

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, D.C. 20006

August 29, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 93-199-R
	:	PENN 93-308
NEW WARWICK MINING CO.	:	

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

DECISION

BY: Jordan, Chairman; Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves the issue of whether New Warwick Mining Company (“New Warwick”) violated 30 C.F.R. § 70.207(a)<sup>1</sup> by taking bimonthly designated occupation respirable dust samples inside a miner’s airstream helmet, and whether the alleged violation resulted from its unwarrantable failure to comply with the standard. Administrative Law Judge Arthur Amchan concluded that New Warwick violated the regulation and that the violation resulted from unwarrantable failure. 16 FMSHRC 1083 (May 1994) (ALJ). The Commission granted New Warwick’s petition for discretionary review, which challenges the judge’s determinations. For the reasons that follow, we affirm those determinations.

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<sup>1</sup> Section 70.207(a) provides, as pertinent:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

## I.

### Factual and Procedural Background

New Warwick owns the Warwick Mine, which is located in Greene County, Pennsylvania. 16 FMSHRC at 1083. On January 15, 1993, Rod Rodavich, the safety director at the mine, asked Robert Newhouse, a supervisor at the Mine Safety and Health Administration (“MSHA”) field office in Waynesburg, Pennsylvania, whether respirable dust sampling could be conducted inside a RACAL airstream helmet, a battery-powered air-purifying respirator. *Id.* at 1083-84; Tr. 61-62. Newhouse responded that samples taken inside a respirator had not been acceptable to MSHA in the past, but he could not cite a specific regulation that forbade the practice. 16 FMSHRC at 1084 & n.1. Later in January, Rodavich discussed the question with MSHA Inspector William Wilson, also of the Waynesburg office. *Id.* at 1084; Tr. 11-12. Wilson indicated that sampling inside the helmet was unacceptable to MSHA, but was also unable to point to a specific regulation that such sampling would violate. 16 FMSHRC at 1084-85 & n.2. On February 5, Rodavich raised the issue with MSHA Supervisory Inspector Tom Light of the Waynesburg office. *Id.* at 1084-85. Light told Rodavich that such sampling was against MSHA policy and that New Warwick would be cited if it took such samples for compliance purposes. *Id.* at 1085 & n.3. Light also told Rodavich that MSHA regulations require sampling in the mine atmosphere and that samples taken underneath the helmet were not samples taken in the mine atmosphere. *Id.* Light further suggested that Rodavich read the preamble to MSHA’s Part 70 regulations. *Id.* at 1085. Light was unable to specify the regulation that would be violated by sampling under the helmet. *Id.*

On February 8, 9, and 10, pursuant to Rodavich’s directions, New Warwick took five respirable dust samples inside the RACAL airstream helmet respirators worn by the longwall shear operators on the tailgate side. 16 FMSHRC at 1085; Jt. Ex. 1 at 3-Stips. 11 and 12; Gov’t Ex. 8. The longwall shear operator position is a designated occupation for purposes of respirable dust sampling. Tr. 8. Although Rodavich had previously informed MSHA personnel that he intended to take such samples unless they were able to point him to a regulation prohibiting them, he did not advise that the sampling would be done on February 8-10. 16 FMSHRC at 1085-86.

A few days after New Warwick completed the sampling, Inspector Wilson saw copies of the mine’s dust data cards. 16 FMSHRC at 1086. Wilson suspected that the samples had been taken inside the helmet and, with Light’s assistance, obtained the results of the samples; the highest reading was 0.5 mg/m<sup>3</sup>. *Id.*; Gov’t Ex. 9. On February 22, a New Warwick miner, upon questioning by Wilson, indicated that the samples had been taken underneath the helmet. 16 FMSHRC at 1086; Tr. 28. The next day Light asked Rodavich to confirm this, which he did. 16 FMSHRC at 1086; Tr. 86.

On February 24, dust samples were taken on the longwall face with the sampling cassette placed outside the helmet. 16 FMSHRC at 1087; Tr. 30-31. The results, which were reported several days later, showed concentrations as high as 4.4 mg/m<sup>3</sup> of air, far in excess of the 2.0

mg/m<sup>3</sup> ceiling established by 30 C.F.R. § 70.100(a).<sup>2</sup> 16 FMSHRC at 1087. On February 25, Wilson issued a section 104(d)(1) order alleging a violation of section 70.207(a) on the ground that New Warwick failed to take valid respirable dust samples during the January/February bimonthly sampling period because New Warwick's dust samplings were taken inside the helmet. 16 FMSHRC at 1083, 1086-87, 1092; Gov't Exs. 1, 2; Jt. Ex. 1 at 3-Stip. 11.

The judge concluded that taking respiratory dust samples underneath the helmet violated section 70.207(a), based on his consideration of the Part 70 regulations in their totality, including 30 C.F.R. §§ 70.100(a) and 70.300, and the preamble to the Part 70 regulations.<sup>3</sup> 16 FMSHRC at 1089. He also found that the record established that MSHA policy, prohibiting the substitution of the airstream helmet for environmental controls, had not changed. *Id.* In concluding that the violative conduct resulted from New Warwick's unwarrantable failure, the judge found that Rodavich's sampling was "intentional," "highly unreasonable under the circumstances," and "sufficiently aggravated to constitute an 'unwarrantable failure.'" *Id.* at 1090-92. The judge assessed a penalty of \$500. *Id.* at 1093.

## II.

### Disposition

#### A. Violation

New Warwick argues that taking respirable dust samples under the helmet does not violate the requirements of sections 70.207(a), 70.100(a), or 70.300, and that the preamble to the Part 70 regulations does not prohibit use of the helmet as an aid to compliance. N.W. Br. at 5-9. In response, the Secretary argues that the judge correctly concluded New Warwick violated section 70.207(a). S. Br. at 9-18. The Secretary contends his interpretation is consistent with the purpose of the Mine Act and the regulations implementing the Mine Act, and that he has consistently interpreted section 70.207(a) to prohibit the practice in question ever since the regulation was promulgated. *Id.* at 11-13, 15.

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. *See, e.g., Utah Power & Light Co.,* 11 FMSHRC 1926, 1930 (October 1989), *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). In ascertaining the plain meaning of a regulation, the Commission must look to the particular regulatory language at issue, as well as the language and

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<sup>2</sup> Wilson issued a citation for this condition. Tr. 33.

<sup>3</sup> The judge also concluded that New Warwick's samples violated section 70.207(a) because they were not taken with an approved sampling device. 16 FMSHRC at 1087. That ruling is not before the Commission on review.

design of the Secretary's regulations as a whole. See *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996), citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions. See 2 Am. Jur. 2d *Administrative Law* § 239 (1994); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987).

We agree with the judge that the Part 70 sampling scheme as a whole clearly prohibits an operator from taking respiratory dust samples underneath the helmet. 16 FMSHRC at 1088. Section 70.207(a) establishes MSHA's designated occupation sampling program, requiring the operator to take five valid respirable dust samples from the designated occupation in each mechanized mining unit (e.g., longwall) bimonthly. "Valid respirable dust sample" is defined by 30 C.F.R. § 70.2(p) as a sample collected and submitted pursuant to part 70 and not voided by MSHA. The "designated occupation" is the occupation determined to have the greatest respirable dust concentration. 30 C.F.R. § 70.2(f).

The designated occupation sampling program contained in section 70.207(a) is an area sampling program, not a personal sampling program. *American Mining Congress v. Marshall*, 671 F.2d 1251, 1256 (10th Cir. 1982); preamble to the Part 70 regulations, 45 Fed. Reg. 23,990, 23,991, 23,993, 23,998 (1980); Tr. 181, 185-86, 191-92, 195. Area sampling programs are premised on the assumption that if the concentration of dust in the atmosphere of the highest risk occupation is not excessive, then the dust concentration in the atmosphere of other occupations with lower concentrations will be below the prescribed maximum. *American Mining Congress*, 671 F.2d at 1256; Tr. 181, 191. The preamble to Part 70 further indicates that designated occupation samples "measure the mine atmosphere . . . rather than the exposure of any individual miner . . ." 45 Fed. Reg. 23,998. In considering the predecessor provision under the Federal Coal Mine Health and Safety Act of 1969 ("1969 Coal Act"), the Senate Committee indicated its intention that "the average dust level at any job, for any miner, in any active working place during each and every shift, shall be no greater than the standard." S. Rep. No. 411, 91st Cong., 1st Sess. 20 (1969) ("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 146 (1975) ("*1969 Coal Act Legis. Hist.*") (emphasis supplied).

The judge correctly determined that a sample or sampling technique not in compliance with section 70.100(a) would not be valid for purposes of section 70.207(a). 16 FMSHRC at 1088-89. Section 70.100(a) requires the operator to "maintain the average concentration of respirable dust in the mine atmosphere . . . to which each miner in the active workings . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . ." 30 C.F.R. § 70.100(a) (emphasis supplied). The samples taken pursuant to section 70.207(a) are the primary means by which MSHA and the operator monitor compliance with section 70.100(a). Thus, a sample taken underneath a respirator cannot be considered a sample taken "in the mine atmosphere." The locality applicable under section 70.100(a) is the "active workings," which is defined as "any place . . . where miners are normally required to work or travel." 30 C.F.R.

§ 70.2(b). Because the RACAL airstream helmet is an air-purifying respirator and New Warwick's dust sampling device measured only respirable dust inside the helmet face shield after purification, we agree with the judge that New Warwick's device did not measure respirable dust concentrations in the "mine atmosphere." *See* 16 FMSHRC at 1088-89.

In addition, the judge correctly reasoned that the Part 70 preamble further supports the proposition that the helmet may not serve as a means of compliance with section 70.100(a). *See* 16 FMSHRC at 1089. During the course of the Part 70 public hearings, MSHA had been urged to accept the use of the airstream helmet as a means of compliance with the respirable dust standard in certain longwall mining operations. MSHA rejected this proposal, indicating in the preamble that it would "continue to require implementation of engineering controls in coal mines as the means of achieving compliance with the applicable dust standard." 45 Fed. Reg. at 23,993.

The use of the airstream helmet for purposes of respirable dust sampling is not consistent with the language and purposes of section 70.300.<sup>4</sup> *See* 16 FMSHRC at 1089. Section 70.300 prohibits the substitution of respirators, which do not materially alter the dust concentration in the mine atmosphere (Tr. 43), for environmental controls (e.g., ventilation, water sprays, and other mechanisms regulating the concentration of dust in the mine atmosphere) in the active workings. Section 70.300 also requires that respiratory equipment be made available to persons exposed to respirable dust in excess of the levels required to be maintained in Part 70. This requirement indicates that the maximum permissible respirable dust levels under section 70.100(a) are

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<sup>4</sup> Section 70.300 provided:

Respiratory equipment approved by the Secretary and by the Secretary of Health and Human Services shall be made available to all persons whenever exposed to concentrations of respirable dust in excess of the levels required to be maintained under this part 70. Use of respirators shall not be substituted for environmental control measures in the active workings. Each operator shall maintain a supply of respiratory equipment adequate to deal with occurrences of concentrations of respirable dust in the mine atmosphere in excess of the levels required to be maintained under this part 70.

30 C.F.R. § 70.300 (1994). Effective July 10, 1995, section 70.300 was revised. 60 Fed. Reg. 30,401 (1995). Under the revised regulation, the National Institute of Occupational Safety and Health has the sole responsibility for approving respiratory equipment. Otherwise, the substantive provisions of the regulation are essentially the same.

determined independent of respirators.<sup>5</sup> Thus, we reject New Warwick's contention that, because section 70.100(a) limits the concentration of respirable dust "to which each miner in the active workings . . . is exposed," sampling underneath the helmet complies with the regulation. *See* N.W. Br. at 5. The use of the helmet only protects the user, and is not indicative of the respirable dust exposure of other miners in the active workings.

In sum, taking dust samples underneath the helmet is clearly prohibited by section 70.207(a) and its related Part 70 provisions. We therefore affirm the judge's conclusion that New Warwick violated section 70.207(a).

#### B. Unwarrantable Failure.

New Warwick argues that Rodavich did not intentionally violate the cited regulation or the Mine Act. N.W. Br. at 10. New Warwick also contends that Rodavich attempted a good faith challenge of MSHA's interpretation of the regulation and wished to have the issue clarified by receiving a citation. *Id.* at 11, 13. New Warwick further asserts that Rodavich made every attempt that a reasonably prudent person would have made to determine whether he would be violating the law if he took samples under the helmet. *Id.* at 11-13. In response, the Secretary stresses that New Warwick's conduct was deliberate, and that New Warwick was not acting in an objectively reasonable manner in taking the test samples. S. Br. at 20-23.

Unwarrantable failure constitutes aggravated conduct, exceeding ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has required that an operator's efforts in trying to achieve compliance with a standard be reasonable. *Peabody Coal Co.*, 18 FMSHRC 494, 498 (April 1996).

New Warwick contends that it acted in good faith in challenging the regulation, but its actions were not reasonable. Samples collected inside a miner's respirator cannot measure the respirable dust exposure of other miners working on the section. *See* Tr. 182. New Warwick's

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<sup>5</sup> The language of the standard is essentially derived from section 202(h) of the Mine Act, 30 U.S.C. § 842(h), which was carried over without significant change from the 1969 Coal Act. The Coal Act's legislative history indicates that personal respirators should not be used as substitutes for environmental controls because they are "extremely uncomfortable to the workers and impracticable for the type of operations [they] must generally perform." H. Rep. No. 563, 91st Cong., 1st Sess. 15 (1969), *reprinted in 1969 Coal Act Legis. Hist.* at 1045. The Senate Report concluded that the equipment "should be used only in those specialized occasional situations specifically authorized . . ." S. Rep. at 21, *reprinted in 1969 Coal Act Legis. Hist.* at 147.

sampling inside the helmet is also contrary to the clear regulatory requirement. Further, Rodavich knew beforehand that sampling from inside a respirator was a major departure from conventional practice. 16 FMSHRC at 1091. Rodavich further acknowledged he had never heard of MSHA accepting respirable dust samples collected inside a respirator. Tr. 218. In addition, New Warwick's failure to identify the source of the samples is inconsistent with its assertion that its challenge to the regulation was made in good faith. Thus, we cannot conclude that Rodavich acted in an objectively reasonable manner.

We reject New Warwick's argument that it made every reasonable attempt to determine whether it would be violating the law. The judge did not err in concluding that Rodavich should have gone to MSHA's District Office for further consultation. *See* 16 FMSHRC at 1091. MSHA personnel had advised Rodavich to take various steps if New Warwick intended to challenge the regulations, including: (1) submitting a plan to MSHA's District Manager requesting an evaluation of the proposed sampling procedure; (2) requesting permission to sample from inside the respirator for test purposes; and (3) contacting MSHA's District Health Supervisor for further advice. Tr. 42, 78-79, 106-07, 110, 112, 118-19. Rodavich was advised not to sample on his own. Tr. 119. Nothing in the record indicates Rodavich took any of these steps or followed Supervisory Inspector Light's suggestion to read the preamble to Part 70. 16 FMSHRC at 1091. Accordingly, we conclude that the violation resulted from New Warwick's unwarrantable failure.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that New Warwick violated section 70.207(a) and that the violation resulted from unwarrantable failure.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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James C. Riley, Commissioner

Commissioner Marks, concurring:

I concur with the opinion of my colleagues. I write separately to address an additional concern about the operator's sampling of air filtered through personal protective equipment.

New Warwick's sampling method would run directly counter to an important Congressional mandate by permitting miners in active working places to be exposed to dust in excess of the 2.0 mg/m<sup>3</sup> specified in 30 C.F.R. § 70.100(a). Sampling inside a respiratory device worn by a miner is a *personal* sampling program, not an *area* sampling program. *American Mining Congress v. Marshall*, 671 F.2d 1251, 1255 (10th Cir. 1982); Tr. 182. I agree with the Secretary (S. Br. at 16-18, 23-24) that, if operators were permitted to collect samples from underneath the face shield of the respirator worn by the designated high risk miner, miners in less risky occupations who may be wearing a different helmet or no helmet at all would not be protected. *See* Tr. 182-83. Sampling within an individual's respirator measures an atmosphere unique to the individual wearing that respirator, not the general atmosphere at the mine. Tr. 181-82. The record shows that section foremen, spending close to 65 percent of their time near the shear operator, were not wearing the helmet. 16 FMSHRC 1083, 1092 n.6 (May 1994) (ALJ); Tr. 241-42. Indeed, New Warwick did not have a requirement that its miners wear the helmet. Tr. 242. Therefore, the fact that the shear operator may not have been exposed to excessive dust concentrations beneath his airstream helmet provides no assurance that other miners were not exposed to excessive concentrations, Tr. 182, and sampling underneath the helmet would defeat the area-sampling basis of 30 C.F.R. § 70.207(a). *See also American Mining Congress*, 671 F.2d at 1257; 45 Fed. Reg. at 23,998 (advantages of area sampling over personal sampling). New Warwick's sampling inside the airstream helmet was therefore clearly inconsistent with section 70.207(a).

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Marc Lincoln Marks, Commissioner