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SOL (MSHA) V. ROB COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

ROB COAL COMPANY, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 84-187
A.C. No. 36-04151-03504

Rob Strip Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor,
Pennsylvania, for Petitioner;
Clarence Creel, President, Rob Coal Company,
Kittanning, Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of \$40 for two alleged violations of mandatory surface mining health standard 30 C.F.R. 71.208(a).

The respondent filed a timely answer and contest, and pursuant to notice a hearing was held in Pittsburgh, Pennsylvania on October 23, 1984, and the parties appeared and participated fully therein.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

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Stipulations

The parties agreed that the mine in question is subject to the Act and that the presiding judge has jurisdiction to hear and decide this case. They also agreed that the respondent is a small mine operator and that the Rob Mine is a small strip mining operation employing a total of three miners (Tr. 6-8).

Petitioner's counsel asserted that the respondent's total history of prior citations consists of two prior "single penalty" violations for which the respondent paid \$40 in civil penalties. Counsel also asserted that the two citations in issue in this case involved a low degree of negligence and gravity, and that since no further action was required to be taken by the respondent to achieve compliance, the issue of timely abatement is not relevant to any civil penalty determination (Tr. 8-10).

Discussion

The two section 104(a) non-"S & S" citations in question in this case were issued on May 11, 1984. Citation No. 9951272, charges the respondent with failing to take a valid respirable dust sample during the February-March 1984 bimonthly sampling cycle on designated work position 001-0-368. Citation No. 9951273, charges the respondent with failing to take a valid sample during the same sampling cycle on designated work position 001-0-382.

30 C.F.R. 71-208(a) provides in pertinent part as follows:

Each operator shall take one valid respirable dust sample from each designated work position during each bimonthly period beginning with the bimonthly period of February 1, 1981. The bimonthly periods are:

February 1 - March 31

* * * *

For purposes of Part 71, of MSHA's mandatory health standards for surface coal mines, the term "valid respirable dust sample" is defined by section 71.2(r), as "a respirable dust sample collected and submitted as required by this part, and not voided by MSHA." (Emphasis supplied.)

Petitioner's Testimony and Evidence

MSHA Inspector Gerald F. Moody confirmed that he issued the citations in this case, and he stated that they were based on information received from MSHA's computer (exhibits G-1 and G-2). Mr. Moody explained that the information that is used to support the citation is gathered by MSHA's district office and that he simply signs the citation forms because the person who prepares the noncompliance data is not an inspector authorized to issue citations (Tr. 10-14).

Nancy MacCumbee, Inspection Compliance Clerk, MSHA Monroeville District Office, testified that she is responsible for monitoring the surface and underground respirable dust reporting program for the mines in her district. She explained the procedures she follows in connection with the dust sample cassettes submitted by mine operators to her office.

Mrs. MacCumbee explained that mine operators submit their respirable dust cassette samples by mail to MSHA's dust analysis laboratory in Pittsburgh. The operator is required to fill out a data card form along with the cassette, (exhibit G-4). She stated that this is a new form which has been in use for about a year, and she identified exhibit G-5, as the old mine data card. These data cards are not MSHA forms, and they are supplied by the company which supplies the sampling cassettes to the mine operator. In the instant case, the cassettes and forms are supplied by the Bendix Company.

Mrs. MacCumbee identified exhibit G-3, as an "Input Transaction Error Report," received in her office on April 2, 1984, and she explained that the form is generated by MSHA's computer center in Denver, Colorado. She confirmed that this particular report indicated that items 9 and 10 on the dust data card submitted with the dust sample cassette by the respondent in this case were not filled out. Since the form was incomplete, the computer rejected the sample cassette as an invalid sample for designated work position 368, Caterpillar dozer operator, and that is why she prepared Citation No. 9951272, for Mr. Moody's signature. She confirmed that a similar error report was received for designated work position 382, Fiat Allis Front-End Loader operator, and that is what prompted the issuance of Citation No. 9951273.

Mrs. MacCumbee identified exhibit G-6, as a copy of a letter dated May 4, 1983, from MSHA's district manager,

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to the respondent explaining certain changes in the reporting requirements for respirable dust samples from designated work positions. She indicated that MSHA's district office provided a training program for mine operators in the district to explain the new procedures for submitting the data required with the dust sampling devices.

Mrs. MacCumbee confirmed that both of the citations issued in this case were the result of the failure by the respondent to fill out items 9 and 10 on the new data form. Since the computer which scans this data did not pick up the information, it rejected the cassettes which were submitted as "invalid," and that is what triggered the issuance of the citations by her office. She explained further that if the respondent submitted the old data form with the cassettes, the "computer rejection" result would be the same since the old card form does not utilize coded items 9 and 10 as shown on the new forms. She indicated that mine operators were instructed to submit the new data cards along with any old forms still in use, and that in this case this was apparently not done (Tr. 20-35).

Respondent's Testimony and Evidence

Clarence Creel, the owner and operator of the mine in this case, confirmed that he was issued a prior citation for an invalid dust sample at the mine. However, he explained that the initial sample had become contaminated with dirt, and that an MSHA inspector advised him "to forget it," and to submit a new sample. Although he submitted another sample which indicated that he was in compliance, the first sample was rejected, and as a result, he received a citation. He decided to pay the assessment rather than to contest the citation, and since that time he has been on a regular sampling cycle. He claimed that he has been unable to convince MSHA's district office that since that episode, he has always been in compliance with the respirable dust requirements. Under the circumstances, he decided to contest the instant two citations rather than pay the proposed assessments (Tr. 40-41).

Mr. Creel testified that when he submitted the two dust samples which are in issue in this case he filled out the data cards which were with the sample cassettes supplied to him by the Bendix Company, the supplier. He confirmed that he was not furnished a supply of new data cards until after the citations were issued (Tr. 46). He also confirmed that he does his own sampling, and that after filling out the data cards, he mailed the cassettes and cards to MSHA in a self-addressed container provided for that purpose (Tr. 48-49).

Findings and Conclusions

The facts presented in this case reflect that the respondent took the two samples in question and submitted them to the appropriate MSHA office as required by the regulations. However, since the respondent used an old data card form when he submitted the samples, they were voided by the computer because some of the information required to be submitted on the new form was not programmed, and the computer could not process the data reflected on the old card.

MSHA's counsel conceded that the citations resulted from the respondent's use of old data cards when he submitted the required samples. Since the old cards do not provide for the submission of the kinds of information required by the new data cards, the samples were rejected by the computer as being invalid under MSHA's definition of the term "valid samples." Counsel also conceded that the citations here do not concern a matter of noncompliance with the respirable dust level requirements, but only with the respondent's failure to submit "valid" samples. Counsel agreed that nominal civil penalties are in order for the citations (Tr. 47-50).

I conclude and find that the petitioner has established the fact of violation as to both citations and they are affirmed. However, I have considered the fact that the citations were triggered by a computer which rejected and invalidated the dust samples which the respondent submitted because the data accompanying the samples was incomplete. Under the circumstances, I conclude that there are facts presented here which strongly mitigate any civil penalty assessed for the two citations.

Gravity

I conclude and find that the violations here are nonserious.

Negligence

Although respondent is presumed to know that he was required to submit new data cards with his samples, he denied that this was ever brought to his attention during any MSHA training sessions he may have attended. Having viewed the respondent on the stand during his testimony, I found him to be an honest and straightforward witness, and I believe his assertions that he was somewhat confused over why he was still required to submit dust samples. Although MSHA produced a communication dated May 4, 1983, addressed to Mr. Creel advising him of the new dust reporting procedures, I find Mr. Creel's explanation as to why he used his old supply of data cards to be credible mitigation of his negligence in this case. Accordingly, I conclude that the violations resulted from a low degree of negligence on his part.

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Good Faith Compliance

This factor is inapplicable to the facts of this case. MSHA conceded that since the bimonthly sampling had already passed at the time the citations were issued, there was no way for the respondent to abate the citations. The record here supports a conclusion that the respondent has an excellent compliance record, and I have taken this into consideration in assessing the civil penalties for the two citations in question.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a small mine operator and that the penalties assessed will not adversely affect its ability to continue in business.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that civil penalties in the amount of \$5 for each of the two citations are appropriate in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$10 for the two citations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge