation history for the immediate two year period prior to July 27, 2005. The history indicates a total number of 1022 violations of which 425 were indicated to be significant and substantial. I find that there is not any basis in the record to either significantly increase or decrease the assessment of a penalty based upon Highland's history of violations.

Negligence

Stipulated Facts

On July 7, 2004, Highland received a citation for the MMU 063-0 unit for a violation of Section 70.100(a), *supra*, based on MSHA sampling taken on June 28, 2004, which indicated that an average of 2.216 mg/m3 of respirable dust. As a result of the issuance of the citation, Highland submitted a revision to its dust control portion of the ventilation plan which was approved by MSHA on July 15, 2004. On September 20, a further revision was approved by MSHA.

Between November 30, 2004 and December 2, 2004, dust concentration samples taken by Highland averaged 2.303 mg/m3 of respirable dust. On December 13, 2004, Highland received a citation for the MMU 063-0 unit alleging a violation of Section 70.100(a), *supra*. On January 14, 2005, as a result of the issuance of the citation, Highland submitted a revised ventilation and dust control plan which was subsequently approved by MSHA on January 27, 2005. A more complete plan which incorporated these revisions was approved on May 23, 2005.

Between December 13, 2004 and July 18, 2005, on three occasions, Highland sampled the continuous miner operator,[2] and MSHA sampled five occupations in the MMU 063-0 unit. The average dust concentration for these samples was below the level considered by MSHA to constitute a violation of Section 70.100(a), *supra*.

Additional Facts and Discussion

In analyzing whether Highland was negligent, a key issue is whether, prior to the issuance

[2]30 C.F.R. § 70.207(d)(2), requires an operator to sample the designated occupation 036 (continuous miner operator) on a bi-monthly basis because that is the occupation expected to have the greatest dust exposure.

of the citation at bar,[3] Highland had notice or knowledge that it had a dust problem on the MMU 063-0 unit. In this connection, I note Highland's history of dust violations on the unit at issue. Highland was cited on July 7, 2004, based on sampling which indicated an average dust concentration of 2.216 mg/3; three occupations were exposed to more than 2.0 mg/m3. Highland was cited again on December 13, 2004, based on its sampling which indicated an average dust concentration of 2.303 mg/m3. Additionally, six out of fifteen of Highland's sampling results between January 2005 and May 2005, and more than thirty percent of the results of MSHA's sampling, were in excess of 2.0 mg/m3.[4]

Robert Smith, an MSHA Health Inspector and Health Supervisor, opined that the violation on July 28, 2005, constituted high negligence as Highland ". . . was in a state of heightened awareness from prior violations, discussions and meetings . . . ." (Tr. 113) Smith explained his opinion as follows: "We've shared the existence of [government review] programs, how they work, and the importance of maintaining all exposures below the applicable standard, which in most instances is 2 milligrams, . . ." . (Tr. 114).

Highland's No. 9 Mine Safety and Training Manager, James Allen, who oversees its dust compliance efforts, agreed that three citations for respirable dust sampling violations in the same unit would be a cause for concern. However, although Highland's dust sampling between March 29, 2005 and March 31, 2005, indicated dust concentrations of 2.02 mg/3, Highland did not make any changes in its plan. Nor did Highland change its plan after its sampling indicated dust concentration levels of 1.93 mg/m3. Allen explained that "what probably happened" was that Highland "... would've got with our maintenance department, showed them these results, just wanted them to ensure us that our scrubber system was functioning as it should've, maybe look at our duct work. And also we would've gotten our section foreman, sat down and reviewed our samples, and we do this with them regularly, and showed them the concentrations of the samples that they run and instructed them to have got with their miner operators, let them know what their concentrations were and just reinforced dust parameter compliance." (Tr. 156) (emphasis added). Not much weight was accorded this testimony inasmuch as Allen did not testify based upon personal knowledge, what if anything Highland actually did in response to the May 2005, test results of 1.93 mg/m3, but rather what "probably happened" or what they "would've" done. (*Id.*)

On the other hand, in mitigation of Highland's negligence, the record indicates that after Highland was found to not be in compliance on December 13, 2004, it revised its dust plan, which was approved by MSHA. In this connection, Smith conceded on cross-examination that it

