

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 19, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 96-165
Petitioner : A.C. No. 46-01318-04269
v. :
 : Robinson Run No. 95 Mine
CONSOLIDATION COAL CO., :
Respondent :

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Elizabeth S. Chamberlin, Esq., Consol, Inc., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et. seq., the "Act," to challenge Citation No. 3493950 issued by the Secretary of Labor to the Consolidation Coal Company (Consol) and to contest the civil penalty proposed for the violation charged therein. The general issue before me is whether Consol violated the cited standard and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 3493950 issued on March 18, 1996, as modified on March 25, 1996, reads as follows:

Based on the results of (2) valid respirable dust samples collected by MSHA, the average concentration of dust in the working environment of the 013 occupation (clean-up man/belt cleaner) exceeds to 2.0 mg/M3 standard.

The dust samples collected from 2-20-96 to 3-05-96 show an average concentration of 11.22 Mg/M3 for the 013 occupation, 001-0 entity, which is located along the No. 2 5 North Mains belt line from the 6D transfer to the Mains section.

Mine management shall take corrective action to lower the respirable dust and then to sample 701-2 each day until five valid samples are taken and submitted to the Pittsburgh respirable dust processing laboratory.

The cited standard, 30 C.F.R. Section 70.100(a) 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 as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with ' 70.206 (Approved sampling devices; equivalent concentrations).

Scott Springer, a coal mine health and safety inspector for the Mine Safety and Health Administration (MSHA), set up a dust pump on February 20, 1996, on the belt cleaner who worked the 5 North Mains No. 2 beltline. Under his observation the belt cleaner attached the approved sampling device. At the end of her shift Springer removed the cassette and, following standard procedures, sent it to the Pittsburgh processing laboratory for analysis. On March 5, 1996, Springer took another dust sample on the same miner. That sample was also sent to the Pittsburgh processing laboratory for analysis. Springer subsequently received a computer printout of the samples reporting an average dust concentration of 11.2 mg. per cubic meter. Springer accordingly issued the instant citation on March 18, 1996, for an average concentration of dust in the working environment of the belt cleaner exceeding the 2.0 mg.-per-cubic-meter respirable dust standard.

Consol argues that the Secretary failed to sustain her burden of proving the violation claiming that the sampling and laboratory testing were performed contrary to the Secretary's established procedures and were therefore not reliable. More specifically Consol argues that the sample results were unreliable because there was a problem with the dust pump used to collect the sample on February 20, 1996. The testimony of Inspector Springer in this regard is undisputed. The pump stopped running for several minutes in the first two hours of sampling. Springer hypothesized that the sampling tube had been pinched-off due the miners position when riding on the mantrip to her work station and that the pump automatically shut off as a result. Springer explained however that the pump itself was not defective and that once the problem was discovered and corrected, the pump operated for the remainder of the shift.

MSHA's dust weighing laboratory chief, Lewis Raymond, testified moreover that for valid sampling the dust pumps need only to operate for 100 minutes. On February 20, 1996, the sampling pump ran for approximately 360 minutes. While agency regulations require dust pump failures to be reported on the dust data card, the failure to report in this case was irrelevant to the validity of the sample. The pump at issue operated for the entire time that the belt cleaner worked along the belt and in excess of the minimum time required for a valid sample. Consol's argument herein is accordingly rejected.

While Consol also alleges that the testing laboratory procedures were contrary to established agency procedures, this allegation is not supported by the evidence. Consol has not established that either the February 20 or March 5 sample exceeded the oversized particle

standard necessary to void either sample. Indeed, Raymond found that both samples were normal. Consol's argument in this regard must also therefore fail. The violation is accordingly proven as charged.

Consol acknowledges that, if there was a violation, it was "significant and substantial". Accordingly I find that the violation was also "significant and substantial" and of significant gravity. The Secretary also maintains that the operator was only moderately negligent in that the area tested was not known by prior sampling to have been one of high dust concentration. The Secretary also observes, however, that Consol was placed on notice of possible high dust concentration from prior complaints by the subject belt cleaner dating back to as early as January 1996. I accept the Secretary's evaluation of Consol's negligence as moderate.

