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SOL (MSHA) V. TAMMSCO & HAROLD SCHMARJE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATIVE (MSHA),
PETITIONER

Civil Penalty Proceedings

Docket No. LAKE 81-190-M
A.O. No. 11-02051-05011-V

v.

Docket No. LAKE 82-65-M
A.O. No. 11-02051-05014-A

TAMMSCO, INC.,
HAROLD SCHMARJE,
RESPONDENTS

Tammsco Company Mill

DECISIONS

Appearances: J. Philip Smith, Trial Attorney, U.S. Department of Labor,
Arlington, Va., for the petitioner Malachy J. Coghlan,
Esquire, Chicago, Illinois, for the respondents

Before: Judge Koutras

Statement of the Proceedings

These are consolidated civil penalty proceedings under sections 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. 820(a) and 820(c).

In Docket No. LAKE 81-190-M, Respondent Tammsco, Incorporated, the operator of the Tammsco Company Mill, a silica-producing plant located in Tamms, Alexander County, Illinois, is charged under section 110(a) of the Act with violating the mandatory safety standard under 30 CFR 57.5-5.

On May 7, 1981, MSHA Inspector George LaLumondiere issued a section 104(d)(1) Citation No. 0501241 to Tammsco, citing an alleged violation of mandatory standard 30 CFR 57.5-5, and the condition or practice described on the face of the citation states 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.

In Docket No. LAKE 82-65-M, Respondent Harold Schmarje, the Tammsco Company plant manager, is charged under section 110(c) of the Act with knowingly authorizing, ordering, or carrying out the aforesaid violation as an agent of the corporate operator, Tammsco.

A consolidated hearing was conducted in these proceedings in Chicago, Illinois, October 6-7, 1982, and the parties appeared and participated fully therein. By agreement of counsel, posthearing depositions of several additional witnesses who did not testify at the hearing were taken in Evansville, Indiana, November 3-4, 1982. The parties submitted posthearing briefs and proposed findings and conclusions, and all of the arguments presented have been considered by me in the course of these decisions.

Issues

1. Whether Respondent Tammsco, Inc., the corporate mine operator, committed a violation of 30 CFR 57.5-5 under section 110(a) of the Act, and, if so, the appropriate civil penalty which should be assessed against said operator pursuant to section 110(i) of the Act.

2. Whether Respondent Harold Schmarje, acting as an agent of the corporate mine operator, knowingly authorized, ordered, or carried out the aforesaid violation under section 110(c) of the Act, and, if so, the appropriate civil penalty which should be assessed against him individually pursuant to section 110(a) of the Act.

3. Additional issues raised by the parties are identified and discussed in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Commission Rules, 29 CFR 2700.1 et seq.

3. Sections 110(a) and 110(c) of the Act. Section 110(a) provides for assessment of civil penalties against mine operators for violations of any mandatory safety or health standards, and section 110(c) provides as follows:

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) (emphasis added).

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An "agent is defined in Section 3(e) of the Act (30 U.S.C. 802(e)) to mean "any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

4. 30 CFR 57.5-5 provides in pertinent part as follows:

Control of employee exposure to harmful airborne 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.

Testimony and evidence adduced by the petitioner

Max B. Slade, Acting Chief, Division of Health, Metal and Nonmetal Section, MSHA, Arlington, Virginia, testified as to his background and experience (exhibit P-1), and confirmed that he was familiar with the respondent's mining operation. He first became aware of silica dust problems at the plant in 1976, and he was concerned about the company's noncompliance record, as well as its advertising claims that its product was an amorphous type silica which should be of no concern to MSHA as a health problem. Amorphous silica is not as harmful as crystalline silica. As a result of the company's claims, and since MSHA's analysis indicated that the silica was crystalline, Mr. Slade requested NIOSH to conduct a health hazard evaluation of the workers at the plant to determine if the silica was in fact amorphous and whether it was harmful, and he did so by letter received by NIOSH on April 18, 1979 (exhibit P-3) (Tr. 20-28).

In response to questions concerning exhibit P-2, a computer printout depicting the prior history of section 57.5-5 citations at the plant, Mr. Slade agreed that many of those listed are in fact one citation in which the abatement time had been extended (Tr. 30). In general, many of the citations address specific pieces of equipment or job descriptions of miners, and that the equipment or individual miner is subjected to dust exposure tests as required by Part 57 of the regulations. Dust samples obtained through these tests are submitted to MSHA's analytical lab in Denver, Colorado, and if the results show that an operator is out of compliance a citation will issue and the operator would be expected to bring the airborne contaminants within the allowable limit (Tr. 32).

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In response to a question as to what caused MSHA to initiate a NIOSH survey of the plant in question, Mr. Slade responded as follows (Tr. 33-34):

THE WITNESS: The company had sent us numerous correspondence, pictures, microscopic analysis of their product, claiming that it was amorphous silica and should not be regulated under the silica dust standard, that it should be regulated under the amorphous dust standard. Our individual laboratory showed that it was crystalline silica and we needed some cooperation from NIOSH to verify this fact.

JUDGE KOUTRAS: Now, was this communication from the respondent, from the company in this case, in the context of defenses to each of these citations that were issued against the company, or is it in connection with some other general--

THE WITNESS: Usually some other general correspondence, just trying to make an agreement with us that we would not treat them as a crystalline silica operation but we would allow them a more liberal TLV, that we would allow them to have more dust contamination in the atmosphere than is allowed with crystalline silica.

Cathy Moring, Industrial Hygienist, NIOSH, Morgantown, West Virginia, testified as to her background, experience, and expertise as reflected in the report which she co-authored, exhibit P-5, and she also confirmed that exhibit P-3 is a copy of the letter from Mr. Slade requesting NIOSH's technical assistance. She confirmed that NIOSH conducted a dust survey at the plant, and this included a "walk-through" survey in May 1979, and the company physician and union were contacted in connection with the survey. An "industrial hygiene medical survey" of the current and ex-employees was conducted in July 1979, and in August 1979, the workers surveyed were notified of the results of the survey. In September 1979, the preliminary interim medical reports findings were published, and the final technical assistance report was presented to MSHA and the company in March 1980, (exhibit P-5, Tr. 37-41). Ms. Moring confirmed that she and Dr. Banks, whose name appears on the report, conducted the survey together and she co-authored it. Dr. Banks is no longer with NIOSH, and is in private medical practice in New Orleans (Tr. 42). She explained the survey procedure as follows (Tr. 45-46):

THE WITNESS: The procedure that we go by, we receive a written request from MSHA to provide technical assistance, from there on it's our ballgame. We contacted the president of the company,

the local union, the company physician, to let them know we were coming, that this is the type of information we wanted to look at, we would like to take a walk-through survey of the facility, we'd like to look at their medical records, their environmental sampling records, compliance type records, so we can get an idea of the history of the facility. From that determination we can plan our strategy as to how we should investigate the plant to find out if there was a potential health hazard existing in the facility, so that we come back in July to take environmental sampling to determine the exposures that the workers have at that date and time. We also provided chest X-rays and under informed consent to all workers. We had a few refusals. And we also contacted ex-workers because of the seriousness of the disease in question.

The information is then, all prior identifiers is taken out of this information and reported back to the company, to the union, to the regional OSHA and MSHA offices, and individual copies to people that participated in the surveys are given back their medical findings and referrals from our physicians that say, "You need to seek further attention", or "from the findings we found there seems to be no problem."

JUDGE KOUTRAS: And I take it the recommendations that are contained in this report at Page 9 are recommendations to the plant, to the company. Is there any followup done on this?

THE WITNESS: We make our recommendations and at a later period of time the Division Director, Dr. Merchant of this facility, offered the assistance of our control technology group to assist these companies in improving their conditions.

Ms. Moring testified as to some of her findings, as follows (Tr. 53-55):

Q. Now, let me just ask you this question specifically before I ask you to discuss the findings in the report. Did you find in your survey the silica at this particular plant to be of the amorphous or the crystalline type?

A. It is 98 to 100 per cent crystalline structure.

Q. Now, I would like you to at this time discuss very briefly your findings in that report and your conclusions?

Q. Can you explain the difference between the two types of silica, what the effect of them is?

A. Amorphous silica has no crystalline structure. It is considered to be less toxic and its degree of toxicity is under question right now in the scientific field. Crystalline silica has crystalline structure. This particular product is microcrystalline, meaning that, where the name amorphous came from if you look at an electronmicrograph you will see an amorphous structure, a structure that has no definite size of shape; if you look closer its an amorphous conglomerate of crystals, so it's truly a microcrystalline quartz.

JUDGE KOUTRAS: Now, from a layman's point of view, the amorphous type is something that is not likely to adhere to--

THE WITNESS (interrupting): With silicosis the exact way it causes, silica causes the disease is still unknown, there are several theories on it. It is accepted fact that amorphous silica is not as toxic as crystalline silica and there have been suggestions in the literature that microcrystalline is more toxic than the crystalline structure.

JUDGE KOUTRAS: So, between the two the amorphous is the lesser of two evils, if I could characterize them, take license with that type of characterization?

THE WITNESS: Right.

Q. Would it also be fair to say that amorphous is less harmful?

A. Same thing, less harmful, less toxic.

Q. And the micro, did I understand you to say that according to your survey this was microcrystalline, which is even worse than crystalline by itself?

A. That hasn't been proven yet. It is the suggestion in other studies that microcrystalline may be more fibrogenic than the regular crystalline.

And, at Tr. 56-58; 59-60:

A. Our first conclusion is that NIOSH considered the situation down at Tammsco to be of imminent danger status, basing it upon the health hazard present,

exposure to health hazard present can cause irreversible harm and can shorten life. We feel there's a very serious hazard.

JUDGE KOUTRAS: O.K., as of the date of this?

THE WITNESS: As of the date, based on our results of the day we were there, the 17 workers that we sampled were over-exposed to free silica according to the NIOSH recommended standards. Our standards are not the same as MSHA.

JUDGE KOUTRAS: All right, hold it now. Your recommended standard?

THE WITNESS: We have a recommended standard of 50 micrograms per cubic meter.

JUDGE KOUTRAS: Fifty?

THE WITNESS: Micrograms. To compare that with the NIOSH standard, if you're looking at 100 per cent quartz, our standard is essentially half of MSHA's enforceable standard.

JUDGE KOUTRAS: And where is MSHA's enforceable standard found, do you know?

THE WITNESS: It's confusion, it's a calculation, if you look on Page 4 --

MR. SMITH (interrupting): Well, that's the TLV we gave you, Your Honor.

THE WITNESS: Right, the formulas used for MSHA.

MR. SMITH: That's Petitioner's P-4, Your Honor.

JUDGE KOUTRAS: All right?

THE WITNESS: The bottom line to our study is that 27 per cent of the current and ex-workers that we studied with people that worked greater than one year in this environment had radiologic evidence of, radiographic evidence of silicosis. That's seven people in 26 that we saw; three current workers and four ex-workers for the overall prevalence of 27 per cent.

JUDGE KOUTRAS: All right, stop there just a second, if I may interrupt you.

So, assuming that as of that study they had a work force of 26 people, three people still on the job had it?

THE WITNESS: If they had a work force of 26 people, seven people.

JUDGE KOUTRAS: I thought you said some of those were ex-workers.

THE WITNESS: There were 15 current workers.

JUDGE KOUTRAS: Now, does the study indicate whether or not, what the length of exposure, whether they had contact with other industries, other environments, et cetera, et cetera, is that all accounted for?

THE WITNESS: That's all accounted for in here. We take a detailed work history to identify a possible silica exposure and we take radiographic evidence and pulmonary function studies, so we were very good about that.

We also found that one current worker and one ex-worker had pulmonary massive fibrosis which I'll let Dr. Richards explain further. It's complicated silicosis, is another term that is used for it, it's a more serious type of disease progressing where ultimately death is attributed to heart and respiratory failure. We feel it's a very serious hazard.

* * * * *

Q. Let me interrupt you right there, since His Honor brought up this point. Assuming that the product has not changed and they're still producing the same silica there at this plant that they were in 1979, is this in fact a harmful airborne contaminant?

A. Yes, it can be with appropriate levels.

On cross-examination, Ms. Moring conceded that the report she prepared, exhibit P-5, containing a number 79-104107, and exhibit R-1, which is a draft sent to the company and the union for review and possible technical changes, and is numbered 79104, are different in that the latter does not contain an appendix which refers to dust control improvements through use of baggers with shrouds or hoods (Tr. 87). She conceded that the draft report with the appendix included was not submitted to the company for review (Tr. 88).

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Ms. Morring testified that she was present at the plant during the sampling survey in question, but only for two shifts on July 23, over a 24-hour period, and that Dr. Banks stayed for the entire three days of July 24 through 26 (Tr. 90). She identified other persons who were present during the survey, and indicated that their names appear at page 12 of the report (Tr. 91). She confirmed that she has not returned to the plant since the survey (Tr. 92).

In response to questions concerning exhibit R-2, an American Industrial Hygiene Association Journal, Vol. 42, dated January 1981, Ms. Morring confirmed that out of the 27 silica flour producers identified in Table No. 1 of that publication, two are located in Illinois (Tr. 100). She also confirmed that out of the 27 locations itemized in the report, she has surveyed only three, including the respondent's plant (Tr. 101), and she further confirmed that she would have no reason to know what, if any, dust control improvements or tests were made since her survey of 1979, and stated that "I can only talk about what the conditions are now and were in 1979, and make judgments on that" (Tr. 110-111). She elaborated by stating as follows at Tr. 111-112:

JUDGE KOUTRAS: Are you trying to tell me that on May 7, 1981, when the inspector went in there and saw the silica dust being admitted into the atmosphere from this bagging device that did not have a shroud on it, was as bad as it was in 1979 when you were there?

THE WITNESS: No, I am talking hypothetically as we were before about the fact that in 1979, if the situation existed today as it was in 1979 that the people around that environment would be over exposed.

In response to further questions, Ms. Morring testified as follows, at Tr. 114-124:

Q. One other question, his Honor mentioned to you in hypothetical about if you came upon a situation and the shroud, or hood as I think you refer to it, was not in place on the bagger machine and given the same conditions that you saw at the time you conducted your survey, would it be necessary to take a sample, let's say, on May 7, 1981, when this violation was issued, in order to show over-exposure of the employees who were working in that same area?

A. Well, obviously, from our report you can look in the bagging section and they were some of the highest over-exposed people in the whole facility so from that statement, also I do know that MSHA conducts a periodic sampling period several times a year and if the exposure -- hypothetically, if the exposure, if you are over-exposed prior to the date you are speaking

of, if conditions are the same and no engineering controls have been implemented, then you would be over-exposed at that time as well with this bagging.

Q. When you say over-exposed you are referring to the allowable TLV limits?

A. Right.

Q. Ms. Moring, you just mentioned controls and respirators. When you were at Tamms in July of '79 how many different products did they, in fact, make, do you recall?

A. No, I don't, I am not sure it is in here. They had several products and I don't believe it is in the report.

Q. How much, if any, effort did you make to distinguish between a product such as rough buff on one end and a very fine product on the other end, did you take that into effect?

A. Yes, we took both samples ourselves of some of those covered products and sent them to a laboratory for investigation and found out they were all the same quartz material. We did get a close breakdown on particle size ourselves.

Q. Could it have been as many as six products that they made, seven?

A. I have that brochure myself.

Q. Then you are prepared to suggest that in some of these products as much as 90 per cent of it is under 5 microns and some of these products it might be three microns?

A. Yes, that is possible. In an air-classifying system you are not going to get 100 per cent classification of 5 microns, nothing more and nothing less. You are always going to have--it is going to be the majority of the material.

Q. Then what we are saying is that it is possible to have a product which could be--which could have a percentage diminimus, a very small percentage of respirable silica. If we take this kind of standard it is very easy to have and if we take even NIOSH's

standard of 52--incidentally, are we taking 52 standard then it is conceivable, is it not that a rough buff product would have virtually no respirable dust, certain rough buff products could have virtually no respirable dust, would you agree to that?

