FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 15, 1997

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 97-84-R
	:	Order No. 3493571; 5/16/96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Robinson Run No. 95 Mine
Respondent	:	Mine ID No. 46-01318

DECISION

Appearances: Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, on behalf of Contestant;
Melonie J. McCall, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, on behalf of Respondent.

Before: Judge Melick

This contest 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 a failure-to-abate withdrawal order, No. 3493571, issued by the Secretary of Labor to the Consolidation Coal Company (Consol) under Section 104(b) of the Act. The underlying Section 104(a) citation, No. 3493950, was affirmed by this Administrative Law Judge by decision dated June 19, 1997 (18 FMSHRC 1174) and that decision has since become final.[1]

In order to understand the issues concerning the order at bar, it is necessary to understand

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[1] Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

the facts surrounding the underlying Section 104(a) citation. Accordingly, the decision affirming that citation is set forth in relevant part below:

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 to 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 traveled 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. (18 FMSHRC 1174 - 1177).

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 thereafter issued the Section 104(b) closure order now in dispute. 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 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, reinstruct 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 proof 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 dry 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.

As a condition precedent to issuing an order under Section 104(b) of the Act, the Secretary must find that a violation described in the underlying Section 104(a) citation has not been totally abated within the period of time as originally fixed, or as subsequently extended. The burden of proof on this issue is upon the Secretary as the moving party. On the facts of this case, I do not find that the Secretary has met her burden of proving that the underlying violation had not been totally abated within the period of time set forth in MSHA=s extension of the abatement period.

It is undisputed that, in issuing the 104(b) order in this case on May 16, 1996, MSHA Inspector Ponceroff relied on the May 10, 1996, "Report of Continuing Non-Compliance," to determine that the violative condition alleged in the underlying citation had not been abated (Gov. Exh. No. 5, Pg. 2). This report reflected that the average concentration of respirable dust in the cited area was 2.2 milligrams per cubic meter between April 22, 1996, and May 3, 1996. The concentrations of respirable dust for these samples ranged from 1.7 milligrams per cubic meter to 2.6 milligrams per cubic meter.

Consol maintains, however, that the 2.2 milligrams per cubic meter average concentration reported in the May 10, 1996, MSHA laboratory report, was not a valid finding because it was

based upon an April 24, 1996, respirable dust sample which was not obtained in the "designated area." It is not disputed that the April 24, 1996, sample was in fact invalid because the sample was not taken in the "designated area." The miner sampled did not work in the "designated area" for the entire shift. There is no dispute that if one of the five samples used to calculate the 2.2 milligrams per cubic meter average concentration of respirable dust found in the May 10, 1996, MSHA report was invalid, there would have been an insufficient number of dust samples to have permissibly concluded that the designated area was out of compliance, and was therefore still in violation of the dust standard. See 30 C.F.R. ' 70.201(d).

While the Secretary does not dispute that the April 24, respirable dust sample was invalid, she appears to argue that Consol failed to inform MSHA of that deficiency prior to the issuance of the 104(b) order on May 16, 1996. It is reasonable to assume that the burden is upon the mine operator to bring to MSHA=s attention any invalidated dust samples since that information on the facts of this case was within the exclusive control of the operator. See also Energy West Mining Company v. FMSHRC, 111 F.3d 900 (D.C Cir. 1997). I find from the credible evidence in this case that Consol did indeed bring this information to the attention of MSHA prior to the issuance of the order.

First, Consol Mine Safety Supervisor, David McCullough, testified that he had attached a note to the dust data card which he submitted to the MSHA laboratory, notifying the laboratory that the sample had not been properly obtained in the designated area. Second, McCullough testified that he informed MSHA Inspector, Charles Thomas, on May 6, 1996, that the April 24, respirable dust sample had not been taken in the designated area because the miner sampled did not work in the designated area for the entire shift. Inspector Thomas confirmed that McCullough had indeed told him on May 6, that the April 24 sample was, in effect, invalid. Thomas also noted on his subsequent action form dated May 6, 1996, that the April 24, 1996, sample had been voided.

Under the circumstances, I find that Consol did in fact inform MSHA, that the April 24, sample was invalid. Clearly then, MSHA knew as of May 6, 1996, that the April 24, 1996, sample was invalid. Since MSHA was on notice that one of the five samples used to calculate the 2.2 milligrams per cubic meter average concentration was invalid, it had no legal basis to conclude that the designated area was out of compliance. Accordingly, the Secretary has not sustained her burden of proving that the cited violation had not been totally abated within the extended abatement period. Accordingly, the order at bar must be vacated.

ORDER

Order No. 3493571 is hereby **VACATED** and this contest proceeding is **GRANTED.**

Gary Melick
Administrative Law Judge

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