

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 3, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-169
Petitioner : A.C. No. 42-01994-03614
:
v. :
: Cottonwood Mine
ENERGY WEST MINING COMPANY, :
Respondent :

DECISION AFTER REMAND

Before: Judge Manning

This case 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. (1988)("Mine Act") following a remand from the Commission. 18 FMSHRC 565 (April 1996). In its decision, the Commission affirmed the determination of former Commission Administrative Law Judge John J. Morris that an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") did not abuse his discretion in issuing a failure to abate order of withdrawal under section 104(b) of the Mine Act. The Commission vacated Judge Morris's penalty assessment, however, and remanded the case for reconsideration of that issue. Id. at 571.

The citation involved in this case states that respirable dust samples taken by Energy West Mining Company ("Energy West") showed an average concentration of 2.2 milligrams of respirable dust per cubic meter of air, in violation of 30 C.F.R. ' 70.100 (a). The health standard requires that the average concentration be maintained at or below 2.0 milligrams. Energy West conceded that it violated section 70.100(a) as alleged in the citation but disputed that the violation was significant and substantial ("S&S") and challenged the failure to abate order issued by the MSHA inspector.

At the hearing, Judge Morris granted the Secretary's motion to amend the citation to delete the S&S allegation based on evidence that the miners exposed to the respirable dust were wearing airstream helmets. 16 FMSHRC 835, 837 (April 1994). The judge found that these helmets "provid[ed] a virtually dust-free air

supply to miners, reducing respirable dust exposure to insignificant levels." Id. at 843. The condition described in the citation was not abated within the time set in the citation. The inspector determined that an extension of the abatement time was not warranted and he issued a failure to abate order. The judge determined that the inspector did not abuse his discretion in issuing the failure to abate order. Id. at 844. Judge Morris assessed a civil penalty of \$3,000 based on his finding that the gravity of the violation was high, given the risk of pneumoconiosis and that such violations are generally considered to be S&S. Id. at 850.

In its decision, the Commission affirmed the judge's decision with respect to the failure to abate order. 18 FMSHRC at 571. The Commission noted that the judge granted the Secretary's motion to delete the S&S allegation because the miners were wearing airstream helmets and were thereby provided with a virtually dust-free air supply. Id. The Commission stated that the judge did not indicate whether he considered this evidence when he determined that the violation was of high gravity or when he assessed the civil penalty. Id. On that basis, the Commission vacated the penalty and remanded the case for consideration of that evidence and the assessment of an appropriate civil penalty.

This case was assigned to me on April 25, 1996. By order dated April 29, I asked the parties to confer for the purpose of reaching agreement on the narrow issue remanded by the Commission. In response, the parties entered into the following stipulation:

1. The gravity of the violation was low because the miners affected were wearing personal protective equipment which provided "a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels." For this reason, the Secretary did not consider the violation significant and substantial.

2. Since the gravity of the violation was low, and the findings in the Judge's decision issued in April 1994 about the other statutory factors for assessment of the civil penalty for the violation were not at issue before the Commission and are not at issue on remand, an appropriate civil penalty for Citation 3850746 is \$850.00.

Joint Stipulation at 2 (citations omitted). The parties stated

that they entered into the agreement, in part, to conserve the resources of the Commission and the parties, and they request that I issue a final decision assessing a civil penalty of \$850.00 without further proceedings.

Based on my consideration of the decisions of Judge Morris and the Commission, the record in this case, and the parties' joint stipulation, I concluded that the proffered agreement contained in the joint stipulation is appropriate under the criteria set forth in section 110(i) of the Mine Act.

Accordingly, the parties' proposal set forth in their Joint Stipulation is **ACCEPTED**, the citation is **MODIFIED** to show that the gravity of the violation was low, and Energy West Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$850.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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