FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 25, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. KENT 94-996
v.	:	KENT 94-997
	:	KENT 94-998
HARLAN CUMBERLAND COAL	:	KENT 94-1024
COMPANY	:	KENT 94-1307

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 (AMine Act@ or AAct@), 30 U.S.C. ' 801 et seq. (1994). At issue is whether Commission Administrative Law Judge Roy J. Maurer correctly found that Harlan Cumberland Coal Company (AHarlan Cumberland@) violated 30 C.F.R. '' 70.207(a) and 70.208(a)[1] when the Department of Labor=s Mine Safety & Health Administration (AMSHA@) failed to receive several respirable coal dust samples that Harlan Cumberland was required to submit to MSHA on a bimonthly basis. 17 FMSHRC 1551, 1554, 1557 (September 1995) (ALJ). Also at issue is whether the $3000 in penalties assessed by the judge against Harlan Cumberland for its alleged violations are supported by substantial evidence. *Id*. at 1555, 1558. The Commission granted Harlan Cumberland=s petition for discretionary review challenging these determinations. For the reasons that follow, the judge=s findings of violations are affirmed and his penalty assessments are vacated and remanded.

[1] Section 70.207(a) states in relevant part: AEach operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly [sampling] period.@ 30 C.F.R. ' 70.207(a). Section 70.208(a) states in relevant part: AEach operator shall take one valid respirable dust sample from each designated area on a production shift during each bimonthly [sampling] period.@ 30 C.F.R. ' 70.208(a).

I.

Factual and Procedural Background

Harlan Cumberland operates the C-2 Mine in eastern Kentucky near the town of Gray=s Knob. On November 16, 1993, Eddie Sargent, Harlan Cumberland=s safety director, certified on Dust Data Cards that designated area samples were taken that same day at sampling points 904-0 and 904-1 in the C-2 Mine pursuant to section 70.208(a). Ex. R-1; Tr. 115-117. During December 1993, Matthew Coots, a section foreman at the C-2 Mine, and Jeremy Madon, the superintendent of Harlan Cumberland, certified on Dust Data Cards that five designated occupation respirable coal dust samples were taken on Mechanized Mining Unit (AMMU@) 004-0 in the C-2 Mine pursuant to section 70.207(a). Ex. R-2; Tr. 120-23.

MSHA did not receive either of the designated area samples, or two of the five designated occupation samples. 17 FMSHRC at 1553, 1556-57. Nor did Harland Cumberland offer any direct evidence at the hearing on this matter that the samples MSHA failed to receive were ever actually mailed. *Id*. at 1554, 1557. The company=s standard procedure was to transport its respirable dust samples to its offices in Gray=s Knob, a task generally done by Sargent. *Id*. at 1554. The dust cassette card numbers for each sample were typically logged into a book for the particular mine from which the sample had been collected; then the sample would be placed in a box designated for outgoing mail. *Id*. The practice was for Clyde Bennett, Harlan Cumberland=s general manager, to then take the dust samples from the company=s office to a nearby post office and place them in the U.S. mail for non-certified delivery. *Id*., Tr. 153.

On December 9, 1993, in response to two Advisories of Noncompliance sent out by MSHA=s Respirable Dust Processing Laboratory, MSHA Inspector Calvin E. Riddle issued two citations, Nos. 9885355 and 9885356, alleging that Harland Cumberland violated section 70.208(a) because it failed to take a valid respirable dust sample during the October/November 1993 bimonthly sampling cycle for sampling points 904-0 and 904-1. 17 FMSHRC at 1553. On January 14, 1994, in response to another Advisory of Noncompliance, Riddle issued Citation No. 9885368 alleging Harland Cumberland violated section 70.207(a) because it failed to take five valid respirable dust samples during the November/December 1993 bimonthly sampling cycle for MMU 004-0. *Id*. at 1556-57. The Secretary subsequently proposed $1000 penalties for each of the alleged violations of section 70.208(a). S. Pet. for Assessment of Penalty, Ex. A (August 18, 1994). The Secretary also proposed a $3500 penalty for the alleged violation of section 70.207(a). S. Pet. for Assessment of Penalty, Ex. A (August 24, 1994). Harlan Cumberland contested each of these penalties.

The judge noted that sections 70.207(a) and 70.208(a) require submission of valid respirable dust samples and concluded that, to determine the validity of a sample, it must be received and examined by MSHA. 17 FMSHRC at 1554, 1557. Finding that MSHA received none of the samples at issue, the judge determined that Harlan Cumberland violated sections 70.207(a) and 70.208(a). *Id*. at 1554-55, 1557. The judge concluded that the violations of

section 70.208(a) resulted from Harlan Cumberland=s Amoderate@ negligence. *Id*. at 1555. He also found that the company had a Apropensity to repeatedly violate this same section of the standards.@ *Id*. Noting that he had considered Aall the statutory criteria in section 110(i) of the Mine Act,@ 30 U.S.C. ' 820(i), but without making any separate findings of fact on any of the criteria except the negligence criterion, the judge assessed a penalty of $1000 for each violation of section 70.208(a). *Id*. The judge concluded that Harlan Cumberland=s violation of section 20.207(a) was Aserious@ and due to the company=s Amoderate@ negligence. *Id*. at 1557. Without making any other findings on the penalty criteria, he assessed a $1000 penalty for this violation. *Id*. at 1558.

II.

Disposition

Harlan Cumberland argues that under the plain meaning of sections 70.207(a) and 70.208(a), it complied with the standards when it took the samples and placed them in the mail. H.C. Br. at 8-13. The company faults the judge=s interpretation of the cited standards as requiring MSHA=s receipt of a sample to render the sample Avalid,@ arguing that it is impossible for an operator to guarantee that MSHA will receive a sample. *Id*. at 11-13. Harlan Cumberland also argues that the penalty assessed by the judge is excessive and not supported by substantial evidence. *Id*. at 13-14. The Secretary responds that AMSHA cannot determine whether a dust sample is valid for purposes of Sections 70.207 and 70.208 unless it receives the sample.@ S. Br. at 10. The Secretary argues that the Commission should defer to this interpretation of sections 70.207(a) and 70.208(a), and reject Harlan Cumberland=s argument that operators comply with these standards merely by collecting samples and placing them in the mail. *Id*. at 14, 17. The Secretary also argues that substantial evidence supports the judge=s conclusion, regarding his penalty assessment for the violations of section 70.208(a), that Harlan Cumberland had Aa persistent problem of failure to submit valid dust samples.@ *Id*. at 17-18 n.11. The Secretary contends the judge correctly determined that the violation of section 70.207(a) was serious Abecause it rendered the dust standards unenforceable.@ *Id*.

A. Violations

We do not agree with Harlan Cumberland=s contention that it complied with sections 70.207(a) and 70.208(a) merely by taking the requisite respirable dust samples and placing them in the mail. Instead, the plain language of these standards, when read in conjunction with the provision in Part 70 defining Avalid respirable dust sample,@ requires receipt and examination by MSHA. The Commission has recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996) (citations omitted). It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary=s interpretation arises. *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Since the meaning of sections 70.207(a) and

70.208(a) is clear and unambiguous, we need not address the Secretary=s contention that her interpretation of the standards is entitled to deference.

At issue here is whether Harlan Cumberland complied with the requirements of sections 70.207(a) and 70.208(a) to take Avalid respirable dust samples.@ The term Avalid respirable dust sample@ is defined elsewhere in MSHA=s Part 70 regulations as Aa respirable dust sample collected and submitted as required by [Part 70], and not voided by MSHA.@ 30 C.F.R. ' 70.2(p). Thus, to comply with sections 70.207(a) and 70.208(a), three elements must be met. First, an operator must collect respirable dust samples in accordance with the many requirements of Part 70 regulating how, where, by whom, and under what conditions such samples are to be collected. *See* 30 C.F.R. '' 70.201-70.208. Second, an operator must submit its samples to MSHA. This requirement is addressed by section 70.209(a), which requires that A[t]he operator shall transmit within 24 hours after the end of the sampling shift all samples collected to fulfill the requirements of this part . . . to [MSHA=s] Respirable Dust Processing Laboratory, . . . P.O. Box 18179, Pittsburgh, Pennsylvania . . . .@ 30 C.F.R. ' 70.209(a). Finally, to be valid, an operator=s samples must not be voided by MSHA for some reason. A dust sample taken pursuant to section 70.207(a) will be voided, for example, if no production takes place on the shift sampled. *See* Ex. G-15, Advisory No. 0051.

The judge construed sections 70.207(a) and 70.208(a) as requiring that operators= samples be *received* by MSHA in order to determine their validity. 17 FMSHRC at 1554, 1557. The judge also defined a valid sample as one that Acomplies with the appropriate dust standard.@ *Id*. at 1554. Although this definition is incorrect **C** validity depends not on compliance with the dust standards of Part 70, but rather on MSHA=s determination of whether any circumstances warrant voiding a particular sample **C** we nevertheless find that the judge reached the proper conclusion. MSHA=s definition of Avalid respirable dust sample@ includes the clear and unambiguous requirement that, to be valid, a sample must not be voided *by MSHA*. It follows that MSHA cannot determine whether any circumstances warrant voiding a dust sample unless it receives and examines the sample. Any risk that the samples might not reach MSHA properly lies with the operator. Once received by MSHA, the agency must then assume responsibility for the orderly processing of the samples to determine their validity. Accordingly, we conclude that the judge properly determined that Harlan Cumberland violated sections 70.207(a) and 70.208(a) when MSHA failed to receive the samples at issue.

B. Penalties

The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the statutory criteria of section 110(i) of the Mine Act and the deterrent purposes underlying the Act=s penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984). Section 110(i) requires Commission judges to consider the

following six criteria in assessing appropriate civil penalties:

> [1] the operator=s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator=s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. ' 820(i). Findings of fact on each of these statutory criteria must be made. *Sellersburg*, 5 FMSHRC at 292.

Here, the judge made no findings for any of the violations on the appropriateness of the penalties he assessed to Harlan Cumberland=s size, whether the company showed good faith in abating the violations, or the company=s history of previous violations. These omissions necessitate a remand so that the requisite findings can be made.

Although the judge also made no findings on the effect of the penalties he assessed on Harlan Cumberland=s ability to stay in business, the parties stipulated that a reasonable penalty would have no affect on the company=s survival. Ex. J-1 & 4. On remand, this must be taken into consideration when the penalties are reassessed.

The judge made no gravity findings with respect to the two violations of section 70.208(a). He concluded that Harland Cumberland=s violation of section 70.207(a) was Aserious.@ 17 FMSHRC at 1557. Although the gravity criterion is frequently analyzed in terms of Aseriousness@ (*see Consolidation Coal Co.*, 18 FMSHRC at 1549), the judge offered no specific factual findings in support of his conclusion. Such supporting findings are required. *Sellersburg*, 5 FMSHRC at 292; *see also Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (a judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision). We thus direct the judge to make specific findings on the gravity criterion on remand.

The judge found that Harlan Cumberland was moderately negligent in connection with each violation. 17 FMSHRC at 1555, 1557. He offered no explanation for his finding of moderate negligence with respect to Harlan Cumberland=s violation of section 70.207(a), which we direct him to do on remand. In explanation of his negligence findings with respect to the two violations of section 70.208(a), the judge stated that A[t]he record is clear that MSHA did not receive the subject dust cassettes, and that, without more, is enough for me to find ordinary or >moderate= negligence.@ *Id*. at 1555. We find this analysis of the negligence criterion inadequate.

The judge found that Harlan Cumberland took the requisite samples. 17 FMSHRC at 1555. Thus, the only omission for which the judge could have found Harlan Cumberland

negligent is failure to mail the samples. But the judge made no finding regarding whether the samples were mailed. The judge observed that Harlan Cumberland Awas unable to establish that the cassettes were actually mailed to MSHA.@ *Id*. at 1555. But he failed to analyze and weigh the disputed circumstantial evidence in the record on this question. On the one hand, Harlan Cumberland offered evidence that respirable dust samples were routinely mailed according to a well-established procedure. *See* Tr. 148-49. On the other hand, the Secretary argued that Harlan Cumberland failed to adduce any evidence that the samples at issue were either logged according to the company=s mailing procedures or actually mailed, and that, thus, Athe weight of the circumstantial evidence demonstrates the cassettes were not mailed.@ S. Proposed Findings of Fact and Conclusions of Law at 4-6.

If the company actually mailed the samples, it was not at all negligent. It would be inequitable to impute to Harlan Cumberland the negligence of the U.S. Postal Service in failing to deliver the samples. Any failure by the company to place the samples in the mail, however, would constitute some degree of negligence. We therefore direct the judge to make specific findings on this issue on remand.

But this is not the end of the inquiry concerning whether Harlan Cumberland was negligent, or the degree of its negligence. The Commission has held that Aa history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction and thus, this history may be relevant in determining the degree of the operator=s negligence.@ *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992). Regarding his assessment of penalties for the violations of section 70.208(a), the judge noted that he considered Harlan Cumberland=s Apropensity to repeatedly violate this same section.@ 17 FMSHRC at 1555. But the judge failed to explain the basis of this finding, nor did he relate it to the negligence criterion.

Although Harlan Cumberland=s C-2 Mine had been cited once before for a violation of section 70.207(a) when MSHA did not receive samples as required (*see* Ex. G-13), the record contains no prior violations by the C-2 Mine of section 70.208(a). Even if the judge had reasoned that a prior violation of section 70.207(a) should have put Harlan Cumberland on notice that it needed to take greater efforts to ensure the MSHA received its respirable dust samples collected pursuant to section 70.208(a), one prior violation does not establish a Apropensity to repeatedly violate@ the cited standard. However, several of Harlan Cumberland=s other mines had also been cited during 1993 for similar violations of both standards. *See* Exs. G-12, G-14, G-16, G-17, G-18, and G-19.[2] These other violations *could* have placed Harlan Cumberland on notice of a problem with its mailing of respirable dust samples. However, the judge failed to explain whether this was his rationale, and if so, how the violations at other mines could have put the C-2 Mine on notice of a problem. We therefore direct the judge to make specific findings on this issue on remand.

[2] The C-2 Mine was cited on May 18, 1993 for a violation of section 70.207(a), but this violation was based on a sample being received but voided because of Ainvalid production.@ Ex. G-15. This violation is thus irrelevant for purposes of determining whether Harlan Cumberland was on notice that it needed to take greater efforts to ensure the MSHA received its respirable dust samples.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s conclusion that Harlan Cumberland violated sections 70.207(a) and 70.208(a), and we vacate his penalty assessment and remand for reassessment consistent with our decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner