

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ELAINE L. CHAO,	:	No. 3:02cv202
Secretary of Labor, United States	:	
Department of Labor,	:	
Plaintiff	:	(Judge Munley)
	:	
v.	:	
	:	
RANDY ROTHERMEL, JR. and	:	
CINDY ROTHERMEL, individually	:	
and d/b/a D & F DEEP MINE COAL	:	
COMPANY,	:	
Defendants	:	

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MEMORANDUM

Before the court for disposition is plaintiff’s complaint for a permanent injunction. The plaintiff is Elaine L. Chao, Secretary of Labor, United States Department of Labor (the “Secretary”). The defendants are Randy Rothermel, Jr. and Cindy Rothermel, (the “Rothermels”), owners and operators of the D&F Deep Mine Coal Company, Buck Drift Mine, in or near Minersville, Pennsylvania. This court held a trial on the merits on the Secretary’s complaint on March 13, 2002, and at the direction of the court the parties submitted post-trial briefs. For the reasons that follow, we will grant the Secretary’s request for a permanent injunction.

Background

The events leading to the Secretary’s request for a permanent injunction are not, for

the most part, in dispute. On November 19-21, 2001, the Rothermels prevented representatives of the Secretary from conducting a roof plan inspection of the Rothermels' Buck Drift Mine. This court granted the Secretary's subsequent motion for a temporary restraining order and preliminary injunction prohibiting Randy Rothermel from interfering with the Secretary's execution of the Federal Mine Safety and Health Act of 1977, (the "Act"), 30 U.S.C. § 801 *et seq.* See Chao v. Rothermel, No. 3:01cv2228 (M.D. Pa. filed Nov. 23, 2001). At the request of the Secretary, the court lifted that preliminary injunction on December 20, 2001. See Chao v. Rothermel, No. 3:01cv2228 (M.D. Pa. filed Dec. 20, 2001).

On January 30, 2002, Kenneth Chamberlin, an employee of the Mine Safety and Health Administration ("MSHA") and a representative of the Secretary, visited the Buck Drift Mine for the purpose of taking a respirable dust sample pursuant to 30 U.S.C. § 813. The Rothermels refused Chamberlin entry into the Buck Drift Mine, arguing that MSHA lacked the authority to take respirable dust samples under the Act.

Having been refused entry into the Buck Drift Mine, Chamberlin told the Rothermels that he would have to issue a citation and an order of denial of entry to the Rothermels. The Rothermels still refused to allow Chamberlin to enter the mine for the purpose of taking respirable dust samples. Chamberlin then left the Buck Drift Mine and returned to his office where he told his field office supervisor, Kenneth Hare, of the Rothermels' decision. In a second effort to gain entry to the Buck Drift, Chamberlin returned to the mine with Hare

later in the day on January 30. The Rothermels again refused entry to take respirable dust samples. Chamberlin then issued a citation and an order of denial of entry.

Given the refusal of the Rothermels to permit MSHA to take respirable dust samples from the Buck Drift Mine, the Secretary filed a complaint, pursuant to 30 U.S.C. § 818, for a preliminary and permanent injunction against the Rothermels on February 7, 2002. In her complaint, the Secretary alleges that the Rothermels have interfered with her execution of the Act and that they are likely to continue to do so. The court held a hearing on the Secretary's complaint on February 20, 2002. At the conclusion of that hearing, the court granted the Secretary's request for a preliminary injunction, finding that the Secretary was likely to prevail on the merits and that injury to the miners in the Buck Drift would be imminent and irreparable. The court, however, denied the Secretary's request for a permanent injunction and set a hearing on the matter for March 13, 2002.

Jurisdiction

This court has jurisdiction to consider the Secretary's request for a permanent injunction pursuant to 30 U.S.C. § 818.

Standard of Review

A court may issue a permanent injunction when the plaintiff satisfies three requirements. Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1152-1153 (E.D. Pa. 1987). First, the exercise of equity jurisdiction must be appropriate. Id. (citing Younger v. Harris, 401 U.S. 37, 43-44 (1971)). Second, the plaintiff must succeed

on the merits. Id. (citing Ciba-Geigy Corp. v. Bolar Pharm. Co., 747 F.2d 844, 850 (3d Cir. 1984)). Third, the plaintiff must demonstrate that the balance of equities is in favor of granting a permanent injunction. Id. (citing Ciba-Geigy Corp. v. Bolar Pharm. Co., 747 F.2d 844, 850 (3d Cir. 1984)). With these standards in mind, we will now consider the merits of the Secretary's complaint for a permanent injunction.

Discussion of Facts and Law¹

The Rothermels contend that the Act does not give the Secretary the authority to conduct respirable dust inspections. Accordingly, they have blocked MSHA inspectors from collecting bimonthly respirable dust samples from their Buck Drift Mine. Tr. 2/20/02 at 4. The court will first determine whether the Secretary has the authority under the Act to conduct bimonthly respirable dust inspections and then proceed to examine the propriety of a permanent injunction.

1. The Secretary's Authority Under 30 U.S.C. § 813(a)

Under 30 U.S.C. § 813(a) the Secretary has the authority to develop guidelines for bimonthly respirable dust inspections and to conduct such inspections. The Act provides, in relevant part:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose

¹ The law permits the record from a preliminary injunction hearing to become part of the record of a trial on the merits for a permanent injunction. FED. R. CIV. P. 65(a)(2). In this matter, the record from the preliminary injunction hearing is consolidated with the record from the trial on the permanent injunction.

of . . . (4) determining whether there is compliance with mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this chapter. . . . In carrying out the requirement[] of clause[] 4 of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year. . . . *The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter and his experience under this chapter and other health and safety laws.*

30 U.S.C. § 813(a) (emphasis added). The Secretary has developed guidelines for the bimonthly inspection of coal mines for respirable dust. (Secretary's Ex. 7). These guidelines were developed in response to a demonstrated problem with black lung disease. (Tr. 3/13/02 at 19; Secretary's Ex. 7). Section 813(a) gives the Secretary broad authority to enter mines for the purpose of conducting health and safety inspections. The respirable dust inspections at issue in this case are well within that authority. See Secretary of Labor v. Tracey & Partners, et al., 11 FMSHRC 1457, 1461, 1989 WL 433559 (F.M.S.H.R.C.) (discussing the Secretary's authority under section 813(a) of the Act).

The respirable dust guidelines developed by the Secretary pursuant to section 813(a) do not need to be published as regulations in order to permit the Secretary to conduct bimonthly respirable dust inspections. Section 811(a) of the Act requires the Secretary to promulgate rules when establishing or revising mandatory health and safety standards, and section 811(a)(2) states that such rules shall be published in the Federal Register. The mandatory health standards for respirable dust in coal mines are codified at 30 C.F.R. pt. 70.

The respirable dust sampling guidelines at issue in this case do not replace or revise those existing mandatory health standards. Instead, they simply establish procedures for conducting respirable dust sampling inspections, which inspections are designed to ensure compliance with the standards currently existing and codified at 30 C.F.R. pt. 70. See Coal Mine Health Inspection Procedures Handbook, Chapter 1.1, Secretary's Ex. 7. The guidelines, in short, do not alter or affect the existing respirable dust standards, and they do not place additional substantive burdens on mine operators to comply with those standards. Secretary's Ex. 7; Tr. 3/13/02 at 22-23. Therefore, as the new respirable dust guidelines do not replace or revise the currently effective respirable dust standards for coal mines, section 811 of the Act does not require the publication of the guidelines as rules.

Although the Secretary has broad power under section 813(a) to develop guidelines for mine health and safety inspections, the Rothermels correctly note that the Secretary's section 813(a) inspection powers are not unlimited. In Donovan v. Dewey, the United States Supreme Court noted that mine owners can challenge the right of the Secretary to enter a mine under the Act. 452 U.S. 594, 604-605 (1981). Here the Rothermels contend that any power the Secretary has under section 813(a) is limited by the language in section 842(g) of the Act.

Section 842(g) states that the Secretary shall make spot inspections of mines to obtain compliance with section 842. Section 842 requires mine owners to take samples of respirable dust and transmit those samples to a representative of the Secretary. See also, 30

C.F.R. pt. 70. The Rothermels argue that the respirable dust spot inspections required by section 842(g) preclude the Secretary's bimonthly respirable dust inspections. We disagree. The plain language of section 813(a) permits the Secretary to develop guidelines for the conduct of inspections not specifically listed in that subsection. Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm., 740 F.2d 271, 273-274 (3d Cir. 1984). Other sections of the Act, like section 842(g), which prescribe specific inspections do not limit the power of the Secretary to conduct section 813(a) inspections. Id.

The court acknowledges that the new 813(a) bimonthly respirable dust inspections and the 842(g) inspections may be duplicative, to a degree; however, as section 813(a) respirable dust inspections do not place additional burdens on mine operators the court holds that they do not, at this time, equal an unnecessary duplication of effort in violation of section 813(e) of the Act.

2. The Propriety of a Permanent Injunction

Having concluded that the Secretary has the authority to conduct bimonthly respirable dust inspections under the Act, the court holds that a permanent injunction is called for in this case. First, the exercise of the court's equity jurisdiction is appropriate. The Secretary has no effective legal remedy at her disposal and the record demonstrates that the injury to miners working in an atmosphere with elevated levels of respirable dust is irreparable. Tr. 3/13/02 at 18, 28-29.

Second, the Secretary has succeeded on the merits of her case. There is no dispute

that the Rothermels have barred the entry into the Buck Drift mine of MSHA inspectors trying to conduct bimonthly respirable dust inspections. Tr. 2/20/02 at 4, 8. The Secretary, however, as discussed above, has the authority under section 813(a) of the Act to conduct such inspections.

Third, the balance of equities strongly favors granting the Secretary's request for a permanent injunction. The respirable dust sampling conducted by the Secretary does not interfere substantively with the working of the D&F Deep Mine Coal Company. Tr. 3/13/02 at 22-23. On the other hand, the dangers from respirable coal dust are grave, Tr. 3/12/02 at 18, 28-29, and the Rothermels' frequent denial of entry to MSHA inspectors is a drain on the resources of MSHA and a potential danger to other miners. Tr. 3/13/02 at 32-35.

Congress has given the Secretary broad power under the Act to protect the health and safety of miners. See 30 U.S.C. §§ 801, 813. This court will enjoin the Rothermels from interfering with the Secretary's execution of that trust. An appropriate order follows.

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COMPANY,	:	
Defendants	:	

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ORDER

AND NOW, to wit, this 25th day of April 2002, after careful consideration of the evidence presented at the trial and the arguments propounded by each side, the court finds as follows:

1. The Plaintiff, Elaine L. Chao, Secretary of Labor, has the power, pursuant to 30 U.S.C. § 813(a), to cause her authorized representatives to conduct bimonthly respirable dust sampling/inspections as set forth in the Coal Mine Health Inspection Procedures Handbook; and

2. The defendants, their agents, employees, and all others in active concert or participation with them are hereby permanently **ENJOINED** from delaying, hindering, and/or denying entry to authorized representatives of the Department of Labor who are attempting to conduct inspections and/or sampling or otherwise fulfill the responsibilities of the Secretary and/or her authorized representatives under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*; and

3. The Clerk of Court is directed to close this case.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

Filed April 25, 2002