

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 Skyline, Suite 1000  
5203 Leesburg Pike  
Falls Church, Virginia 22041

June 26, 1998

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 98-23  
Petitioner : A. C. No. 36-06967-03923  
v. :  
Tanoma Mine  
TANOMA MINING COMPANY, INC., :  
Respondent :

**DECISION**

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;  
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Tanoma Mining Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petition alleges four violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$598.00. For the reasons set forth below, I vacate three of the citations, approve a settlement agreement concerning the fourth, and assess a penalty of \$75.00.

A hearing was held on March 19, 1998, in Indiana, Pennsylvania. The parties also submitted post-hearing briefs in the case.

**Settled Citation**

At the beginning of the hearing, the counsel for the Secretary advised that the parties had agreed to settle Citation No. 3688643. The agreement provides that the citation will be modified to delete the Significant and substantial designation and the penalty will be reduced from \$94.00 to \$75.00. Based on the representations of the parties, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i) and approved the agreement. (Tr. 4-5.) The provisions of the agreement will be carried out in the order at the end of this decision.

**Findings of Fact**

On July 14, 1997, the Tanoma Mine, an underground coal mine in Indiana County, Pennsylvania, began working ten hour shifts. With the change, Michael J. Elias, the mine's Health and Safety Manager, had to make a change in the dust sampling procedures at the mine.<sup>1</sup> Section 70.201(b), 30 C.F.R. ' 70.201(b), requires that: ASampling devices shall be worn or carried directly to and from the mechanized mining unit [MMU] or designated area and shall be operational portal to portal. Sampling devices shall remain operational during the entire shift or for 8 hours, whichever time is less.@ Elias was concerned with how to meet this requirement during a ten hour shift.

Not finding any guidance in the MSHA *Program Policy Manual*,<sup>2</sup> Elias next looked at the MSHA *Coal Mine Health Inspection Procedures Manual* (1989), which sets forth procedures for inspectors to follow in carrying out their duties. At paragraph 8, p. 1.6, under ASampling Procedures@Elias found the following: AFull-shift samples shall be considered 8-hour samples unless the normal work shift is less than 8 hours. When a normal work shift is in excess of 8 hours, the samplers shall be turned off at the conclusion of 8 hours sampling, the filter cassettes, plugged or protected, and the time recorded.@ (Resp. Ex. 6.) From this he concluded that he should do the same thing, that is, have the miner wear the pump into the mine when he began his

---

<sup>1</sup> Section 70.207(a) of the Secretary's regulations, 30 C.F.R. ' 70.207(a), requires that:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

<sup>2</sup> The manual states only that: AIn cases where the designated occupation of a MMU works longer than 480 minutes or the production shift for a DA is longer than 480 minutes, arrangements shall be made to remove the sampling device from the miner at the expiration of this time period.@ Vol. V, Part 70, Subpart C, MSHA *Program Policy Manual* 7 (07/01/88).

shift, at the conclusion of 8 hours turn off the pump, take it off of the miner and secure it, and then take the pump out of the mine at the end of the shift.

Tanoma was conducting its September-October sampling in this way on September 2, 1997, when Inspector Thomas H. Whitehair, II, informed Elias that this was not a proper method of sampling, since the regulation required that the pump be removed from the mine at the end of eight hours. Elias immediately called Ted Glusko, the supervisor at the Indiana Field Office, to ask him how other mines working extended shifts conducted sampling. Glusko said he did not know and would get back to him.

Concerned that time was running out, and not having received a reply from Glusko, Elias next called Paul Bizich in the Huntingdon, Pennsylvania, District Office. Finding Bizich on vacation for a couple of days and worried that he was wasting time, he called Kevin Strickland, who used to be in Bizich's position at the MSHA District Two office, and left a voice mail message. Elias waited a day or two, decided he was not going to get an answer and then called Joe Garcia, District Manager in the MSHA District Two New Stanton office. He explained the problem to Garcia and asked what they should do. Garcia told Elias that he needed something in writing, so Elias sent him a letter on September 10, 1997.

In the letter, Elias set out two scenarios that have been presented to me, one of which I do not feel is representative of the sampling cycle, and one which we cannot physically perform due to time restrictions in the sampling cycle. (Resp. Ex. 1.) He then stated:

The scenario which I would like to present to you, which does not technically comply with Part 70.201(b) according to MSHA, but generates the most representative sample of the sampling entity is as follows. The sampling device would be started at the portal at the beginning of the shift, and at the end of the eighth hour or 480 minutes, the sampling device would be stopped while still at the working section or designated area. The sampling device would then be brought out to the mine portal at the end of the ten hour shift. This actually allows the sampling device to be at the sampling entity longer than normal, for whatever time it would have normally taken to travel out of the mine. This is the only scenario with which I can insure compliance with all other applicable regulations, and the local mine safety committee is in agreement with this method while we operate in this ten hour scenario.

(*Id.*) He closed by stating: I would request that you respond to my concerns as soon as possible as we are partially into a sampling cycle presently and will need to begin sampling soon. (*Id.*)

At this same time, Elias had also been in contact with the company attorney, who in turn had called Robert Thaxton at MSHA's Arlington, Virginia, headquarters for guidance. However, by the first week in October, Elias had not received a response to his letter to Joe Garcia and

believed that he had to start taking samples. He called the company attorney to find out if he had learned anything and was advised that the best way to comply was to deliver the pumps to the miners to wear. Elias then called Ted Glusko to discuss this plan with him. As a result of this discussion, Elias concluded that it was better for me to deliver the pumps in the morning, starting two hours after the shift began and running them to the end of the shift, for a total of eight hours. (Tr. 70.)

On October 6, 1997, Inspector Lewis E. Kish went to the Tanoma Mine to inspect it. In the portal before entering the mine, he had a conversation with Elias about sampling procedures. At the hearing, he related that:

Mike told me, he said, we might not want to use our sample because it's going to be -- I've got a lot of places to go before we get in there. I said, Mike, those pumps are supposed to go directly in and directly out. And Mike said, I'll get it in there as fast as I can. So I told him, Mike, if you don't get it in and get it out, directly in and out, then I'll be citing you. Mike said, well, I'll get it in when I get it in.

(Tr. 10.)

To deliver the pumps on October 6, Elias entered the portal at 9:00 a.m. and took the elevator to the Main A entry track. He had four dust sampling pumps, which had been turned on at 9:00 a.m., with him, for sections C-12, E-1, E-8 and Main E. He got in a battery powered mantrip and traveled down the Main A entry track to the Main C entry track where he stopped at the entry to the C-12 section. He took the C-12 pump, leaving the other pumps in the mantrip, and went to the working face of the section where he placed the pump on the miner operator.

Elias returned to his mantrip and traveled to the end of the Main C entry track onto the Main E entry track. He took the E-1 pump, leaving the other two in the mantrip, and got into the E-1 section's mantrip, which was waiting there for him, and drove into the E-1 section where he went to the working face and placed the pump on the miner operator.

Elias returned to the Main E track entry, got in his mantrip and traveled on the Main No. 2 track until he got to the area near the E-8 section switch. He then got out of his mantrip and took the E-8 pump, leaving the remaining one, to the working face where he placed it on the miner operator.

Elias then returned to the Main E track entry, got back in his mantrip and drove down the track to the Main E section. He walked the pump partially into the mining section and placed it on the miner operator. Inspector Kish was in the Main E section when Elias arrived to place the pump and noted that it was 11:27 a.m. He informed Elias that he would be citing the mine for that sample.

Inspector Kish informed Bob DeBreucq, Vice President of Operations, that he would be writing citations for the pumps that were delivered late. DeBreucq told him he should check with his superiors because the mine, through Elias, had had discussions concerning the proper way to perform the sampling. As a result, Kish called his supervisor, Ted Glusko, for advice.

Kish returned to the mine on October 7, still not having been able to contact Glusko. Finally, Glusko sent Inspector Whitehair to the mine with instructions for Kish to issue the citations. As a result, Kish issued Citation Nos. 3688641, 3688642 and 4174660 to the mine. Citation No. 3688641 alleges a violation of section 70.201(b) in that:

The operators bimonthly respirable dust sample taken on 10-6-97 on the E8, 021 MMU, occupation 036, was not representative of the mines environment for eight hours as required in that the approved respirable dust pump was not carried directly to the E8, 021 MMU, after being started at 9:00 a.m.

The certified person responsible for placing the dust pump on the person did not place the dust pump until 11:09 a.m. after placing other dust pumps in the C12 and E1 sections of the mine. The mine worked a ten hour shift starting at 7:00 a.m. and ending at 5:00 p.m.

(Govt. Ex. 1.) Citation No. 3688642 is worded identically to Citation No. 3688641, except that it deals with the 024 MMU in the Main E section and states that the pump was not delivered until 11:27 a.m. after pumps were delivered to the C-12, E-1 and E-8 sections. (Govt. Ex. 2.) Citation No. 4174660 is the same as the other two, except that it concerns the 026 MMU in the E-1 section and states that the pump was not delivered until 10:40 a.m. after a pump was delivered to the C-12 section. (Govt. Ex. 3.) With the exception of Citation No. 3688642, where Inspector Kish was present when the pump was delivered, the inspector obtained the time of delivery from Elias.

On October 10, 1997, Tanoma's attorney sent a letter to the Division of Health outlining the problems being encountered by the mine and recommending actions for MSHA to take. (Resp. Ex. 2.) He received a response to his letter, dated January 28, 1998, from Marvin W. Nichols, Jr., Administrator for Coal Mine Safety and Health. The letter stated, in part:

We share your concern that work shifts beyond the traditional 8 hour time period may not be fully addressed by our current respirable coal mine dust sampling procedures. However, we have been informed by the Office of the Solicitor that any changes in those procedures will require rulemaking. . . .

Please be assured that extended work shifts will be given serious consideration in any future rulemaking involving the mine operator sampling program. Until the standard is revised, however,

mine operators will be required to comply with the current procedures for respirable coal mine dust sampling.

(Resp. Ex. 3.)

### **Conclusions of Law**

As Mr. Nichols admitted in his response to the company, section 70.201(b) does not fully address work shifts beyond the standard eight hour time period. Nor has MSHA offered any guidance as to how companies working a longer shift can comply with the regulation. Accordingly, based on the specific facts of this case, I conclude that Tanoma did not have adequate notice of the requirements of the regulation with regard to sampling during a 10-hour shift.

Concerning the issue of notice afforded by a regulation, the Commission has stated:

We fully appreciate that in order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted). However, in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but 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 (November 27, 1990).

This is not a case where the operator ignored the regulation. Tanoma, through Elias, was making a good faith effort to comply with it. He checked first with the MSHA *Program Policy Manual*, but all this advised was that for shifts longer than eight hours arrangements shall be made to remove the sampling device from the miner at the expiration of 8 hours. Significantly, it does not say anything about the pump exiting the mine at the end of 8 hours. When Elias checked the inspector's manual which provided that at the end of 8 hours the pump would be turned off and the cassette plugged or protected, he concluded, not unreasonably, that this was how the operator's sampling should be conducted.

When he was informed by Inspector Whitehair that this was not the proper way to sample, he stopped doing it that way and he tried to find out how it should be done. Inspector Whitehair apparently did not give him any guidance on how the sampling should be done. Neither did any of the many MSHA officials he contacted.

With time running out, and sampling having to be performed, the only advice that he had received was that the pumps should be carried into the mine by someone other than the wearers at 9:00 a.m. so that they could then be worn out of the mine at 5:00 p.m. He performed this function himself, traveling by the most direct route to each section. Once again, I cannot find that his solution was unreasonable and not a good faith attempt to comply with the standard. However, after he had done it, he was informed that this method did not comply with the regulation, because of the time it took to get the pumps to the appropriate locations, and the company was cited.

In view of the fact that no one from MSHA could provide the company with any information as to how the specific requirement of the regulation could be met when operating on 10 hour shifts, it is difficult to conclude that a reasonably prudent person familiar with the mining industry would have recognized how to meet the specific requirement of the regulation. Furthermore, the company was doing more than just trying to interpret the section, it was actively seeking guidance on the issue.

For these reasons, I cannot conclude that the standard provided Tanoma with adequate notice of what it required. Consequently, I conclude that Tanoma may not be held responsible the three alleged violations of section 70.201(b) and will vacate the citations.

### **ORDER**

Accordingly, Citation Nos. 3688641, 3688642 and 4174660 are **VACATED**; Citation No. 3688643 is **MODIFIED** by deleting the **significant and substantial** designation and is **AFFIRMED** as modified. Tanoma Mining Company is **ORDERED TO PAY** a civil penalty of **\$75.00** within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph A. Yuhas, Esq., 1809 Chestnut Avenue, P.O. Box 25, Barnesboro, PA 15714 (Certified Mail)

/fb