A. No. No. 1, I have no--we did not sample the rough buff product ourselves. I have seen laboratory analysis on the product itself, and I think in any of these products because of the air classification system that it viewed that you are going to have it, just like a bell-shaped curve on normal distribution that most of the products are going to be as advertised as far as whatever the micron size is. You are going to have a percentage of below and a percentage that is above, as well.

Q. Do you know what a classifier is, Mr. Moring?

A. Air classifier?

Q. Yes.

A. Yes, it separates the particles by their organic size.

Q. Is it possible that an air classifier, it can separate particles so there would be no respirable particles? Is it possible?

A. I am not that familiar with the air classifier.

Q. Let me ask you, you are talking about dust controls and you mention among others, hoods and respirators. In your NIOSH report you mention, among others, dust collectors, vacuum cleaners, preventive maintenance, monitoring dust levels, housekeeping, mass sonic spray, wall and floor enclosures and it seems to me that you didn't mention specifically a shroud in that report. Do you recall?

A. We don't refer to it as a shroud, per se, we refer to it as a hood.

Q. Are you prepared to say that if we took a shovel full of this silica dioxide from July of 1979 and put it in the bagger and put a sampler on it and another identical bagger and we took a shovel full of this in May 1981 and put the same sampler on it, that we would come out with the same results?

A. As far as I know. I think you are asking me, if the process hasn't changed, if the material is the same?

Q. All of these identical.

A. As far as I know if these things have not changed, things that would affect the particle size and the product itself, yes, you would see the same thing.

Q. That they would be the same, a year, two years later?

A. Yes, I think so. I want to make one clarification on your last statement about engineering shroud, we don't say shroud, per se, but in our jargon we do. We talk about engineering controls, and one of the engineering controls is ventilation system, i.e., shrouds, hoods, ductwork, fans.

* * * * *

Q. One final question on rough buff sampling, the particular coarse product that we talked about classifying. I am handing you what purports to be a Department of Labor memorandum from a Mr. Hollenbeck--I am sorry, from a George Weems to a Mr. Hollenbeck, "subject, particle size distribution analysis of rough buff product at Tammsco", and ask you to direct your attention to these micron ranges.

A. On this 6 per cent.

Q. Right, what does that say? Does that say what they did, is they took this rough buff product and they put it through a 325 mesh and everything that was respirable stayed on top and only 6 per cent was under the screen?

A. No.

Q. It does not say that?

A. It says they took this product and put it through minus 325 mesh screen, which is 44 microns, and 6 per cent of it passed through that screen and 6 per cent of the bulk product is less than 44 microns. Then they took that material and put it through a culture counter and by optically sizing it they got this type of particle size range.

THE WITNESS: No, 94 per cent. That is 98 per cent of the 6 per cent is what they consider respirable.

MR. COGHLAN: So you did, in response to the Judge's question, indicate that the 94 per cent that stayed above the screen was not respirable?

THE WITNESS: Into the lung.

MR. COGHLAN: Well, was not respirable into the--

THE WITNESS: It can still be respirable but not at that 44 micron.

BY MR. SMITH:

Q. But is it the type of respirable material that we are concerned about in this proceeding?

A. It is still toxic material, still silica.

JUDGE KOUTRAS: Let me ask the question another way. Let's assume you have sampled the material and found that none of it sifted through and none of it was respirable according to your definition, would an operator be subject to a citation under this particular standard for failure to control airborne, harmful airborne contaminants?

THE WITNESS: I can't answer that.

BY MR. SMITH:

Q. All right, I wanted to ask you this, what happens to the non-respirable dust after it gets on the floor under traffic?

A. I mentioned that before, that it is dry and feet walking, machinery running over it, any type of action such as that activity, grinds the particles, changes the particle size and can--the main problem with dust being on the floor is that as people move there are air currents that can become reentrained in the atmosphere.

Q. Is it as that point no longer non-respirable?

A. Yes, if the particle size is such. It changes the particle size, it may make it smaller, smaller particles get into the lungs.

Q. Isn't that really the heart of the problem?

A. Right, that is the problem.

Q. And that is very typical at a bagger system if you don't have the proper controls on it?

A. Sure, because there is someone standing there. In any plant.

* * * * *

JUDGE KOUTRAS: What is rough buff?

THE WITNESS: One of their products.

JUDGE KOUTRAS: It is what?

THE WITNESS: I assume it is an abrasive type of material.

JUDGE KOUTRAS: I take it that they mine silica and they process it and they produce five or six different products from it and rough buff is one of the products?

JUDGE KOUTRAS: When you said you did not sample the rough buff machine, did you say that the rough buff was not sampled?

THE WITNESS: In our study I don't know what the products were at our bagging operations that were bagged that day.

JUDGE KOUTRAS: Let's assume that rough buff was not one of the products that was sampled during your survey. What effect would that failure to sample have on whether or not rough buff, of the type that this inspector cited in '81, how does that fit in?

THE WITNESS: I think it makes sense to laymen and is scientifically sound as well, I know that interim samples periodically were taken as far as I know, other samples have been out of compliance in the plant almost consistently. I think there were a few cases where they were in compliance. The samples were taken on Day 1 and they were out of compliance, on Day 15 no samples were taken and the machine still operated, there was a visible cloud or puff of this type of airborne. On Day 30 samples were taken again and the situation is the same throughout and it is reasonable to assume that if they took a sample that day the same situation would be true.

JUDGE KOUTRAS: So are you suggesting that if this particular manufacture, or this particular plant manufactures six products and that at some time during the compliance history of this plant MSHA samples all the products, and assuming no changes, that at some future date you can assume that that same product that is airborne would be as harmful as it was the first time it was subjected to a test?

THE WITNESS: The conditions should not change, yes, what you see that day is what you are going to see the days around.

JUDGE KOUTRAS: What if this particular manufacturer manufactures the same six products but only five are ever subjected, one is not sampled for some reason, can you come to the same conclusion with respect to the one product that has not been sampled, ever sampled?

A. I think you have to use your judgment in that case and from what I am aware from this situation that there is evidence of airborne high concentrations, i.e., you can see a cloud visibly. Like this is the plant, it is one room and the conditions are pretty well even throughout, so you don't have enclosures around--like say, if you had an enclosure around the bagger would that be contained there. So that any type of--if that product was bagged that day and you saw the visible, physical signs of dust in the air, then I think it is a good assumption, yes, that the same problem exists and that people around that and through the building are being over exposed. It contributes to the overall dust load.

JUDGE KOUTRAS: Do I get the impression that what NIOSH is attempting to achieve and what MSHA would like to achieve here is not so much that this one particular rough buff bagging machine be addressed but that the overall ventilation in this entire plant, so that would avoid all these problems, is that what they are trying to do?

THE WITNESS: What NIOSH would like to see is the workers not be over exposed to silica dust.

JUDGE KOUTRAS: In the entire plant?

THE WITNESS: Right, and we are concerned about all those workers' health.

JUDGE KOUTRAS: Well, in this case, let's assume that I come to the conclusion that this operator failed to comply with the standard by not achieving compliance at this rough buff bagging machine and I sustain the citation and the violation and fine him \$400 for the violation, how does that cure your overall concern about the rest of the plant?

A. As far as NIOSH is concerned it is until the levels of the overall plant are brought down to the limits that have been set by law or by NIOSH recommended standards we feel there still is a health hazard. We are hard nosed about that type of thing.

Dr. Thomas B. Richards, Staff Physician, Clinical Investigation Branch, Division of Respiratory Disease Studies, NIOSH, Morgantown, West Virginia, testified as to his background and expertise. He identified a copy of the NIOSH survey report concerning the plant in question, exhibit P-5, and confirmed that he had read it thoroughly, and testified as to his conclusions concerning the findings made in that report (Tr. 142-150).

On cross-examination, Dr. Richards confirmed that he had never visited the plant in question, and he indicated that his testimony is based on his reading of the report, as well as his experience and training, and "review of the literature" (Tr. 150). He also confirmed that he had done no actual personal work with silica (Tr. 151).

In response to question concerning silicosis, Dr. Richards testified as follows (Tr. 152-155):

Q. Would you agree with this statement, the common denominator in all cases of silicosis is the inhalation of a high concentration of crystalline silica of particles less than 10 microns in diameter are respirable, but the particles most likely to be deposited in the alveoli spaces in the lung which caused the disease, are only 1 to 3 microns in diameter. Would you agree with that statement?

A. Let me rephrase the statement because it has multiple parts to it. The factors that would lead to silicosis, no. 1, the type of dust as I tried to explain. There are several different types of silica dust. No. 2 is the concentration of dust. No. 3 is the exposure of the individual and No. 4 is probably an individual factor because there are some discussion as to whether there are I guess you would call it like an egg-shell worker, a person who has an anti-body reaction, whatever, and is much more sensitive to it than other people. In terms of what people can breathe in on the size of the particles, if it is somewhere in the 5 to 10 micron size,

more likely or not those size particles will be blocked out by the nasal hairs or screened out somewhere in the upper respiratory system. We are talking about particles that are getting down into the lungs, would be somewhere between 0 to 5 microns and the 5 micron size in terms of silica is probably the particle size that is causing the most damage for acute silica is a very small size.

Q. Would you agree with the statement to the effect that if chronic, it might have no effect whatsoever on life expectancy, any different that a city dweller?

A. Let me again divide this into categories.

Q. Is there a way that could be answered yes or no?

A. If you ask me to answer it yes or no I will have to lump everything together and I will say that silicosis will reduce your life by 6 to 11 years. If you want me to separate it out, separate out certain forms of chronic silicosis that don't seem to cause quite as much damage, as I said, there are several factors involved. One of which is an individual's response to it. Like anything, you may have some people who react more, some people who react less.

Q. Have any of the tests that were done that are in your report there, have you ascertained whether or not any of these people had T.B.?

A. I note there is a recommendation that they should do annual T.B. skin tests. I am not sure, I can't remember whether they did T.B. Skin tests--

Q. (Interrupting) Doctor, were any of these men coughing blood, do you know?

A. I don't know the answer to that.

Q. Did any of these men lose any weight, do you know?

A. Again, I don't know the answer to that.

And, at pages Tr. 159-160:

JUDGE KOUTRAS: Doctor, do you know what this specific proceeding is about in terms of the citation that was served on the respondent Tammsco?

THE WITNESS: Mr. Smith has explained a little bit about it but I don't pretend to know the whole --

JUDGE KOUTRAS: The operator in this case was cited for failure to provide the rough buff bagging machine with a dust collection system, to wit, some sort of a shroud or a hood that the government contends had been agreed to by this operator. And that is the nuts and the bolts of the citation. The standard cited says that a mine operator is required to control harmful, airborne contaminants insofar as feasible. By prevention of contamination and removal by exhaust ventilation or by dilution. The government takes the position that this airborne contaminant, harmful airborne contaminant, rather could have been controlled or otherwise disposed of by the use of this device.

Now, the study that was conducted by NIOSH, which is Exhibit P-5, was a study conducted of the dust exposure levels at that plant in 1979. This particular citation was issued in 1981. Now, absent any changes would the harmful effects of the airborne contaminants be any more or less in 1981 than they were in 1979 when the study was conducted? In other words, can I assume that once you have an airborne contaminant that is considered to be harmful to the types of tests, the types of analyses that are done in this NIOSH thing, does that mean that all things being equal that that is it, from then on that 15 years being equal that that is it, from then on that 15 years later MSHA can come back and say the mine operator is being out of compliance based on that particular study?

THE WITNESS: The answer to that is yes, and that is why I tried to underline or emphasize the first recommendation of NIOSH that you must have engineering control, absent that engineering control the danger and in NIOSH's point of view we call it imminent danger. We may have a quibble there with MSHA as to why they downgraded this as to not really an imminent danger but if you are reducing the definition of imminent danger you cannot expect abatement before bodily harm would insue and if you are offering the way your control or abatement this respiratory program, I can guarantee you that the respiratory program, given its fine particle size and problems people always have with the respiratory programs, that it just is not going to work. What we need to have is engineering control. Absent that engineering control that danger will go on and on and people are going to get sick.

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MSHA Inspector George Lalumondiere, testified as to his experience and background, and he confirmed that he has conducted numerous at respondent's plant, starting in late 1979, and up to a year ago. He confirmed that the respondent mines silica, and the product is used in the manufacture of paint (Tr. 161-164). There are approximately 17 to 22 employees at the plant, and the plant produces approximately 16,000 to 17,000 tons of product annually. He identified the President of the company as John Norton, and confirmed that respondent Harold Schmarje is the plant superintendent (Tr. 166). The plant operates on a five-day week, two shifts daily.

Mr. Lalumondiere identified exhibit P-8 as a copy of the citation he issued in this case on May 7, 1981, including the modification and termination after abatement of the conditions cited (Tr. 168). He also identified exhibit P-9 as the respondent's dust control plan submitted to MSHA on April 14, 1980, and that is the plan referred to in his citation. He described the conditions cited, and stated the reason for issuing the citation, as follows (Tr. 168):

A. The point that was in violation is that the ruff-buff bagging machine engineering controls were not being maintained on it and were not being utilized on it and the fact that it was tied in to the dust collection system to eliminate the contamination of the worker's atmosphere by removal of dust from the bagging operation.

Mr. Lalumondiere confirmed that the specific dust control plan which was not followed is Item 4-E, which reads "A shroud will be installed or maintained at all bagging machines". He detailed the evolution of the respondent's dust control plan, and confirmed that it was submitted after the plant had been shut down for noncompliance with the dust standards on March 18, 1980, and confirmed further that the plan was modeled after a similar plan submitted by one of the respondent's competitors, Illinois Minerals Company. The plan was voluntary, and the respondent participated in its formulation, modeled after a copy of the plan for Illinois Minerals, and it was in fact the only plan accepted by MSHA in effect at the time he issued his citation of May 7, 1981 (Tr. 170-175).

Mr. Lalumondiere confirmed that the plant was shut down as a result of certain Section 104(b) Orders on October 10, 1979, and these citations affected six occupations which were being performed within the mill, and without these occupations working, the mill could not operate and the respondent shut the entire operation down (Tr. 176). Subsequent modifications permitted the plant to be reopened and operated periodically until such time as the dust control plan was submitted on March 18, 1980, at which time the plant was again reopened (Tr. 178).

Mr. Lalumondiere testified that his belief that Mr. Schmarje knew about the requirement that the dust shroud be in place on the Ruff-Buffer

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bagger machine while it was in operation stems from the fact that he was aware of the fact that this was a condition for terminating the closure order of October 10, 1979, to permit work to continue on April 14, 1980, after the respondent agreed to follow the dust control plan of that date. Mr. Schmarje was served with copies of these orders and notices (Tr. 260-261).

Mr. Lalumondiere stated that the bagger in question was originally installed sometime in early January 1981, but that it was actually received at the plant sometime in October 1979, but was left in the packing crate for some time. On numerous occasions subsequent to the installation of the bagger, he was at the plant on inspections and observed the shroud lying on the floor by the door. It was his understanding that this shroud lying on the floor by the door was an old shroud which he believed was at one time installed on the old bagger, but subsequently removed. While it was supposed to be attached to the new bagger he never saw it attached anytime prior to May 7, 1981. He confirmed that when he asked Mr. Schmarje why the shroud had not been attached to the bagger, Mr. Schmarje advised him that he had only planned to use the bagger for a short time in order to build up a stockpile, and saw no need in wasting time to attached the shroud (Tr. 262).

Mr. Lalumondiere confirmed that when he issued the citation on May 7, 1981, Mr. Schmarje conceded that the dates shown on the bags of silica on the pallets found near the bagger were in fact the dates on which the product in question was bagged, and he also confirmed that at that time Mr. Schmarje admitted that the shroud was not in place on the bagger at the time the material was bagged (Tr. 263).

Mr. Lalumondiere identified exhibits P-17 through P-19 as photographs of the bagging machine in question as it appeared after the shroud was installed and after the citation was abated (Tr. 266). He also identified exhibit R-6 as copies of notes which he made at the time he issued the citation in issue, and he read a notation from those notes as follows: "Bags on pallets for days, from 11/12, all the way up through 5/5/81. This would indicate that the bagger is used regularly, as the superintendent stated it has been, and is being used for stockpiling" (Tr. 293). He confirmed that these notations, made on his inspector's statement, reflect his views that the bagger was used and had been used to bag the material in question (Tr. 294). He confirmed that three of the seven bags which he observed on the pallet near the bagger were stamp-dated May 5, 1981 (Tr. 297). He also confirmed that he observed seven pallets, each with 50 bags of ruff-buff material stored on them, or a total of 350 bags (Tr. 298), and these pallets were located in the same room as the bagger, approximately 20 to 25 feet away from the machine (Tr. 300-301).

Mr. Lalumondiere confirmed that one of the pallets which he observed contained seven bags of ruff-buff material, and they were dated May 5, 1981 (Tr. 304). After randomly checking the dates on the pallets which were fully loaded with 50 bags each,

he determined that the dates stamped on the bags were 11/12 to 12/17/80, and 1/8, 3/27, and 8/12/81 (Tr. 305).

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He confirmed that he did remove a sample of ruff-bugg from a bag stored on the pallets, and while he believed it was sometime in August 1981, he could not recall the specific date which stamped on the bag from which he removed the material (Tr. 306).

Mr. Lalumondiere confirmed that he personally never saw the bagger in question in operation, and that his conclusion that it was used to bag the material which he found on the pallet near the machine came from Mr. Schmarje, and he also confirmed that he never sampled any of the ruff-buff material in question (Tr. 312-313). However, he did confirm that he did sample the material either on August 20 or 21, 1981 (Tr. 315). He also confirmed that Mr. Schmarje admitted to him that the bagger was used on the days indicated by the stamped dates on the bags of material stored on the pallet near the machine, and that Mr. Schmarje also stated that it was his intent to continue using the bagger to bag material until he had a stockpile built up (Tr. 317).

Max Slade, was recalled, and again confirmed that he accompanied Mr. Lalumondiere on his inspection tour on May 7, 1981, and he described the conditions which he observed while he was with the inspector in the plant (Tr. 323-325). He confirmed that the dust which he observed in the plant came from "general dust from the entire plant, from all three bagging machines and from the various leaks around the plant" (Tr. 326). He also confirmed that he had no way knowing with any certainty that the "tracks of dust" he observed on the plant floor was in fact silica dust from the bagging machine which was cited in this case (Tr. 326). Mr. Slade's explanation as to why the plant was out of compliance on the day the citation in this case issued is reflected in the following colloquy (Tr. 328-333):

A. * * * We went on through the plant, observing the leaks, which were numerous. One leak in particular on the roof of the building was a pile of silica several feet high that was dribbling down over the building and through the cracks and just permeating through the entire building. Dust in the air was visible. This is sub micron-size particles. One report shows that the medium-size particle is around five microns, which is of respirable size. This size particle is not visible to the naked eye, unless it is in extremely high concentrations. Any time you can see dust of this size, it is a scientific fact that there is a violation, if it is silica.

JUDGE KOUTRAS: All right. Stop right there. Would you then suggest a mandatory safety standard, in Part 57, that says whenever an inspector can visibly see with the naked eye airborne dust, that he knows is silica, that there is ipso facto a violation of this standard?

THE WITNESS: No, sir, because you would have to have a particle-size distribution before you could make that determination.

JUDGE KOUTRAS: Is that not true on any given day at this plant?

THE WITNESS: Yes. Well, no, sir, if it is good and clean, you cannot see the dust in the air.

JUDGE KOUTRAS: No, what I am saying is: If you can see dust in the air, at any given time at the plant, you are saying that it is a known scientific fact that there has got to be a violation?

THE WITNESS: That is right.

JUDGE KOUTRAS: Why not just say that in the standards, if one can just come to the conclusion that by visibly looking at it and seeing dust flying that that is a violation?

THE WITNESS: Then we would have to have a standard for every mine and for every different size distribution.

JUDGE KOUTRAS: No, no. The standard could say for this particular mine. For example, if you know that they are mining Product "A" at Plant "A" and the inspector goes in there and sees Product "A" flying through the air, then that is a violation for that plant?

THE WITNESS: We would end up with 15,000 standards. We would have to have a different standard for each operation.

JUDGE KOUTRAS: Do you mean for each product that is mined?

THE WITNESS: Yes.

JUDGE KOUTRAS: There are 15,000 different types of products that are mined, in metal and nonmetal?

THE WITNESS: Every silica plant has different size distributions of the particles because they manufacture different types of material, different grades, proportionates.

JUDGE KOUTRAS: So, in other words, if you have a plant that mines silica, not of the coarseness or the fineness or whatever the terms may be that is being mined at this plant, am I to assume that when you go to that plant and see it flying around, they may not be out of compliance.

THE WITNESS: That is right. You would have to know the size distribution of the material, itself, before you could make that assumption.

JUDGE KOUTRAS: If I were to go out there at the plant this afternoon, let us say, for a site visit, and I see silica dust floating all over the place and I am leaving my own tracks through the plant, as I walk to this bagging machine this afternoon, to look at it, can I assume that, since this particular plant mines the type of silica that MSHA asserts they mine, ipso facto, when I see it with my eye, that is a violation of the standard?

THE WITNESS: Yes, sir. You could assume that.

JUDGE KOUTRAS: Based on what?

THE WITNESS: Based on the size of the material that they grind and bag in that operation.

JUDGE KOUTRAS: Has what? Has already been tested?

THE WITNESS: Has already been tested.

JUDGE KOUTRAS: When?

THE WITNESS: NIOSH tested it. We have tested it. They advertise it in their own literature as submicron size particles. This is the way it is advertised and sold.

JUDGE KOUTRAS: But you can see that the inspector that issued this citation did not test it to support this particular violation, is that not so?

THE WITNESS: He has cited it numerous times. He has tested it numerous times. We have taken a hundred and twenty-some airborne samples in this operation.

JUDGE KOUTRAS: Of Ruff-Buff?

THE WITNESS: No, of the dust in this plant, which is in the same room with the Ruff-Buff and which is in the same general area and breathed by the same employees.

JUDGE KOUTRAS: Can I ask a question now, from a layman's point of view? Has the Ruff-Buff product, itself, the stuff that goes into that bag from that machine, ever been subjected to laboratory analysis?

THE WITNESS: Yes, sir. It has been subjected to a size distribution.

JUDGE KOUTRAS: When was that done?

THE WITNESS: We have it in evidence. You have the analysis sheet marked as, I believe, p-6, in evidence.

JUDGE KOUTRAS: Now, have the other products, that are produced at this plant--somebody mentioned something about a brochure--all of those products, individually, been subjected to laboratory analysis?

THE WITNESS: We have evidence, in evidence here, the NIOSH report, that gives the size distribution of the airborne contaminants.

JUDGE KOUTRAS: So, in other words, what you are telling me is that the inspector goes out to the plant and, if he sees this very same bagging machine, with the shroud off, and sees dust flying all over the place and piled up there, he does not grab a handful of it and put it in a bag and label it and then--

MR. SMITH: He does not have to.

JUDGE KOUTRAS (continuing) -- just a minute -- issues a citation, sends that bag off for analysis, gets the results back and then that will support, but that is not the procedure? Mr. Smith says he does not have to. Is that your understanding of how the inspector supports citations at this operation for dust violations?

THE WITNESS: In many cases, wherever possible, the inspector will take a sample to support the violation. In this case, there was no chance to take a sample. It is not needed in this case because all existing, outstanding citations in that very area are against the very people, the same people, that operate this Ruff-Buff machine. A sample was taken both before and after this May 7th date, all of which show noncompliance.

JUDGE KOUTRAS: Were these outstanding citations against this very same machine or were they outstanding with respect to the people that work in the area which was sampled individually?

THE WITNESS: Outstanding against the airborne contaminants in that area, of which this Ruff-Buff bagger is an integral part. Any dust emanating from that bagger will contribute to the overall dust load of the mill and, as such, is a harmful airborne contaminant.

JUDGE KOUTRAS: What you are saying is that for the several months before this citation, there were some samples taken of the Social Security numbers and the job identification

numbers of people that are in close proximity to this Ruff-Buff bagging machine?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Those samples came back and showed noncompliance.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Citations issued?

TE WITNESS: Yes, sir.

JUDGE KOUTRAS: Citations are not going to be abated until they do something to reduce the levels of exposure to those individuals to bring them into compliance, correct?

THE WITNESS: That is right.

JUDGE KOUTRAS: And that this Ruff-Buff machine citation is an integral part of that entire picture?

THE WITNESS: Yes, sir.

With regard to Mr. Schmarje's prior knowledge that the Ruff-Buff machine was used to bag the materials found by Inspector Lalumondiere on the pallets in question, Mr. Slade confirmed that he heard Mr. Schmarje state that this was in fact the case, and that he also heard him state that the material was bagged without the shroud being in place because he wanted to build a stockpile so that the bagger could be moved to another location, and that he needed an additional few days to move the machine (Tr. 334). Mr. Slade also confirmed that the shroud he observed lying on the floor had obviously not been used since it was covered with dust and dirt, and in view of the fact that he also observed an accumulation of silica material under the machine it was obvious to him that the bagger had been used to bag material without any dust collection system attached to it (Tr. 335).

Mr. Slade identified exhibits P-20 and P-21 as two proposed dust control plans for the plant in question, and the former is a compliance schedule covering five years, and the latter is a compliance plan spanning a period of ten years (Tr. 338-341). He conceded, however, that there is no specific regulatory requirement that a mine operator submit and adopt any specific dust control plan, or to seek MSHA's approval for such a plan (Tr. 353). He also confirmed that at no time did MSHA agree that any engineering controls, except for the ones set forth in the April 14, 1980 dust control proposal, would be acceptable (Tr. 355). Mr. Slade identified exhibit P-22 as a letter dated May 21, 1981 which he sent to Mr. Norton concerning the conditions observed during the inspection which led to the issuance of the citations in this case (Tr. 357).

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On cross-examination, Mr. Slade identified exhibit R-7, which a letter dated July 10, 1981, from respondent's president, John Norton, explaining the circumstances surrounding the issuance of the citation, and while the letter is addressed to Mr. Slade, he denied ever receiving it or seeing it prior to the hearing (Tr. 362).

Mr. Slade confirmed that the two-spout bagger and the ruff-buff bagger are two separate machines and are not similar. He also confirmed that he observed the new ruff-buff bagger on May 7th, and also saw the shroud lying in the corner by a door leading to a parking lot, and the shroud was covered with dust. In view of the amount of dust on the shroud, Mr. Slade was of the opinion that it was on the floor more than a day or two prior to May 7th (Tr. 372).

Mr. Slade stated that on May 7th he and Mr. Lalumondiere had a conversation concerning the partial pallet of ruff-buff material which was located near the machine. Mr. Slade observed seven bags on that pallet, and every bag which he could see was dated May 5th. He confirmed that no samples of the ruff-buff were taken, and no effort was made to record the dust levels on May 7th (Tr. 373).

Respondent's testimony and evidence

John Norton, confirmed that he is the owner and sole stockholder of Tammsco, Inc., and has owned the company since 1973. He agreed that a shroud is an accepted engineering control measure for a bagger, and he confirmed that a new bagger was purchased in late 1979, and installed sometime in 1980, and that a shroud was subsequently installed upon it (Tr. 396). He described other dust control measures that he has taken since July 1979, and these included the acquisition and remodification of dust collectors and the changing of circuits throughout the plant. He also confirmed that he has his own dust sampling devices which are used for monitoring purposes, but that he has contracted with several private companies to collect and analyze samples and to report to him in this regard, and some of these companies were among those recommended to him by MSHA. He confirmed that testing was conducted a week after the citation in question was issued (Tr. 395-399).

Mr. Norton denied that the present condition of his plant is as bad as MSHA says it was in the past, and in his opinion, the plant has made improvements and progress since 1979 to achieve compliance with the required dust requirements (Tr. 401).

Harold Schmarje, confirmed that he is respondent's plant manager, was hired in that capacity on February 20 or 21, 1980, and that he has four and one half years' experience as a hard rock miner working in underground mines. He also confirmed that he has experience as a plant engineer dealing with dust control shrouds, including the redesign of such devices. He conceded that such shrouds are acceptable engineering dust control devices for baggers, and that a shroud was installed on the ruff-buff

bagging machine at the time the machine was installed. In

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addition to the shroud, he testified as to other engineering dust control measures which were taken to control the dust at the plant in question since he has been the manager. He also testified as to certain problems which he encountered in his attempts to control the dust, and the improvements and actions taken by him to insure compliance with MSHA's dust control requirements (Tr. 402-409).

Mr. Schmarje testified that a day or two before the MSHA inspection in question the bagger had been run into and damaged, and he instructed that it be cleaned up and either put back into service or taken "off the line" (Tr. 410). He confirmed that on the day of the inspection he told the inspectors that the shroud had been in place, but that it had been damaged and the machine was not in service. He conceded that he also stated to the inspectors that it was possible that the machine could have been used for a short period of time to remove the material that was in the bin, but that he did not know this was in fact the case. He denied ever telling anyone that he knew the shroud was off the bagger and that he used it in order to continue production. He explained further as follows (Tr. 412-413):

A. Well, what I did say is that, if the shroud were not on there and it had been run, explaining, you know, for the short period of time, "I doubt very much that it would contribute to any dust levels in the plant because that material is the heaviest material that we run." It is the residue, in other words. It has already been run through the system. It has physically and purposely been air swept twice and the fine particles, as much as possible, have been taken out of there to recover.

I think, at the time, that I remarked something like, "If there was something in the area of 2 per cent of fine material left in there, I would doubt it very much and that would probably be adhered--"

One of the problems that we have is that the particles have a tendency to develop a static charge and they have a tendency to stick together. One of our problems is trying to separate that. Now, we succeed in separating it when we put it through the air classifiers and such, but it will have a tendency to combine again afterwards. This is a problem they run into at the dispersion.

At any rate, I made the comment that, "If there were any dust there, it would probably be so closely tied with the other materials that I doubt if it would be liberated at all." That was the gist of the conversation.

Referring to the fact that the people mentioned that I had said that we had run it without and that I intended to run the thing without, no way. I do not proceed that way.

Q. My final question to you, Mr. Schmarje, is: From and after the installation of the shroud, whenever it was, January or February, when that machine went on line, to the time just at, or about, the 7th of May, to your knowledge, did you ever order that shroud off or, to your knowledge, did you ever run that Ruff-Buff bagger, knowing that the shroud was not on it? Yes or no?

A. No, sir. I never have. It has been damaged a couple of times, slightly, and then put back into shape, but no, sir, I never ordered in that manner.

On cross-examination, Mr. Schmarje confirmed that he had previously been interviewed by MSHA special investigator Dennis Haeuber and that he had received a copy of that interview. However, he insisted that his statements made to Mr. Haeuber were taken out of context and that is the reason why he refused to sign the statement (Tr. 141). He identified exhibit P-24 as a copy of the interview, and MSHA's counsel confirmed that the interview was not tape recorded or taken down by a shorthand reporter, but that Mr. Haeuber wrote down the questions as well as the responses made to those answers, and then it transcribed and sent to Mr. Schmarje for his review and signature. Counsel explained that the normal procedure was to tape record such interviews, but that Mr. Schmarje refused to have this done (Tr. 422). Counsel also confirmed that such statements are not taken under oath since the investigator has no authority to administer such oaths (Tr. 422-423).

Mr. Schmarje testified as to certain contradictory statements made in the interview and he explained some of the recorded answers given to Inspector Haeuber (Tr. 435-443). He also explained some of his interview answers as follows (Tr. 451-465):

THE WITNESS: "Do you have an explanation of why the Ruff-Buff machine was allowed to operate without a shroud in place?"

Again, I would have qualified it, that I would not have allowed the machine to run without the shroud in place and, if it had been run, it would have been run only to empty out the material that was left in.

