

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

September 6, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-996
Petitioner	:	A. C. No. 15-07201-03644
v.	:	
	:	Docket No. KENT 94-997
HARLAN CUMBERLAND COAL COMPANY,	:	A. C. No. 15-07201-03645
Respondent	:	
	:	Docket No. KENT 94-998
	:	A. C. No. 15-07201-03646
	:	
	:	Docket No. KENT 94-1024
	:	A. C. No. 15-07201-03647
	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 94-1307
	:	A. C. No. 15-08415-03624
	:	
	:	D-1 Mine

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
H. Kent Hendrickson, Esq., Rice and Hendrickson,
Harlan, Kentucky, for Respondent.

Before: Judge Maurer

In these consolidated cases, the Secretary of Labor (Secretary) has filed petitions for assessment of civil penalties, alleging violations by the Harlan Cumberland Coal Company (Harlan Cumberland) of various and sundry mandatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard before

me on May 23, 1995, in London, Kentucky. The parties filed posthearing briefs and proposed findings of fact and conclusions of law on August 1, 1995, which I have duly considered in writing

this decision.

During the course of the trial of these cases, and even afterwards, the parties discussed and negotiated settlements concerning some of the citations contained in these five dockets.

I will deal with and dispose of these settled citations in this decision as well as decide the remaining issues concerning the still contested citations, in order, by docket number.

In addition to the arguments presented on the record in support of the proposed settlements, the parties also presented information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlements, and pursuant to Commission Rule 31, 29 C.F.R. ' 2700.31, I rendered bench decisions approving the proposed settlements. Upon further review of the entire record, I conclude and find that the settlement dispositions which have been previously approved are reasonable and in the public interest, and my bench decisions are herein reaffirmed.

Docket No. KENT 94-996

The parties have agreed to settle 12 of the 14 citations included in this docket as follows:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487440	03/22/94	75.400	\$ 204	\$ 153
4242386	04/04/94	75.362(b)	189	140
4242389	04/04/94	75.503	189	140
4242392	04/04/94	75.503	189	140
4242393	04/04/94	75.1100-2(f)	189	140
4242396	04/04/94	75.330(b)(2)	189	140
4242397	04/04/94	75.330(b)(2)	189	140
4242398	04/04/94	75.1100-2(i)	235	176
4242399	04/04/94	75.400	189	140
4242400	04/04/94	75.1107-16(c)	189	140
4487521	04/04/94	75.601-1	189	140
4487522	04/04/94	75.904	189	140

Two substantially identical citations remain to be decided in this docket which were tried before me and were subsequently briefed by the parties.

Citation No. 9885355, issued on December 14, 1993, by MSHA Inspector Calvin E. Riddle, alleges a violation of the standard found at 30 C.F.R. ' 70.208(a) and alleges that respondent failed to "take a valid respirable dust sample during the Oct.-Nov. 1993 bimonthly sampling cycle for the Designated Area Sampling Point No. 904-0. . . ." Citation No. 9885356 alleges the same with

regard to Designated Area Sampling Point No. 904-1.

Inspector Riddle testified that on December 9, 1993, his office received two Advisories of Noncompliance, Failure to Submit notices as generated by the Respirable Dust Processing Laboratory of MSHA's Pittsburgh Safety and Health Technology Center. The advisories indicated that MSHA had not received valid respirable dust samples during the October-November 1993 bimonthly sampling cycle from Harlan Cumberland for Designated Areas 904-0 and 904-1 of the C-2 Mine. After reviewing these notices, Inspector Riddle issued Citation Nos. 9885355 and 9885356, pursuant to section 104(a) of the Mine Act, for two violation of 30 C.F.R. ' 70.208(a).

Basically, respondent's defense is that the required dust samples were in fact collected and subsequently placed in the United States Mail, properly addressed to MSHA's Pittsburgh laboratory. Respondent is at a loss to explain why they apparently never reached their destination.

Mr. Eddie Sargent, respondent's Safety Director, testified regarding respondent's dust sampling procedures and sponsored two dust cassette sampling cards, signed by himself, indicating that the appropriate samples for the two designated areas were timely collected during the sampling period.

Mr. Sargent testified that he personally transported the dust cassettes to respondent's office at Gray's Knob, Kentucky. Once there, he logs the dust cassette card number from each sample into the book for that particular mine, and then places the cassette into the box designated for outgoing mail.

Respondent's general manager, Mr. Clyde Bennett, takes over from there, as a general rule. Normally (95 percent of the time) he takes the dust samples from the mail box at the Gray's Knob Mine office to the post office, 1 mile away.

The crux of the matter here, of course, is that no one can certify that these particular cassettes were mailed, or not mailed, for that matter, only that the scheme related by Sargent/Bennett is the general practice of the respondent. It was not their practice to mail these cassettes certified mail or to keep any formal record of delivery to the post office.

The cited mandatory standard requires the submission of a valid respirable dust sample from each designated area during each bimonthly period. The Secretary maintains that a dust sample is not considered valid unless and until the MSHA laboratory at Pittsburgh determines that the weight of the sample complies with the appropriate dust standard. It follows then that if they do not receive a sampling cassette, for whatever reason, they are unable to make the necessary determination.

I agree with the Secretary of Labor that the operator's act of placing a bimonthly dust sample in the mail does not satisfy the regulatory requirement to provide a valid dust sample to MSHA. It must also be received and it must also be in compliance with the appropriate standard. As a practical matter, the dust sampling program would be unworkable if it were otherwise.

Accordingly, I find the violations alleged in Citation Nos. 9885355 and 9885356 to be proven as charged. The citations will be affirmed herein.

Turning now to the issue of negligence, the record evidence establishes that the respondent collected the requisite dust samples for the 904-0 and 904-1 Designated Areas at the C-2 Mine.

However, respondent was unable to establish that the cassettes were actually mailed to MSHA, or that the samples were valid, i.e., complied with the applicable standard when weighed. The record is clear that MSHA did not receive the subject dust cassettes, and that, without more, is enough for me to find ordinary or "moderate" negligence on the part of the respondent in both of these violations.

After consideration of all the statutory criteria in section 110(i) of the Mine Act, most particularly the respondent's propensity to repeatedly violate this same section of the standards, I find a civil penalty of \$1000 per violation to be appropriate, and it will be assessed herein.

Docket No. KENT 94-997

The parties settled this case on the following terms:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487531	04/06/94	75.400	\$ 189	\$ 140
4487532	04/06/94	75.400	189	140
4487540	04/06/94	75.370(a)(1)	189	140
4487806	04/12/94	75.809	189	140
4487807	04/12/94	75.809	189	140
4487808	04/12/94	75.807	189	140
4487809	04/12/94	75.400	189	140
4487810	04/12/94	75.400	189	140
4487811	04/12/94	75.1100(2)(e)	189	140
4487813	04/13/94	75.512	189	140
4487641	04/18/94	75.512	189	140
4487642	04/18/94	75.400	189	140
4487814	04/18/94	75.370(a)(1)	204	153
4487815	04/18/94	75.400	189	140
4487816	04/18/94	75.400	<u>189</u>	<u>140</u>
TOTAL			\$2850	\$2113

Citation No. KENT 94-998

The parties settled this case on the following terms:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487817	04/18/94	75.370(a)(1)	\$ 204	\$ 153
4487818	04/18/94	75.503	189	140
4487819	04/18/94	75.400	189	140
4487820	04/18/94	75.1702(1)	189	140
4487646	04/20/94	75.1710	189	140
4487649	04/20/94	75.326	204	153
4487652	04/25/94	75.400	<u>189</u>	<u>140</u>
TOTAL			\$ 1353	\$ 1006

Docket No. KENT 94-1024

At the hearing, the parties agreed to settle one of the four citations included in this docket as follows:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487643	04/18/94	75.202(a)	\$ 189	\$ 140

Also, at the hearing, the Secretary vacated the three section 104(b) orders associated with the other three section 104(a) citations included in this docket which were tried before me. Therefore, Order Nos. 3165086, 3165087, and 3165088 will be vacated herein. Finally, subsequent to the hearing, the Secretary decided to vacate section 104(a) Citation Nos. 9885353 and 9885354 in view of the uncontradicted testimony of the respondent's witnesses that the No. 003 Section of the C-2 Mine produced coal for no more than 6 hours during a single shift of the relevant bimonthly sampling cycle.

That leaves just a single citation left to be decided in this docket. Citation No. 9885368, issued on January 14, 1994, by Inspector Riddle, alleges a violation of the standard found at 30 C.F.R. ' 70.207(a) and alleges that respondent failed to "take

5 valid respirable dust samples during the Nov.-Dec. bimonthly sampling cycle on Mechanized Mining Unit (M.M.U.) I.D. No. 004-0 for the designated occupation code 036. . . ." The citation notes that "3 valid respirable dust samples were received and credited to this bimonthly sampling cycle."

Therefore, this citation is about the two missing cassettes. Once again, as noted earlier in this decision, the respondent defended by producing some evidence that it collected the subject

dust samples and placed them in the U.S. Mail, postage prepaid, addressed to the MSHA laboratory in Pittsburgh, Pennsylvania. And once again, they were not received for whatever reason, at the laboratory, and their whereabouts remain unknown. No one has offered any explanation for their seeming disappearance.

I can only reiterate here the same rationale I previously stated in affirming the two similar citations in Docket No. KENT 94-996. Respondent has provided no direct evidence to establish that the dust cassettes were ever actually mailed. The person who generally takes the company's mail to the post office has no recollection of placing these particular cassettes in the mailstream, and respondent maintains no mailing records. Nor does it use certified mail to mail in its sampling cassettes, as others do.

In any case, the sample must be received by the laboratory in order to determine its validity. The regulation requires not just a sample, but a valid dust sample to comply with 30 C.F.R. ' 70.207. And a dust sample is not considered valid until the MSHA laboratory determines that the weight of the sample complies with the appropriate dust standard.

Therefore, inasmuch as the subject dust sampling cassettes were not received by the MSHA laboratory, I find the respondent violated the cited standard, and I will affirm Citation No. 9885368 herein.

I find this to be a "serious" violation and due to the respondent's "moderate" negligence. Accordingly, after consideration of all the statutory criteria in section 110(i) of

the Mine Act, including respondent's history of violations, I find a civil penalty of \$1000 to be appropriate to the violation, and it will likewise be assessed herein.

Citation No. KENT 94-1307

The parties settled this case on the following terms:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
3165096	05/19/94	75.370(a)	\$ 235	\$ 188
3165097	05/19/94	75.370(a)	235	188
4469844	06/21/94	75.400	168	140
4469846	06/21/94	75.400	178	140
4469847	06/21/94	75.523(3)(b)(4)	178	140
4469849	06/21/94	75.701	<u>168</u>	<u>140</u>
TOTAL			\$ 1162	\$ 936

According, I enter the following:

ORDER

Docket No. KENT 94-996

1. Citation Nos. 4487440, 4242386, 4242389, 4242392, 4242393, 4242396, 4242397, 4242398, 4242399, 4242400, 4487521, 4487522, 9885355* and 9885356* **ARE AFFIRMED.**

* modified negligence finding from "high" to "moderate."

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$3729 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-997

1. Citation Nos. 4487531, 4487532, 4487540, 4487806, 4487807, 4487808, 4487809, 4487810, 4487811, 4487813, 4487641, 4487642, 4487814, 4487815, and 4487816 **ARE AFFIRMED.**

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$2113 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-998

1. Citation Nos. 4487817, 4487818, 4487819, 4487820, 4487646, 4487649, and 4487652 **ARE AFFIRMED**.

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$1006 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-1024

1. Citation Nos. 4487643 and 9885368* **ARE AFFIRMED**.

* modified negligence finding from "high" to "moderate."

2. Citation Nos. 9885353 and 9885354 and Order Nos. 3165086, 3165087, and 3165088 **ARE VACATED**.

3. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$1140 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-1307

1. Citation Nos. 3165096, 3165097, 4469844, 4469846, 4469847, and 4469849 **ARE AFFIRMED**.

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$936 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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