The Secretary maintains however that Consol did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. As a preliminary matter it is noted that in order to abate the violation the operator was required to obtain "five valid samples" of the subject belt examiner and to submit those samples to the Pittsburgh respirable dust processing laboratory. The samples are mailed to the laboratory and, following analysis, results are mailed back to the operator. Only then can the operator know whether it is in compliance. There may accordingly be delays of several weeks between the actual sampling and notification to the operator of the results of the sampling. To further complicate matters and delay compliance efforts, the submitted dust samples may be invalidated by MSHA for any number of reasons, some of which are beyond the control of the mine operator. It is also apparent that respirable dust levels in the ever-changing environment of a coal mine are not a precise constant and that individual exposure may vary depending on that person's work habits and motivation to reduce exposure. Finally, it should be observed that experts in the field may, in good faith, disagree as to the best way to reduce respirable dust exposure.

The citation at bar issued March 18, 1996, set the abatement or termination for April 1, 1996. An extension for abatement was granted on April 30, 1996, after five valid respirable dust samples for the period March 20, 1996 through April 2, 1996, showed a respirable dust concentration of 2.9 mg. per cubic meter -- still above the 2.0 mg. per cubic meter required by the regulatory standard. In the extension to the citation MSHA Inspector Charles Thomas noted abatement efforts the operator had already taken and others it was planning to take. Those actions were noted as follows:

. . . The velocity has been increased at the No. 74 Block (5N-No.2) to 57' Fpm. The velocity of air has been increased to 165 fpm at the 5N mains tail piece. The operator has ordered a different type of spraying system for the belt lines. Also a tamper proof system is being installed at the water spray system outlets to prevent the water from being shut off. The keys will only be given to two authorized persons on each shift. Additional time is granted to the operator to increase the air at the No. 74 block (5N No.2), to install the water systems and install the tamper proof controls for the outlets that control the water flow on the new spraying systems. Sampling will begin on the day shift (4/22/96) and continue until 5 valid samples are collected. The operator will submit a plan prior to

sampling. The operator has also agreed to divide the dragging of the affected area between the different shifts.

Inspector Thomas returned to the subject mine on May 6, 1996, and granted another extension of the abatement period noting in the "subsequent action" form dated May 6, 1996, the reasons for MSHA's invalidation of a number of samples. The form indicates as follows:

Four (4) of the five (5) required valid samples were submitted for the 013 occupation between 4-16-96 and 5-6-96. On following dates samples were taken and voided for following reasons,

- 1) 4-24-96 cassette number 50-234511 did not work entire shift at location
- 2) 4-29-96 cassette number 50-233897 person injured not on location all shift
- 3) 4-30-96 cassette number 50-234515 dust pump bottom failure

Also the 013 occupation travelled with federal inspector as walkaround 4-23-96 and took one graduated vacation day (4-25-96) during the sampling period from 4-16-96 - 5-6-96, the fifth valid sample was submitted but rejected by the computer as invalid code on 4-22-96 and operator became aware 5-6-96.

On May 16, 1996, Inspector Thomas, accompanied by William Ponceroff, the Chief of Health at MSHA District No. 3 returned to the subject mine. Ponceroff found insufficient abatement efforts and issued a closure order under Section 104(b) of the Act.¹

The order states as follows:

An adequate effort was not made to abate Citation No. 3493950, dated 3/18/96. The concentrations of respirable dust was 11.22 mg/m³ (average concentration) for the 013 occupation (001-0 entity). This occupation is located along the No. 2, 5 North Mains belt line. Adjustments and corrections were made and the subsequent sample reflected an

¹ "Section 104(b)" Order No. 3493571, contrary to previous secretarial practice, was not included nor referenced in any way in the petition for civil penalty herein. Citation No. 3493950 was misidentified in the petition as "104(a)-104(b)". There appears to be no legal authority that would permit this Commission to compel the Secretary, against her wishes, to amend the petition to include that order in this proceeding. Consol has accordingly filed a separate contest challenging the validity of the order.

average concentration 2.9 mg/m³. The citation was extended based on increasing the air, install new auto flow water spray system on the 7-D & 8-D beltlines, install a water spray systems on the No. 2 5-N beltline where intentional shutdown of the spray system is minimized, restruct the individual sampled and increase the airflow to 80 fpm after these adjustments were made. The results of the respirable dust samples (average) was 2.2 mg/m³. Upon investigation of the changes after the second continued noncompliance, the following conditions were observed: a tamper spray (intentional shutdown of the spray system for the No. 2, 5-N belt was not installed. Two of the 3 sprays (top) were shut off. The top belt was day from the No. 64 crosscut to the No. 91 crosscut, a distance of 2,700 feet. The water spraying system for the 8D beltline did not have a water spray for the top surface of the top belt. The valve to prevent intentional shutdown of the water spraying system was connected to a hose, but not installed in the water system. A citation for float coal dust was issued at the 8-D belt transfer where coal is dumped on the No. 2, 5 North beltline. The tamper proof valve to prevent intentional shutdown of the sprays for the 7-D system was not installed to prevent the sprays from being shut off. Two of the three bottom sprays were turned off. The 9-D beltline also dumps coal on the 5N, No. 2 beltline. A top spray was not installed to spray the top surface of the top belt. Management was aware that the valve to minimize intentional shutdown was being defeated by using an acetyline wrench. This had occurred on at least 2 occasions. Measures were not implemented to prevent this from happening. Management has failed to assure that the new system for the water were installed and properly maintained. No other means of evaluation were implemented by the company.

Panceroff was not, at the time he issued his order, aware, however, of all of the efforts made by Consol to abate the violation. Panceroff himself also acknowledged that it was not necessary for Consol to have taken any of the measures cited in his order so long as compliance was achieved. Under the unique circumstances of this case wherein Consol, prior to the issuance of the order, paid an outside expert consultant, Conflow, Inc., to conduct a complete evaluation of the cited respirable dust problem and had either implemented or was in the active process of implementing all of the recommendations of this consultant, I find that Consol is entitled to some mitigation in penalty for good faith efforts to achieve compliance. Robert Semple, sales engineer for Conflow, Inc., described these efforts in detail at hearing (Tr. 251-301). It is apparent that the Secretary was not fully aware of all of these abatement efforts at the time the "Section 104(b)" order was issued. On the other hand it is apparent that Consol had not in fact, at the time the order was issued, achieved compliance with the respirable dust standard. This too is taken into consideration in assessing a penalty herein.²

² The scope of review for this criterion in evaluating a civil penalty is not necessarily congruent with the scope of review of a "Section 104(b)" failure-to-abate order. Recently, in *Energy West Mining Co. v. FMSHRC and Secretary of Labor*, No. 96-1243 (D.C. Cir. April 25, 1997), the circuit court held that the MSHA inspector could rely on continuing violative respirable dust samples as a basis for issuing a "Section 104(b)" order without conducting any further inquiry concerning the operator's efforts to abate the violation. The court also placed the burden on the mine operator to bring to MSHA's attention any specific abatement measures

justifying extension of the abatement period. Accordingly, Consol's abatement efforts in this
Footnote 2 Continued

case which were not completely brought to MSHA's attention and which have been considered in some mitigation of the penalty amount, would not be relevant in evaluating the validity of the related 104(b) order.

Under the circumstances and considering all of the criteria under Section 110(i) of the Act I find that a civil penalty of \$800 is appropriate for the violation herein.

ORDER

Citation No. 3493950 is affirmed and Consolidation Coal Company is directed to pay a civil penalty of \$800 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

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