

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 24, 2000

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2000-245-M |
| Petitioner | : | A.C. No. 10-00648-05511 |
| | : | |
| v. | : | Rocky Mountain Quartzite Quarry |
| | : | |
| NORTHERN STONE SUPPLY, INC., | : | |
| Respondent | : | |

DECISION

Appearances: Deia Wallace-Peters, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
 Gary Mullard, President, and Garth Greenwell, Quarry Manager, Northern Stone Supply, Inc., Oakley, Idaho, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Northern Stone Supply, Inc. (“Northern Stone”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Twin Falls, Idaho. The parties presented testimony and documentary evidence and made closing arguments.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Rocky Mountain Quartzite Quarry is a dimension stone quarry operated by Northern Stone in Cassia County, Idaho. It is a rather small quarry that operates on a seasonal basis. As a consequence, it is usually inspected by MSHA only once a year.

On July 1, 1999, MSHA Inspector Curtis Chitwood conducted a health inspection at the quarry. As part of this inspection, he sampled five miners for exposure to silica-bearing dust. He used the type of sampling devices that MSHA typically uses and took the sample over a single six-hour shift. These devices consist of a “constant flow sampling pump” that is designed to take an air sample in each miner’s breathing zone. These devices are calibrated at a flow rate of 1.7 liters per minute. The five respirable samples that were obtained were sent to MSHA’s laboratory in Pittsburgh, Pennsylvania, along with a control sample. As a result of this sampling, Inspector Chitwood determined that two miners were overexposed to silica-bearing dust and he issued two

citations under section 104(a) of the Mine Act. He issued a third citation alleging that Northern Stone was not conducting dust surveys at the quarry.

A. Citation No. 7977666

Citation No. 7977666 alleges a violation of 30 C.F.R. § 56.5001(a)/.5005. The condition or practice section of the citation provides, in part:

The miner (Florentino Castillo) assigned to work in the quarry area was exposed to a shift-weighted average of .33 mg/cubic meter (TWA) of respirable silica-bearing dust on 7/1/99. This exceeded the permissible exposure limit of .15 mg/cubic meter (TLV) times the sampling factor (1.2 for respirable free silica dust sampling and analysis). .15 times 1.2 (EF) equals .18. .33 is 1.87 times .18 (TLV times EF). A fit tested respirator was not being used and a respiratory protection program meeting the requirements of ANSI Z88.2-1969 was not in place. All feasible engineering controls were not in use to control employee's dust exposure....

In the citation, Inspector Chitwood determined that it was reasonably likely that the violation would lead to a serious illness; that the violation was of a significant and substantial nature ("S&S"); and that Northern Stone's negligence was moderate. The Secretary proposes a penalty of \$655 for this violation. The safety standard provides, in part, that "exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists...." Section 56.5005 provides, in part, that when "engineering control measures have not been developed or when necessary by the nature of the work involved ..., employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment."

Northern Stone contested this citation for a number of reasons. First, Northern Stone states that MSHA conducted silica dust surveys in the past and no over-exposures were detected. As a consequence, it believed that it was in compliance with MSHA's health standards. Second, Northern Stone believed that MSHA was responsible for conducting these respirable dust surveys and it relied on MSHA's surveys to remain in compliance. Third, Northern Stone questions the accuracy of the allegations in the citation because, after the citation was issued, it arranged for its own respirable dust survey and no over-exposures were found.

I find that the Secretary established a violation. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety [or health] hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

For purposes of this case, I find that MSHA may issue a valid citation for an overexposure to silica-bearing dust based on a single-shift silica dust survey. I reach this conclusion based on the Commission's decision in *Asarco, Inc.*, 17 FMSHRC 1 (1995), and former Commission Judge Maurer's subsequent analysis in *Asarco, Inc.*, 19 FMSHRC 1097, 1130-1136 (1997). Based on the evidence presented, Judge Maurer concluded that "MSHA's use of single-shift sampling is a reasonable means of ascertaining, to the requisite degree of accuracy, whether the enforcement concentration level standard in Section 57.5001(a) has been exceeded." *Id.* at 1136.

The Secretary presented evidence as to the procedures used by Inspector Chitwood to take the sample and the protocol used to analyze the sample at MSHA's Pittsburgh laboratory. Jaime Alvarez, a safety and health specialist in MSHA's Western District, testified very generally about MSHA's sampling procedures. (Tr. 6-20). Inspector Chitwood testified about the procedures he used to sample at the quarry. (Tr. 20-59). Cathy Burns, the quality assurance coordinator at MSHA's laboratory, testified about the procedures used to analyze respirable dust samples at the laboratory. (Tr. 75-101). James Polizzano, an x-ray analyst at the MSHA laboratory, testified as to the procedures he used when analyzing the particular respirable dust sample at issue. (Tr. 102-121). Northern Stone did not present any evidence to rebut this evidence. Consequently, I credit the testimony of these witnesses. I find that MSHA followed correct procedures when sampling for respirable dust at the quarry and when analyzing the sample at its laboratory. Accordingly, I find that the citation accurately reflects the amount of silica dust to which Mr. Castillo was exposed during the particular six-hour shift that was sampled. The shift-weighted average of .33 mg/cubic meter of respirable silica-bearing dust detected by MSHA is an "estimate" of that "individual's exposure concentration level" on that date. *Id.*

The Commission has held that, in certain instances, there is a presumption that the violation of a respirable dust standard is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986); *Twentymile Coal Co.*, 15 FMSHRC 941 (June 1993). In those cases, the mine operator violated sections 30 C.F.R. § 70.100 or §70.101, which apply to coal mines.

An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ...

mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

Under the *Mathies* test, the Secretary must establish: (1) the underlying violation of the health standard; (2) a discrete health hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

In the cases involving coal mines, cited above, the Commission held that because an analysis of the four elements of the S&S test would be essentially the same in each instance in which the Secretary proves a violation of 30 C.F.R. § 70.100 or §70.101, proof of a violation gives rise to a presumption that the violation is S&S. *See* 8 FMSHRC at 1281. It based this presumption, in large measure, on the legislative history of the Mine Act. The Commission noted that "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." 8 FMSHRC at 895.

For reasons set forth below, I find that this presumption should not be applied under the particular facts of this case. First, the Secretary made no attempt to introduce any evidence concerning the gravity of this violation, the reasonable likelihood of an illness, or whether any illness is likely to be serious. Indeed, counsel for the Secretary ignored the S&S and gravity issues both in the presentation of the evidence and in her closing arguments. The only evidence on these issues is the citation itself. The Secretary cannot rely on this presumption without at least attempting to invoke it in some way. The fact that the Commission created this presumption does not obviate the Secretary's responsibility to establish her case.

In addition, this case involves facts that were not present in the Commission's decisions. The Rocky Mountain Quartzite Quarry operates on a seasonal basis with short-term workers. The quarry only mines dimension stone about six months a year. Mr. Castillo was a stone cutter at an area of the quarry known as Silver Peak. When Inspector Chitwood conducted the health survey, Mr. Castillo agreed to cut stone for the entire shift. Normally, stone cutters do not cut stone straight through their shift. (Tr. 25-27). At Inspector Chitwood's urging, Mr. Castillo agreed to work through lunch without taking any breaks or performing any tasks during his shift other than cutting stone. *Id.* Thus, his exposure to silica dust during this shift may not have been representative of his exposure on a typical work day. In addition, it is not clear from the record whether Mr. Castillo returns every spring to work at the quarry or whether different

people work at the quarry each season. Mr. Castillo returns to his home outside of Idaho when he is not working at the quarry. Given these circumstances, I believe that the application of the presumption would be inappropriate.

I find that the Secretary established the first two elements of the Commission's four part S&S test. A violation occurred that contributed to a discrete health hazard. The Secretary did not establish the third element of the *Mathies* formula: a reasonable likelihood that the hazard contributed to will result in an illness. First, other than the citation itself, the Secretary did not offer any evidence on this element. Second, as stated above, the sample taken by the inspector may not reflect Mr. Castillo's exposure over a period of time. The S&S criteria are to be evaluated assuming continued normal mining operations. It is not at all clear that Mr. Castillo would have been exposed to a shift-weighted average of .33 mg/cubic meter of silica dust during his normal work days. Accordingly, I find that the Secretary failed to establish that the violation was S&S.

I am required to assess a civil penalty for all violations of safety and health standards taking into consideration the six penalty criteria set forth in section 110(i) of the Mine Act. One criteria is the gravity of the violation. As stated above, the Secretary did not offer evidence on this criteria except the citation. Based on the evidence of record, I find that the violation was only slightly serious. I take official notice of the fact that, if a miner is overexposed to silica-bearing dust over a period of time, he can develop silicosis, which is a debilitating disease. But I also take into consideration the fact that it is not clear in this case that Mr. Castillo had been actually exposed to the level of silica dust measured by the inspector over a significant period of time or that he would be so exposed in the future. His work routine was altered when the sample was taken. The Secretary is not usually required to establish that the cited exposure level would continue, but the facts in this particular case warrant such consideration. The Secretary bears the burden of proof on the gravity criterion and I have taken into consideration the fact that this issue was not raised by counsel for the Secretary at the hearing.

I also find that Northern Stone's negligence was low. Mr. Greenwell testified that MSHA had taken silica dust samples at the mine and no citations were issued. He believed that the quarry was in compliance with the silica dust standard and that MSHA was responsible for taking samples to ensure compliance. He was very concerned that the sample showed an overexposure. He questioned the accuracy of the sample because he believed that miners were not being overexposed, but he also wanted to take steps to ensure that miners worked in a healthy environment. After the citations were issued, Northern Stone purchased a sampling device and has sought MSHA's assistance in developing a sampling program. It is important to note that the Secretary did not introduce any evidence on the negligence criterion.

B. Citation No. 7977667

Citation No. 7977667 alleged another violation of 30 C.F.R. § 56.5001(a)/.5005. The condition or practice section stated that a miner was exposed to a shift-weighted average of .17 mg/cubic meter of respirable silica-bearing dust on July 1, 1999, and that the exposure limit, taking into consideration the error factor, was .25 mg/cubic meter. When I pointed out that this citation does not set out a violation because the exposure level was less than the exposure limit, the Secretary agreed to vacate the citation. (Tr. 61-64, 133-34). It appears that the inspector made an error when entering the data received from MSHA's laboratory.

C. Citation No. 7977668

Citation No. 7977668 alleges a violation of 30 C.F.R. § 56.5002. The condition or practice section of the citation provides, in part:

Two (2) stone cutters were overexposed to respirable silica-bearing dust at the dimensional stone quarry site on 07-01-1999. The mine operator had not conducted dust surveys as frequently as necessary to determine the adequacy of the engineering control measures at the dimensional stone quarry site, to ensure a safe work environment for the miner.

Inspector Chitwood determined that it was reasonably likely that the violation would lead to a serious illness; that the violation was S&S; and that Northern Stone's negligence was moderate. The Secretary proposes a penalty of \$655 for this violation. The safety standard provides that "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

Northern Stone contends that it did not know how frequently such surveys were required under the standard. Northern Stone attempted to get clarification from MSHA on several occasions after the citations were issued. As stated above, Northern Stone incorrectly believed that MSHA would take all of the required respirable dust surveys.

I find that the Secretary established a violation because Northern Stone had not conducted any dust surveys prior to the issuance of this citation. Thus, the issue of how frequently such surveys must be taken is irrelevant for this citation. I note that Northern Stone contested the citations in this case primarily because it felt that MSHA was not providing sufficient assistance in helping it achieve compliance with its health standards. After the citations were issued, Northern Stone sought MSHA's assistance in developing a plan to solve respirable dust problems at its quarry and also sought help in learning how to use the sampling equipment it had purchased. Northern Stone's own silica-dust sampling results indicated that miners were not being overexposed. Messrs. Greenwell and Mullard expressed their frustration at the hearing and continued to seek MSHA's advice. They admitted that they did not sample for silica dust prior to July 1999, but they were perplexed by MSHA's failure to follow through

on its health inspection by answering their rather basic questions about the regulatory requirements.

Although the Secretary did not introduce any evidence on the gravity and negligence criteria at the hearing, I find that the violation was serious and that Northern Stone's negligence was moderate. The citation itself supports these findings. If a mine operator does not conduct respirable dust surveys, it cannot determine whether its employees are being overexposed to silica dust. Although MSHA conducts health surveys at mines from time to time, the standard requires mine operators to monitor the health conditions at the mine. It cannot rely on MSHA's testing alone. Since the language of the standard clearly places this responsibility on the mine operator, I find that Northern Stone was moderately negligent.

I could not help but notice that immediately after the close of the record in this case, while the parties were still in the courtroom, Mr. Alvarez of MSHA's Metal/Nonmetal Western District Office and Messrs. Greenwell and Mullard began generally discussing approaches that Northern Stone could take with respect to compliance with the silica dust standard. It appeared to me that Mr. Alvarez, on behalf of MSHA, pledged to provide assistance to Northern Stone in this regard. It is my hope that the parties follow through on this discussion so that Northern Stone can provide a healthy environment for its employees. Discussion and assistance will help improve health conditions at this quarry more than further litigation will ever achieve.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Northern Stone was issued 13 citations during the two years prior to this inspection. None of these citations involved silica dust. Northern Stone is a small operator and the quarry worked 9,980 man-hours. The violations were abated in good faith. Northern Stone appeared eager to take steps to prevent future violations of the cited standards. The penalties assessed in this decision will not have an adverse effect on Northern Stone's ability to continue in business. My gravity and negligence findings are set forth above. I significantly reduced the penalties, in part, because Northern Stone is small and it demonstrated good faith. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

| <u>Citation No.</u> | <u>30 C.F.R. §</u> | <u>Penalty</u> |
|---------------------|--------------------|----------------|
| 7977666 | 56.5001(a)/.5005 | \$80.00 |
| 7977667 | 56.5001(a)/.5005 | Vacated |
| 7977668 | 56.5002 | 120.00 |

Accordingly, Citation Nos. 7977666 and 7977668 are **AFFIRMED** as modified above; Citation No. 7977667 is **VACATED**; and Northern Stone Supply, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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