JUDGE KOUTRAS: What was your response to that?

THE WITNESS: It says, "When I saw the machine was in operation, I let it continue to operate, because I believe the dust levels are negligible. The time element left to produce the material was also negligible."

JUDGE KOUTRAS: Now, when he asked you to explain why you allowed it to operate without a shroud and you responded, "When I saw that machine in operation", that leads me to believe that when you saw it in operation, it did not have the shroud on it, by your response.

THE WITNESS: I did not see it in operation. I saw that the machine did not have the shroud on it. I told the men to make sure that thing is emptied out. Now, if I may go back, maybe I can simplify this and clear it up.

That machine was in a position that was subject to being--what would I say? It was in an inconvenient area, because the forklifts were coming through there off-and-on, traveling through that particular area, when they would pick up the material from the neo-sil bagging area.

I had slated to move that machine, also, to go and reconstruct the machine, itself, because it is now--it was a pressure flow type of bagger and we were experimenting with trying to go to an air flow type bagger. We had already slated to move the machine, to put it into a different position, for two reasons: To test if the air flow type of machine would work with that particular product and, if it would, perhaps we could use with finer products; and the other reason was to eliminate an elevator, which is one of the problems with regard to a dust source. Elevators are very difficult to seal up around bearings and such. That is the reason why it was slated to be moved.

Now, the machine, itself, with regard to the question there--I would not have said that I allowed the machine to run without a shroud on it. I do not do things like that. The only reason that it--During the period of time--in other words, if the shroud was damaged and it was off of there, if there was any product left in that machine, it had to be emptied out. That is what I am trying to say.

JUDGE KOUTRAS: And they would use it to get that material out?

THE WITNESS: And they would have to use it to get that material out.

Now, the only way you can get it out, other than putting it in a bag--and that is probably where the seven bags came from. I do not know that as a fact. That may have been emptied out beforehand I do not know.

But the only way to get it out of there, and the least dust way to get it out of there, is to put it in a bag. Otherwise, you have to dump it out either into a vat or a bin or on the floor. And I would have qualified the statement and explained it thoroughly.

* * * JUDGE KOUTRAS: Mr. Schmarje, I am having just a little trouble comprehending this. On May 7th the inspector comes in and gives you this citation, right?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Are you telling me that the shroud had been knocked off a couple of days before he got there on May 7th?

THE WITNESS: The shroud was not actually knocked off. It had to have been removed, cut off of there.

JUDGE KOUTRAS: With a blow torch?

THE WITNESS: Yes, I would assume so.

JUDGE KOUTRAS: From that very machine?

THE WITNESS: From that machine, I would assume so.

JUDGE KOUTRAS: Well, what is this accident we have all been hearing about?

THE WITNESS: Well, the machine was in a bad position and, if they just bumped the shroud, it jams the scales and then the machine cannot be--

JUDGE KOUTRAS: So they have to take it off?

THE WITNESS: If it is just a light bump, they can usually push it back in shape, so on and so forth. That is one of the reasons why we wanted to move the darn thing, because it was in a bad position. Now, if they bump it real hard, they are going to jam the

scales and bend them out of shape and it will not operate. Then they will have to take the shroud off and repair the machine, itself, and then they have to put the shroud back on.

JUDGE KOUTRAS: On May 7th, when the inspector came in and found the shroud off the machine--

THE WITNESS: Yes, sir.

JUDGE KOUTRAS (continuing)--what explanation did you give him as to why it was off the machine?

THE WITNESS: I told him it had probably been bumped into.

JUDGE KOUTRAS: Probably been bumped into.

THE WITNESS: And they removed the--

JUDGE KOUTRAS: And they probably removed it.

THE WITNESS: And the machine was--

JUDGE KOUTRAS: And they probably cut it off with a blow torch, and they probably laid it by the door. Is that what you told them?

THE WITNESS: I did not say probably all--

JUDGE KOUTRAS: But would you not know, as plant superintendent, if this device had been knocked into and somebody took it off and laid it aside? Why would you have to find out sometime later from your lawyer--

THE WITNESS: No, sir. I knew that it had been taken off. I saw that the machine was--Let me back up. On May 7th the inspectors came in.

JUDGE KOUTRAS: Right.

THE WITNESS: O.K. Now, it was approximately a day or two before that I had seen that the shroud was off the machine.

JUDGE KOUTRAS: O.K., and laying there--

THE WITNESS: Right. So I assumed that the machine had been run into again and that they had removed the shroud. I told them, I said, "Get that thing cleaned down. Take it off the line and shut it down." That is it.

JUDGE KOUTRAS: So two days before this inspection, you saw that contraption off the machine, laying down some place?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Your assumption was that the reason it was off and laying down was because somebody probably bumped into it--

THE WITNESS: That is right.

JUDGE KOUTRAS (continuing)--and took it off to do something with it?

THE WITNESS: Correct, for repair.

JUDGE KOUTRAS: You are the plant superintendent?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why would you make those assumptions, without finding out what did happen to this thing and when it is going to be repaired, who did it, and when they are going to put it back?

THE WITNESS: Unfortunately, I ordered that it be repaired and put back into condition.

JUDGE KOUTRAS: Who did you tell that to?

THE WITNESS: That I do not know. It may have been my assistant. It may have been one of the mechanics.

Mr. Schmarje testified that the silica mined by his company and processed at the plant in question is 99 percent pure silica, but he denied that it was all respirable since it may contain other impurities. He conceded that the ruff-buff product in question was pure silica, and he also conceded that the original characterization of the silica mined by his company is "amorphous" was misnomer, and that sometime after 1979, after subjecting the silica to high-powered microscopic testing, it was discovered that it has in fact composed of a micro-crystalline structure. He confirmed that the silica processed at his plant is mined from an underground incline mine located some six miles from the plant, and the silica is transported to the plant by truck (Tr. 268-470). The processed silica is used for a number of purposes, including paints, plastics, abrasion rubber, etc. (Tr. 471).

Mr. Schmarje described the process followed in the production of the ruff-buff material in question, and he confirmed that neither his company nor MSHA have ever sampled the ruff-buff. He explained that the ruff-buff bagging

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machine has never operated over an eight-hour sustained period of time, and that since the machine is not operated continuously for sustained periods of time, any samples would be negligible, and any airborne contaminants coming from that machine would be minimal (Tr. 472). He also stated that any fine particle respirable dust that would be left in the ruff-buff product during the bagging process would not contribute to the overall plant dust level, because it would have been "air-swept" (Tr. 474). Since the ruff-buff is of a heavier particle size, he did not believe it was as damaging as the other silica dust processed at the plant (Tr. 474).

When asked why MSHA would insist that he have a shroud on the ruff-buff machine if it is not harmful, Mr. Schmarje stated that his position was that since the dust control plan called for a dust control shroud on each machine in the plant, he would insist that it be placed on the ruff-buff bagger. He also alluded to the fact that the NIOSH study in question assumed that no matter where silica was present in his plant, it was a respirable health hazard. He agreed that if it can be established that ruff-buff is respirable, then it would be a hazard, and he further explained his answer as follows (Tr. 477):

THE WITNESS: A standard is for an eight-hour period. It's time-weighted period, I understand, and it is 10 milligrams per cubic meter on time-weighted. What I'm saying is that that machine is never operated for an eight-hour period and that the percentage of fine, respirable dust that would be in there would be so negligible with regard to any testing of such that it would not show up. It wouldn't even appear.

JUDGE KOUTRAS: What standard do you believe MSHA is holding you to?

THE WITNESS: They are holding me to the standard of maintaining a dust collection system on the bagger and it was in place. We complied with those standards, according to the April 14 dust control plan, which had subsequent plans submitted with regard to it.

Mr. Schmarje confirmed that he was not with the inspectors when they found the partial pallet near the ruff-buff bagging machine, nor was he present when they sifted through the bags of material on the pallet. He conceded that the ruff-buff material in those bags was bagged by the machine in question, but he denied telling the inspectors that the material was bagged with the dust shroud off, that he knew it was off, and that he instructed the bagger operator to go ahead and bag the material anyway (Tr. 487). He stated that he explained to the inspectors that the bagger had apparently been damaged, and that when he discovered the shroud was off he instructed the operator to clean the machine out and to take out all of the ruff-buff material left in the machine storage bin. Since there were seven bags of material on the pallet, he had no way of knowing

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whether the material had been bagged with the shroud on or off (Tr. 489). He denied making any statements to the inspectors that the bags containing dates of November 12 and December 12, 1980, were bagged without the use of the dust shroud (Tr. 490).

Mr. Schmarje confirmed that the bagging machine in question is not used on a regular basis, that the material bagged with that machine is minimal, and that it is used for the purpose of building up a warehouse stockpile. Once the inventory is reduced, the machine is again used to build up a stockpile (Tr. 491, 492-493). Mr. Schmarje conceded that the ruff-buff bagging machine was used to bag the materials which were stamp-dated 11/12/80, 12/12/80, 12/17/80, 1/8/81, 3/27/81, and 5/5/81, as noted by the inspector on exhibit P-15 (Tr. 494). He also agreed that the machine must have been installed at least as early as November 12, 1980 (Tr. 494).

Ernest Butler, testified that he is employed by the respondent as a maintenance man, and he confirmed that he is a welder and that his duties include the repair of the machines in the plant. He confirmed that the new ruff-buff bagging machine was acquired "somewhere around 1980" as a replacement for the old one. He stated that he installed the dust shroud on the new machine when that machine was installed, and that the shroud was the one which was previously on the old machine (Tr. 504). The installation was made by welding the shroud onto the machine, and he explained how this was done (Tr. 505-506).

Mr. Butler stated that during the week of May 7, 1981, foreman Gene Pool told him that someone had called and requested that a shroud be installed on the ruff-buff bagger, and when he went to look for the shroud he found in "standing back towards the maintenance shop", and it did not have an accumulation of dust on it. Mr. Pool told him had someone had called him and Mr. Pool said "ernie, will you put that shroud back on" (Tr. 507). Mr. Butler then "went to repair the shroud so I could put it back on". During a conversation with Lee Kirby, another maintenance man, Mr. Kirby informed him that the shroud had been damaged when it was run into by a fork lift. Mr. Butler stated further that he believed the shroud had been damaged the day before he was told to reinstall it because he had previously seen it on the machine the day before when he left his work shift (Tr. 508). Mr. Butler described the damage, and the repairs which he made (Tr. 509). He identified exhibit R-9 as his daily worksheet, dated May 8, 1981, and there is a notation "worked on ruff-buff machine. Put hood back on" (Tr. 511).

On cross-examination, Mr. Butler confirmed that he made the original installation of the shroud on the machine the same time the machine was installed, but he could not recall the precise dates (Tr. 512). He also confirmed that to his knowledge since the original installation of the shroud, it had never been off the machine except for the time he rewelded it back on on May 8, 1981 (Tr. 514), and had it been off any other times he would have known about it because he is the only welder available for such work (Tr. 516). He also was of the opinion that the shroud could

not have been off overnight because he walked by it "50 times a day" and he would have noticed it (Tr. 518).

In explaining the work he did in putting the shroud back on the machine on May 18, 1981, Mr. Butler explained that after repairing the legs, he had to make additional repairs to facilitate hooking in the air pipe, and he explained that "The hoses for the air pipe were already there, but I had put it in with metal pipe, and whoever took it off had cut it off. Instead of unbanding it, they just cut the pipe out of the way." (Tr. 513). When asked to explain who did this work, Mr. Butler stated that he was told that the mechanic on the second shift cut the shroud off with a welding torch after it was damaged, and someone stacked in the corner, and he was instructed to repair it and reattach it. Mr. Butler also indicated that the mechanic who cut it off "can weld, but not very good" (Tr. 517).

In response to further questions, Mr. Butler identified exhibits 17, 18, and 19 as photographs of the shroud in question, and he indicated that they must have been taken after he reattached the shroud (Tr. 520). He also indicated that he could not remember speaking with anyone about the shroud at the time the citation issued on May 7, 1981, including the inspector, and he confirmed that his work shift is from 7:00 a.m. to 3:00 p.m. (Tr. 520). He identified Inspector Lalumondiere in the hearing room, acknowledged that he knew he was an inspector, but he denied that he knew that Mr. Lalumondiere was the person who issued the citation in question, and he denied that he had ever discussed the citation with him (Tr. 521). In response to further questions as to how long the shroud may have been off the machine prior to May 8, 1981, Mr. Butler testified as follows (Tr. 522-523):

Q. Does it surprise you to hear that Mr. Schmarje even said that thing was off on May 5? That's two days earlier, at the very least.
(No response.)

BY MR. SMITH:

Q. Well, you don't have to answer the question. If you can't answer it, you don't have to. If I tell you that, in point of fact, that shroud was off on May 5, 1981, which is some three days before you repaired it or put it back on, as you put it, May 8, 1981, does that surprise you in anyway?

A. Yes, it does.

* * * *

Q. Mr. Butler, in other words, would it be your testimony that it could have been the 5th or the 6th--is it consistent with your understanding of this that it could have been the 5th or the 6th that it was knocked off?

A. It could have been. I go by that thing all the time. I don't stop and look at every machine to see if

the shrouds are on them.

Q. But you know that--

JUDGE KOUTRAS (Interrupting): Well, let's don't split hairs. Mr. Schmarje himself said it could have been a couple of days. The man is telling you, "In the normal course of business on any given day, I usually walk by there, and if it would have been off, I would have seen it." The question I would ask him, if it was off in November 1980, would you have known about it?

THE WITNESS: Yes, sir.

Paul Riston, testified that he has worked for the respondent for two years, and that his job is to "clean up". He could not recall any specific dates, but confirmed that he told respondent's counsel about "the day" he ran into the ruff-buff machine with a fork lift he was operating, that he didn't think he had done much damage, but "felt bad" about it and went home after the incident (Tr. 527). Mr. Riston reviewed his work "time card" shown to him by respondent's counsel, and he confirmed that it reflects that he worked eight hours on Monday and Tuesday, but that on Wednesday, the record only reflects 5.5 hours, and he believed that is the day he left work after hitting the machine and damaging the shroud (Tr. 529-530). He told no one about leaving work early, could not remember discussing the incident with any supervisor, and he did not know when management found out about it (Tr. 531). He also confirmed that he was afraid he would be fired (Tr. 531).

George Storm, testified that he was employed by the respondent as a mill operator, and he confirmed that he has operated the old and new ruff-buff machines in question. He could not state when the new machine was acquired, but he confirmed that he has used it over a period of six or eight months. He stated that he ran the machine no more than once a month, and that he has run the new one 10 or 15 times (Tr. 533). Prior to May 1981, he may have run it "more than five times", but always with the dust shroud in place and he never operated it without a shroud (Tr. 534). He identified a copy of exhibit R-11, as a statement in question and answer form which was sent to him for his signature after an interview with MSHA's investigator, and he stated that he never returned a signed statement (Tr. 536). Mr. Storm also identified the deceased mechanic who removed the damaged shroud as his brother Henry Storm, and confirmed that they both worked the second shift at the time in question (Tr. 536).

Wayne Vik, testified that he is employed by the respondent as a mine foreman, and also serves as the Union labor representative. He confirmed that at one time the company had an old Regis Ruff-Buff bagging machine, and subsequently purchased a new one. He did not know when the new one was actually installed, but knew that it had been in the plant for a number of months (Tr. 538). He confirmed that during the period January to May of 1981, he had occasion to go through the plant on a daily basis, and that he never observed the bagger in question without

the shroud on it (Tr. 539). As far as he knew, the shroud was always affixed to the bagger (Tr. 539).

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Mr. Vik testified as the labor representative, he was present during the time MSHA Special Investigator Dennis Haeuber interviewed employees George Storm and Otha McKee (Tr. 539). Mr. Vik stated that Mr. McKee told him that in response to one of the questions asked by Mr. Haeuber, he (McKee) gave a "wrong answer" because he didn't fully understand the question. However, Mr. Vik could not say which particular question or answer confused Mr. McKee (Tr. 542).

