

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 19, 1995

ASARCO, INC. :

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. SE 94-362-RM

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY THE COMMISSION:

This contest 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 a citation alleging a violation of 30 C.F.R. §§ 57.5001(a) and 57.5005,¹ issued to ASARCO, Inc. ("ASARCO") by the

¹ Section 57.5001, which establishes exposure limits of contaminants for underground metal and nonmetal mines, provides:

Except as permitted by § 57.5005--

(a) . . . the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. . . . Excursions above the listed

Department of Labor's Mine Safety and Health Administration ("MSHA"), was invalid under the Commission's holding in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994) ("*Keystone*"). Administrative Law Judge Roy J. Maurer, concluding that the case was controlled by *Keystone*, granted ASARCO's motion to dismiss and vacated the citation. Order of Dismissal, August 8, 1994 (unpublished). The Commission granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we vacate the judge's order and remand for further proceedings.

I.

Factual and Procedural Background²

thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

....

30 C.F.R. § 57.5001.

Section 57.5005, which governs control of exposure to airborne contaminants, provides:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment

30 C.F.R. § 57.5005.

² This case was decided on ASARCO's motion to dismiss prior to a hearing. The pertinent facts are based on the parties' pleadings.

On March 16, 1994, MSHA issued a citation to ASARCO at its Young Mine, a zinc mine in Tennessee. The citation alleged that a "skip tender"³ in the mine was exposed to an average of 2.3 milligrams of respirable silica-bearing dust per cubic meter of air (mg/m³), which exceeded the permissible level. The citation further stated that, although respiratory protective equipment was in use, all feasible engineering controls were not being used to control the exposure of employees to dust.

ASARCO filed a notice of contest, asserting that it was in compliance with the applicable standard and that the citation was based on a single, inaccurate dust sample. It also requested an extension of the abatement time. The Secretary filed an answer and ASARCO moved to dismiss based on the Commission's decision in *Keystone*.

In its motion, ASARCO contended that the citation was based on a single-shift dust sample and, citing *Keystone*, argued that the Commission had invalidated single-shift sampling as a method of measuring respirable coal dust. Mot. to Dismiss at 1–2. The Secretary opposed ASARCO's motion, asserting that *Keystone* dealt only with single-shift sampling in underground coal mines. The Secretary further argued that in *Keystone* the Commission had invalidated the Secretary's spot inspection program for coal mines on procedural grounds alone and had not addressed whether sampling during a single shift was substantively reliable. Statement in Opp'n at 1–2. In reply, ASARCO cited testimony, given in a hearing before a judge in another Commission case, on the unreliability of single-shift sampling. Reply to Opp'n at 1–2.

ASARCO's motion was granted and the citation was vacated; the judge stated:

I agree with the contestant that the validity of a citation issued on the basis of analysis of a single sample used to determine the average concentration of respirable dust in the atmosphere has been decided adversely to the Secretary by the Commission in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994). That decision applies equally to silica dust and coal dust in my opinion.

Order of Dismissal. The Secretary filed a petition for discretionary review, which ASARCO opposed. ASARCO also moved to strike certain arguments set forth in the Secretary's petition, asserting that they had not been raised before the judge. The Commission granted review.

³ A "skip tender" is a miner who directs the movement of cages or elevators that move miners, mine cars, and supplies between various levels of the mine and the surface. See Bureau of Mines, U.S. Dept of Interior, *A Dictionary of Mining, Mineral, and Related Terms*, 161, 1022 (1968).

II.

Disposition

At issue in *Keystone* was the validity of the Secretary's spot inspection program and citations alleging violations of the respirable dust standard for underground coal mines based on single-shift dust samples. The applicable mandatory standard, 30 C.F.R. § 70.100(a), provides that the "average concentration" of respirable dust in the mine atmosphere must be no greater than 2 mg/m³. Pursuant to section 202(f) of the Mine Act, 30 U.S.C. § 842(f), upon which 30 C.F.R. § 70.100(a) is based, the "average concentration" is to be determined by measurement

over a single shift unless the Secretary of Labor and the Secretary of Health and Human Services find that such a single-shift measurement "will not . . . accurately represent such atmospheric conditions during such shift."

Section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 842(f) (1976) (amended 1977) ("Coal Act"), predecessor to the Mine Act, established a virtually identical procedure for determining "average concentration." Pursuant to section 202(f) of the Coal Act, the Secretary of Interior and the Secretary of Health, Education and Welfare had published a notice in the *Federal Register* stating their conclusion: "single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed." 36 Fed. Reg. 13286 (July 17, 1971). *See Keystone*, 16 FMSHRC at 7–8. Title II of the Coal Act, including section 202(f), was carried over to Title II of the Mine Act, which establishes the mandatory standards for respirable dust in underground coal mines. *Id.* at 11 and n. 1.

In *Keystone*, the Commission concluded that the 1971 finding applied to MSHA sampling of the atmosphere in underground coal mines, including the spot inspection program, and not only to atmospheric sampling performed by operators. 16 FMSHRC at 11. The Commission further concluded that the 1971 finding was a legislative rule and that the Secretary had failed to rescind it through notice-and-comment rulemaking, in accordance with section 202(f) of the Mine Act and the Administrative Procedure Act (the "APA"), 5 U.S.C. § 551 et seq. *Id.* at 12–16. The Commission held that, because the spot inspection program bypassed the requisite rulemaking in attempting to rescind the 1971 finding, the citations in question were invalid. *Id.* at 16.

The Secretary argues that the judge incorrectly relied on *Keystone* because this case does not involve an underground coal mine and, therefore, is not subject to section 202(f) of the Mine Act, 30 U.S.C. § 842(f). The Secretary contends that section 201(a) of the

Mine Act, 30 U.S.C. § 841(a), explicitly provides that section 202(f) is applicable only to underground coal mines. Sec. Br. at 4–5. He also argues that ASARCO misstates the scheme of the Mine Act by asserting that, with the enactment of the Mine Act, the provisions of the Coal Act, including section 202(f), were made applicable to all mines. Sec. Br. at 10–11.

ASARCO contends that single-shift sampling in metal and nonmetal mines does not result in an accurate representation of atmospheric conditions, that the 1971 finding established the inaccuracy of such sampling, and that the decision in *Keystone* is dispositive here because the core issue, the validity of single-shift sampling, is the same. A. Br. at 2–4, 5–7.

ASARCO also asserts that, contrary to the review provisions of section 113(d) of the Mine Act, 30 U.S.C. § 841(d), the Secretary attempts to raise on review issues not raised below. A. Br. at 7–16.

We agree with the Secretary that *Keystone* is not dispositive of the issue in this case. *Keystone* did not reach the merits of single-shift sampling.⁴ Contrary to ASARCO's argument, *Keystone* addressed only the procedural validity of single-shift samples in determining violations of the respirable dust standard for underground coal mines, 30 C.F.R. § 70.100(a). Section 201(a) of the Mine Act is clear: "The provisions of sections 202 through 206 of this title [including section 202(f)] . . . shall be interim mandatory health standards applicable to all *underground coal mines* until superseded" 30 U.S.C. § 841(a) (emphasis added). Thus, the legal basis underlying *Keystone* limits its application to underground coal mines.⁵ By contrast, this case involves a citation alleging a violation of 30 C.F.R. § 57.5001(a) and § 57.5005, the dust standards for metal and nonmetal mines. Neither section 202 nor the *Federal Register* notice pertain to metal and nonmetal mines. Thus, the issues in this case are not controlled by the Commission's decision in *Keystone*. The judge erred in dismissing the citation on that basis.

⁴ On February 18, 1994, the Secretary published in the *Federal Register* his intent to rescind the 1971 *Federal Register* notice and to use single-shift samples, in addition to multiple-shift samples, to enforce the respirable dust standard in coal mines. 59 Fed. Reg. 8356.

⁵ The Commission denies ASARCO's motion to strike the Secretary's argument that section 202(f) applies only to underground coal mines. In its opposition to ASARCO's motion to dismiss, the Secretary discussed and distinguished *Keystone*, relying in part on section 202(f). *See* Sec. Opp'n. at 2. Thus, section 202(f) was raised and argued sufficiently before the judge to meet the requirements of section 113(d)(2), 30 U.S.C. § 823(d)(2). Further, the Secretary also opposed ASARCO's theory before the judge that *Keystone* is applicable to metal and nonmetal mines and that opposition inherently encompassed his argument on review concerning section 202(f). *See generally* *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (August 1992). We need not reach the other issues raised in ASARCO's motion to strike.

III.

Conclusion

For the foregoing reasons, we vacate the judge's order dismissing the citation and remand for further appropriate proceedings consistent with this opinion.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner