

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

SCOTT HOWARD,

Petitioner,

v.

Case No. _____
Electronically Filed

ELAINE CHAO,
Secretary, United States
Department of Labor,

Respondent.

PETITION FOR WRIT OF MANDAMUS

This is an action seeking a writ of mandamus. The Mine Safety and Health Administration (MSHA) of the United States Department of Labor has failed to promulgate properly-protective standards governing coal miners' exposure to respirable dust. The Petitioner requests that this Court compel MSHA to promulgate a standard that prevents black lung disease as contemplated by the Mine Act of 1977. The Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1361.

Parties

1. Throughout his working life, the Petitioner has been a coal miner in eastern Kentucky. He presently works as a coal miner in Letcher County, Kentucky, in the Court's Pikeville Division. He also resides in Letcher County, Kentucky.
2. The Respondent, Elaine Chao, oversees the Mine Safety and Health Administration (MSHA) of the United States Department of Labor. MSHA is a federal regulatory agency with the mission to administer the provisions of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801, *et seq.*, as amended by the Mine Improvement and

New Emergency Response Act of 2006 (MINER Act), and to enforce compliance with mandatory safety and health standards as a means to eliminate fatal accidents; to reduce the frequency and severity of nonfatal accidents; to minimize health hazards; and to promote improved safety and health conditions in the Nation's mines.

Facts

3. Black lung disease is a respiratory disease. It is incurable and it can cause disability and death. Black lung is caused by the inhalation of coal mine dust, including silica dust, and it includes the diseases of coal workers' pneumoconiosis (CWP), silicosis, anthracosis, and progressive massive fibrosis (PMF). Coal mine dust inhalation also can cause chronic obstructive pulmonary disease.
4. In 1969, when Congress passed the Coal Act, and when Congress passed the more comprehensive 1977 Mine Act, which incorporated much of the Coal Act, Congress directed that the Respondent, through MSHA, promulgate regulations to prevent new incidences of CWP, PMF, and other such workplace respiratory illnesses and prevent the worsening of existing respiratory illnesses. 30 U.S.C. § 842(d).
5. However, coal miners continue to develop new cases of CWP, PMF, and similar ailments, and continue to do so at sharply-increased rates. Centers for Disease Control and Prevention, "Advanced Cases of Coal Workers' Pneumoconiosis – Two Counties, Virginia, 2006," Morbidity and Mortality Weekly Report (August 25, 2006). Attachment A.
6. In fact, recent x-ray surveillance indicates a doubling of CWP in the past five (5) years. National Institute for Occupational Safety and Health, "The NIOSH Coal Workers'

Health Surveillance Program (CWHSP): Recent Findings” (September 2007).
Attachment B.

7. In the Mine Act, Congress set a standard for respirable dust concentration that MSHA must require operators to meet:

Effective three years after the date of enactment of this Act [enacted Dec. 30, 1969], 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 of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

30 U.S.C. § 842(b)(2) (emphasis added).

8. However, Congress further directed that MSHA is to revisit this standard of 2.0 mg/m³ to assure elimination of respiratory illness wrought by working conditions in mines:

Promulgation of new standards; procedures. Beginning six months after the operative date of this title and from time to time thereafter, the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] shall establish, in accordance with the provisions of section 101 of this Act [30 USCS § 811], a schedule reducing the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed below the levels established in this section to a level of personal exposure which will prevent new incidences of respiratory disease and the further development of such disease in any person. Such schedule shall specify the minimum time necessary to achieve such levels taking into consideration present and future advancements in technology to reach these levels.

30 U.S.C. § 842(d) (emphasis added).

9. MSHA does not enforce a separate standard for respirable silica when quartz is present in respirable coal mine dust.
10. Rather, MSHA uses a formula to adjust the 2.0 mg/m³ respirable silica standard downward when the respirable coal mine dust in the mine atmosphere contains more than five (5) percent quartz.

11. As to the 2.0 mg/m³ respirable dust standard, the National Institute for Occupational Safety and Health (NIOSH), which is part of the Centers for Disease Control and Prevention, is the federal agency responsible for conducting research and making recommendations for the prevention of work-related injury and illness.
12. For at least 12 years, NIOSH has stated that respirable dust standard of 1.0 mg/m³ would be the appropriately-protective exposure level. NIOSH, “Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust,” Cincinnati, OH: U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, National Institute for Occupational Safety and Health, DHSS (NIOSH) Publication No. 95-106 (September 1995). Attachment C.
13. As to respirable silica, NIOSH similarly has stated that a 50 percent reduction in the exposure limit, i.e. an exposure limit of 50 micrograms per cubic meter, would be the appropriately-protective exposure level. *Id.*
14. Moreover, the Respondent convened an expert scientific committee – comprised of four neutral representatives, two industry representatives, and two labor representatives – that recognized NIOSH’s findings and ultimately recommended lowering the respirable dust exposure limits to an unspecified degree. Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers, “Report of the Secretary of Labor’s Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers,” (October 1996). Attachment D.
15. However, the Respondent retains the respirable dust standard of 2.0 mg/m³. 30 C.F.R. § 70.100(a) (underground mines), 30 C.F.R. § 71.000 (surface mines, surface areas of underground mines).

16. The Respondent also retains the formula for respirable silica. 30 C.F.R. § 70.101 (underground mines), 30 C.F.R. § 71.101 (surface mines, surface areas of underground mines).
17. The Respondent previously declared an intention to undertake rulemaking to lower the permissible exposure limit for respirable coal mine dust, given that “[r]espirable coal mine dust is one of the most serious occupational hazards in the mining industry. Long-term exposure to excessive levels of respirable coal mine dust can cause black lung and silicosis, which are both potentially disabling and can cause death.” 64 Fed. Reg. 21486, 21519 (April 26, 1999).
18. However, inexplicably, the Respondent then abandoned those efforts. 67 Fed. Reg. 74749, 74771 (Dec. 9, 2002).
19. As a result, the Petitioner continues to work regularly in an environment that the Respondent has failed to properly regulate for respirable dust, contrary to the Respondent’s duties under the Mine Act.

Grounds

20. The Respondent is an officer of the United States who owes the Petitioner performance of a plain legal duty to promulgate a respirable dust regulation that will eliminate respiratory illnesses caused by work in coal mines.
21. The Petitioner has a clear legal right to seek relief in mandamus.
22. Mandamus is the only adequate remedy available to the Petitioner for the relief sought.

WHEREFORE, the Petitioner asks the Court to:

- A. Issue a Writ of Mandamus directing the Respondent to promulgate an emergency temporary mandatory standard for respirable dust;
- B. In the Writ of Mandamus, direct the Respondent to promulgate both an emergency temporary mandatory standard and final standard for respirable dust standard that requires each operator to continuously maintain the average concentration of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed at or below 1.0 mg/m³, and which also requires each operator to continuously maintain the average concentration of respirable silica in the mine atmosphere at or below 50 micrograms per cubic meter.
- C. Award Petitioner's attorney fees and costs.
- D. Award all other relief to which the Petitioner may appear to be entitled.

SCOTT HOWARD,

By Counsel

/s/ Stephen A. Sanders

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