On cross-examination, Mr. Vik confirmed that in May 1981, he was the underground foreman, but spent the morning in the mill and the rest of the day in the mine, and he conceded that he was not always around the mill area (Tr. 547). Mr. Vik stated that he was present during the MSHA special investigator's interview with Mr. McKee, but he could not recall the date. MSHA's counsel quoted several "questions and answers" from a copy of that interview, and in response to a question as to whether he recalled Mr. McKee's responses, Mr. Vik stated that he vaguely remembered them, but took no notes. He also stated that while he discussed the interview with Mr. McKee the next day, he could not recall the specific question that Mr. McKee had in mind when he said he gave a "wrong answer" (Tr. 449-550).

Inspector Lalumondiere was recalled by the Court, and he confirmed that exhibit P-15, a copy of his field notes made during the inspection in question, reflect the dates that he found on the bagged ruff-buff product which he found on the pallet by the machine. He confirmed further that Mr. Schmarje acknowledged that the dates shown on the baggs on question reflected the dates on which the materials were bagged by the machine. When asked if Mr. Schmarje was questioned as to whether the dust shroud was on or off the machine on each of the days that the machine was used to bag the materials found on the pallet, he responded as follows (Tr. 576-577):

JUDGE KOUTRAS: Did he tell you, also, that on the dates that those, reflected on those bags, that when that material was bagged, that the shroud was off it and he knew it was off it? Like, for example, that December 1980 date on there.

THE WITNESS: On the dates that are in question here, I asked him if he had run this bagger on this date. He said, "Yes, I had." I asked him why isn't the shroud on. I said, "Had you had it on there?" We specifically asked him--he was asked, yes.

JUDGE KOUTRAS: You asked him, "Did you use this machine to bag this material on December--on November 12, 1980?"

THE WITNESS: On these different dates--

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JUDGE KOUTRAS (interrupting): He said, "Yes, the machine was used to bag it."

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And then you asked him a follow-up question, "Was the shroud on the machine on these dates?"

THE WITNESS: I don't remember exactly how I asked him the question. I asked him if he had put the shroud on when he bagged it, and he said that he had never put the shroud on.

JUDGE KOUTRAS: He said he never put the shroud on when he bagged this material on those dates?

THE WITNESS: That's right.

JUDGE KOUTRAS: That's what he told you?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why is it that in your notes anywhere--this seems like a pretty incriminating statement on his part. Why wouldn't you put that in your field notes?

THE WITNESS: Well, if I had to do it over, I'd put a lot more things in them, sir, but--

MR. SMITH (interrupting): It is in the inspector's statement.

THE WITNESS: I believe I put it in the inspector's statement that he stated that he had used it.

JUDGE KOUTRAS: Using it is one thing but using it without the bagger is another.

THE WITNESS: Used it without the shroud.

JUDGE KOUTRAS: On all those dates?

THE WITNESS: Yes, sir.

MR. SMITH: I think it's one of the respondent's exhibits.

When asked about his "inspector's statement" (Exhibit R-7), Mr. Lalumondiere conceded that there is no documentation for the alleged "admission" by Mr. Schmarje that the bagging machine was operated without

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a dust shroud when each of the bags found on the pallet were bagged. Mr. Lalumondiere also conceded that his inspector's statement does not reflect any admission by Mr. Schmarje that he made such a statement (Tr. 578). However, he insisted that Mr. Schmarje did admit "that he never put the shroud on" (Tr. 579).

Mr. Lalumondiere conceded that he was not in the plant on each of the days that he noted the machine was used to bag the ruff-buff, and he confirmed that the reason he did not issue any citations on the days he observed the dust shroud off the machine was that it was not in use on those days (Tr. 581). He also confirmed it was possible that the shroud was off the machine and lying on the floor because the machine was not being used. However, when he found the dates on the bags indicating that the machine had been used, he questioned Mr. Schmarje's prior assertions that the machine had not been used (Tr. 582).

Mr. Lalumondiere also conceded that his "inspector's notes" do not reflect any notations concerning his observations that the shroud he observed was "gathering dust". He also confirmed that Mr. Schmarje said nothing to him about the shroud being bumped or damaged by a fork lift (Tr. 585), and in response to additional questions stated as follows (Tr. 588-589):

JUDGE KOUTRAS: O.K. You walked in the mine and you saw the shroud over there on three or four different occasions.

THE WITNESS: Right.

JUDGE KOUTRAS: When I asked you why you didn't issue a citation and why you just simply brought it to Mr. Schmarje's attention, your response was, "I didn't issue a citation, Judge, because they weren't using the machine."

THE WITNESS: Well, I think I better clarify that. I said, maybe you didn't understand me, that I wouldn't issue a citation because this was a new machine, it was installed, and according to what he told me, they were still in the process of getting things working to the way they should on there.

JUDGE KOUTRAS: I see.

THE WITNESS: Therefore, I would not issue a citation. When you get into one where they operate it all the time and you go in there and there's evidence of it, then it's a different situation.

JUDGE KOUTRAS: If you had not found those bags with those dates on them, you wouldn't have cited them?

THE WITNESS: No, sir, I would have had no indication that he was using it. I would have no reason to believe he was using it.

Depositions

By agreement of the parties, and with leave of the Court, depositions of additional witnesses were taken by the parties and were submitted and accepted for the record. The deposition of former MSHA Special Investigator Dennis Haeuber was taken by petitioner's counsel on November 3, 1983. Mr. Haeuber confirmed that he is presently employed as Safety Director by Mulzer Crushed Stone Company, Tell City, Indiana. Included as exhibits to Mr. Haeuber's deposition are the following documents:

1. Mr. Haeuber's investigative report dated July 11, 1981, concerning his "Investigation of a Possible Knowing and Willful Violation at Tammsco Inc."
2. A one page handwritten notation made by Mr. Haeuber during his investigation.
3. A memorandum prepared by Mr. Haeuber, dated May 18, 1981, concerning a conversation with Inspector Lalumondiere.
4. A copy of an interview conducted by Mr. Haeuber with Harold Schmarje on June 17, 1981.
5. A copy of an interview conducted by Mr. Haeuber with John Norton on June 17, 1981.
6. Handwritten notations made by Mr. Haeuber during the aforementioned interviews, including a handwritten "addendum" memorandum prepared by Mr. Haeuber concerning the results of laboratory tests conducted on ruff-buff samples obtained by Inspector Lalumondiere on August 5, 1981.

Mr. Haeuber confirmed that he conducted the special investigation in question and that all of the documents affixed to his deposition are part of his official report of investigation. He confirmed that on May 18, 1981, he and Inspector Lalumondiere had a conference concerning the inspection of May 7, 1981, and that Mr. Lalumondiere told him that Mr. Schmarje had admitted to him that he knew that the cited condition existed, but that he had to produce or stockpile the ruff-buff product. Mr. Haeuber also confirmed that after his interview with Mr. Schmarje on June 17, 1981, Mr. Schmarje stated that "it was quite obvious that the ruff-buff bagging machine had been in use without the shroud being in place. We would not deny that fact, but we believe that the ruff-buff product is heavy enough to stay out of suspension" (Tr. 8). Mr. Haeuber stated that he made a notation of that statement, and it is included as an exhibit to his deposition (Tr. 10).

Mr. Haeuber confirmed that he also interviewed Otha McKee and Lee Kirby, but that Mr. Norton was the only person who returned a statement to him, and Mr. Norton made some corrections and additions to his statement, and they are reflected by circles

on the file copy. Mr. Haeuber also confirmed that at different times during his special investigation, both Mr. Schmarje and Mr. Norton took the position that the plant dust control plan of

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April 14, 1980, was superseded by a revised plan which had been submitted to MSHA during a meeting with Congressman Paul Simon (Tr. 13). Mr. Haeuber stated further that to the best of his knowledge, everything that is contained in his report of investigation of July 11, 1981 is true.

Mr. Haeuber stated that at no time during his interview with Mr. Schmarje did he in anyway indicate that the dust shroud was on the ruff-buff bagging machine everytime it was operating. In fact, Mr. Haeuber stated that just the opposite is true, and that Mr. Schmarje admitted that the shroud was off the machine when it was operated, and he explained that it was off because the April 14, 1980 dust plan had been superceded, and that the shroud was not needed because the silica materials were coarse and would not be suspended in air (Tr. 16). Mr. Haeuber also stated that at no time during the interview did Mr. Schmarje inform him that the bagging machine had been run into by a forklife or that the shroud had been knocked off (Tr. 17, 23).

With regard to the changes made by Mr. Norton on his interview statement, Mr. Haeuber stated that the date-stamp on the front of the statement reflects that it was received in his office on July 22, 1981 (Tr. 32). Mr. Norton's addition to his statement indicating that the shroud had been damaged was the first time anyone had mentioned this (Tr. 33).

On cross-examination, Mr. Haeuber confirmed that from 1978 to 1981, he inspected the respondent's plant less than ten times, and that Mr. Lalumondiere also inspected the plant during those years and that they would be on inspections together (Tr. 71). Mr. Haeuber also confirmed that he assumed the duties of a "special investigator" or "safety and health specialist" in July 1979 (Tr. 74), and that the only two silica mines he inspected were Tammsco and Illinois Mineral (Tr. 76).

Mr. Haeuber explained the procedure for initiating a special investigation, and he confirmed that after Inspector Lalumondiere issued the section 104(d)(1) citation, they discussed the citation, and Mr. Haeuber then recommended an investigation by filling out the "willful violation review" form which is attached as an exhibit to his deposition (Tr. 100). His investigation actually began on June 17, 1981 when he visited the plant to conduct his interviews, and on that day he met with Mr. Schmarje and Mr. Norton and explained the procedures he would follow in conducting his investigation (Tr. 106-108).

Mr. Haeuber stated that after Mr. Norton's corrected statement reflecting his assertion that the machine in question had been damaged was received in his office, he spoke to no one about the statement and did not pursue the matter further. He stated that he assumed his complaints processor sent the statement to MSHA's office in Arlington, Virginia, and he explained why he did not pursue the matter further as follows (Tr. 136-138):

Q. So, it's your testimony that knowing this, of the

damage of the shroud or at least the possibility of it,
you discussed it with nobody?

A. The report was already sent in. I just added an addendum.

Q. Still, you discussed it with nobody?

A. I didn't need to.

Q. You don't think it has a bearing on these proceedings?

A. It's an alleged.

* * * *

Q. Given this allegation, Mr. Haeuber, wouldn't you think it reasonable to pursue it?

A. No, I do not.

Q. Why not? Would you explain that?

A. Because, for one thing, Mr. Schmarje already indicated that he knew the shroud was off and continued to let the machine operate. For the second thing, this thing... this correction that Mr. Norton made was only hearsay. I don't think it was pertinent to the investigation or to the case. And if it came out, let it come out in court.

Q. So, it's your feeling that the allegation of damage to the shroud, at or about the time of the violation, is not pertinent to the case?

MR. SMITH:

He didn't say that. He included it with his report for everybody to see.

Q. In other words, you didn't investigate the possibility of this being a fact, is that right?

A. All the facts that were obtained during the interviews indicated that there was no damage to the shroud. There was nothing mentioned about damage to the shroud. Not one word.

Q. Did you investigate the possibility of the truth of that allegation?

A. What do you mean?

Q. Did you do anything about it once you knew it?

A. No, I did not.

MR. SMITH:

Except, you included it as part of your report?

A. As an addendum, yes.

Q. What report did you include that in?

A. It would have been sent to Arlington, Virginia, in the Final Report of the investigation into the 104(d)(1).

Q. You included the shroud damage allegation in a report to Arlington?

A. I would have included the copy of the interview that Mr. Norton sent back to the Vincennes office. I would have sent that or had my Complaint Processor send that to Arlington to be included in their copy of the investigation.

Q. And when would you have done that, Mr. Haeuber?

A. I don't know when my Complaint Processor did it.

Q. Would you have done it at or about the time you received the corrected statement?

A. Sure, sure. I would say so.

In response to further questions, Mr. Haeuber stated that on previous occasions when he was inspecting the plant for leaks in the duct work or emissions, he would take respirable silica dust samples. However, he denied that he ever directed anyone to take any dust samples after the citation was issued by Mr. Lalumondiere, but was aware of the fact that such samples were taken, and that he included those results as part of his report by the memorandum which is attached to his deposition (Tr. 174-175).

In a separate continuation of Mr. Haeuber's deposition, there is attached the following documents:

1. List of exhibits.
2. Mr. Haeuber's notes and interviews with Otha McKee and Lee Kirby.

Respondent's Mill Operator, Otha McKee was interviewed by Inspector Haeuber on June 17, 1981, and a copy of that "question and answer" interview is a part of the record in this case, and it is also attached to Mr. McKee's deposition taken by petitioner's counsel on November 3, 1982. Pertinent portions of that interview are as follows:

Q. Who instructed you to operate the Rough Buff bagging machine?

A. I don't remember. Several people were in the lunchroom before shift and in general conversation someone said we're running Rough Buff this evening.

Q. Were you aware that when this bagging machine is in operation, that a shroud and ductwork shall be connected into the dust collecting system?

A. No.

Q. Did anyone tell you that the shroud was supposed to be in place when this bagging machine was in operation?

A. No.

Q. Are you familiar with the company dust control plan as submitted by Tammsco, Inc. to the Mine Safety and Health Administration?

A. Yes. I wasn't really familiar with that particular item.

Q. How long had you had experience operating the Rough Buff bagging machine before the citation of May 7, 1981?

A. I don't think that the Rough Buff bagger was operated more than several times prior to that date.

Q. Was the shroud ever in place when you were operating the Rough Buff machine?

A. Yes, after the citation was issued on May 7, 1981.

Q. Do you know what percent silica the Rough Buff product contains?

A. No.

Q. Do you have any idea what airborne respirable silica bearing dust does to human lungs?

A. Yes.

Q. Do you believe that when you were operating the Rough Buff bagging machine without the benefit of a shroud and ductwork to the dust collector that when you were bagging the product, you were afforded all the protection available?

A. Yes.

Q. What type of protection were you afforded?

A. Respirators.

Q. During normal bagging operations with the shroud in place, is there a large quantity of dust present?

A. No.

Q. You've had the opportunity to operate the Rough Buff bagger with the shroud off and with it in place. Can you see any difference in the airborne dust?

A. I can't see any great difference.

Q. Is there anything else that you can think of that we haven't discussed that might aid in the conducting of this investigation?

A. This plant pays more attention to training to make employees aware of hazards of silica.

In his deposition, Mr. McKee claimed he was confused about Mr. Haeuber's use of the term "shroud", and while he specifically rememberd the shroud being in place after the citation issued, he stated that he could not recall whether it was in place when he operated the machine, and when asked whether he specifically recalled operating the machine two days before the citation issued, he stated he could not recall (Tr. 11). He also confirmed that he did not return a signed copy of the statement because he believed that it was inaccurate (Tr. 12).

Mr. McKee stated that he was not present during the inspection of May 7, 1981, and did not know when the violation was cited. He learned about the incident for the first time when he was interviewed by Mr. Haeuber, and he reiterated that he could not recall whether the shroud was on the machine on May 5, 1981 (Tr. 22).

The deposition of respondent's mechanic Lee Kirby was taken by the petitioner on November 3, 1982. Mr. Kirby confirmed that he was previously interviewed by Inspector Haeuber on November 18, 1981, and identified his "question and answer" statement of that date, and a copy is attached to his deposition. Mr. Kirby could not recall what he did with the statement sent to him by Mr. Haeuber for his signature, and Mr. Kirby was questioned by petitioner's counsel about the following questions and answers which appear on the statement in question:

Q. As a maintenance man, have you had the opportunity to work on the shroud and ductwork on the Rough Buff bagging machine? When?

A. Yes.

Q. Prior to May 5, 1981, did you disconnect the collecting shroud and ductwork at the Rough Buff bagger?

A. The Rough Buff bagger and Neosil bagger were swapped or changed, but the Rough Buff bagger was not put back into service then.

Q. Who gave you orders to do this work?

A. Harold Schmarje.

Q. Who do you take your orders or instructions from?

A. Harold.

Q. Have you seen the Rough Buff bagger in operation in the last two months?

A. Yes.

Q. Would that have been before or after May 7, 1981, when the citation was issued?

A. It would have been after May 7, 1981, when the shroud was on.

Q. Do you know the approximate date when the Neosil and Rough Buff baggers were swapped?

A. Possibly the first of the year, maybe January.

Q. Were you instructed to connect or to leave disconnected the shroud and ductwork of the Rough Buff bagger?

A. I think it was on for a period before May 7, 1981, but then the shroud and ductwork were removed for some reason and never replaced.

Q. Who gave you these instruction?

A. I would not know for sure because I was not involved in taking it off.

When asked whether he remembered the questions and answers, Mr. Kirby replied "I don't remember. It's been so long, I actually don't" (Tr. 9). Mr. Kirby stated that prior to May 7, 1981, the bagging machine in question was disconnected and "sitting in the corner" and the shroud was off, but he could not recall how long it was there (Tr. 10). The ruff-buff machine was eventually exchanged for a neosil bagger.

Mr. Kirby confirmed that he did not know Inspector Lalumondiere. He also confirmed that prior to May 7, 1981, the ruff-buff machine was not connected, and the dust shroud was off the machine and he observed it lying in the corner (Tr. 11). He stated further that prior to May 7, 1981,

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he observed the shroud on the new ruff-buff bagging machine, but could not recall the date. He also stated that the shroud was knocked off the machine, and while he indicated that "it couldn't be over a day at the most, if at all", he stated that he simply couldn't remember (Tr. 13). When asked to resolve the apparent contradiction in his prior statement that the shroud was "removed", and his present statement that it was "knocked off", he explained that the shroud had been hit and bent, and while he personally did not see the condition of the shroud Paul Riston told him that it had been hit. He also stated that he was not involved in the shroud repair work (Tr. 16). When asked whether he observed the ruff-buff bagger on a daily basis, Mr. Kirby responded that he "didn't pay any attention to it" (Tr. 17). He confirmed that he personally did not observe the shroud, and was simply told that it was knocked off (Tr. 18).

Mr. Kirby stated that at some point in time a new or different ruff-buff bagger was put into production and that he and someone else installed a shroud on it as soon as it was put into production. Subsequently, when the ruff-buff bagger was exchanged for the neosil bagger, the machine and the shroud were disconnected and were placed "over by the door in the corner". The ruff-buff bagger was again moved back into production, and he and Henry Storm put the shroud back on, and the machine continued to operate with the shroud attached. He next worked on the ruff-buff shroud when he and Ernie Butler put the shroud back on after Mr. Riston told him that it had been knocked loose (Tr. 19-21). In summary, he stated that there were two occasions when he and Ernie Butler put the ruff-buff bagger shroud on, and one occasion when he and Henry Storm put it back on. In the meantime, the shroud and the bagger were "sitting over in the corner" (Tr. 22).

Mr. Kirby stated that he did not know whether the shroud was on or off the machine when it was operated by Mr. McKee on May 5, 1981, and he confirmed that he could not personally state whether or not the shroud was on the machine everytime it was used prior to the time of the inspection (Tr. 24).

Neil Handley, employed at MSHA's assessment office in Wisconsin, was deposed by respondent's counsel on November 4, 1982. In reference to a telephone conference held on July 21, 1981, with regard to the citations in question, he stated that he could not recall a conversation with Mr. Schmarje on that day, but confirmed that he has had a number of conversations with Mr. Schmarje in the past. Mr. Handley confirmed that he spoke with MSHA Inspector Roesler about the citations sometime in July 1981, and Mr. Roesler confirmed that the dust shroud was off the ruff-buff machine at the time of the inspection in question (Tr. 6). Mr. Handley denied that he ever spoke with Mr. Slade or with Mr. Petrie, and he identified his "conference worksheet", a copy of which is attached to his deposition. He confirmed several notations he made on this document, and the notations reflect that Mr. Handley "talked to Ray Roesler and Dennis Haeuber. Roesler says that during the inspection Mr. Schmarje admitted he knew this shroud was not in place. Dennie Haeuber indicates that

during his special investigation similar information was developed" (Deposition Tr. 15-17; exhibit 1). Mr. Handley's notations also include a statement "talked to Mr. Schmarje and informed him no adjustment would be made in the proposed assessment".

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James Petrie, MSHA Industrial Hygienist, Arlington, Virginia, was deposed by respondent's counsel on November 4, 1982. He was shown copies of exhibits P-20, P-21, and P-22, which are copies of respondent's dust plan and an exchange of correspondence between respondent and MSHA, and he denied ever seeing exhibits P-20 and P-22 prior to November 4, 1982, and he stated that the first time he saw exhibit P-21 was when MSHA's counsel Smith showed to him on October 29, 1982.

The deposition of Dr. Aurel Goodwin, MSHA's Deputy Administrator for Metal and Nonmetal Mine Safety and Health, Arlington, Virginia, was taken by respondents' counsel on November 4, 1982, and it is a matter of record in this case. Dr. Goodwin was asked to identify a number of documents which are labeled RD-1 through RD-22, they are included as exhibits to his deposition, and some of them are copies of exhibits made a part of the record during the hearing in this case.

Discussion

Background and history concerning respondent's silica dust problems.

TAMMSCO, INC., the corporate respondent in this case, is an Illinois Corporation engaged in the processing and sale in interstate commerce of various grades of silica products. The company Mill is a silica-producing plant, operated since 1973 by the Corporation, and Mr. John Norton is president and sole stockholder. Respondent Harold Schmarje has been plant manager since approximately February of 1980, and during the material times involved in this case in 1981, he supervised a work force of approximately 17 to 22 miners. In 1981, approximately 16,000 to 17,000 tons of silica was produced by the plant, utilizing some 45,000 manhours, and the plant is usually operated two shifts per day, five days a week. The primary use of the silica product is for the processing of paints, and the material involved in the instant proceeding is "ruff-buff", and respondent asserts that it is the "coarsest product manufactured by the company".

The silica bearing ore is extracted from underground mines located several miles from the plant and mill site and it is transported there by truck. At the mill, the ore is crushed by means of a pulverizer, and the crushed ore is conveyed to a kiln dryer where it is heated, and then through a series of pebble mills for fine grinding. From these mills, the finely ground material is conveyed or "air swept" through air classifiers where it is separated by specification into various product grades. The various grades of materials are then conveyed to large storage bins by bucket elevators, and then to large cone shaped hoppers located above, and attached to, three bagging machines or "bagging stations" for packaging. After packaging or "bagging" at the "bagging stations", the material is placed on pallets and then transported by forklift truck to the warehouse for storage to await sale and shipment by rail or truck to customers.

At the time the citation issued on May 7, 1981, there were

three bagging stations in the mill building: dual spout, neosil, and ruff-buff. The mill itself is a building of about 100,000 square feet, and it is separate and distinct from the crusher building and the warehouse, which

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is as large and an extension of the mill facility. The ruff-buff bagging machine in question has been described as air powered and equipped with a small plastic nozzle, over which the bag is fitted. Behind the nozzle is a scale which "trips" the machine off at the desired weight, normally fifty pounds. The bagger is designed to be equipped with a hood or shroud device which is connected to a central dust collections system. The shroud acts as a vacuum to collect fugitive dust which not only protects the worker, but preserves the product. Photographs of the machine are part of the record here, exhibit P-17 through P-19.

The record in this case reflects that MSHA's interest in respondent's silica producing plant began sometime in 1973 when it inspected the facility, began sampling the silica dust, and as a result of those tests, began issuing notices, citations, and orders for noncompliance with the requirements of the mandatory dust standards found at 30 CFR 57.5-1 and 57.5-5. According to the testimony of Max Slade, he first became aware of the silica dust problems at the plant in 1976, and he was concerned about the respondent's poor dust compliance record, as well as its advertising claims that its product was an amorphous type silica and not as harmful as the crystalline type silica. Since MSHA's laboratory analysis reflected that it was the more harmful type (crystalline), MSHA requested that the National Institute for Occupational Safety and Health (NIOSH) conduct an environmental and medical survey study of current and former employees of the plant to determine if workers were currently being exposed to hazardous levels of silica dust and to determine the prevalence of silicosis among current and former workers. That study was conducted on July 23, 25, and 26, 1979, and the results are part of the record in this case (Exhibit P-5).

Following the NIOSH study, respondent's plant was effectively shut down by MSHA on October 10, 1979, through the issuance of section 104(b) withdrawal orders because of the respondent's failure to comply with a number of outstanding dust violations which had previously been issued during February, September, and November 1979. The citations were issued because six of the occupations tested at the plant were found to be out of compliance with the applicable dust standards, and without those six occupations working, the plant could not operate. Exhibit P-2 is a six-page table listing the notices, citations, and orders served on the respondent for violations of section 57.5-1 and 57.5-5 from 1974 to May 7, 1981.

MSHA's closing of the plant in October 1979, resulted in a series of meetings and exchanges of communications and correspondence between the respondent, one Congressman, MSHA's local and National enforcement and staff personnel, MSHA's legal counsel, respondent's legal counsel, and officials of the Union representing the plant employees. My personal observation, after reviewing and wading through the voluminous record in this case, is that this flurry of activity came about because: (1) NIOSH's characterization of the silica dust problems at the plant as "an imminent danger" caught MSHA's attention, and MSHA wished to insure compliance with the applicable dust standards; (2) the

plant closing caught respondent's attention, and respondent was seeking a way to stay in operation while

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still addressing the dust problems; (3) the Union wanted to insure continued operation of the plant and wished to avoid any permanent shut down which would result in loss of employment; (4) legal counsel on both sides were attempting to address the problem, while at the same time advising their clients as to various enforcement and compliance possibilities, and (5) the Congressman's office wished to resolve the issues while addressing all of these concerns.

In order to comprehend the scope and magnitude of MSHA's enforcement efforts at the plant in question, I deem it appropriate to review the record of the citations, notices, orders, and other enforcement actions taken by MSHA's inspection force prior to May 7, 1981, the date on which the citations in the instant proceedings were issued. In this regard, included among exhibits P-16 in these proceedings are copies of four citations issued by Inspector Jack Lester on March 20, 1979, each of which charge a violation of mandatory standard section 57.5-5, because the inspector believed that the two-spout bagger, the clean-up man, the crusher operator, and the mill operator were all out of compliance with the permissible dust exposure levels (Citation Nos. 365172, 365173, 365174, and 365175). In each instance the inspector noted that even though the workers were wearing respirators, "administrative or engineering controls were not being used to control the contaminant and eliminate the need for respirators". The abatement time for each of the citations was fixed by the inspector as April 20, 1979, and in each instance the inspector extended the abatement time several times, up to and including August 10, 1979, and his justification for doing so is noted as "This dust citation is being extended on the basis of the company's abatement plan".

On October 10, 1979, Inspector Lalumondiere issued four section 104(b) withdrawal orders, Nos. 366580, 366581, 366582, and 366583, after finding that the time for abatement of the previously issued citations of March 20, 1979, should not be further extended, and the reason for not extending the abatement time further is noted as "efforts to control this dust problem did not warrant further extension". He ordered withdrawal of the entire milling operation, the entire mill building, the pulverizer crusher, and the two spout bagger.

On April 14-15, 1980, Inspectors Lalumondiere, Roesler, and Haeuber conducted an inspection of the plant while it was still under the previously issued closure orders of October 10, 1979, and copies of their report, as well as the actions taken as a result of that inspection are found in Exhibit P-10. Those documents reflect that the closure orders were terminated, the citations were "reinstated", and the abatement times were further extended. As justification for these actions, Inspector Lalumondiere noted as follows:

In accordance with the company's respirable dust control plan of April 14, 1980, a good faith effort to install feasible engineering controls is now

being made. Moreover, as noted in that plan an effective respirator program is being installed. * * * However, further sampling and evaluation will be needed to determine if all feasible engineering and administrative controls have been implemented or whether present controls have reduced exposure to below the T.L.V.

In his "field notes" attached as part of Exhibit P-10, Inspector Lalumondiere made the following notation:

The ruff-buff bagger was just being reinstalled, and the neosil bagger had a capture velocity of about 350 F.P.M. When we checked the two spout bagger, we were getting a capture velocity of 400 FPM. This was considered adequate and within that recommended by Denver Tech. Support. A new slide had been installed at the elevator of the crusher to the storage tank and the leaks in the crusher elevator had been repaired. When I checked the #3 elevator, the section that had been leaking so bad before had been replaced. The clean up in the mill and throughout the warehouse was good as it had been washed down. We terminated the orders and reinstated the (6) six dust citations. When we got ready to leave the property, we tried to explain to Mr. Smarje [sic] that the place would have to be kept in its present condition if he wanted to operate, and at this time he became very arrogant. Ray told him that if he did not keep the place in a clean condition and did not keep his leaks repaired, he could be assured that he would not operate and we left it at that.

Exhibit P-11 are copies of section 104(b) closure orders issued by MSHA Inspectors Jack Lester and Bruce Dial on June 27, 1980, and they all cite violations of section 57.5-5. The areas affected by the closure orders are shown as "two spout bagger", "fork lift", "mill building", and "crusher building", and in each instance the inspector noted that "the company failed to follow the dust control plan submitted to MSHA on April 14, 1980". Inspector Dial's field notes, included as part of Exhibit P-11, state in part as follows:

* * Mr. Smarje [sic] came in and said that we picked a good day to come and shut them down, because everything was wrong. He also told us that they were not following the plan that they drew up for wrapping the pallets.

* * We left the property and went to a table in a park to talk about the orders and write them. While we were writing the orders a Mr. Norton "owner" came to the table and ask [sic] what we found. Jack told him

that they were not going by the plan that he wrote up. He ask [sic] if we were going to shut them down and we said that we were going to issue some orders. He said that he was going to call his attorney then.

* * We went back to the plant at 10:10 and issued the withdrawal orders. Jack spoke with there [sic] attorney and we waited till 10:45 to see if the plant was being shut down. We left the plant and called Ray Rossler [sic] and he told us to return to the office.

Mr. Lester's "field notes" contain the following notations:

Smarje [sic], when asked about plastic wrapping the palletized material, stated that he had not been complying with that part of the plan. Only 8 of the 69 pallets in the warehouse was wrapped. * * The attorney for Tammsco talked to me on the phone before we left and wanted me to call Dr. Goodwin. I informed Smarje [sic] that I would have to go through proper channels in order to converse with Dr. Goodwin, and that he would be contacted after we returned to the office.

Mr. Lester's and Mr. Dial's field notes both make reference to the "two spout bagger," and they observed that the area around it was being washed down by employees, but that the dust collector in the catch basin was plugged up on one of the spouts, but that two men were immediately put to work on this. No mention is made of the ruff-buff bagger.

On July 1, 1980, Inspector Lester rescinded his previous closure orders concerning the two-spout bagger and the crusher operator, and reinstated the citation and extended the abatement time. He did so for precisely the same reasons as Inspector Lalumondiere on April 14-15, 1980 (Exhibit P-16).

On August 20, 1980, Inspector Lalumondiere issued four section 104(b) withdrawal orders affecting the mill clean-up man, the mill operator, the crusher operator, and the two spout bagger, as his stated reasons for doing were "due to the lack of good faith effort being put forth by operator and failure to follow dust control plan, this citation does not warrant further extension" (Exhibit P-16). He also issued withdrawal orders for fork life operator and the bag stacker for the same reasons (Exhibit P-12). Mr. Lalumondiere's "field notes", regarding these citations contain the following notations:

* * * There was a pile of dust about six inches high behind the two spout bagger where the catch basin had filled and was spilling over.

* * * There was a bad leak at the neosil feed elevators and also leaks in the screw conveyor above the ruff-buff bagger. A velocity check of the neosil bagger showed only 100 to 150 FMP and the crusher the

same thing.

