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SOL (MSHA) V. TWENTYMILE COAL
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June 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-449
TWENTYMILE COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether the violation of 30 C.F.R. 70.100(a)(Footnote 1) by Twentymile Coal Company ("Twentymile") was of a significant and substantial nature ("S&S").(Footnote 2) Commission Administrative Law Judge Michael A. Lasher, Jr. held that the violation was S&S. 14 FMSHRC 549 (April 1992)(ALJ). For the reasons set forth below, we affirm the judge's decision.

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1 Section 70.100, entitled "Respirable dust standards," provides in subsection (a):

> 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 ....

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2 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

I.

Factual and Procedural Background

Twentymile contested only the S&S designation of the citation and the matter was submitted to Judge Lasher on stipulated facts. The stipulations pertinent on review are as follows:

> 1. On October 10, 1990, Citation No. 9996580 was issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Act").
>
> 2. The Citation alleged a violation of 30 C.F.R. 70.100(a) 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, code 036 in mechanized mining unit 006-0 was 2.1 milligrams which exceeded the applicable limit of 2.0 milligrams.... Management will take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.
>
> 3. The Citation alleged that the condition significantly and substantially contributed to the cause and effect of a mine safety or health hazard.
>
> 4. The miners who were the subject of the sampling on which the Citation was based were not wearing respirators at the time the sampling was conducted.
>
> 5. The average concentration of respirable dust on which the Citation was based was 2.1 mg/m3, which exceeded the applicable limit by 0.1 mg/m3.
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> * * * * * *
>
> 9. The parties agree and stipulate that the only issue for hearing in this matter is whether a citation based upon an average respirable dust concentration of 2.1 mg/m3 may properly be designated as "significant and substantial." Twentymile wishes

> to seek review of such issue by the Commission. The parties believe that a hearing is not necessary on such issue, since the issue is a legal one based upon the Congressional findings contained in the legislative history of the Federal Mine Safety and Health Act and the regulatory history.
>
> 10. To that end, the parties agree and stipulate that a violation of the cited standard existed and that, if the citation is designated "significant and substantial," the appropriate penalty is $276.00, the full proposed penalty.

The judge upheld the inspector's S&S designation based on the Commission's decision in Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987)("Consol"), and Chief Administrative Law Judge Merlin's decision in Consolidation Coal Co., 13 FMSHRC 1076 (July 1991)(ALJ)("Consol II"). Judge Lasher held that, "when the Secretary finds a violation of 70.100(a), a presumption that the violation is significant and substantial is appropriate." 14 FMSHRC at 552, quoting Consol II, 13 FMSHRC at 1079. He applied the presumption to the facts in this case and concluded that the violation was S&S. Judge Lasher noted that Twentymile did not seek to rebut the presumption. The Commission granted Twentymile's Petition for Discretionary Review and heard oral argument.

II.

Disposition of the Issues

A. S&S Presumption

Twentymile contested the inspector's S&S finding on the grounds that a violation of the health standard based on an average concentration of less than 2.2 mg/m3 is not S&S. Although Twentymile acknowledges that, in Consol, the Commission held that any concentration of respirable dust over the 2.0 mg/m3 standard is presumptively S&S, Twentymile argues that the Commission did not focus on whether this presumption should apply to "concentrations of respirable dust that are marginally above the standard." Tm. Br. 4. Twentymile bases its argument on a report of the U.S. House of Representatives prepared at the time the House was considering the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977). In the Report of the House Committee on Education and Labor, dated October 13, 1969, to accompany H.R. 13950, a section entitled "Justification for Dust Standards" refers to British studies that used a statistical analysis to predict the probability of a miner contracting pneumoconiosis after 35 years of exposure at specific levels of respirable dust. H. Rep. 563, 91st Cong., 1st Sess. 15-20 (1969), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 94th Cong. 1st Sess. Part I Legislative History of the Coal Mine Health and Safety

Act of 1969, at 1045-50 (1975)("Legis. Hist."). The House Report states, in part:

> In a dust environment below about 2.2 mg/m3, there is virtually no probability of a miner contracting pneumoconiosis (ILO category 2 or greater), even after 35 years of exposure to such concentration. It is significant that simple pneumoconiosis below ILO category 2 is not disabling.

Legis. Hist. at 1048. Twentymile contends that this statement is essentially a Congressional finding of fact that exposures below 2.2 are not significant and substantial. Twentymile further argues that Judge Lasher's decision is incorrect as a matter of law because the Mine Act does not provide that all respirable dust violations are S&S. It asserts that the application of the presumption to "marginal" violations of the respirable dust standard ignores the Mine Act's graduated scheme of enforcement.

The Secretary argues that the presumption established in Consol is applicable to this case. The Secretary contends that Congress set the respirable dust standard at 2.0 mg/m3 in order to eliminate respiratory disease by reducing dust in the mine atmosphere. The Secretary maintains that, by adopting a 2.0 standard, Congress recognized that exposures above that level can lead to respiratory illness.

In Consol, the Commission determined that the "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." 8 FMSHRC at 895 (emphasis in original). It further determined that Congress intended the 2.0 mg/m3 standard to be the "maximum permissible exposure level" during every working shift. 8 FMSHRC at 897. With these considerations in mind, the Commission adapted the four part S&S test set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) for application to violations of the respirable dust standard. 8 FMSHRC at 897-99. The Commission found that the elements of the S&S test would be the same in all instances where the Secretary proves a violation of section 70.100(a). The Commission concluded "if the Secretary proves that an overexposure to respirable dust in violation of section 70.100(a), based upon designated occupation samples, has occurred, a presumption arises that the third element of the significant and substantial test -- a reasonable likelihood that the health hazard contributed to will result in an illness -- has been established." 8 FMSHRC at 899. The Commission reached this conclusion because "the development of respirable dust induced disease is insidious, furtive and incapable of precise prediction," and Congress expressed a "strong concern" that all respiratory illnesses in mines be eliminated. 8 FMSHRC at 898-99. With respect to the fourth element of the S&S test, the Commission concluded that "there is a reasonable likelihood that illness resulting from overexposure to respirable dust will be of a reasonably serious nature." 8 FMSHRC at 899.

As a consequence, the Commission held that, "when the Secretary proves that a violation of 30 C.F.R. 70.100(a), based upon excessive designated occupation samples, has occurred, a presumption that the violation is a

significant and substantial violation is appropriate." 8 FMSHRC at 899. The Commission further held that the presumption may be rebutted if the operator establishes that the miners in the designated occupation "were not exposed to the hazard posed by the excessive concentration of respirable dust, e.g., through the use of personal protective equipment." Id.

The United States Court of Appeals for the D.C. Circuit affirmed the Commission's use of this presumption. 824 F.2d at 1084-86. The Court rejected the operator's argument that "Congress intended that some concentration of respirable dust higher than 2.0 mg/m3 be found before a violation of the respirable dust standard could be designated as significant and substantial." 824 F.2d at 1084-85. Indeed, the Court determined that Congress required operators to "continuously maintain" the concentration of respirable dust at or below 2.0 mg/m3 "during each shift" rather than "over the long term." 824 F.2d at 1086. Noting that the harmful effect of any one incident of exposure to excessive concentrations of respirable dust is negligible, the Court concluded that, without the presumption, the application of the sanctions set forth in sections 104(d) and (e) of the Act would be precluded because no single violation could ever be designated as significant and substantial. Id.

The legislative history cited by Twentymile, when examined in context, does not support the position that the Consol S&S presumption should not apply to Twentymile's violation of section 70.100(a). The legislative history states that exposures at 2.0 mg/m3 over a 35 year period would cause at least 2% of miners to develop simple pneumoconiosis. Legis. Hist. at 142, 356 (emphasis added). Congress expressed its desire that working conditions in underground coal mines be sufficiently free of respirable dust to enable miners to work their entire working lives without "incurring any disability from pneumoconiosis or any other occupation-related disease...." 30 U.S.C. 841(b)(emphasis added)

At the time the 1969 Coal Act was debated, no federal standards existed for respirable coal dust. As passed by the House, H.R. 13950 would have established an exposure limit of 3.0 mg/m3. Legis. Hist. at 959. The British studies were cited in the House Report to justify this 3.0 limit. This House Report makes clear, however, that the committee expected the Secretary to reduce the exposure limit by regulation:

> The ideal mine environment is a dust-free one. The committee realizes that, given the state of existing technology, this is an unreachable goal. The Committee expects the Secretary ... to prescribe the limit of at least 2.2 mg/m3 as soon as he deems it attainable, and to prescribe limits below that level in a final attempt to eliminate even simple pneumoconiosis (ILO Category 1) through dust control.

Legis. Hist. at 1048-49.

The Senate rejected a 3.0 mg/m3 exposure limit because it was concerned that such a limit was "not a good medical standard." Legis. Hist. at 146.

Accordingly, the Senate bill (S. 2917) adopted a 2.0 mg/m3 standard, to be phased in over three years. Id. The Conference Committee approved the Senate's more stringent 2.0 standard because the committee was not satisfied that a less stringent standard "would protect the health of miners...." Legis. Hist. at 1551 (Statement of Representative Perkins, the chief House conferee). Congress enacted the 2.0 standard into law.

Finally, we reject Twentymile's argument that application of the S&S presumption in this case would ignore the Mine Act's graduated scheme of enforcement. Violations of section 70.100(a) in any degree can contribute to the development of chronic bronchitis, pneumoconiosis and other respiratory illnesses in miners. Consol, 8 FMSHRC at 898-99. The D.C. Circuit in Consol expressly rejected the argument that the presumption adopted by the Commission is invalid because of the Mine Act's graduated scheme of enforcement. 824 F.2d at 1084-85.

For the foregoing reasons, we reaffirm our holding in Consol that any concentration of respirable dust over 2.0 mg/m3 is presumptively S&S.

B. Motion to Strike

Shortly before oral argument, the Secretary wrote to the Commission requesting that we take judicial notice of a report on coal workers' pneumoconiosis prepared by the National Institute for Occupational Safety and Health of the U.S. Department of Health and Human Services ("NIOSH"). See Oral Arg. Tr. 21-22. Twentymile moved to strike the proffered document. Oral Arg. Tr. 18. For the reasons set forth below, we grant Twentymile's motion.

Section 113(d)(2)(C) of the Mine Act states, in relevant part, that the record on review consists of the "record upon which the decision of the administrative law judge was based...." 30 U.S.C. 823(d)(2)(C). This provision is consistent with section 113(d)(2)(A)(iii) of the Mine Act, which provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. 823(d)(2)(A)(iii). The Commission has held that these provisions "evinc the Congress' view that the adjudication process is best served if the administrative law judge is first given the opportunity to admit and examine all the evidence before making his decision." Climax Molybdenum Co., 1 FMSHRC 1499, 1499-1500 (October 1979). These procedures are consistent with "settled principles of administrative and general law limiting the record on review to the record developed before the trier of fact." Union Oil Company of California, 11 FMSHRC 289, 301 (March 1989)(citation omitted).

In addition, the Commission has held that:

> [Judicial] notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. However, such notice cannot extend to the acceptance as fact of

> scientific publications and studies, the truth of whose contents is the subject of reasonable dispute by the opposing parties. See McCormick on Evidence, 3rd Ed. 329, 330 (pp. 923-927, 1028-1032); Fed. R. Evid. 201.

Union Oil, 11 FMSHRC at 300 n.8.

The conclusions of the report and its relevance to this proceeding are disputed by Twentymile. Oral Arg. Tr. 27-28. We conclude that it would be inappropriate for the Commission to take judicial notice of the NIOSH report in this case. Our holding is based solely on the stipulations agreed to by the parties before the judge.

III.

Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner