FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 9, 2001

RAG SHOSHONE COAL CORP.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 99-342-R
v.	:	Citation No. 9895049; 7/8/99
	:	
SECRETARY OF LABOR	:	Docket No. WEST 99-384-R
MINE SAFETY AND HEALTH	:	Citation No. 4073211; 8/3/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Shoshone No. 1
	:	Mine ID 48-01186

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Contestant;
Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Cetti

Contest proceeding No. WEST 99-342-R was commenced by the Contestant RAG Shoshone Coal Corporation (Shoshone) with the filing of a Notice of Contest against Respondent Secretary of Labor (Secretary) challenging the validity of Citation No. 9895049 in Docket No. WEST 99-342-R. That citation alleges a non S&S violation of 30 C.F.R. § 70.207(a) pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act). The citation charges Shoshone failed to send MSHA five valid respirable dust samples or a valid reason for not sampling the longwall MMU 008-060 for the bimonthly period May-June 1999.

MMU 008-0-060 is the mechanized mining unit for the longwall section of the Shoshone No. 1 mine.

About a month later the Secretary directed Shoshone to include code 060 longwall (return side face worker) designated occupation in its mine ventilation plan. Shoshone informed the Secretary it wished to challenge such requirement. The Secretary then issued Citation No. 4073211 to Shoshone on August 3, 1999, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). That citation alleges a S&S violation of 30 C.F.R. § 75.370(a)(1) for mining without a valid mine ventilation plan based upon Shoshone's failure to include in its ventilation plan the 060 code for sampling the longwall mechanized mining unit (MMU 008-0-060). Shoshone contested the citation which is docketed at WEST 99-342-R.

Findings of Fact and Statement of Law

Shoshone operates the Shoshone No. 1 Mine, MSHA ID No. 48-01186 located in Hanna, Wyoming, and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. ("the Act"). Shoshone's operations affect interstate commerce.

The Shoshone No. 1 mine employs approximately 100 miners and produces coal on one 10 hour shift per day, four days per week. Equipment maintenance is performed on a separate nonproducing shift. Coal is mined by continuous mining machines and longwall mining equipment. The mine has one longwall working section which is at issue in this proceeding.

Underground coal mine operators are required to perform sampling for respirable coal mine dust. Under 30 C.F.R. § 70.207(a), each mine operator is required to take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period. A designated occupation is defined in 30 C.F.R. § 70.2(f) as:

> the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration.

On its longwall section, which is at issue here, unless the district manager directs otherwise, the operator is required under 30 C.F.R. § 70.207(e)(7) to sample the designated occupation as follows:

> (e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:
>
> * * * * *
>
> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner; (emphasis added)

Section 30 C.F.R. § 70.207(e)(7), authorizes the district manager to direct the mine operator to sample a different designated occupation and authorizes him to direct the placement of the sampling device in the longwall section. The longwall designated occupation codes utilized by the Secretary in the underground coal mines as of July 30, 1999, are listed in the document received in evidence as Gov. Ex. 7. The parties stipulated that the Secretary may utilize other codes in addition to those listed in that document. (Stip. 14).

Shoshone, in sampling its longwall section sampled the designated occupation of the tailgate shearer operator, Code 044, since at least October 11, 1983. The parties stipulated the 044 designated occupation code had been in effect nationally since at least 1978.

Operators such as Shoshone conduct respirable dust sampling using respirable dust sampling apparatus which include a sampling pump, a hose at least 36 inches in length, and a cyclone assembly containing a filter cassette. The pump draws air into the cyclone which is designed to separate out nonrespirable or larger particles of dust which fall into the "grit pot." The air containing the smaller (respirable) dust particles is directed into the filter cassette. The particles enter the filter cassette and are deposited on the filter face. At the end of sampling, the filter cassette is removed from the cyclone assembly and sent to MSHA for weighing.

MSHA inspectors also conduct sampling on the longwall section at Shoshone. When they conduct such sampling they sample various occupation codes such as the shearer operator, jacksetters, and mechanics in addition to the designated occupation which Shoshone is required to sample. (Stip. 18).