* * * The main elevator on the roof of the building for the neosil and ruff buff was leaking at the neosil slide.

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On August 26, 1980, Inspector Haeuber rescinded Inspector Lalumondiere's closure orders of August 29, 1980, reinstated the citations, and he did so for the same reasons quoted above (Lalumondiere). He extended the abatement times to September 29, 1980, and they were further extended to November 10, 1980, February 18, 1981, April 10, 1981, July 8, 1981, September 8, 1981, and in each instance the extensions were granted so that "shift weighted average resampling" could be conducted and the results "calculated to determine the shift weighted average exposure" of the occupations in question. Further extensions for abatement were made up to and including July 6, 1982 (Exhibit P-16).

Exhibit P-14 is an April 13, 1981, memorandum report from Inspector Lalumondiere to Mr. Slade concerning a dust survey conducted at the plant on March 10-11, 1981. Aside from the results of the survey which are attached to the memorandum, Mr. Lalumondiere presents a narrative summary concerning his observations, and it includes observations of "piles of silica dust", "dust collectors venting dust like a steam engine into the atmosphere", "leaking equipment", "dust blowing everywhere" by the main elevator for the 2-spout bagger, "only a few pallets were wrapped", and he concluded his report by stating that "I could see no great improvement of the conditions at Tammsco other than the fact that the employees are more conscientious when it comes to wearing a respirator".

As a result of the dust survey of March 10-11, 1981, Inspector Bruce Dial issued a citation on April 6, 1981, No. 0500426 (Exhibit P-16), citing a violation of section 57.5-5 because the laboratory results from the silica bearing dust for the neosil bagger was out of compliance. Inspector Dial concluded that a violation existed on March 11, 1981, the day the sample was taken, but he indicated on the face of the citation form that "this citation is issued on April 6, 1981." He fixed the abatement time as July 8, 1981, and Inspector Lalumondiere extended the abatement times to September 8, 1981, December 8, 1981, and February 25, 1982.

The compliance extensions through February 25, 1982, were made pending receipt of the results of dust resampling and recalculation to determine the shift weighted average exposure of the neosil bagger. Thereafter, on March 16 and May 17, 1982, Inspector Donald Baker, after noting the results of the dust tests for the neosil bagger, extended the time for compliance to April 26 and July 6, 1982, and in both instances he noted that the extensions were made "to allow time for additional engineering controls to be performed", and he also explained the dates on which he wrote the extensions of the abatement times as "due to the delay in getting the samples analyzed".

Respondent's "dust control plans".

It should be noted at the outset that there are no mandatory MSHA regulations or standards requiring a mine operator subject to the mandatory health and safety standards found in Part 57,

Title 30, Code of Federal Regulations, to submit or adopt any specific dust control plan, or to submit

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such plans to MSHA for review and approval, and Mr. Slade conceded that this was true (Tr. 353). Thus, absent any such mandate, a mine operator is free to fashion any plan that he wishes, as long as MSHA doesn't object. Any objections by MSHA usually take the form of citations and closure orders, and this forces the operator to review its "plan" so as to achieve "abatement" until the next inspection. In short, such plans are all too often formulated by such "trial and error methods", and the evolution of the respondent's so-called "dust control plan" of April 14, 1980, is in my view a classic example of this.

Respondent's "dust control plan" is in the form of a letter dated April 14, 1980, from John Norton to MSHA's Vincennes, Indiana field office (Exhibit P-9). The letter states that it is in response from MSHA for a revised plan, and Mr. Norton agrees to follow the itemized dust control measures set forth in the letter. Item 4(e) states that "shrouds will be installed and maintained on all bagging machines". Also included among the dust control measures are provisions for "clean-up as necessary" to prevent silica from becoming airborne, "immediate clean-up" of silica spills, repair of leaks, daily and periodic pre-shift and on-shift inspections by a supervisor, dust control measures for equipment, and measures to insure personal respiratory protection for all employees. Attached to the exhibit is a December 18, 1979, Tammsco Inc. notice to all employees concerning the company's program for the use, cleaning and repairing of respirators.

Inspector Lalumondiere's testimony reflects that the "plan" came about after one of the respondent's competitors, Illinois Minerals Company, faced with a closure order from MSHA for noncompliance with the same dust standards, asked for an expedited hearing. According to Mr. Lalumondiere, after the start of the hearing, the parties reached a compromise agreement which permitted Illinois Minerals to resume its operation as long as the company agreed to submit a written "dust control plan" detailing its proposed dust control methods. Faced with a similar closure situation, and in an attempt to have his plant reopened, Mr. Lalumondiere stated that on advice of MSHA's legal counsel, Tammsco's President, John Norton, was advised that the plant could be reopened, but only if Mr. Norton submitted a plan similar to that submitted by Illinois Minerals. At Mr. Norton's request, Mr. Lalumondiere permitted Mr. Norton to copy the provisions of the Illinois Minerals plan, and it was subsequently submitted by Mr. Norton in his letter of April 14, 1980, and Mr. Lalumondiere stated that both plans were basically the same (Tr. 171-172).

During the course of the hearing, as well as during the taking of various depositions, respondent's counsel maintained that the respondent's dust control plan of April 14, 1980, was superceded by a subsequent plan dated September 23, 1980 (exhibit R-8). Although Mr. Norton makes reference to both plans in his interview statement filed with Inspector Haeuber, Mr. Norton was asked no questions concerning these plans by either party during the hearing, and he gave no testimony on this issue. His prior

comments to Inspector Hawuber concerning the April 14, 1980, plan is an assertion at page two of his corrected statement that "this plan was dictated to us

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by the Mine Safety and Health Administration". His only explanation concerning the September 23, 1980 plan, was in response to a question asking him to explain why the ruff-buff bagging machine was allowed to be operated without a shroud. His response, at page two of his corrected statement is "The dust control plan of April 14, 1980, was superseded by a dust control plan of September 23, 1980".

I take note of the fact that the September 23d plan does not provide for any dust control shrouds. In fact, the "plan" consists of four paragraphs, and an attachment which is dated June 20, 1980, titled "Cost to Upgrade Production", and it appears to be some sort of preliminary cost analysis for two phases covering the years 1980-1989 and 1989-1990. The four paragraphs on the face of the plan itself are as follows:

By means of inspection, repair and clean-up, dust levels will be maintained at or below conditions existing at the onset of the Mine Safety and Health Administration PAR program (September 1980).

Above dust levels will be monitored by equipment specifically designed for measuring respirable dust and under the supervision of a neutral party.

Efforts to bring the plant into dust standard compliance will continue. An overview of the plan to accomplish this is marked exhibit A and attached hereto.

Respiratory protection will be provided and the respirator program will be consistent with American National Standards Institute requirements for a respiratory protective program.

In arguing both the existence of the September 23, 1980 plan, and in support of his assertion that it superceded the April 14, 1980 plan, respondent's counsel produced several documents received for the record as exhibits R-7, R-8, and R-13. These documents are a letter dated July 10, 1981, addressed to MSHA's office in Arlington, Virginia, for the attention of Mr. Slade, a copy of an MSHA "buck slip" or "routing slip" dated 3/26/81, addressed to Mr. Slade from Inspector Roesler, enclosing a copy of the 9/23/80 plan, and a document dated August 4, 1981, which is Mr. Schmarje's "corrected" version of his interview with Inspector Haeuber in which Mr. Schmarje makes reference to the 9/23/80 plan. In addition, attached to the deposition taken of Dr. Goodwin is a copy of a letter dated March 20, 1981, to Dr. Goodwin from Mr. Norton, in which Mr. Norton makes reference to the September 25, 1980 plan, a letter dated July 30, 1981, to Congressman Paul Simon from Mr. Norton, in which Mr. Norton makes reference to the plan, and a letter dated July 15, 1981, from Mr. Schmarje to MSHA assessment officer Neil Handley, which also makes reference to the plan.

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Mr. Slade denied ever receiving the July 10, 1981, letter addressed to his attention concerning the second plan, and Dr. Goodwin could not recall seeing the correspondence referred to by counsel during his deposition. Further, Mr. Slade testified that notwithstanding any other "plans", at no time did MSHA ever agree that any engineering controls other than those stated in the April 14, 1980, letter from Mr. Norton would be acceptable (Tr. 355).

In response to certain bench questions concerning the two plans, respondent's counsel asserted that his point in pursuing the existence of the second plan was to establish that the respondent was acting in good faith (Tr. 344). Counsel conceded that the second plan did not repeal the April 14, 1980, requirement that the dust shroud in question be maintained on the bagging machine in question as a feasible and acceptable engineering control (Tr. 344), and he conceded that the shroud was just such a device (Tr. 345-347). His concern is reflected in the following colloquy at Tr. 347-349:

JUDGE KOUTRAS: But what you are saying is that "Judge, if you find for the respondent in this case, on the fact of this case, and dismiss the citation, that means we can take all these devices off all these machines, because we are coming up with a better--we are coming up with a ten-year plan."

MR. COGHLAN: No, I am not saying that, Judge. I am not saying that at all. I am saying that the Secretary is obliged to do certain things under the case law with reference to each plan or submission. In other words, it would appear as though the Secretary appears to be continually negotiating. The Secretary must not continue to negotiate. He has a duty to expressly tell the operator, "Look, we are not negotiating. I want to remind you that there is no revision. There is no refinement. There is no carryover." We are not talking about that. What we are talking about is that you are obliged to keep your agreement. We are not revising it.

Now, in coal, as you know better than I, they have very definite standards and, in coal, the operator has some very special remedies, but in metal, nonmetal, and especially underground, they just do not have it. There is no statutory authority for the plans.

Now, what concerns me is this: This the one definitely had overhanging it for many months, in conversation with various people, criminal sanctions threatened [sic]. I, personally, was advised of this.

JUDGE KOUTRAS: I understand.

MR. COGHLAN (continuing): --this roundabout way of making law, whereas where criminal sanctions are involved, just like Chapter 38 here in Illinois, we need that type and kind of certainty, and that the agent cannot be in doubt when he is told by the operator, "Look, do not worry about it. I was in Washington. There are four more plans going."

JUDGE KOUTRAS: Mr. Coghlan, my only observation to that is that what MSHA probably could do, and probably should have done, to dispell any notion that they are doing it piecemeal is to shut the plant down and leave it shut down.

MR. COGHLAN: So that everybody knows.

JUDGE KOUTRAS: But what happens in the real world is that the operator will do anything in his power to terminate that citation. He will promise MSHA the moon. That is what he did in this case. It is obvious to me in this letter.

When asked by the Court why there is no mandatory standard requiring a mine operator to submit a dust control plan, Mr. Slade responded as follows (Tr. 352-354):

JUDGE KOUTRAS: You know, but I have asked this question time and time again: Why is there not a standard that requires them to come up with a plan?

MR. COGHLAN: That is my question.

JUDGE KOUTRAS: I will ask it again, Mr. Slade. What is the answer?

THE WITNESS: Because we have never been able to get one through public hearings and ALJs.

JUDGE KOUTRAS: What do you mean, "ALJs"? Do you mean to tell me that the Secretary cannot propose a rule to amend "57" to include a provision in there that requires a mine operator in metal or nonmetal to submit a dust control plan?

THE WITNESS: He can propose it, but the objections are usually so strenuous --

JUDGE KOUTRAS: Has it ever been proposed?

THE WITNESS: Yes, sir, it has.

JUDGE KOUTRAS: Has it ever gone to a rulemaking hearing before the Administrative Law Judge of the Labor Department, because we are out of the rule-making business now?

THE WITNESS: I do not know.

JUDGE KOUTRAS: In other words, when it is published in the Federal Register and the Secretary gets objections from the industry, then he just drops it?

THE WITNESS: In many cases, yes.

JUDGE KOUTRAS: I am talking about the specific proposal, rule-making, for a requirement that mine operators submit a plan to MSHA for review.

THE WITNESS: Well, there are Presidential guidelines and such that demand a reduction in paper work. They demand to--

JUDGE KOUTRAS (interrupting): In my humble opinion, the lack of such a specific mandatory standard generates more paper work rather than cutting it down, because what I see in this case is plans done by correspondence and by law firms and by Congressmen and by lawyers in the Solicitor's Office.

That is the way these plans are written. I am suggesting to you, Mr. Slade, that you promulgate a standard that tells any mine operator, "You are required to come up with a plan within X number of days of starting to dig that first piece of whatever you are digging there, and you submit that plan to MSHA for their review. We will give you suggestions and the guidelines and, once you go through the filtering process, there is the requirement."

THE WITNESS: I assure you that the air quality standards under proposal right now will include that proposal.

Findings and Conclusions

In Docket No. LAKE 81-190-M, the corporate operator Tammsco Inc. is charged under section 110(a) of the Act with a violation of mandatory standard 30 CFR 57.5-5. The citation charges that on May 7, 1981, the ruff-buff bagging machine, which is in use, was not hooked into the dust collection system of the mill as stated in a dust control plan submitted by the company on April 14, 1980. In Docket No. LAKE 82-65-M, Respondent Harold Schmarje, the plant manager, is charged under section 110(c) of the Act with knowingly authorizing, ordering, or carrying out this same alleged violation as an agent of Tammsco Inc.

The interpretation and application of the term "knowingly" as used in the Act has been the subject of litigation before this Commission. MSHA v. Everett Propst and Robert Stemple, 3 FMSHRC 304 (1981). In MSHA

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v. Kenny Richardson, 1 FMSHRC 874 (July 1979; ALJ Michels), 3 FMSHRC 8 (January 1981), the Commission held that the term "knowingly" means "knowing or having reason to know", and it rejected the assertion that the term requires a showing of actual knowledge and willfulness to violate a mandatory standard. In this regard, the Commission adopted the following test as set forth in U.S. v. Sweet Briar, Inc., 92 F.Supp. 777 (D.S.C. 1950):

"[K]nowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

In Richardson, the Commission held that its interpretation of the term "knowingly" was consistent with both the statutory language and the remedial intent of the Act, and expressly stated that "if a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute". On appeal to the Sixth Circuit, the Court affirmed the Commission's decision, Richardson v. Secretary of Labor, FMSHRC, 689 F.2d 632, decided October 1, 1982. *

The respondents in these proceedings are charged with violations of mandatory standard section 57.5-5. This standard requires that employee exposure to harmful airborne contaminants be controlled, insofar as feasible, by prevention of contamination, removed by exhaust ventilation, or by dilution with uncontaminated air. Thus, the standard on its face, does not require the complete elimination of such harmful airborne contaminants. It simply requires that employee exposure be controlled by prevention, removal, or dilution, and these control measures are directly dependent on the development and application of feasible and acceptable engineering control measures so as to insure that any employee exposure is limited to or does not exceed those exposure levels mandated by the threshold limit values mandated by mandatory section 57.5-1. Section 57.5-5, contains two exceptions. The first exception comes into play if no accepted engineering dust control measures have been developed. In this case, employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels as long as they wear respirators, and as long as the company's "respirator program" meets the requirements of subsections (a), (b), and (c) of section 57.5-5. A second limited exception is dictated by the "nature of the work involved", i.e., occasional entries into contaminated areas while establishing controls, performing maintenance, or conducting investigations, and in these cases employees are required to wear respirators.

MSHA has the burden of proof in these proceedings, and it must establish by a preponderance of the credible testimony and evidence that (1) employee exposure to harmful silica dust exceeded the permissible levels, and (2) there existed feasible engineering or administrative controls to control employee exposure to such dust, and that these controls were not utilized.

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The Dictionary of Mining, Mineral, and Related Terms, published by the U.S. Department of the Interior, Bureau of Mines, defines "silicosis" as follows at pgs. 1012-1013:

Lung disease caused chiefly by inhaling rock dust from air drills. * * * A condition of massive fibrosis of the lungs marked by shortness of breath and resulting from prolonged inhalation of silica dusts by those, as stonecutters, asbestos workers, miners, regularly exposed to such dusts.

