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MSHA V. TAMMSCO & HAROLD SCHMARJE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Washington, D. C. 20006
December 4, 1985
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. LAKE 81-190-M
LAKE 82-65-M
TAMMSCO, INC. & HAROLD
SCHMARJE

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this consolidated civil penalty proceeding arising under sections 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982), we are asked to decide whether Tammsco, Inc. violated a mandatory health standard, 30 C.F.R. • 57.5-5 (1984), and whether Harold Schmarje, manager of the Tammsco Company Mill, knowingly authorized the violation.1/

The Secretary of Labor challenges the

1/ 30 C.F.R. • 57.5-5 (1984) was a mandatory health standard for metal and nonmetal underground mines and surface operations of such mines. The standard limited the exposure of miners to airborne contaminants. The standard stated in part:

□ 57.5-5 Mandatory. Control of employee exposure to harmful contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. ...

30 C.F.R. • 57.5-5 was an exception to 30 C.F.R. • 57.5-1 (1984). 30 C.F.R. • 57.5-1 stated in part:

• 57.5-1 Mandatory. Except as permitted by • 57.5-5:
(a) ... [T]he exposure to airborne contaminants shall not

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decision of a Commission administrative law judge concluding that the Secretary had not proved the violation and dismissing the proceedings against both Tammsco, Inc. and plant manager Schmarje. 5 FMSHRC 1063 (June 1983) (ALJ). For the reasons that follow, we affirm the judge's decision.

Tammsco, Inc. is an Illinois corporation engaged in the processing and sale of various grades of silica products used primarily in the manufacture of paints. The Company mill facility is a building of about 100,000 sq. ft. In the mill, silica-bearing ore extracted from nearby underground mines is crushed, dried and heated, then fine ground by a series of pebble mills. The finely ground material is air-swept into classifiers where it is separated into various product grades. The coarsest product is called "ruff-buff". From the crusher section, the various grades of crushed silica are conveyed to storage bins. From there, the silica is conveyed to another section of the building and is placed in cone-shaped hoppers. The hoppers are located above and attached to three bagging machines which package the silica in 50-pound bags. The bagging machines are designed to be equipped with a hood or shroud device connected to a central dust collection system. The shroud acts as a vacuum to collect fugitive dust, protecting the worker, and preserving the product. Packed bags are placed on pallets and transported by forklift to the warehouse section of the mill to await sale and shipment. Tr. 325; 5 FMSHRC at 1110. On May 7, 1981, Federal Mine Safety and Health Administration ("MSHA") inspector George LaLumondiere, accompanied by Max Slade of MSHA's Metal and Nonmetal Health Division, MSHA supervisor Raymond Roessler, and plant manager Harold Schmarje, conducted an inspection of the mill. There is no evidence in the record that employees were working in the mill or that any machinery was in operation during the inspection. MSHA performed no testing or sampling of exposure levels to airborne contaminants during the inspection. On the warehouse floor, settled dust showed tracks from the forklift, and the floor and equipment through out the mill were covered with dust. Air leaks which emitted dust into the mill were observed. Dust in the air was visible.

Footnote 1 end.

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.

... Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

30 C.F.R. • 57.5-1 and 57.5-5 were recodified without change in 1985 as 30 C.F.R. • 57.5001 and 57.5005. 50 Fed. Reg. 4048 (January 29, 1985).

~2008 Mr. Slade testified that the dust he observed in the plant was "general dust from the entire plant, from all three bagging machines and from the various leaks around the plant." Tr. 326. Slade also confirmed that he had no way of identifying with any certainty the specific source of the dust he observed on the floor. At the classifiers and at the milling machines, dust was everywhere. At the ruff-buff bagging machine, the shroud was disconnected from the machine and lying on the floor several feet away. Both the floor around the machine and the shroud were covered with heavy accumulations of dust. Based on the thickness of silica dust covering the shroud, Slade estimated the shroud had been on the floor for several weeks.

A pallet partially filled with bags containing ruff-buff was adjacent to the ruff-buff bagger. Also, seven pallets stacked with filled bags were located nearby. From the packaging dates stamped on the bags, Inspector LaLumondiere estimated that since the installation of the ruff-buff bagger in January 1981, the machine had been in operation at least five times through May 5, 1981, although he had never personally seen it in operation. Because of its infrequent use, MSHA had never tested the ruff-buff bagger for compliance or sampled the levels of employee exposure to silica dust generated by the bagger. Tr. 232-241. An MSHA analysis of a ruff-buff sample taken from an opened bag at the mill on August 21, 1981, three and one-half months after the citation was issued, showed that 94% of the tested ruff-buff was not of sufficiently small size to be considered respirable. However, an employee of the National Institute of Occupational Safety and Health ("NIOSH") testifying for the Secretary stated that of the remaining 6%, 98% would be respirable. Tr. 124-25, 127-28.

Mr. Schmarje and several Tammsco witnesses testified that the shroud had been on the machine until several days prior to the May 7 inspection, when it was damaged by a forklift and removed. Schmarje specifically denied admitting to the inspector on May 7 that the bagging machine had been used previously without the shroud attached. Tr. 410-13, 451.

After inspecting the ruff-buff machine and the pallets, the inspector issued a citation under section 104(d)(1) of the Act, 30 U.S.C. • 814(d)(1), alleging a violation of 30 C.F.R. • 57.5-5. The citation described the violation as follows:

The Ruff Buff bagging machine was not hooked into the dust collection system of the mill. The dust control plan submitted on 4-14-80 states that all bag machines will have dust collectors as engineering controls to control silica dust. This bagger is in use and a pallet of Ruff Buff was partially loaded. This is an unwarrantable failure.^{2/}

^{2/} The statement in the citation that, "[t]his bagger is in use" was explained by MSHA witnesses to mean not that the machine was being used on May 7, 1981, but that it must have been used at times between January 1981 and May 5, 1981 as evidenced by the dates stamped on filled bags of ruff-buff. Tr. 206-09.

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Much of the voluminous record developed at the hearing concerns the evolution of the "dust control plan" referred to in the citation. Following an inspection of the mill in July 1979 by NIOSH health experts and the issuance of several section 104(b) closure orders based upon sample results showing silica dust in excess of the applicable threshold limit value ("TLV"), MSHA furnished Tammsco with a copy of a "dust control procedure plan" used by a competitor silica mill to maintain permissible levels of air quality. MSHA suggested that the Tammsco mill could reopen if a similar plan were put into effect. On April 14, 1980, Tammsco submitted to MSHA the "dust control plan" referred to in the citation, and the closure orders were terminated.

In his decision vacating the citation, the judge concluded: Although the citation issued in these proceedings implies a violation of "the dust control plan submitted on April 14, 1980", I fail to understand how MSHA believes it can establish a violation of such a plan when there is no mandatory standard requiring an operator to submit or adopt any dust control plan.

5 FMSHRC at 1139.

The judge also held that "the application of section 57.5-5 is specifically conditioned on a finding that exposure to airborne contaminants is in excess of the permissible limit defined in section 57.5-1," and that such finding 'has consistently been determined by testing and sampling to establish that employee exposure to such dust exceeded the recognized TLV.'" 5 FMSHRC at 1124, 1132; (emphasis deleted). The judge noted that MSHA had not conducted timely testing or sampling to establish employee exposure levels prior to issuing the citation. The judge concluded "MSHA has failed to establish that the levels of employee exposure to any harmful silica dust generated by the bagging of the ruff-buff product without the dust shroud attached to the cited bagging machine exceeded the acceptable threshold limit value mandated by section 57.5-1." 5 FMSHRC at 1132-33.

As to the section 110(c) proceeding brought against plant manager Schmarje, the judge found that MSHA had proved that Schmarje "knew or had reason to know" that the bagger had been operated without the shroud on May 5, 1981. 3/ However, the judge held, in effect, that because a

3/ Section 110(c) of the Mine Act, 30 U.S.C. • 820(c)(1982) states: Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

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violation of the cited standard was not established, there was no basis to assess a civil penalty against Schmarje. 5 FMSHRC at 1139, We agree with the judge that in order to establish a violation of section 57.5-5, the Secretary must first prove a violation of section 57.5-1. It is clear from the language of the Secretary's standard that section 57.5-5 establishes an exception to the general mandate of section 57.5-1 which requires that airborne contaminants not exceed their TLV, and that the application of section 57.5-5 is conditioned specifically on a determination that miners are exposed to excessive levels of airborne contaminants in violation of section 57.5-1.4/ These exposure levels are to be determined by actual sampling, not by inference.5/ As the judge noted, however, the citation at issue alleges a failure to comply with a provision of the "dust control plan", and does not allege over-exposure to airborne contaminants. We agree with the judge that the Part 57 air quality standards do not provide for the adoption and approval of a dust control plan which can be enforced as a mandatory health standard. Cf. Carbon County Coal Co., 7 FMSHRC 1367, 1370 (September 1985) (discussing the approval and adoption of dust control plans required by 30 U.S.C. • 863(o)). For this reason, and because no monitoring, testing or sampling of employees or the atmosphere was performed by MSHA during the inspection, the judge correctly dismissed the proceedings.

In light of our decision it is unnecessary to reach the technical questions concerning proper sampling procedures and methods of material analysis addressed at length in the Secretary's brief.6/

Nor do we need to reach the Secretary's contention that the judge erred in considering the ruff-buff and the ruff-buff bagger in isolation from all

4/ In Climax Molybdenum Company, the Secretary conceded that there could be no violation of section 57.5-5 without first proving a violation of section 57.5-1, and we affirmed a Commission judge's vacation of five alleged violations of 30 C.F.R. • 57.5-5 based on the Secretary's representation that he could not prove that excess concentrations occurred due to "problems" with his sampling procedures. 2 FMSHRC 2748, 2750-51 (October 1980), aff'd 703 F.2d 447 (10th Cir. 1983).

5/ This conclusion is consistent with MSHA's own procedures as stated in the Metal and Nonmetal Mine Safety and Health Inspection and Investigation Manual (1981). 65-AA1 and 66-D-2-3. This manual is an official MSHA publication. It contains guidelines to aid MSHA inspectors in citing violations of the mandatory safety and health standards for metal and nonmetal mines.

6/ There is pending a motion by the Secretary to strike the first full paragraph on page 4 of Tammsco's brief filed February 1, 1984, which contains comments on the Secretary's brief by an authority who had not testified at the hearing. Citing section 113(d)(2)(c) of the Mine Act, 30 U.S.C. • 823(d)(2)(c)(1982), the Secretary argues that the Commission's consideration on review is limited to evidence in the record before the administrative law judge. Tammsco responded to the motion. Upon consideration, the Secretary's motion is granted.

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other sources of airborne contaminants throughout the mill. While these issues and considerations might be relevant in other cases, they represent issues unrelated to the controlling issue here. The Secretary also urges us to read into section 57.5-1 and section 57.5-5 a premise that once excessive exposure levels have been established through monitoring, and engineering controls have been implemented, proof of a subsequent failure to maintain those controls, without proof of overexposure through further monitoring, constitutes a violation of the cited standards. This, however, is not what the standards provide. If the Secretary desires to cite an operator for failure to maintain engineering controls without first needing to resort to proving overexposure to airborne contaminants through accepted sampling procedures, the Secretary must amend his standards. Accordingly, we affirm the decision of the judge vacating the section 104(d)(1) citation and dismissing these proceedings. 7/ 7/ Commissioner Doyle assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases but such participation is discretionary

and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Doyle's assumption of office, and participation by Commissioner Doyle would therefore not affect the outcome. In the interest of efficient decision making, Commissioner Doyle elects not to participate in this case.

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