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SOL (MSHA) V. PACER
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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.

PACER CORPORATION,
RESPONDENT

Civil Penalty Proceeding

Docket No. DENV 79-257-PM
A.C. No. 39-00509-05002

Virginia Mine

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Robert L. Cullum, President and General Manager, and Mike Treloar, Safety Director for Pacer Corporation, for Respondent.

Before: Administrative Law Judge Michels

This matter is before me for hearing and decision on the petition for assessment of civil penalty filed by Petitioner MSHA on January 25, 1979. The Respondent, Pacer Corporation, answered the petition on February 2, 1979, and entered in effect a general denial. A hearing was held in Rapid City, South Dakota, on June 5, 1979, and thereafter the parties filed briefs and proposed findings. (FOOTNOTE 1)

The only significant issue in this proceeding is whether a miner, Nerl Krueger, a rock sorter, was exposed to silica dust in excess of that permitted under the standard 30 CFR 55.5-1(a). (FOOTNOTE 2) MSHA contends that the threshold limit value for this miner under the regulation is 1.105 mg/m³ (milligrams per cubic meter), and that such employee was exposed to a concentration of 1.564 mg/m³ when sampled on April 20, 1978.

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The Respondent has no disagreement with the mathematical calculations made by MSHA's laboratory technician (Tr. 73), but it does in effect argue that there was an error in the sampling procedure because it claims that the 3- to 14-percent variance in the percent of free silica shown by the evidence is entirely unlikely.

The charge here is focused on a condition which existed in a relatively small shed or room with dimensions of approximately 12 by 16 feet. On April 20, 1978, five miners were sampled and four of these worked inside the shed. One was designated den leader. Mr. Krueger was a rock sorter and the others were designated as pickers. The occupation of the fifth man apparently working outside the shed was that of loader and truck operator (R-1).

The record is not completely satisfactory as to the precise location of the four men who worked inside the sorting room, nor does it disclose whether or not they may have exchanged places. All that is known from the record is that the four men were working as sorters or pickers in the shed separating feldspar from the rock (Tr. 29-30). The record further shows that a belt went completely through the room and it would appear to be a reasonable inference that the men worked across from each other on either side of the belt. (FOOTNOTE 3) Of the men in the sorting room none were overexposed except Mr. Krueger (R-1, R-4).

The record gives us some details about the sorting room, but not all aspects of it are fully described. Mr. Treloar stated that it had one door, partial openings at each end through which the conveyor belt passed and windows on either side which apparently were boarded over (Tr. 69). The size of the room was given as approximately 12 by 16 feet. The witnesses disagreed as to the placement of a ventilation fan. Mr. Westphal, the inspector, asserted that Mr. Krueger, the exposed miner, was in the northwest corner of the shed and that there was a fan drawing air up by that location (Tr. 16). Mr. Treloar, on the other hand, testified that the fan was in the center (Tr. 73).(FOOTNOTE 4)

The evidence presented by MSHA shows the weight of the dust obtained in the samples as well as a percentage of the contaminant silica. The TLV or threshold limit value which establishes the maximum exposure is obtained by a formula contained in the document titled,

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"TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973." The initials stand for the "American Conference of Governmental and Industrial Hygienists." The document is incorporated by reference into the regulation.

The sampling processes are fully covered in the record from page 37 forward. The filters are first dessicated and the weight recorded. The inspector takes these and places filters which apparently are in cassettes into dust-pumps. The dust-pumps have previously been calibrated. The pumps are placed on the men for approximately 8 hours. They are checked during the 8-hour period. The measurements are all recorded (P-1, P-3). After use, the cassettes are returned to the laboratory where they are reweighed and a record is made of the dust weight (P-4).

After the weighing of the filters, they are sent via U.S. mail to the Denver Technical Center where they are analyzed for silica. The dust sample form (Tr. P-4) is partly filled out at the regional MSHA office and follows the samples to Denver. The laboratory in Denver fills in the amount of free silica detected by the laboratory tests. In the case of Mr. Krueger, the dust weight was found to be 1.177 milligrams and the free silica detected was 90 micrograms.

Upon obtaining the results from the samples, the laboratory technician at MSHA's regional office calculates the amount of the TLV or threshold limit value. In Mr. Krueger's case, it was 1.105. The percentage of quartz or free silica was found to be 7.047 percent. The technician first finds the TWA or time weighted average which in the case of Mr. Krueger was 1.564 milligrams per cubic meter. The amount of the TLV is determined pursuant to the formula found in the "TLV Book" (P-6). In Mr. Krueger's case, as noted, he was exposed to 1.564 milligrams per cubic meter, whereas the threshold limit value was 1.105. He was, in other words, .459 milligrams over the threshold limit according to the test, which is a significant amount (Tr. 61).

The evidence produced by MSHA shows that of the five miners sampled, only one, Mr. Krueger, was overexposed on the basis of the threshold limit value found. Respondent has made no showing that an error was made at any particular stage of the sampling procedure. It claims only in a general way that mistakes are often made. Mr. Treloar suggested the possibility that a pump could be turned upside down, but there was no evidence to suggest that this happened (Tr. 65). In its brief, Respondent claims that only a minute sample is taken, but there has been no showing that such a small sample would necessarily be invalid.

Nevertheless, Respondent takes the position that a variance of from 3-to 14-percent free silica is virtually impossible.

The net result is that MSHA has presented evidence showing that in a relatively confined space, one miner out of four was overexposed to silica dust. The logic of this result is troubling. It is possible perhaps that air currents for some reason unknown carried more dust toward and into the filtering pump of the one miner, Mr. Krueger, than into the pumps of the others. That seemed to be MSHA's explanation for the variation since it presented evidence about the placement of the fan. It is true that the sampling shows that Mr. Krueger received more dust than all the others (Exh. R-1).

It is possible perhaps to accept the fact that one miner received more dust than three others even though in a restricted space, because of the vagrancy of air currents. But, it is harder to rationalize on this record the further fact of the wide variances in silica received of the five sampled. Only three were relatively close in terms of the percent of contaminant received. The percentages for these three were 7.047, 8.974 and 7.246. The other two miners received widely varying amounts of silica, of 3.825 and 14.572 percent. If the silica is fairly constant in the rock feldspar being processed as Mr. Treloar testified, it is reasonable to question why the amount should vary so widely in the dust in the atmosphere. Possibly there is a good explanation for this but the record does not reveal it. Mr. Benson, MSHA's laboratory technician, testified that the results were not so far out of line as to suspect them of being invalid and that "[t]hese are pretty much in line with what we've been running at Pacer" (Tr. 54). Since Mr. Benson was not specific, it is unknown whether he was talking about the free silica content, the sample dust weight, or both. In another context, he testified that variances from 3.8 to 14.7 percent of silica did not cause him to question the analysis because he never knew where the men were working (Tr. 60). He was not asked, however, for his opinion based on the fact that four of the men were all working in the same 12 by 16 room, and he did not testify that such variances may be expected in these circumstances.

The inspector at the time of the inspection had not formed an opinion as to why only one employee was overexposed "because I didn't realize that I would have any over, or if there was, I could have supposed that all of them would have been over" (Tr. 16). [Emphasis supplied.] He later went on to express his opinion as formed after the results were received from Denver and this was that a fan drew the air right up by the affected miner. This opinion is at least questionable in light of other evidence about the fan's location, but in any event, his opinion would explain only the increase in sample weight it does not explain the percentage variation of free silica among the five miners sampled.

No witness directly addressed the question of the variance in the free silica, except Respondent's witness, Mr. Treloar, Pacer's safety director. He testified that he runs silica analyses in Respondent's

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chemical laboratory in the ore mine, and that one would not expect to find more than one-hundredth of a percent of silica (Tr. 64). On the other hand, he did not run a test for free silica which apparently requires more sophisticated testing equipment. He claimed, however, that he estimated the free silica to be high (Tr. 70). In expressing his opinion that it would not be possible to have the variances shown on Exhibit P-4, Mr. Treloar stated:

Okay. My analysis of feldspar chemical. I base my opinion on this, on my chemical analysis of feldspar. It just does not vary that much. There is, what, almost an eight percent variance there, and even from different ore bodies its almost impossible. I've never run into it even in different ore bodies throughout the Hills, that it will have that great of variance.

(Tr. 71). He also testified that there should not be a difference in concentrations between the material itself and the dust that is airborne (Tr. 73).

On the state of this record, I cannot conclude that MSHA has met its burden of proving a violation by the preponderance of the evidence. The fact of the wide variations in the percent of free silica in the samples has not been explained. On the basis of the limited evidence on the subject, it is at least as likely that the sample results demonstrate the inaccuracy of the methods as it is that they show that one miner was overexposed. When the evidence contains such an uncertainty, it is my conclusion that MSHA has not sustained its burden. On this record, I am not questioning MSHA's sampling procedures in general. All that this decision resolves is that the evidence in this proceeding is inadequate to support a finding that one of the five sampled miners was overexposed. Accordingly,

It is ORDERED that Citation No. 328213, issued May 15, 1978, be VACATED and this proceeding be DISMISSED.

Franklin P. Michels
Administrative Law Judge

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~FOOTNOTE_ONE

1 The proposed findings not adopted or specifically rejected are hereby rejected, as immaterial or not supported by fact.

~FOOTNOTE_TWO

2 The mandatory standard 55.5-1(a) reads in pertinent part as follows:

"(a) Except as provided in paragraph (b), 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."

~FOOTNOTE_THREE

3 In its posthearing brief, Respondent contends that the men were only a few feet from one another and were working at the same task only an arm's length apart.

~FOOTNOTE_FOUR

4 It is difficult to say who was right with respect to the fan. In its posthearing brief, in a statement which is not evidence, Respondent asserts that there are in fact two exhaust fans in the shed, one at each end of the building over the belt and shrouded to the belt.