

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 3, 2009

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-701
Petitioner	:	A.C. No. 46-09066-123671
	:	
	:	Docket No. WEVA 2007-580
v.	:	A.C. No. 46-09066-119010
	:	
	:	
BROOKS RUN MINING CO., LLC,	:	Mine: Cucumber
Respondent	:	

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
MOTIONS FOR SUMMARY DECISION**

Before: Judge Bulluck

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d), against Brooks Run Mining Company (“Brooks Run” or “Respondent”). The Secretary issued four significant and substantial (“S&S”) citations alleging violations of her mandatory safety standard found at 30 C.F.R. § 70.100(a). The parties have filed cross Motions for Summary Decision.

Judicial notice is taken of the disease probability rates concerning respirable dust contained in the Legislative History of the 1969 Coal Act. Section 70.100(a) is lifted, almost verbatim, from section 202(a) of the Mine Act, 30 U.S.C. § 842, which, in turn, was carried over from the 1969 Coal Act without significant amendment.¹ See *Consolidation Coal Co.*, 8 FMSHRC 890, 896 (June 1986).

Based upon the stipulations and uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. Sec’y Mot. at 1-16; Resp. Mot. at 4-10. Having reviewed the parties’ Motions, I conclude that, for the reasons stated below, the Secretary is entitled to summary decision, in part, and the Respondent is entitled to summary decision, in part, as a matter of law.

¹ See Rep. No. 91-411, 91st Cong., 1st Sess. 15-16 (1969).

I. Factual Background

Brooks Run Mining Company, Incorporated, operates the Cucumber Mine in McDowell County, West Virginia, which produces approximately 6,000 tons of coal on two nine-hour production shifts per day, seven days a week. The mine has been in operation since February 27, 2006, and has four active mechanized mining units (“MMU”)– 001-0, 002-0, 003-0, and 004-0. MMU 001-0 went into producing status on May 8, 2006; MMU 002-0 on May 8, 2006; MMU 003-0 on April 17, 2006; and MMU 004-0 on May 8, 2006. Sec’y Stip 86; Resp. Stip 1. Section 70.100(a) of the Code of Federal Regulations requires that an operator continuously maintain the average concentration of respirable dust in a mine atmosphere at or below 2.0 mg/m³. 30 C.F.R. § 70.100(a). To determine whether an operator is complying with the applicable limit for respirable dust, section 20.207(a) requires that each operator take five valid respirable dust samples from the designated occupation in each MMU, and submit them to MSHA for testing.

On June 5, 6, 7, 8 and 9, 2006, Respondent collected five designated occupation samples from MMU 004-0 for the May-June 2006 bimonthly sampling cycle. Sec’y Ex. 1. The results of the five samples showed an average concentration of 4.2 mg/m³. Sec’y Ex. 1. On June 16, 2006, MSHA Inspector Michael T. Dickerson issued Citation No. 9967760 to Respondent for exceeding the respirable dust limit of 2.0. Sec’y Ex. 1. Dickerson found that it was an S&S violation that would be highly likely to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent’s negligence was moderate. Sec’y Ex. 1. The citation was terminated on July 6, 2006, after Respondent submitted samples showing an average dust concentration within the applicable limit. Sec’y Ex. 1.

On January 23, 24, and 26, 2007, Respondent collected five designated occupation samples from MMU 003-0 for the January-February 2007 bimonthly sampling cycle. Sec’y Ex. 2. The results of the five samples showed an average concentration of 3.0 mg/m³. Sec’y Ex. 2. On February 1, 2007, MSHA Inspector Paul Prince issued Citation No. 9967919 to Respondent for exceeding the respirable dust limit of 2.0. Sec’y Ex. 2. Prince found that it was an S&S violation that would be highly likely to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent’s negligence was moderate. Sec’y Ex. 2. The citation was terminated on March 29, 2007, after Respondent submitted an updated Methane and Dust Control Plan (“Dust Control Plan”) and respirable dust samples showing an average dust concentration within the applicable limit. Sec’y Ex. 2; Resp. Ex. 6 and 7.

On January 29, 30, 31, and February 1 and 2, 2006, Respondent collected five designated occupation samples from MMU 001-0 for the January-February 2007 bimonthly sampling cycle. Sec’y Ex. 3. The results of the five dust samples showed an average concentration of 2.7 mg/m³. Sec’y Ex. 3. On February 13, 2007, Inspector Prince issued Citation No. 9967921 to Respondent for exceeding the respirable dust limit of 2.0. Sec’y Ex. 3. He found that it was an S&S violation that would be “reasonably likely” to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent’s negligence was

high. Sec'y Ex. 3. The citation was terminated on May 16, 2007, after Respondent submitted a revised Dust Control Plan and respirable dust samples showing an average dust concentration within the applicable limit. Sec'y Ex. 3; Resp. Ex. 6 and 7.

On March 26, 27, and 28, 2006, Respondent collected five designated occupation samples from MMU 004-0 for the March-April 2007 bimonthly sampling cycle. Sec'y Ex. 4. The results of the five dust samples showed an average concentration of 3.9 mg/m³. Sec'y Ex. 4. On April 9, 2007, Inspector Prince issued Citation No. 9967966 to Respondent for exceeding the respirable dust limit of 2.0. Sec'y Ex. 4. He found that it was an S&S violation that would be highly likely to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent's negligence was moderate. Sec'y Ex. 4. The citation was terminated on May 10, 2007, after Respondent submitted an updated Dust Control Plan and respirable dust samples showing an average dust concentration within the applicable limit. Sec'y Ex. 4; Resp. Ex. 6 and 7.

There was no MSHA inspector present at the mine when the respirable dust samples at issue were taken. Resp. Stip. 24. Respondent has not presented any facts that would contradict the validity of the test results.

II. Findings of Fact and Conclusions of Law

Commission Rule 67(b), governing summary decisions, provides as follows:

A motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

Section 70.100(a), governing respirable dust limitations 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 and in terms of an equivalent concentration determined in accordance with §70.206 (Approved sampling devices: equivalent concentrations).

30 C.F.R. §70.100(a). To ensure that an operator is in compliance with section 70.100(a), section 70.207(a) provides, in pertinent part:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period Designated occupation samples shall be collected of consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.²

30 C.F.R. §70.207(a). The operator selects the days during the bimonthly period when dust sampling will be conducted. The “designated occupation” is the particular work position on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration. 30 C.F.R. § 70.2(f). The five valid samples are collected using MSHA approved filter cassettes contained in an air sampling unit worn by the miner in the designated occupation. The operator then sends the five dust samples to MSHA’s laboratory, where the filters are removed and weighed to determine whether the average dust concentration for each sample is in compliance with the 2.0 milligram limit set by section 70.100(a)³. The average concentration of the five respirable dust samples are considered representative of the mine atmosphere over the course of the entire bimonthly sampling period. *Consolidation Coal Co.*, 8 FMSHRC at 900.

If a violation of the applicable respirable dust standard is found, an MSHA inspector issues a citation setting a deadline for abatement. During the abatement period, the operator must take corrective action to lower the concentration of respirable dust to within the permissible level, and then sample each production shift until five valid samples are taken. 30 C.F.R. §70.201(d). MSHA may also require that the operator submit changes, in writing, to its Dust Control Plan. Upon MSHA’s receipt of five acceptable dust samples, the citation is terminated. The issuance of the citation and abatement by MSHA typically occur without a visit to, or inspection of, the mine.

In these matters, the Secretary seeks to modify the citations by raising gravity factors of the number of persons affected and the likelihood of injury or illness, and the negligence findings, as well as the penalty amount assessed for each violation. Brooks Run does not challenge the fact of violations or the S&S designation of the citations. It does, however, dispute the high and moderate negligence findings, as well as the gravity findings that injury or illness was highly likely, would be permanently disabling, and affected five persons.

² As set forth by 30 C.F.R. § 70.208, the bimonthly periods for “designated area” sampling are February 1-March 31; April 1- May 31; June 1-July 31; August 1- September 30; October 1- November 30; and December 1- January 31.

³ While Respondent contends that MSHA failed to check the subject dust samples to determine the level of any diesel mantrip exhaust, which could have altered the weight of the sample, it has presented no proof that the samples on which these violations are based were inaccurate. Sec’y Mot. at 6, Stip. 37; Resp. Mot. at 12. See *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1088 (D.C. Cir 1987).

Gravity

Likelihood of Injury or Illness

The Secretary contends that the high likelihood of injury or illness was appropriately designated for Citation Nos. 9967760, 9967919, and 9967966, based on the degree of overexposure shown by the test results. She states that exposure levels of 3.0 to 4.2 mg/m³, which exceed the applicable limit by 150-220%, are highly likely to contribute to the occurrence of the permanently disabling disease of pneumoconiosis. Moreover, the Commission has recognized that any exposure above 2.0 mg/m³ is significant and substantial, and that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC at 899.

Brooks Run argues that the gravity findings should be reduced to reflect that the violation is reasonably likely to result in lost workdays or restricted duty. The Secretary counters by presuming that, once the designated samples are out of compliance, everyone on the section is exposed and highly likely to receive permanent, disabling illnesses. The Secretary relies on the probability rates for contracting simple pneumoconiosis “after 35 years exposure.” *Id.* at 896. However, the miners were not exposed to excess dust for any significant period of time and, as Brooks Run also points out, during June 2006 through May 2007, only seven out of ninety-one samples were above 2.0 mg/m³ on different, isolated dates, and for different jobs and different MMUs. These results, when viewed in their entirety, provide a more accurate depiction of the dust levels in the mine.

In preventing disabling respiratory disease, the Commission has stated that “Congress clearly intended the full use of the panoply of the Act’s enforcement mechanisms to effectuate this congressional goal, including designation of a violation as a significant and substantial violation.” *Consolidation Coal Co.*, 8 FMSHRC at 897, *aff’d sub nom. Consolidation Coal v. FMSHRC*, 824 F.2d 1071 (D.C.Cir. 1987). The Commission has also recognized that, with respect to exposure-related health hazards, some departure from the Secretary’s enforcement approach is justified “because of fundamental differences between a typical safety hazard and the respirable dust exposure-related health hazard at issue.” *Id.* at 895; *see also Costain Coal, Inc.*, 19 FMSHRC 1653, 1656 (Oct. 1997) (ALJ).

While examining the third element of the *Mathies* test⁴, in the context of respirable dust accumulations, the Commission recognized that:

⁴ To establish an S&S violation under the *Mathies* test, the Secretary 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon the concentration and duration of each exposure, and that proof of a single incident of overexposure does not, in and of itself, conclusively establish a reasonable likelihood that respirable disease will result. There is no dispute, however, that overexposure to respirable dust can result in chronic bronchitis and pneumoconiosis. The effects of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms—as noted, simple pneumoconiosis is asymptomatic. This factor makes precise prediction of whether or when respiratory disease will develop impossible. Likewise, it is not possible to assess the precise contribution that a particular overexposure will make to the development of respiratory disease. In sum, the present state of scientific and medical knowledge, as exemplified by the present record, do [sic] not make it possible to determine the precise point at which the development of chronic bronchitis or pneumoconiosis will occur or is reasonably likely to occur.

Consolidation Coal Co., 8 FMSHRC at 898.

A primary purpose of the Mine Act is to prevent or significantly reduce the occurrence of respirable dust induced diseases among coal miners. Congress established the 2.0 mg/m³ respirable dust standard because it recognized that anything in excess of this level would produce disabling complicated pneumoconiosis or progressive massive fibrosis and other occupation-related diseases in a statistically significant portion of coal miners. *Id.* Consequently, it also recognized that, at levels below 2.2 mg/m³, there would be virtually no probability of a miner contracting complicated pneumoconiosis, even after exposure of 35 years. Congress chose to adopt a universal approach to assure that all miners, regardless of their susceptibility to illness or length of time worked, “would be uniformly protected from the incremental health hazards presented by repeated overexposures to respirable dust in coal mines.” *Id.* Where the Secretary has proven, based on designated occupation samples, that an overexposure to respirable dust has occurred in violation of section 70.100(a), there is a presumption that there is a *reasonable likelihood* that the health hazard contributed to will result in an illness. *Id.* at 899.

With regard to Citation Nos. 9967760 and 9967919, the Secretary offers nothing beyond the probability rates at various exposure levels, that each of the individual violations are highly likely to cause pneumoconiosis in each miner exposed. Resp. Mot. at 21. Although each “drop in the bucket” significantly and substantially contributes to a health hazard, it does not logically follow that pneumoconiosis is highly likely to occur as a result of an isolated incident, even at an exposure level of 4.2 mg/m³. See *Consolidation Coal Co.*, 5 FMSHRC 378, 381-82 (Mar. 1983) (ALJ) (exposure to a coal mine respirable dust level of 4.1 mg/m³ over a 5-day period would

not, in itself, cause or significantly contribute to the development of chronic bronchitis or coal workers' pneumoconiosis, and its effect on the development of pneumoconiosis would be minuscule). Such a disease results from an aggressive accumulation of respirable dust. *Id.* at 389; *see also Consolidation Coal Co.*, 8 FMSHRC at 898. As there has been no showing of a history of respirable dust violations preceding these citations for the MMUs in question, I am not persuaded that these violations, even at the recorded exposure levels, were anything more than "reasonably likely" to result in an illness.

Conversely, Citation No. 9967966 was the third respirable dust violation to be issued to Brooks Run for MMU 004-00 within six bimonthly sampling cycles. The violations, on average, more than doubled the acceptable 2.0 mg/m³ limit, recording respirable dust levels of 4.2, 4.4 and 3.9 mg/m³, respectively. These citations indicate that miners were repeatedly exposed to very high rates of respirable dust. Sec'y Ex. 1, 4 and 13. Consequently, I find that the violation was "highly likely" to result in an illness.

Result of Injury or Illness

Coal workers' pneumoconiosis is a chronic lung disease that is untreatable and irreversible. *Consolidation Coal Co.*, 5 FMSHRC at 381. Complicated pneumoconiosis, or progressive massive fibrosis, destroys the lungs' air exchange capabilities, distorts the remaining lung tissue, and significantly impairs the lungs' capacity to function due to severe internal scarring, contracture of the lungs' with compensatory emphysema, and loss of the vasculature. *Consolidation Coal Co.*, 8 FMSHRC at 899. It commonly causes shortness of breath and coughing, and can result in severe pulmonary impairment and early death. 5 FMSHRC at 381. Lung deterioration can continue even after a miner is no longer exposed to coal dust. *Id.* As stated by the Commission, these facts support a conclusion that there is a reasonable likelihood that illness resulting from overexposure to respirable dust will be of a reasonably serious nature. Consequently, I affirm the Secretary's findings that the resulting illness is likely to be "permanently disabling," and Citation Nos. 9967760, 9967919, 9967921, and 9967966 shall remain as written.

Number of Persons Affected

The Secretary argues that all shift members are affected by MMU dust violations because they all work in the vicinity of the sampled designated occupation. She asserts that, rather than five persons affected, the facts indicate that more persons were affected than originally cited and thus, the number should be increased for each citation. Brooks Run counters that the number should be reduced from five to one for each citation, because other shift members typically worked in areas with less or no exposure to the recorded dust levels. It looks to *Costain* for support, where it is concluded that some occupations ordinarily have less dust exposure than the designated occupation.

Respondent's reliance on *Costain*, however, ignores the fact that this argument was found insufficient to circumvent the standard's purpose. As previously stated, the purpose of section

70.100(a) is to limit the respirable dust exposure of miners in active workings of a mine. “Active workings” is defined as “any place in a coal mine where miners are normally required to work or travel. 30 C.F.R. §70.2(b). Section 70.2(f) defines designated occupation 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.” 30 C.F.R. §70.2(f). In *Costain*, the Administrative Law Judge noted that:

the purpose of MSHA’s high risk occupation bimonthly sampling program is to monitor the atmospheric conditions in active workings. Monitoring the high risk occupation ensures that, if the high risk miner is not overly exposed, no one on that MMU shift is exposed to impermissible levels of respirable dust. Put another way, monitoring the high risk continuous miner occupation at the face provides the earliest warning of excessive respirable dust in the active workings atmosphere.

Costain, 19 FMSHRC at 1659.

It is likely that the continuous miner operator working at the face would have endured a greater level of dust exposure than other occupations, but that fact does not defeat the probability that other occupations also would have been exposed at levels above the maximum 2.0 mg/m³. I conclude that all miners working a shift are at risk for overexposure to respirable dust, because they work in the vicinity of the sampled designated occupation.

Brooks Run contends that roof bolter operators typically wear respirators when bolting down wind of the continuous miner. However, Brooks Run does not require the miners to use respirators, nor does it offer any proof that the roof bolter operators were, in fact, wearing the respirators when the dust samples in question were taken, or that they, otherwise, customarily wore them. Resp. Mot. Stip. 25 and 26.⁵

⁵ See for example *Jim Walter Resources, Inc.*, 9 FMSHRC 957, 962 (May 1987)(ALJ), where the “availability” of respirators was discussed:

The operator asserts that it rebuts the presumption of significant and substantial by making respirators available to the miners The foregoing Commission precedent is not couched in terms of availability. Rather, the Commission holds that the presumption may be rebutted only when the operator establishes that the miners in fact were not exposed to excessive concentrations of respirable dust through the use of personal protective equipment. The distinction is clear. The Commission requires a showing that miners were not exposed because they used respirators. Merely making respirators available without any concern or interest in

I find that the violations affected the entire shift which, in this case, was the number of MMU miners for each shift for which a sample showed exposure above the established limit. Sec’y Mot. Stip. 77-80, 82 and 83; ex. 5a, 6a, and 20 at ¶ 34. Accordingly, the Secretary’s motion to increase the number of miners affected, with respect to all citations, is granted, and the Respondent’s motion to reduce the number is denied.

Negligence

Although the Secretary concedes that Citation Nos. 9967919 and 9967921 appropriately attribute moderate negligence to Brooks Run, she argues that the negligence classifications for Citation Nos. 99677760 and 9967966 should be raised from “moderate” to “high.” In contrast, Brooks Run moves that the negligence levels for each citation be reduced to “low” or “none.” It argues that it exercised diligence in abating the citations and no identifiable violation of the approved Dust Control Plan existed in relation to the subject citations.

In *Costain*, factually similar to the instant cases, the discussion of the operator’s negligence is helpful in assessing Respondent’s negligence. The ALJ noted that the density of respirable dust can vary from shift to shift and is affected by various factors, including temperature, humidity, and the amount of coal being produced. Because excessive dust levels are MMU-specific, a dust reading in one MMU is not indicative of dust concentrations in another. *Costain*, 19 FMSHRC at 1656. It is also important to observe whether an operator has a history of respirable dust violations, and a pattern of violating its own Dust Control Plan, regardless of the respirable dust history of the MMU in question. *Id.* He concluded that, “to attribute high negligence to an operator for a section 70.100(a) violation in the absence of a pertinent identifiable dust control plan violation, or an MMU-specific history of violative dust samples providing notice that greater dust control measures at that MMU were required, is tantamount to the presumption of high negligence approach rejected by the Commission in *Peabody Coal*, 18 FMSHRC at 498.” *Costain*, 19 FMSHRC at 1658. Such is the case here.

After an operator has received notice of non-compliant conditions, the Commission requires that an operator's good faith efforts must be reasonable when trying to achieve compliance with a standard. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (Aug. 1994). Where an operator reasonably believes in good faith that its efforts are the safest means of compliance, such conduct is not aggravated and does not constitute a finding of more than ordinary negligence. *Utah Power and Light Co.*, 12 FMSHRC 965, 972 (May 1990). In *Peabody Coal*, the Commission reversed and remanded unwarrantable failure and high negligence findings for a 70.100(a) violation, stating that the operator, in an effort to control dust levels, had a “good faith” and “reasonable belief” that its “remedial efforts were working” due to

their actual use falls short of the evidentiary requirement established in *Consolidation Coal*.” (citation omitted).

a series of compliant bimonthly sampling results immediately prior to the violative sample that gave rise to the section 70.100(a) citation at issue. *Peabody Coal Company*, 18 FMSHRC 494, 499 (Oct. 1997).

Citation No. 9967919 was issued on February 1, 2007, in connection with MMU 003-00, which went into producing status on April 7, 2006 – nearly 10 months prior to the issuance of the citation. Respondent was cited on four occasions, from July 2006 - November 2006 for violating Section 70.100(a). Sec’y Ex. 11-14. Those citations were not issued in connection with MMU 003-00. In fact, there is no indication that Brooks Run was cited for respirable dust violations for MMU 003-00 prior to Citation No. 9967919. Resp. Ex. BR-5. In addition, there are no identifiable Dust Control Plan violations that contributed to the issuance of this citation. Therefore, I conclude that there are no previous violations of Section 70.100(a) that would have placed Brooks Run on notice that heightened measures were needed to control the dust levels on MMU 003-00, nor has Respondent exhibited a pattern of violating its Dust Control Plan for this particular MMU. In addition, Respondent, in its effort to suppress airborne dust, utilized 26 non-directional sprays, instead of the 24 required by MSHA. Accordingly, I find that Respondent’s negligence was low.

Citation No. 9967921 was issued on February 13, 2007, in connection with MMU 001-00, which went into producing status on February 27, 2006. On at least three occasions between February 27, 2006, and February 13, 2007, Respondent was cited for failing to comply with its Dust Control Plan. Sec’y Ex. 21, 22 and 26. All citations were terminated the same day. There is no identifiable Dust Control Plan violation that contributed to this citation. There are also no previous respirable dust control violations for this MMU that would have placed Brooks Run on notice that heightened measures were needed to control the dust levels. In accordance with its Dust Control Plan, Respondent utilized 26 non-directional sprays, instead of the 24 required by MSHA, to suppress airborne dust. Resp. Ex. BR-6. I find that Respondent’s negligence was low.

Citation No. 9967760 was issued on June 16, 2006, in connection with MMU-004-00, which went into producing status on May 8, 2006. The documentation submitted indicates that there were no respirable dust violations issued to Brooks Run for MMU-004-00 prior to Citation No. 9967760. There is also no indication of any Dust Control Plan violations that contributed to this citation. It was abated within three weeks when Respondent submitted respirable dust samples showing an average dust concentration within the applicable limit. Respondent has admitted, however, that it used a blowing device that was unfamiliar to many of its miners. As a result, the continuous miner operators did not know where to stand in relation to the equipment, in order to reduce their exposure to respirable dust. This admission evidences Respondent’s negligence in failing to train its miners on the appropriate standing position, which deficiency should have been observed during an on-shift examination required under section 75.362(a)(2). However, when coupled with its history of violation for this MMU, the facts do not justify a finding of high negligence. I find that Respondent’s negligence, as originally assessed, was moderate.

Citation No. 9967966 was issued on April 9, 2007, also in connection with MMU 004-00. Unlike Citation No 9967760, this citation was the third to be issued for a violation of Section 70.100(a) for MMU 004-00 in six bimonthly test cycles. Sec'y Ex. 13. On September 26, 2006, Brooks Run was cited for failing to submit the required bimonthly respirable dust samples for the July - August 2006 period under Citation No. 9967828. Sec'y Ex.12. The samples submitted to abate Citation No. 9967828 were also non-compliant and resulted in issuance of Citation No. 9967868 on November 7, 2006. It is clear that Respondent's repeated violations of section 70.100(a) placed it on notice that greater dust control measures on MMU 004-00 were needed. Respondent's negligence is mitigated, however, by the fact that, after receiving this second violation for exceeding the respirable dust limit, the company revised its Dust Control Plan, which was approved by MSHA. Sec'y Ex. 13. Following the Plan revision, it submitted five valid respirable dust samples that were within the acceptable range. Sec'y Ex. 13. Further, before issuance of Citation No. 9967966, Respondent believed, in good faith, that it had addressed the problems in its Plan, because it had achieved compliance with applicable limits. As a result of revising its Dust Control Plan, it achieved compliance by May 10, 2007. Sec'y Ex. 20. There is also no indication that Respondent was not in compliance with its Dust Control Plan immediately preceding this citation. The record simply does not support a finding of high negligence. Accordingly, I find that Respondent's negligence, as originally assessed, was moderate.

III. Penalty

While the Secretary has proposed an increase in the total civil penalty from \$10,275.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Brooks Run is a large operator and, as the Cucumber mine is relatively new, its history of assessed violations is low. See Pet. for Assessment of Civil Penalty, Ex. A (MSHA Form 1000-179). As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Sec'y Mot. at 18, stip. 110; Resp. Mot. at 3. I also find that Brooks Run demonstrated good faith in achieving rapid compliance, after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations and Brooks Run's negligence in committing them. These factors have been discussed fully, respecting each citation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

Assessment

Citation No. 9967919

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was reasonably likely to cause an illness that would be permanently disabling, that fourteen persons were

affected, that it was due to Brooks Run's low negligence, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$2,000.00 is appropriate.

Citation No. 9967921

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was reasonably likely to cause an illness that would be permanently disabling, that seven persons were affected, that it was due to Brooks Run's low negligence, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$1,500.00 is appropriate.

Citation No. 9967760

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was reasonably likely to cause an illness that would be permanently disabling, that seven persons were affected, that it was due to Brooks Run's moderate negligence, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$2,000.00 is appropriate.

Citation No. 9967966

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was highly likely to cause an illness that would be permanently disabling, that eight persons were affected, that it was due to Brooks Run's moderate negligence, and that it was timely abated. Applying the six civil penalty criteria, I find that a penalty of \$2,200.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that the Secretary's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART**, that the Respondent's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART**, and that the Secretary **MODIFY** the Citations as follows: **Citation No. 9967919** to reduce the gravity to "injury or illness

reasonably likely,” to increase the persons affected to “14,” and to reduce the negligence to “low;” **Citation No. 9967921** to increase the persons affected to “7” and reduce the negligence to “low;” **Citation No. 9967760** to reduce the gravity to “injury or illness reasonably likely” and increase the persons affected to “7;” and **Citation No. 9967966** to increase the gravity to “injury or illness highly likely” and the persons affected to “8.” It is further **ORDERED** that Respondent **PAY** a civil penalty of \$7,700.00, within 30 days of this Order. Accordingly, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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