FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 26, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-9
Petitioner	:	A. C. No. 46-04955-03631
v.	:	
	:	Docket No. WEVA 98-18
EASTERN ASSOCIATED COAL	:	A. C. No. 46-04955-03632
CORPORATION,	:	
Respondent	:	Lightfoot No. 2 Mine

DECISION

Appearances: Gretchen L. McMullen, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, on behalf of the Petitioner;
Caroline A. Henrich, Esq., Eastern Associated Coal Corporation, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et. seq.*, the "Act," to challenge a citation and withdrawal order issued by the Secretary of Labor to Eastern Associated Coal Corporation (Eastern). Eastern does not dispute the violations as alleged but disputes that those violations were the result of its "unwarrantable failure" to comply. Also at issue therefore, is the appropriate civil penalty to be assessed for the violations considering the criteria under Section 110(i) of the Act.

Citation No. 715188, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 70.101 and charges as follows:

> Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 019-0 was 1.7 mg/m^3, which exceeded the applicable limit of 1.5 mg/m^3. Management shall take corrective actions to lower the respirable dust and then sample each production shift until
>
> five valid samples are submitted and results of the analysis are processed and

recorded at the Pittsburgh Respirable Dust Processing Laboratory.[1]

The cited standard, 30 C.F.R. ' 70.101, provides as follows:

> When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the

---

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

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

> average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams 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 concentration), computed by dividing the percent of quartz into the number 10.

It is undisputed in this case that the applicable reduced dust standard is 1.5 mg/m^3. Neither the violation nor the related "significant and substantial" findings are in dispute. At issue is the question of whether the violation was the result of Eastern=s unwarrantable failure and high negligence. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corporation*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore, include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator=s efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994). Repeated similar violations may also be relevant to this inquiry because they indicate an operator has notice that greater efforts are necessary for compliance with the standard. *Peabody Coal Co.*, 14 FMSHRC 1258 (August 1992).

The Secretary relies in this regard primarily on the testimony of MSHA coal mine inspector Don Braenovich. The subject citation was issued by Inspector Braenovich on June 15, 1997, after the results of the bi-monthly sampling cycle (May through June 1997) for the mechanized mining unit 019 showed an average concentration of respirable dust of 1.7 mg/m^3 - - in excess of the reduced standard of 1.5 mg/m^3. The record shows that seven citations had been issued at the subject mine for respirable dust violations during the 6 **2** month period dating back to November 4, 1996. Three of those respirable dust violations occurred on the same 019 mechanized mining unit at issue herein.

Braenovich also recalled discussing the dust problem with mine officials four or five times in the year before the instant citation was issued. Don Ellis, supervisor of the corresponding MSHA field office, also recalled two formal meetings and many informal conversations with mine officials about their respirable dust problem. In addition, Mine Superintendent George Schuller acknowledged at hearing that he was aware in May and June that they had a dust problem and that they had to take extra precautions to comply with the dust regulations. Mine manager Bernie Milam further acknowledged recognition as early as October 1996 of a dust problem.

While this evidence, standing alone, would tend to support high negligence and unwarrantability findings, I find that it is significantly mitigated by Respondent=s continuing good faith and reasonable efforts to achieve compliance. *See Secretary v. Westmoreland Coal Co.*, 7

FMSHRC 1338, 1342 (September 1985). Indeed, there are significant similarities between Respondent=s good faith and reasonable efforts to achieve compliance in this case and the efforts by the operator in *Secretary v. Peabody Coal Company*, 18 FMSHRC 494 (April 1996), found by this Commission to be a basis to negate unwarrantability findings.

The efforts by Eastern management to correct its respirable dust problem at the subject mine included the addition of pressure pumps to increase water pressure, the replacement of 4-inch water pipes with 6-inch pipes to increase the water supply, the modification of the ventilation system from an exhaust system to a blowing system, the utilization of a dual impact scrubber on at least one of the continuous miners and the retraining of employees in dust control.

More particularly, it is undisputed that between November 1996 and June 1997, Respondent purchased three pressure pumps, two of which were installed prior to the issuance of the instant citation. These pumps were installed to insure a continual uninterrupted flow of water to the continuous miner to help keep dust from being suspended. It is also undisputed that prior to the issuance of the instant citation the 4-inch water lines were replaced with 6-inch lines. According to Eastern Safety Supervisor Donald Pauley, this was done to increase the water supply to obtain the volume and pressure necessary for the type of water sprays they were using. Pauley testified credibly that this change enabled them to reduce the amount of dust generated.

While the MSHA inspectors testified that the increased water flow for the water sprays provided by these pressure pumps and the new and larger water lines had no bearing on reducing respirable dust, I give this testimony but little weight. The more credible testimony is provided by Safety Supervisor Pauley, and from mine superintendent George Schuller. Schuller, a graduate mining engineer, testified that there is no other reason to increase the water supply on the miner than to improve dust suppression. Indeed, in the *Peabody* case, 18 FMSHRC at pages 498-499, this Commission reversed the trial judge, in part, for failing to recognize the relationship between an increased water supply and dust control.

In any event, the critical issue herein is whether Eastern officials acted in the good faith and reasonable belief that their actions in increasing water supplies to the continuous miners would reduce dust levels - - not whether such actions did in fact reduce dust levels. Clearly, the evidence supports the conclusion that they did act in a good faith reasonable belief that their actions would reduce dust levels. Indeed, the Secretary has not shown that there would be any reason to increase the water supply other than to attempt to reduce dust levels.

It is further undisputed that Respondent, over a period of time before the instant citation, had progressively implemented changes in mine ventilation, including removing stoppings and building other stoppings with the objective of changing the ventilation system to a blowing fan system. Even Inspector Braenovich recognized that these changes would have improved the air flow and, implicitly, also improved dust control. Mine manager Benny Milam, also credibly testified that the "biggest purpose" for this ventilation change was dust control at the continuous mining units.

The Secretary nevertheless argues that these efforts were irrelevant because the actual

changeover to a blowing fan system did not take place until June 14, 1997, after the May/June bi-monthly samples had been taken. The Secretary again misses the point however. Not only is it undisputed that many changes were made in the ventilation prior to the bi-monthly sampling but also, in determining mitigation, the issue is the good faith and reasonable efforts by the operator to reduce dust levels. The proposed improvement in ventilation, even though not fully implemented at the time the citation was issued, nevertheless, is therefore a mitigating factor.

It is further undisputed that Eastern had revised its dust control plan for MMU 20 to increase the air from 3,000 to 4,000 cfm. Even Inspector Braenovich conceded that this would reduce dust levels. In addition, Eastern officials were working with a vendor to purchase and install a dual intake scrubber in MMU 17 to assist in dust suppression. Finally, it is undisputed that training had been conducted at the Lightfoot No. 2 mine between November, 1996 and June 15, 1997, to improve dust suppression. This training included the review of methane and dust control plans with both hourly and salaried personnel.

In assessing Respondent=s good faith and reasonableness in trying to control respirable dust, I also consider the fact that after the citation issued January 8, 1997, showing non-compliance with the dust standard by 3.9 mg/m^3, Respondent thereafter showed improvement and, while nevertheless out of compliance on the dates shown by citations on March 27, May 6 and June 15, 1997, such non-compliance was by margins of only .1 mg/m^3, .5 mg./m^3, and .2 mg/m^3, respectively. Eastern therefore, could have had reason to believe that its remedial efforts were generally showing improvement and that its continuing efforts, e.g., by fully converting to a blowing fan ventilation system, would likely succeed in controlling the dust.

Under all of the circumstances, I conclude that Eastern=s remedial efforts clearly demonstrated a good faith, reasonable belief that it was taking the steps necessary to achieve compliance with the dust standard at issue, sufficient to mitigate its negligence and to negate findings of unwarrantable failure.

Order No. 7151884, issued June 24, 1997, pursuant to Section 104(d)(1) of the Act alleges a violation of the standard at 30 C.F.R. ' 70.208(c) and charges as follows:

> The operator failed to submit five additional respirable dust samples on the 817-0 belt designated area within the required fifteen days. The operator was notified May 22, 1997, that five valid samples were required to be done. As of today, no samples have been submitted or received at the Pittsburgh Respirable Dust Processing Laboratory.

The cited standard, 30 C.F.R. ' 70.208(c), provides as follows:

> Upon notification from MSHA that any respirable dust sample taken from a designated area to meet the requirements of Paragraphs (a) or (b) of this section exceeds the applicable standard in Section 70.100 (respirable dust standards) or Section 70.101 (respirable dust standard when quartz is present), the operator shall take five valid respirable dust samples from that designated area within 15 calendar

days. The operator shall begin such sampling on the first day in which there is a production shift following the day of the receipt of notification.

There is no dispute that the requisite dust samples were not submitted as required and there is no dispute that the violation existed as charged. The issue is whether the violation was the result of Eastern=s high negligence and unwarrantable failure to comply. In this regard, safety supervisor Donald Pauley testified that Eastern maintained notebooks containing all of the dust mailers but that in this case, for unknown reasons, the mailer was filed in the wrong notebook. This error was not discovered until the violation was charged. According to Pauley, mailers had never before been misfiled. While Inspector Braenovich was apparently skeptical of this version of events, Pauley=s testimony is not directly disputed.

The Secretary nevertheless argues that Respondent was highly negligent because it had been cited once previously, on January 7, 1997, for failing to submit additional samples. One previous violation of this nature, particularly without knowledge of the underlying facts and their similarity, *vel non*, with the instant case, is not sufficient to establish high negligence or unwarrantable failure. The Secretary also argues that Inspector Braenovich had verbally warned company personnel about submitting samples late in May 1997, and that Steve Richards, the company official responsible for submitting the samples, had previously submitted samples at the last minute. The Secretary has failed however, to establish a rational connection between prior lawful and timely submissions of dust samples, even though submitted at the last minute, and the facts of instant case that would warrant findings of unwarrantability.

Under the circumstances, I find that the Secretary has failed to sustain her burden of proving that the violation was the result of unwarrantable failure or high negligence. Order No. 7151884 must accordingly be modified to a citation issued pursuant to Section 104(a) of the Act.

In assessing civil penalties in these cases, I have considered the high gravity of the violation charged in Citation No. 7151881, the low gravity of the violation charged in Citation No. 7151884, and that these violations were the result of moderate to low negligence. I have also evaluated the operator=s prior history (Gov. Exh. 3, 4 and 12) and other record evidence in light of the criteria under Section 110(i) of the Act.

ORDER

Citation No. 7151881 is hereby MODIFIED to a citation issued under Section 104(a) of the Act and Eastern Associated Coal Corporation is directed to pay a civil penalty of $500.00, for the violation charged therein within 30 days of the date of this decision. Order No. 7151884 is hereby MODIFIED to a citation under Section 104(a) of the Act and Eastern Associated Coal Corporation is directed to pay a civil penalty of $100.00, for the violation charged therein within 30 days of the date of this decision.

Gary Melick

Administrative Law Judge

Distribution:

Gretchen L. McMullen, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

Caroline A. Henrich, Esq., Eastern Associated Coal Corp., P.O. Box 1233, Charleston, WV 25324 (Certified Mail)

\mca