On April 9, 1999, John Kuzar, District Manager for Coal Mine Safety and Health District 9, notified Shoshone that it would be required to conduct sampling of the 060 designated occupation rather than the 044 designated occupation in the longwall section. The reason for the change was set out in the notification letter in part as follows:

> Currently, the DO on MMU 008-0 is the tailgate-side longwall operator (occupation 044). However, Agency sampling conducted between August 1997 and February 1999 shows the exposure of the tailgate-side longwall operator averaged 0.841 mg/m3, while the jacksetter (041) averaged 1.679 mg/m3 based on the averages of 7 different surveys during this time frame. More limited sampling also shows exposures on the mechanic (004) to be 1.232 mg/m3, the section foreman at 1.645 mg/m3, and the headgate-side longwall operator (064) at 1.52 mg/m3. These results show several other occupations to be exposed to significantly higher concentrations of respirable coal mine dust than the designated occupation (044). (Gov. Ex. 12).

The notification requires the respirable dust pump to be transferred between miners whenever necessary to make sure that the pump always remains with whichever miner is nearest the return air side of the longwall working face regardless of normal job assignment or occupation of that miner. It states in part:

> [I]f a jacksetter or mechanic goes downwind of the tailgate side longwall operator, the pump must be switched to the jacksetter or the mechanic for the time that he or she is the miner working nearest the return air side of the longwall working face. When the mechanic or jacksetter returns upwind of the longwall operator, the pump would then be switched back to the longwall operator, as that person would now be the person working nearest the return air side.

Shoshone wished to challenge the notification of the district manager that Shoshone would now be required to sample the 060 designated occupation. For that reason, Shoshone conducted sampling for the longwall section on the 044 designated occupation for the May-June 1999 bimonthly sampling period, just as it had done in the past, and submitted the code 044 samples to the Secretary. Shoshone did not sample the 060 designated occupation for the May-June 1999 bimonthly sampling period, nor were samples provided to the Secretary for the 060 designated occupation for that period. (Stip. 21).

Citation No. 9895049 (Invalid dust samples)

Citation No. 9895049 was issued on July 8, 1999, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). It alleges a violation of 30 C.F.R. § 70.207(a). Under the heading and caption "Condition or Practice" the citation alleges as follows:

> The Secretary has not received five valid respirable dust samples or a valid reason for not sampling MMU 008-0-060 for the bimonthly period May-June 1999.

Shoshone's contest of the citation is docketed at WEST 99-342-R.

Citation No. 4073211 (re ventilation plan)

The Secretary, almost a month after issuing Citation No. 9895049, directed Shoshone to include the 060 designated occupation in its ventilation plan for the Shoshone No. 1 mine. Shoshone did not include the 060 designated occupation in its ventilation plan as directed by the Secretary. Shoshone informed the Secretary it wished to challenge the requirement that Shoshone include the 060 designated occupation in its ventilation plan. Consequently, MSHA issued Citation No. 4073211 to Shoshone on August 3, 1999, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). The citation alleged a S&S violation of 30 C.F.R. § 75.370(a)(1) for mining without an approved ventilation plan.

That citation under the heading and caption "Condition or Practice" stated:

> After hand delivery of memo dated 02 Aug. 1999, production crews proceeded to their underground work areas to begin production.
>
> This further mining activity is a violation of 30 CFR 75.370(a)(1), as there is not an approved ventilation plan in effect as of 02 Aug. 1999, at this operation.

Shoshone contested Citation No. 4073211 which is docketed at WEST 99-384-R.

MSHA's Program Policy Manual addresses 30 C.F.R. § 70.207. Excerpts from the Program Policy Manual were attached to the joint stipulations as Ex. E. The heading and item (e) are as follows:

70.207 Bimonthly Sampling; Mechanized Mining Units

(e) If the operator's mining procedures result in the changing of miners from one occupation to another during a production shift, the sampling device must remain on or at the designated occupation (DO). For example, if an operator alternates the duties of the continuous operator on a one-half shift basis between the continuous miner operator and helper, the dust sampler shall be worn for one-half of a shift by the continuous miner operator and the other one-half of a shift by the helper, while each is operating the continuous mining machine, or the sampler shall remain on the machine as required by this section.

A change in the designated occupation of an MMU will be considered after the results of samples collected by MSHA indicate that a work position other than those identified in this section should be designated for bimonthly sampling. When the results of a sampling inspection demonstrate appreciably higher respirable dust levels at a nondesignated occupation within an MMU, consideration should be given to changing the designated occupation.

The MSHA Policy Manual item No. 5 provides as follows:

70.208 Bimonthly Sampling; Designated Areas

Selection of Sampling Points Within DA:
The placement of the respirable dust sampling instrument within a designated area is critical to obtaining a representative measurement of respirable dust concentrations at the location. Dust sampling instruments should be positioned within designated areas so that the measurement is indicative of the highest dust exposure to personnel who are required to work or travel in that area. (Emphasis added).

The parties stipulated the 060 designated occupation computer code for respirable coal mine dust units was established by MSHA in 1988. At the time of the hearing there were 55 active longwall units in the United States. Forty seven of these units sample the 060 designated occupation. In District 9, the first longwall unit that was required to sample the 060 designated occupation began to do so in 1994. (Stip. 30). Gov. Ex. 7 lists the mines with longwall mining units, their locations, and states the code used to sample the longwall section.

A drawing of the longwall face and the equipment on the face at the Shoshone No. 1 Mine was received into evidence as Gov. Ex. 2. The longwall face is ventilated by bringing intake air up the headgate, across the longwall face, and out the tailgate.

Shoshone asserts that the issue with respect to Citation No. 9895049 is whether Shoshone can be required to use the 060 designated occupation for respirable dust sampling of the longwall

section. The Secretary, on the other hand, states the issue as simply whether Shoshone violated 30 C.F.R. § 70.207(a) when it failed to submit five valid respirable dust samples. The issue though worded differently by each party is basically the same identical issue.

Shoshone states that the issue with respect to Citation No. 4073211 is whether the Secretary can require Shoshone to include the 060 designated occupation for respirable dust sampling in its ventilation plan. The Secretary, however states the issue with respect to Citation No. 4073211 is whether Shoshone violated 30 C.F.R. § 75.370(a)(1) when mining on August 3, 1999, without having an approved ventilation plan requiring respirable dust sampling of the longwall using the 060 designated occupation. An additional issue with respect to Citation No. 4073211, if a violation of the cited standard is found, is whether such violation is properly characterized as significant and substantial.

The parties agree that if a violation is established with respect to Citation No. 9895049, that a violation is also established with respect to Citation No. 4073211. In that event Shoshone, would however continue to contest the significant and substantial designation of Citation No. 4073211.

The issues largely focus on the validity of the change in the designated occupation from the 044 code to the 060 code. The parties are not contesting the specific facts set forth in the bodies of the citations. Specifically with respect to Citation No. 9895044, Shoshone stipulates it did not submit samples for the 060 designated occupation code. With respect to Citation No. 4073211, Shoshone concedes it did not include the 060 designated occupation code in its ventilation plan even though the Secretary directed it to do so. The parties have agreed that the testimony of the inspectors issuing the citations is not necessary for a resolution of these matters. In fact, the parties at first filed a motion and a cross-motion for a summary decision stating no issue of material fact existed. Later Shoshone requested the matter be set for hearing.

Discussion

The basic question in this case as stated by the Secretary through counsel at the hearing is whether Shoshone failed to submit five valid respirable samples for the May-June 1999 sampling period. It is undisputed that Shoshone did in fact submit five respirable dust samples for the May-June 1999 sampling period for the tailgate shearer operator (code 044) and did not submit respirable dust samples for code 060. It is undisputed that for many years prior to May 1999 Shoshone, pursuant to 30 C.F.R. § 70.207(e)(7), had properly used code 044 prior to receiving the notice from the MSHA district manager to change from code 044 to code 060 in sampling its longwall section.

On April 9, 1999, John A Kuzar, District Manager, sent Shoshone a Designated Occupation Change Notice, MSHA Form 2000-96, that the DO for MMU 008-0 of Shoshone No. 1 Mine had been changed to occupation 060. The notice directed Shoshone as follows:

> Notice is hereby given that the “designated occupation” on which sampling is required with respect to each working section by Title

30, Code of Federal Regulations, Part 70-Mandatory Health Standards-Underground Coal Mines, is changed as follows:

Changed from (occupation code) 044. Changed to (occupation code) 060 on MMU 008-0

Beginning with the next bimonthly period, you are hereby directed to initiate action to establish a bimonthly sampling cycle for the new "designated occupation" (060).

