FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 3, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 92-798
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners

DECISION

BY: Doyle and Holen, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether a violation of 30 C.F.R. ' 70.201(d) by Consolidation Coal Company ("Consol") was significant and substantial ("S&S").[1] Administrative Law Judge Jerold Feldman determined on cross motions for summary decision that the violation was not S&S. 15 FMSHRC 904 (May 1993) (ALJ). For the reasons that follow, we affirm the judge in result.

I.

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[1] 30 C.F.R. ' 70.201(d) provides:

> During the time for abatement fixed in a citation for violation of ' 70.100 . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken.

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 . . . ."

Background

A. Factual Background

Consol operates the Blacksville No. 2 Mine, an underground coal mine in West Virginia. During December 1991, inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the mine pursuant to MSHA's "Spot Inspection Program" (the "Program"). Under the Program, inspectors were instructed to issue a citation alleging a violation of section 70.100(a) whenever the results of a respirable dust sample taken during a single shift equaled or exceeded the level set forth in an MSHA table.[2] S. Mot. for Sum. Dec. at 5. A citation was to be issued if a single-shift sample at the No. 2 mine showed a dust concentration of 2.5 or more milligrams of respirable dust per cubic meter of air ("mg/m^3"). *Id.* at 5, 7.

On December 9 and 10, 1991, inspectors took samples over single shifts that showed the longwall jack setter had been exposed to dust concentrations of 2.5 mg/m^3 and 3.1 mg/m^3. 15 FMSHRC at 905 n.5. On December 11, Inspector Theodore Betoney issued to Consol a citation alleging an S&S violation of section 70.100(a) for excessive concentrations of respirable dust. The citation stated: "[t]he mine operator shall take corrective action immediately to lower the

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[2] 30 C.F.R. ' 70.100(a) provides:

> 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 . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . .

Before the Program's initiation in July 1991, MSHA determined compliance with section 70.100(a) on the basis of dust samples taken during multiple shifts. The Commission considered the procedural validity of the Program in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994), discussed infra.

amount of respirable dust at 041 non-designated occupation [longwall jack setter], and then sample each consecutive shift until five (5) valid samples are obtained." S. Mot. for Sum. Dec. Ex. C. The abatement time was set for December 16 and was later extended to December 18. 15 FMSHRC at 905 n.3.

On December 12, Consol informed Inspector Betoney that it would decide on the appropriate corrective action after five samples were taken. S. Mot. for Sum. Dec. at 8. Those samples showed excessive dust concentration. On December 19, Inspector Betoney issued a withdrawal order, pursuant to section 104(b) of the Act, 30 U.S.C. ' 814(b), alleging that Consol had failed to lower the dust concentration within the time for abatement set forth in the underlying citation. Later that day, he issued another withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. ' 814(d)(2), alleging an S&S violation of section 70.201(d), caused by Consol's failure to take corrective action. That order, subsequently modified to a citation, is the enforcement action at issue. 15 FMSHRC at 904 n.1.

On December 23, Consol submitted to MSHA a plan to lower respirable dust levels, which was implemented following MSHA's approval. On December 26 and 27, Consol collected samples showing an average dust concentration of 0.9 mg/m^3. S. Mot. for Sum. Dec. at 9. The section 70.201(d) citation as well as the section 104(b) failure to abate order were then terminated. *Id.*; S. Mot. for Sum. Dec. Ex. E.

B. Procedural Background

Consol challenged both citations. The section 70.100(a) citation was assigned to Administrative Law Judge Avram Weisberger as part of Docket No. WEVA 92-761; the instant citation, which alleged a violation of section 70.201(d), came before Judge Feldman.

1. Citation alleging Consol's violation of section 70.100(a)

Judge Weisberger stayed the proceedings in Docket No. WEVA 92-761, based on his determination in *Keystone Coal Mining Corp.*, 14 FMSHRC 2017, 2024-29 (December 1992) (ALJ), that the Program was procedurally invalid because the Secretary had not engaged in notice-and-comment rulemaking prior to implementing it. The Commission granted the Secretary's petition for discretionary review in *Keystone* and Judge Weisberger continued the stay in Docket No. WEVA 92-761, pending decision by the Commission in *Keystone*.

The Commission affirmed the judge's decision in *Keystone*, concluding that the Program was invalid because it constituted a legislative-type rule that had been adopted without the required notice-and-comment rulemaking. 16 FMSHRC at 10-16. The Commission's decision was not appealed. Judge Weisberger subsequently dismissed the section 70.100(a) citation based on the Commission's ruling in *Keystone*. Unpublished Order dated April 1, 1994. The Secretary did not petition for review of the judge's order and it became a final decision of the Commission. 30 U.S.C. ' 823(d)(1).

2. Citation alleging Consol's violation of section 70.201(d)

In the present proceeding, the parties moved for a stay pending final resolution of *Keystone*. Judge Feldman stayed the proceedings only until Judge Weisberger issued his decision. After the Commission directed *Keystone* for review, the Secretary moved for continuance of the stay, pending the Commission's decision. The judge, however, denied the Secretary's motion. He subsequently permitted the parties to proceed on cross motions for summary decision. Unpublished Order at 2 (March 26, 1993).

Because Consol conceded the violation of section 70.201(d), the only issue before the judge was whether that violation was S&S. 15 FMSHRC at 906. In his summary decision, issued before the Commission's *Keystone* decision, the judge concluded that doubts regarding the validity of the Program and, hence, the validity of the underlying citation alleging a violation of section 70.100(a) warranted the deletion of the S&S designation. *Id.* at 907. The judge rejected the Secretary's argument that the violation of section 70.201(d) was presumptively S&S because it arose from the failure to abate an S&S violation of section 70.100(a). *Id.* at 907-08. The judge also stated that application of the Commission's S&S test set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), independently supported his determination that the violation was not S&S. *Id.* at 907. Accordingly, the judge deleted the S&S finding. He assessed a civil penalty of $100. The Commission granted the Secretary's petition for discretionary review.

II.
Disposition

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). The general test for determining whether a violation is S&S is set forth in *Mathies*, 6 FMSHRC at 3-4. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), however, the Commission held: "when the Secretary proves that a violation of [section] 70.100(a) . . . has occurred, a [rebuttable] presumption that the violation is a significant and substantial violation is appropriate." *Id.* at 899.

In his petition for review, filed before issuance of the Commission's decision in *Keystone*, the Secretary asserts, as he did before the judge, that the failure to timely correct a presumptively S&S dust violation is also presumptively S&S.[3] PDR at 4. He asserts further that the judge determined that a short exposure to excessive respirable dust should not be considered presumptively S&S and that such a determination conflicts with *Consolidation*. *Id.* at 7. The Secretary urges the Commission to reject any attempt to carve out an exception to the presumption for even short periods of exposure to excessive dust. S. Br. at 10-13 & n.11.

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[3] The Secretary does not argue for application of the *Mathies* test.

Incorporating by reference his arguments to the Commission in *Keystone*, the Secretary asserts that the judge erred in relying on his "doubts regarding 'the procedural and substantive merits of the Secretary's single shift sampl[ing] procedure.'" *Id.* at 5. He contends that the judge's doubts regarding the validity of the Program pertain only to the fact of violation and are immaterial to the S&S issue. *Id.* at 6-7. The Secretary asks the Commission to reverse the judge and remand for assessment of an appropriate civil penalty.

Consol argues that the judge was correct in his determination that the violation was not S&S. It argues further that MSHA's enforcement actions improperly imposed duplicative S&S sanctions for the same violation, an issue not reached by the judge because he deleted the S&S designation. Consol Br. at 3-6.

With regard to the Secretary's argument that the judge erred in concluding that the violation was not presumptively S&S, we note that, on its face and as found by the judge, the instant citation was based solely on the operator's failure to take timely action to correct the conditions underlying the December 11 citation. Order No. 3720751; 15 FMSHRC at 905, 907.[4] Consequently, determination of whether the instant citation is presumptively S&S depends upon

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[4] Our dissenting colleague relies on the affidavit of Inspector Betoney in an attempt to establish that the citation, which rests explicitly on the earlier test results, was issued not only as a result of the operator's failure to take corrective action but also as a result of subsequent dust sampling. Slip op. at 8. There is no indication in the judge's decision that he credited the inspector's statement in this regard. Rather, it appears that he discredited the statement: he found that the citation was issued "for the respondent's failure to take corrective action" (15 FMSHRC at 907) and that the violation "allegedly occurred because the respondent failed to take remedial action" (15 FMSHRC at 905). Moreover, the inspector's affidavit is not appropriately construed in the Secretary's favor to support his motion *for* summary decision and application of the S&S presumption, as our colleague suggests. She erroneously relies on the law regarding construction of evidence *in opposition to* summary decision to support her position, which, in essence, is to grant the Secretary's motion for summary decision.

the validity of the underlying citation. The Secretary conceded this before the judge:

> Resolution of . . . whether the violation should be designated S&S, is directly dependent on the validity of the single sample method. If the single sample method is invalidated, then the current citation for failure to take corrective action to lower the respirable dust concentration . . . cannot be S&S because there would be no judicially acceptable proof that the respirable dust concentration was violative.[5]

S. Mot. for Stay at 3. The underlying citation was dismissed based on the Commission's ruling in *Keystone.* Consequently, the judge did not err in determining that the violation was not presumptively S&S. To the extent that he erred in deleting the S&S designation based on uncertainty regarding the underlying violation, that error is harmless because the Commission, in *Keystone*, invalidated that citation. *See Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983).

We also reject the Secretary's argument that violations of section 70.201(d) are presumptively S&S under *Consolidation.* In that case, the Commission determined that a rebuttable S&S presumption applies when the Secretary proves a violation of section 70.100(a). 8 FMSHRC at 899. Contrary to the Secretary's assertions, the Commission has not extended that presumption to violations of section 70.201(d) or to any other respirable dust or mandatory health standard. *See Union Oil Co. of Cal.*, 11 FMSHRC 289, 297 (March 1989).

A motion for summary decision is not the appropriate means for pursuing extension of the S&S presumption. We decline to decide on the present record whether violations of section 70.201(d) should also be considered presumptively S&S. In moving for summary decision, the Secretary foreclosed his opportunity to develop the type of record necessary to demonstrate the appropriateness of such a presumption. *See Union Oil*, 11 FMSHRC at 297. *Cf. Consolidation*, 8 FMSHRC at 892-94.

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[5] This concession served as the basis for the judge's stay order. 15 FMSHRC at 906. The dissent discounts this concession (Slip op. at 10) because it was made in a Motion for Stay, which also set forth the terms under which the case would be settled following the Commission's decision in *Keystone*. The statement was part of a legal argument made by the Secretary in support of his motion. The statement was not a factual admission made during settlement negotiations. *See* Fed. R. Evid. 408.

We conclude that the Secretary has failed to articulate persuasive legal grounds for overturning the judge's determination. To the extent the judge suggested that short periods of exposure to respirable dust are exempt from the presumption established in *Consolidation*, we agree with the Secretary that he erred. We do not reach the issue, raised by the operator, that the Secretary's S&S sanctions were duplicative.

III.
Conclusion

For the reasons set forth, we affirm in result the judge's determination that Consol's violation of section 70.201(d) was not S&S.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marks, Commissioner, not participating:

I assumed office after this case had been briefed and considered at a Commission decisional meeting. In light of these circumstances, I elect not to participate in this case.

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Marc Lincoln Marks, Commissioner