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[3]July 28, 2005

[4]In sampling done by Highland in the March 2005 cycle the average exposure was 2.02 mg/m3. In testing by Highland in the May, 2005 cycle, three out of the five samples were above the standard, and the average dust concentration was 1.93 mg/m3.

was believed that the revision contained sufficient changes to result in compliance. In May, 2005, a subsequent plan was approved by MSHA, and Smith agreed that it was subject to the belief that the parameters of the plan would keep Highland in compliance. Also, according to Allen, after Highland became aware of the May 2005 sampling result of 1.93 mg/m3, it provided additional training and "put forth" additional maintenance efforts. (Tr. 158) It is significant that, according to Wright when he cited Highland on July 19, the latter was in compliance with all of the parameters of its plan. Wright indicated that he could not determine what caused Highland to be in violation on July 19. Further, according to Wright, all the sampling that he did on other sections of the mine on July 12, 13 resulted in average dust concentration levels that conformed with the requirements of Section 77.100(a), *supra*.

Within the above context, and considering all the mitigating factors, I conclude that the level of Highland's negligence was moderate.

Gravity

Highland asserts that the Secretary has the burden of establishing the gravity of the violation. Highland argues that the Secretary failed to establish the number of people exposed to the cited condition. Highland alleges that this is an element to be considered regarding the gravity of the violation, citing 30 C.F.R. § 100.3(d). However, Section 100.3, *supra*, sets forth the criteria to be considered by the Secretary in assessing a penalty. In contrast, assessment of penalties by the Commission is governed by Section 110(i) of the Act, and is a de novo determination. (See, *Youghiogheny & Ohio Coal Co.*, ("Y & O"), 9 FMSHRC 673, 678 (April 1987).

In Y & O, *supra*, at 678-679, the Commission elaborated as follows:

> We have consistently rejected assertions that, in serving our separate and distinct function of assessing appropriate penalties based on a record developed in adjudicatory proceedings before the Commission, we are bound by the Secretary's regulations, which are intended to assist him in proposing appropriate penalties. See, e.g., Sellersberg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 737 F.2d 1147 (7th Cir. 1984); Black Diamond Coal Mining Co., 7 FMSHRC 1117 (August 1976); U.S. Steel Mining Co., 6 FMSHRC 1148 (May 1984).

In executing its responsibility of assessing a penalty, the Commission is required to consider six specific criteria, including gravity. Section 110(i) of the Mine Act; see also, *Sellersburg Stone Co.* 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 737 F.2d 1147, 1152 (7th Cir. 1984). "The gravity penalty criterion under section 110(i) of the Mine Act, 30 USC § 820(i), is often viewed in terms of the seriousness of the violation." *Consolidation Coal Company,* 18 FMSHRC 1541, 1549 (1996). In this connection, I note that in *Consolidation Coal Company*, 8

FMSHRC 890, 898-899 (1986) the Commission, held that if a violation of Section 70.100(a), *supra*, has been established, a presumption that the violation is significant and substantial is appropriate.[5] The Commission elaborated in its holding by stating that any exposure above 2.0 mg/m3 creates a measure of danger to health, and a presumption arises that there was a reasonable likelihood that this health hazard will result in an illness. (*Id.*) The Commission set forth its rationale as follows:

> We recognize that the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon the concentration and duration of each exposure, and that proof of a single incident of overexposure does not, in and of itself, conclusively establish a reasonable likelihood that respirable disease will result. There is no dispute, however, that overexposure to respirable dust can result in chronic bronchitis and pneumoconiosis. The effects of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms– as noted, simple pneumoconiosis is asymptomatic * * * *Consolidation Coal*, *supra*, at 898.

Based on the rationale set forth in *Consolidation*, *supra*, I find that the violation of Section 70.100(a), *supra*, established herein was serious, and hence of a high level of gravity.

Conclusion

Based on the factors set forth in Section 110(i) of the Act as discussed above, I find that a penalty of $5,000 is appropriate for the violation of Section 70.100(a), *supra*.

[5]The Commission held that this presumption " . . . may be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the hazard posed by the excessive concentration of respirable dust e.g., through the use of personal protection equipment." (*Consolidation*, *supra* at 899). In the case at bar, I note that the Highland not adduce any such facts, and thus did not rebut the presumption.

Order

It is **Ordered** that Highland pay a total civil penalty of $5,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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