When collecting samples from DO 060, the sampling device shall remain at all times on the miner who works nearest the return air side of the longwall face. If individual miners rotate out of the DO position during sampling, the sampling device shall be shifted to and worn by the miner rotated into the DO position. For example, if all miners are upwind of the tailgate-side longwall operator, the particular miner doing that job becomes the DO becuase (sic) he/she is nearest the return air side of the longwall face. In this case, the sampling device shall remain with that miner during bimonthly sampling. However, if during the sampling shift another miner travels past the tailgate-side longwall operator toward the return air side, that miner would then become the DO and would wear the pump for the period of time during the shift that he/she spends downwind of the tailgate-side shearer operator. Failure to do so will result in the collection of invalid samples.

The Notice of Change to D.O. 060 was enclosed in a cover letter dated April 9 from the district manager to Harry Hales, Mine Manager for Shoshone stating the reasoning for the change to D.O. 060 as follows:

RE: Shoshone No. 1 Mine
ID No. 48-01186
Change in Designated Occupation
MMU 008-0

Dear Mr. Hales:

In order to provide reasonable assurance that all miners are equally protected against overexposure to respirable dust, the Mine Safety and Health Administration adopted the designated occupation (DO) concept. This concept is based on the reasoning that if the environment of those whose exposure is the greatest complies, then the environment of all other miners on the unit will comply

Currently, the DO on MMU 008-0 is the tailgate-side longwall operator (occupation 044). However, Agency sampling conducted between August 1997 and February 1999 shows the exposure of the tailgate-side longwall operator averaged 0.841 mg/m3, while the jack-setter (041) averaged 1.679 mg/m3 based on the averages of different surveys during this time frame. More limited sampling also shows exposures on the mechanic (004) to be 1.232 mg/m3, the section foreman at 1.645 mg/m3, and the headgate-side longwall operator (064) at 1.52 mg/m3. These results show several other occupations to be exposed to significantly higher concentrations of respirable coal mine dust than the designated occupation (044).

Therefore, in accordance with paragraph 70.207(e), Volume V, of the MSHA Program Policy Manual and consistent with section 70.207(e)(7) of Title 30, Code of Federal Regulations, you are being notified that the DO for MMU 008-0 has been changed to occupation 060, the miner who works nearest the return air side of the longwall working face. Please see the enclosed Designated Occupation Change Notice, MSHA Form 2000-96. Bimonthly samples taken at this location will provide a much more accurate indicator of whether all miners are being adequately protected from exposure to excessive levels of dust. This change becomes effective beginning with the May-June bimonthly period.

When collecting samples from DO 060, the sampling device shall remain <u>at all times</u> on the miner who works nearest the return air side of the longwall face. If individual miners rotate out of the DO position during sampling, the sampling device shall be shifted to and worn by the miner rotated into the DO position. For example, if all miners are upwind of the tailgate-side longwall operator, the particular miner doing that job becomes the DO because he/she is nearest the return air side of the longwall face. In this case, the sampling device shall remain with that miner during bimonthly sampling. However, if during the sampling shift another miner travels past the tailgate-side longwall operator toward the return air side, that miner would then become the DO and would wear the pump for the period of time during the shift that he/she spends downwind of the tailgate-side shearer operator. Failure to do so will result in the collection of invalid samples.

As previously stated when Shoshone sent respirable dust samples using the 044 code rather than the 060 code for sampling the longwall section for the bimonthly period May-June 1999, MSHA declared the samples were invalid and issued Citation No. 9895049.

In § 202(b)(2) of the Mine Act, 30 U.S.C. § 842(b)(2), Congress has enacted a statutory requirement that each operator must "continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust . . . ." (Emphasis added).

The statutory limitation of 2.0 milligrams of respirable dust specified in § 202(b)(2) of the Act is repeated in the Secretary's regulations at 30 C.F.R. § 70.100(a) which states:

> 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 . . . . (Emphasis added).

Congress expressly stated that the purpose of this respirable dust limitation in § 201(b) of the Mine Act, 30 U.S.C. § 841(b) is as follows:

> "To provide to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. (Emphasis added)."

The Secretary states that the basic question in this case is whether Shoshone failed to submit five valid respirable dust samples for the May-June 1999 sampling period and that all other issues hinged on the answer to that question.

Counsel for Shoshone in response pointed out that it did submit samples for the May-June 1999 sampling period for the tailgate shearer operator (code 044) just as it had properly done for many years before May 1999. Counsel for Shoshone stated the real issue is whether MSHA can require Shoshone to sample as the designated occupation the 060 code and require Shoshone to place in its ventilation plan the 060 code as the designated occupation to sample the longwall. It is Shoshone's position that for reasons set forth in its brief that the 060 code is not a valid code and the Secretary's imposition of the use of the 060 code upon Shoshone is "contrary to law, unreasonable, capricious, and an abuse of discretion." Shoshone pointed out that § 202(b)(2) of the Act, 30 U.S.C. § 842(b) and 30 C.F.R. § 70.100(a) are directed at regulating the "average" concentration of respirable coal mine dust to which a miner is exposed during a shift and that the 060 code does not do that. The 060 code does not sample an average concentration of respirable dust to which any miner is exposed over the course of a shift. Shoshone's counsel correctly pointed out that both the Act and the regulation § 202(b)(2) of the Act and 30 C.F.R. § 70.100(a)] have the identical language. Both the Act and the regulation state that 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 . . . . (Emphasis added).

The Secretary in support of her position in this matter cites the Tenth Circuit Appellate Court decision in American Mining Congress v. Marshall (AMC), 671 F.2d 1251 (1982), Jim Walters Resources, Inc. 14 FMSHRC 83 (ALJ Koutras, January 1992), and Consolidation Coal Co., 9 FMSHRC 1509 (ALJ Weisberger, August 1987).

I agree that the reasoning of the judges as set forth in their respective decisions fully support the Secretary's position in this matter.

The Tenth Circuit Court firmly established that the regulations promulgated by the Secretary, under the authority of the Mine Act, instituting a "designated area sampling" program, designed to measure concentrations of respirable dust to which coal miners were exposed as they worked and traveled outby areas of the mine, were not arbitrary and capricious in employing area sampling rather than personal sampling to measure compliance with respirable dust standards.

In American Mining Congress case, the petitioner (AMC) challenged the designated area sampling regulations promulgated by the Secretary. The Petitioner in that case argued that the Secretary's decision to employ area sampling rather than "personal sampling to measure compliance with the respirable dust standard is arbitrary and capricious." AMC argued that in passing the respirable dust regulation, "Congress was concerned with reducing the level of individual exposure to respirable dust. Since the only dust to which an individual miner is exposed is that dust within his breathing zone, and since area sampling does not sample the air within an individual's breathing zone, it fails to reflect the level of individual exposure and thus fails to achieve Congress' purpose."

The Tenth Circuit Court rejected the above quoted argument and stated its conclusion as follows:

> We do not think that the Secretary's choice of the area sampling program was arbitrary, capricious, or an abuse of discretion under § 706(2)(A) of the APA.

The Court stated that in reviewing the Secretary's regulations, "we must constantly bear in mind that Congress delegated sweeping authority to the Secretary. The statute provides that "samples shall be taken by any device approved by the Secretary . . . and in accordance with such methods, at such locations, at such intervals, and in such manners as the Secretary prescribes, 30 U.S.C. § 842(a). Because Congress has conferred such wide ranging discretion on the Secretary, this court should be hesitant in imposing constraints on his power. The need for judicial restraint is further heightened by the realization that courts do not share the Secretary's expertise in this highly technical area. The ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

The Court emphasized the Secretary's sweeping authority by stating, "Since there is no perfect sampling method, the Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy. The Secretary is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust."

In Consolidation Coal Company v. Secretary of Labor, 9 FMSHRC 1509 (August 1987) Judge Weisberger relying on the plain language of 30 C.F.R. § 70.207(e)(7) held, in effect, that when a longwall miner No. 1 of X occupation wears the dust sampler because he is the miner nearest to the return air side of the longwall working face, goes on a fresh air break, and as a result, miner No. 2 of the same or different occupation than miner No. 1 becomes the miner who is nearest to the return air side of the longwall, the dust sampler must be passed from miner No. 1 to miner No. 2 and worn by Miner No. 2 as long as miner No. 2 remains the miner nearest to the return air side of the longwall. When miner No. 1 returns from his break and again becomes the miner who is nearest to the return air side of the longwall, the sampling device must be passed back to miner No. 1 by miner No. 2.

The third case which the Secretary cites as directly supporting her position is Judge Koutras' decision in Jim Walter Resources, Inc. v. Secretary of Labor, 14 FMSHRC 83 (January 1992). The primary issue in that case is the same issue we have in the instant case. In both cases, the operator of a mine argued that the Secretary acted "arbitrarily and unreasonably" when it mandated a change in the "designated occupation" to be used in sampling the longwall section from code 044 to code 060. Judge Koutras rejected these contentions and found that in mandating the change in the designated occupation, MSHA acted within its authority and in strict compliance with the sampling procedures found in § 70.207(e)(7), and in so doing, it acted reasonably in carrying out the intent of Congress and the Act to insure that miners are protected from excessive concentrations of respirable dust.

There appears to be some question as to the use of the word "occupation," "designated occupation," and "code." In that regard the testimony of Robert A. Thaxton discussing how and why occupation and code numbers came to be used in the regulations is of interest. Thaxton's testimony was presented as a "health expert" in the area of industrial hygiene with many years experience concerning respiratory dust sampling regulations.[1] (Tr. 16-18). He explained that originally there was only one designated occupation in the longwall section which was the headgate shearer (code 064) which MSHA still has. Thaxton testified that "changing technology" caused MSHA to create the 044 code which was the tailgate shearer operator and later the 060 code. Asked if there was any significance to these code numbers Thaxton testified:

> The numbers are only computer codes so that we have a way of tracking the samples. They don't relate back to actual particular jobs per se. We try to locate them in relation to positions that mining companies typically use. When the initial codes came out, when the reg started in the 1970s, it was that we tried to use codes

[1] See Robert Thaxton's curriculum, Ex. G-1.

that were familiar to union mines because they had established work codes for people. (Tr. 82-83).

Thaxton testified that 060 code is the occupation code that most represents the highest dust concentration on the longwall face and the use of that code would result in all miners working in the area being protected as long as the 060 occupation is protected. (Tr. 120). He also stated you would normally expect the air downwind of the shearer to have a higher concentration than the air upwind. (Tr. 155-156).

Thaxton on further questioning testified:

> Q. Why didn't MSHA put all operators on the 060 code back in 1988 when we added the 060 code.
> A. Even though we added the code and made it available, we still needed to evaluate each mine, each longwall, on a mine-by-mine basis.
> Those changes weren't taken lightly. There was a change in technology, a change in mining systems. Not all mines, just because we created the code in 1988, were at a point where they needed to be on the 060 code. There are several mines even today that are still not on the 060 because it's not the appropriate code for the method of mining that they practice.
> Q. Is the 060 code, based on what you know, the appropriate code to use at the Shoshone Mine?
> A. From what I observed on the shift that I was there and what I have seen from inspector notes and talking with inspectors that have been present at the Shoshone Mine, the 060 code is the appropriate code for that particular longwall. (Tr. 166-167).
> Q. (BY MS. FLOYD) Now there have been allegations in this case that the 060 code is not a designated occupation code but rather a composite code consisting of numerous job positions. Would you agree with that type of characterization?
> A. No.
> Q. Why not?
> A. The designated occupation is not a compilation of codes. It does include multiple miners doing their normal tasks, and that's what the designated occupation was set out to do with the intent from the definition in the regulation. To say that it's a compilation of multiple codes would mean that we are taking a lot of different jobs and combining them into one, which we are not doing.
> Q. So in your opinion is the 060 an appropriate designated occupation code?
> A. Yes, it is.
> Q. And why do you say that?
> A. It actually follows the requirements of the regulation which was proposed and had notice of comment period. It also goes to

exactly what Congress intended for us to do; that is, to select an area that would represent what miners are exposed to so that we can provide protection to wherever miners normally work or travel, to see that their concentrations are maintained at or below the applicable standard. (Tr 111-112).

Q. And the 060, to the extent that anybody is downwind of the shearer, keeps it down in that higher concentration of dust, does it not, or that is the intention?

A. The intention is to get the highest dust concentration on the section.

Q. And I gather that sometimes when you are sampling, the 060 is the highest, leaving out the 061, but the 060 is the highest on the face and sometimes it is not?

A. Generally speaking, yes, that's correct. Most of the time the 060 is the highest concentration. There are times when it will not represent the highest concentration, as indicated even on the sample results that we looked at earlier this morning.

With respect to the inspector's S&S finding in Citation No. 4073211, Thaxton on cross examination was asked:

Q. When in the spring, after Mr. Kuzar sent the letter on April 9th and said you should use the 060, that if they had gone ahead and used the 060, they wouldn't have been cited for not submitting valid samples, is that correct?

A. That's correct.

Q. So there would not have been a challenge?

A. That's correct.

Q. And by doing it the way they did, they had a citation that they could challenge?

A. Yes.

Q. And if after they were notified that the 044 samples were not being considered valid, if they had submitted five samples on 060 before the end of the bimonthly period, they would have been in compliance, would they not?

A. That's correct.

Q. They wouldn't have had a citation challenge?

A. In regard to the sampling, that's correct. (Tr. 133-134).

Thaxton on further questioning testified:

Q. Why didn't MSHA put all operators on the 060 code back in 1988 when we added the 060 code.

A. Even though we added the code and made it available, we still needed to evaluate each mine, each longwall, on a mine-by-mine basis.

Those changes weren't taken lightly. There was a change in technology, a change in mining systems. Not all mines, just because we created the code in 1988, were at a point where they needed to be on the 060 code. There are several mines even today that are still not on the 060 because it's not the appropriate code for the method of mining that they practice.

Q. Is the 060 code, based on what you know, the appropriate code to use at the Shoshone Mine?

A. From what I observed on the shift that I was there and what I have seen from inspector notes and talking with inspectors that have been present at the Shoshone Mine, the 060 code is the appropriate code for that particular longwall. (Tr. 166-167).

On further questioning Thaxton testified:

Q. (BY MS. FLOYD) Now there have been allegations in this case that the 060 code is not a designated occupation code but rather a composite code consisting of numerous job positions. Would you agree with that type of characterization?

A. No.

Q. Why not?

A. The designated occupation is not a compilation of codes. It does include multiple miners doing their normal tasks, and that's what the designated occupation was set out to do with the intent from the definition in the regulation. To say that it's a compilation of multiple codes would mean that we are taking a lot of different jobs and combining them into one, which we are not doing.

Q. So in your opinion is the 060 an appropriate designated occupation code?

A. Yes, it is.

Q. And why do you say that?

A. It actually follows the requirements of the regulation which was proposed and had notice of comment period. It also goes to exactly what Congress intended for us to do; that is, to select an area that would represent what miners are exposed to so that we can provide protection to wherever miners normally work or travel, to see that their concentrations are maintained at or below the applicable standard. (Tr. 111-112)

Shoshone correctly points out that the 060 code does not identify any specific occupation. If Shoshone is attempting to infer an inconsistency in 060 code, it fails because 30 C.F.R. § 70.207(e)(7), which was promulgated after public notice and comment also does not identify any specific occupation. It just uses the term "miner" and identifies that "miner" as the miner who works nearest the return air side of the longwall working face. There is no inconsistency in this regard between 30 C.F.R. § 70.207(e)(7) and the 060 code.

Shoshone asserts that the Secretary's adoption of the 060 designated occupation requires public notice and comment rulemaking on a nationwide basis. It is 30 C.F.R. § 70.207(e)(7), however, and not 060 code that establishes the district manager authority to direct where in the longwall section the sampling device is placed in taking the designated occupation sample of the longwall section. That authority was specifically given to the district manager with the promulgation of that regulation, 30 C.F.R. § 70.207(e)(7). That regulation was promulgated only after public notice in the Federal Register and after opportunity for written and oral comment after five public hearings in various cities where there was opportunity for public discussion and comment. I find merit in the Secretary's assertion that the 060 code is the agency's interpretation of 30 C.F.R. § 70.207(e)(7). The implementation of the 060 code is a valid exercise of the authority given by 30 C.F.R. § 70.207(e)(7). It is also a permissible strategy for the agency to carry out the purpose and goal given to the agency by Congress to insure miners are protected from excessive concentrations of respirable dust.

A fair reading of 30 C.F.R. § 70.207(e)(7) clearly gives the district manager the authority to direct where the sampling device for sampling for the longwall section shall be placed. Under 30 C.F.R. § 70.207(e)(7) the district manager is authorized to direct the placing of the sampling device in taking the respirable dust sample for the longwall section. The regulation does not specify any occupation other than the "miner" who is working nearest the return air side "or who works" along the face of the return side within 48 inches of the corner." The Secretary's implementation of the 060 code is a reasonable and proper exercise of authority specifically given to the MSHA district manager by 30 C.F.R. § 70.207(e)(7). The 060 code is the agency's rationale interpretation of the regulation.

The Secretary's determination regarding the application of the Secretary's MSHA standards is entitled to deference. It is well established that if a regulation's meaning is not plain, an adjudicatory body should give great deference to the Secretary's interpretation of a regulation the Secretary has promulgated under a statute it is entrusted with administering. The Secretary's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or the purpose of the regulation. *Martin v. OSHRC*, 499 U.S. 144, 148-149 (1991); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460-461 (D.C. Cir. 1994); *Secretary of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414-1415 (10th Cir. 1984). In addition, it is well established that an adjudicatory body should give especially great deference to an agency's interpretation of a regulation when the regulation pertains to a complex and technical regulatory program. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 514 (1994); *Pauley v. Beth Energy Mines, Inc*., 501U.S. 680, 697 (1991). Finally, it is well established that a statute or regulation that is intended to protect the health and safety of individuals must be interpreted in a broad manner to actually achieve that goal. *Cannelton Industries*, 867 F.2d at 1435, and *Donovan v. Stafford Const. Co*., 732 F.2d 954, 959-960 (D.C. Cir. 1984) (both stating that a health and safety statute must be interpreted broadly); *Brennan v. OSHRC*, 491 F.2d 1340, 1344 (2nd Cir. 1974) (stating that a health and safety regulation must be interpreted broadly).

Conclusion re: Citation No. 9895049

In summary I find that the Secretary's implementation of the 060 code is not a substantive rule to which the APA's notice and comment provision apply. The Secretary complied with all the necessary procedural requirements including APA notice and comment provision before promulgating 30 C.F.R. § 70.207(e)(7), which gives the MSHA district manager authority to direct the placement of the sampling device in the longwall section of the mine in taking the bimonthly respirable dust sampling of the longwall section as required by 30 C.F.R. § 70.207(e)(7).

Thus I agree with the Secretary's position in this case. Shoshone's contention that MSHA acted unreasonably and arbitrarily when the district manager directed Shoshone to change the designated occupation from occupation code 044 to 060 for purposes of the bimonthly sampling of the longwall in Shoshone Mine No. 1 is rejected. I find that in mandating the change in the designated occupation, MSHA acted within its authority and in compliance with the sampling procedures found in § 70.207(e)(7), and in so doing, it acted reasonably in carrying out the intent of Congress and the Act to insure that miners are protected from excessive concentrations of respirable dust. The preponderance of the evidence and the record as a whole clearly establishes the violation charged in Citation No. 9895049 and that contested citation is affirmed.

Conclusion re: Citation No. 4073211

The parties jointly stipulated that if a violation is established with regard to Citation No. 9895049, Shoshone concedes that a violation with respect to Citation No. 4073211 is also established. (Stip. 38).

In view of the foregoing, the violation of 30 C.F.R. § 75.370(a)(1) is established as alleged in Citation No. 4073211 for mining activity on August 2, 1999, at which time there was no approved ventilation plan in effect for the Shoshone No. 1 Mine.

The citation, however, was issued as an S&S [2] violation and under stipulation No. 38 the parties agreed that Shoshone would continue to contest the significant and substantial designation of Citation No. 4073211.

It appears from Shoshone Ex. 1 that MSHA first instructed Shoshone to put the 060 in its ventilation plan and to submit the amended plan to MSHA by July 23, 1999. So up until at least July 23 the designated occupation in the mine's ventilation plan was 044. MSHA has a policy when there is an impasse in negotiations between the Secretary and the company regarding a change in the mine plan, the company can take a technical citation so that there can be a challenge to the plan and that is what Shoshone did. (Tr. 134-135).

In any event I find that the preponderance of the evidence presented in this case fails to establish the third element of the *Mathies* formula. Citation No. 4073211 is modified to delete the S&S finding and as so modified the citation is affirmed.

ORDER, DOCKET NO. WEST 99-342-R

The contested Citation No. 9895049 in Docket No. WEST 99-342-R citing a violation of 30 C.F.R. § 70.207(a), is **AFFIRMED**. The contest of that citation filed by Shoshone is **DENIED** and **DISMISSED**.

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[2] A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. At 3-4 (footnote omitted); *accord Buck Creek Coal, Inc*. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

ORDER, DOCKET NO. WEST 99-384-R

The contested S&S Citation No. 4073211 in Docket No. WEST 99-384-R citing a violation of 30 C.F.R. § 75.370(a)(1) is modified to delete the S&S finding and as so modified is **AFFIRMED**. The contest of that citation filed by Shoshone is granted to the limited extent of deleting the S&S finding but in all other respects is **DENIED** and the case is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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