According to the information contained in the preface to the 1973 TLV Booklet published by the ACGIH, the term "threshold limit values" refer to airborne concentrations of substances and represent conditions under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect. These values refer to time weighted concentrations for a 7 or 8 hour workday and 40 hour workweek, and the amount and nature of the information available for establishing a TLV varies from substance to substance.

The specific threshold limit values for contaminants are set out in section 57.5-1, which adopts by reference the dust exposure limits set out in the 1973 edition of the American Conference of Governmental Industrial Hygienists (ACGIH) publication TLV's Threshold Limit Values for Chemical Substances in Workroom Air (exhibit P-4). The TLV or threshold limit value which establishes the maximum exposure for any particular contaminant is obtained by a formula found in this publication.

Although the respondent in this case initially indicated that it believed its silica products to be of the amorphous type, the record in this case establishes that it is crystalline, and the respondent conceded that this was the case. The TLV formula for crystalline silica is set out at pgs. 32-33 of the ACGIH TLV Values, exhibit P-4, and in a letter dated May 21, 1981, from Max Slade to Mr. John Norton, Mr. Slade states in pertinent part as follows:

In your letter to Representative Simon you say that, "the MSHA allowable dust level in the workplace environment total is .1 milligram in eight hours." This is a misconception, the MSHA allowable limit for airborne respirable dust is expressed by the formula $10 + (\% \text{ Quartz} + 2)$, and is listed in milligrams of dust per cubic meter of air (mg/m³). For dust containing 50 percent free crystalline silica (quartz) the allowable limit would be $10 + 52$ or 0.192 mg/m³. The average white male under a moderate work load will breathe approximately 22 cubic meters of air in an 8-hour work day. If this air contained .192 mg/m³ of dust, a person would breathe 4.22 milligrams of dust in 8 hours or 21.1

mg per 40-hour week, or 1012.8 mg per 48-week year. This is some 40 times greater than the amount you indicated as the MSHA allowable limit.

In order to determine the adequacy of a mine operator's dust control measures, mandatory standard section 57.5-2, requires that "dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures". Thus, it seems clear to me that there is a direct inter-relationship between the mandatory standards found in sections 57.5-1, 57.5-2, and 57.5-5, and that the clear intent of these standards is to provide a regulatory mechanism for addressing dust hazards by establishing requirements for (1) identifying the existence of hazardous dust levels in the working environment, (2) seeking means to control employee exposure to such hazards, and (3) providing a means for a mine operator to address the problem and come up with workable solutions.

Respondents' defense to the citations is the assertion that on May 6, 1981, the shroud which had been welded on to the ruff bugg bagging machine was knocked off and demolished by a fork life operator. Further, respondent maintained that the new ruff buff bagger had been in place since January 1981, and that it was operated intermittently by Mr. George Storm, who stated that he never operated the bagger without the shroud (Tr. 218-219). Counsel also maintained that Mr. Storm had previously told MSHA investigator Dennis Haeuber that the shroud was always on the machine when he operated it (Tr. 221). He also maintained that the shroud which was installed on the new bagger was in fact the shroud which was on the old bagger, and that after the new one was moved to its present location, the old shroud was welded on the bagger after some modifications were made to accommodate it (Tr. 221). He argued further that the plant as it was on July 23, 1979, was not the same as on May 7, 1981, and that no valid sample was taken that day to substantiate the violation (Tr. 223).

With regard to the lack of samples, respondent's counsel asserted that in this case MSHA has the burden of establishing by a preponderance of the evidence that there was exposure to harmful airborne contaminants, and while it need not test every machine in the plant, if MSHA believes that the ruff-buff product in question exposed an employee to contamination on any given day, it must sample and test the material to support that conclusion on the day it claims the employee was over-exposed (Tr. 384-385). Counsel conceded, however, that if samples were taken a few days before the citation here was issued, and they were found to be out of compliance, then one can assume that on those days, employees were in fact exposed to harmful airborne contaminants (Tr. 384).

MSHA's counsel argued that the physical conditions (airborne silica) of the plant which Mr. Slade and Mr. Lalumondiere observed on the day of the inspection in question, coupled with the fact that dust samples taken before and after that date showed the plant was still out of compliance are important

factors in any determination concerning the presence of

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harmful airborne contaminants. In addition, counsel pointed out that since the NIOSH study, as well as the fact that continuous dust surveys and samples show noncompliance, the respondent is still mining the same silica and nothing has changed (Tr. 387).

At the close of MSHA's case in chief, respondent's counsel moved that the citations be dismissed on the grounds that MSHA has failed to establish employee exposure to harmful airborne contaminants by means of prevention, removal, or dilution. Counsel asserted that MSHA's evidence failed to establish the exposure necessary to establish the violations, and that evidence of harmful exposure two years earlier is insufficient to establish the kinds of violations issued on May 7, 1981. He concluded that any prior sampling was done at times unrelated to the alleged violations in question (Tr. 393-394). The motion was DENIED (Tr. 394).

MSHA's failure to test or sample the ruff-buff material in question

MSHA's mandatory air quality standards as found in section 55.5-1, 56.5-1, and 57.5-1, as well as the requirements for controlling employee exposure to harmful airborne contaminants as found in sections 55.5-5, 56.5-5, and 57.5-5, has been the subject of litigation before this Commission and the courts, and a review of some of these cases follows below. In each instance cited, the question of whether MSHA had established a violation of the airborne contaminant control requirements of sections 55.5-5 and 57.5-5, were dependent on dust samples and tests, based on the TLV requirements found in sections 55.5-1 and 57.5-1. Further, the question of whether a particular airborne dust contaminant was "harmful", and whether employees were unduly exposed to such dusts, has consistently been determined by testing and sampling to establish that employee exposure to such dust exceeded the recognized TLV.

MSHA v. Washington Construction Company, DENV 79-371-PM, 3 FMSHRC, 2125 decided September 14, 1981, involved a quartzite quarry in which the respondent was charged with violations of section 57.5-5, because the results of the sampling of three miners in regard to airborne contaminants revealed that they were subjected to harmful exposure based upon the threshold limit values adopted in accordance with the regulation. The cited miners were exposed to ten, six, and three times the allowable limits, and while they were wearing respirators, the evidence established that accepted engineering control measures (water sprays) could have been applied in order to control the amount of airborne contaminants, thus permitting the respondent to be in compliance without the use of respirators.

MSHA v. Johnson, Stewart & Johnson Mining Company, WEST 79-175-M, decided August 17, 1981, 3 FMSHRC 1937, involved a citation for a violation of section 56.5-5, after a pit laborer, who was sampled for dust exposure during a period of 445 minutes, was exposed to silica bearing dust in the amount of .92 milligrams per cubic meter. The Judge found that according to the threshold limit value adopted by the regulations, .42 milligrams per

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cubic meter should not have been exceeded. He also found that it was feasible to reduce the harmful airborne contaminants by use of water incorporated in the plant's crusher spray system.

In *Climax Molybdenum Company v. MSHA*, WEST 79-72-RM, decided April 16, 1981, 3 FMSHRC 964, Judge Moore took note of the fact that out of the nine cases involving alleged violations of section 55.5-5, which he had docketed for trial, eight were dismissed on motion by MSHA on the ground that there was no evidence to support the citations. With regard to the remaining case, the citation alleged that the quartz-bearing dust level around a floor jaw crusher operator was 1.02 Mg/m³, where the threshold limit value (TLV) was .49 Mg/m³, and that feasible engineering or administrative controls were not being used to reduce the dust levels to the point where respirators could be eliminated. Judge Moore vacated the citation, and he did so on the ground that MSHA's testing procedures were flawed and suspect, and that the testimony of its laboratory technician in support of the citation was confused and unclear.

MSHA v. Pacer Corporation, DENV 79-257-M, decided by Judge Michels on August 28, 1979, 1 FMSHRC 1081, involved a citation for an alleged violation of section 55.5-1, and the citation there charged that a rock sorter was exposed to silica dust in excess of that permitted under section 55.5-1(a). Judge Michel's decision contains a comprehensive review of MSHA's dust sampling procedures, and based on the facts presented he vacated the citation and dismissed the case on the ground that the sample results in support of the citation in question contained unexplained wide variations in the percent of free silica found in the samples, and that the inaccuracy and uncertainty of the testing methods, as demonstrated by the record before him, led him to conclude that a violation had not been established. Although the Commission directed review of this decision in October 1979, it subsequently vacated its order for review in April 1980.

MSHA v. DiCamillo Brothers Mining Company, WEST 81-210-M, April 21, 1982, 4 FMSHRC 718, involved a citation issued for a violation of section 57.5-5, after a miner died when he was exposed to an excessive buildup of carbon monoxide, as determined by tests taken the same afternoon of the accident. Although the fatality apparently occurred when the ventilation was "circuited", the Judge held that the operator had an absolute obligation to insure that the contamination limits set out in section 57.5-5, as expressed in TLV's, were not exceeded.

In a recent case decided on March 21, 1983, by the 10th Circuit Court of Appeals, *Climax Molybdenum v. Secretary of Labor & FMSHRC*, No. 80-2187, the Court affirmed the Commission's decision in *Climax Molybdenum Co.*, DENV 70-102-M, 2 FMSHRC 2748 (Oct. 1980), 1 FMSHRC 1044 (Aug. 1979 decision by ALJ Michels), affirming Judge Michel's dismissal of Climax's application for review of citations charging it with alleged violations of the mandatory dust standards found in mandatory standards 30 CFR 57.5-1 and 57.5-5. Judge Michel's dismissal of the case prior to

a hearing

on the merits was predicated on the fact that MSHA decided to vacate the citations and sought dismissal of the case on the ground that it could not prove that Climax was not using all feasible dust control methods at the cited mining operation. Notwithstanding MSHA's vacation of the citations, Climax insisted that it was entitled to a declaratory order interpreting the cited dust standards and specifying that it was in fact using all feasible controls. In response to Climax's assertions that it was entitled to such declaratory relief, the court made the following observations at page 10 of its "slip opinion":

We recognize that in the case before us, there exists considerable uncertainty regarding the proper interpretation of the FMSHA dust regulations. We are sympathetic to the plight of industries that must structure their operations and make long-term capital investments in the face of this uncertain regulatory environment. Nevertheless, the scope of our review of the Commission's denial of declaratory relief is limited to a determination of whether the Commission abused its discretion. In this case, the Commission provided reasonable justifications for the denial of Climax's request for declaratory relief. The Commission noted that the present dust regulations were unclear, in part, because the government's position on dust regulation is presently undergoing reformulation. The Commission may reasonably withhold declaratory relief in anticipation of a clearer exposition of government policy. The Commission also suggested that Climax has shown no special need for declaratory relief; Climax faces no greater peril than other mining companies in interpreting the content of the regulations. The Commission may reasonably choose to reserve its use of declaratory relief for special cases in order to conserve its administrative resources. Given the Commission's justifications, we conclude that it did not abuse its discretion in denying declaratory relief. (emphasis added).

In his post-hearing brief, respondents' counsel argues that MSHA has presented no evidence whatsoever of any tests made or samples analyzed at or about the time of the inspection of May 7, 1981. With regard to the March 10-11, 1981, plant survey and tests made on those dates (exhibit P-14), counsel points out that the occupations and equipment which were surveyed are not part of the citation issued on May 7, 1981. As for the August 21, 1981, ruff buff particle size analysis (exhibit P-6), counsel points out that this was done after the citation issued. Even so, counsel points out further that the commercial value of the silica product is directly in proportion to the degree by which it is refined. Counsel asserts that the respondent manufactures its product to detailed specifications. The reason for the existence of the process is to change the particle

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size of the raw silica ore deposit, and the finest product manufactured is almost 100% respirable, i.e., airborne and harmful. Since the results of MSHA's August 21, 1981, particle size analysis of the ruff-buff product taken from the plant discloses that it is 94% larger than 44 microns, or almost totally nonrespirable, counsel maintains that MSHA has failed to explain its contradictory opinion that if the ore comes from the same dsposit, it is all harmful, i.e., respirable.

Respondent's counsel argues further that MSHA's position in this case that the conditions at the plant have not changed since 1979 is not supported by the facts. In support of its assertion that the plant conditions were not the same at the time the citation issued on May 7, 1981, counsel cites the testimony of John Norton concerning the capital expenditures made and as detailed in a letter to Dr. Goodwin of June 6, 1980, as well as Mr. Schmarje's testimony regarding five major inovations since February 1980 (Tr. 404). Exhibits R-3 and R-12, which are part of Dr. Goodwin's deposition, reflect the improvements made at the plant to address the dust control problems, including completed or ongoing work with respect to 15 of the NIOSH recommendations, and these negotiations and changes have taken place during the interim period spanning the NIOSH study and the inspection of May 7, 1981 (Tr. 217-219).

Exhibit R-9 is a copy of a dust evaluation study conducted at the plant by MSHA's Denver Technical Support Group during December of 1979, and January of 1980. At hearing and in his brief, respondent's counsel argued that these reports establish that due to certain plant modifications and improvements in controlling the dust, as reflected in this report, the conditions at the plant as of the time of those reports were not the same as those which may have existed at the time of the NIOSH study. Counsel argued that with the dust collecting equipment in place, as shown in these surveys, the dust levels which may have existed in July of 1979 could not be the same as those which may have existed as of May of 1981 (Tr. 380-383).

In response to counsel's arguments, Mr. Slade conceded that the respondent has made improvements and modifications to the plant, particularly in the Crusher Room. However, Mr. Slade indicated that the continuing dust problems stems from the fact that the respondent has neglected the maintenance and clean-up recommendations. Even though dust control measures have been taken, and control devices have been installed, it was his position that the respondent did not properly use or maintain the dust control devices which it had available (Tr. 382).

Mr. Slade confirmed that in a letter to Mr. Norton, he acknowledged that improvements were made to the dust control plan and that money has been spent on some basic controls. However, Mr. Slade was of the following opinion (Tr. 385):

The maintenance and upkeep and housekeeping of the plant is rotten. Their attitude toward dust control is rotten. What money they are putting in is being

wasted because it is not being maintained and the housekeeping is not being adhered to.

MSHA's post-hearing brief contains no discussion concerning the requirement for sampling. However, during the course of the hearing, MSHA's counsel took the position that no sampling was required to support the citation in question because the respondents are not charged with a violation of section 57.5-1, but are charged with a violation of section 57.5-5, for failure to maintain the engineering controls (shroud) on the cited ruff-buff bagging machine (Tr. 478). However, counsel conceded that the term "harmful airborne contaminant" means any such contaminant which does not meet the requirements of section 57.5-1 (Tr. 477).

In support of his position that no sampling or testing was required to support the citation, counsel asserted that the bagging machine in question was an integral part of the plant and that the area around that machine was not in compliance with the dust standards at the time the citation issued on May 7, 1981. In addition, counsel maintained that the evidence establishes that even if the machine were only operated for an hour or two, it would contribute to the prevailing atmosphere, and without the dust shroud, the contaminants from the machine would necessarily contribute to the overall dust conditions which were out of compliance (Tr. 279).

When reminded of the fact that each of the citations and orders issued in 1979, 1980, and 1981 (exhibits P-11, P-12, P-16), for violations of section 57.5-5, were supported by dust samples showing noncompliance, counsel asserted that the ruff-buff bagger in question was not operated everyday or for long periods of time, and that different people may have operated it at any given time. Given the fact that the ruff-buff bagger was located in close proximity to two other bagging devices, and with men working in that area, the lack of shrouds or the failure to comply with the dust standards contributes appreciably to the overall over-exposed work atmosphere (Tr. 484). He also stated as follows (Tr. 485-486):

JUDGE KOUTRAS: But I'm just a little curious as to how one can determine specifically how much of a contribution the Ruff-Buff product has made to a person that's breathing it in if they don't test it. I mean, to me, that sounds like common sense that they would test over an eight-hour period--but you apparently take the position that it contributes and it's all mixed in together--

MR. SMITH (Interrupting): Well, let me say this to that, as far as I know. You can't force the operator, to make somebody stand there and make them be tested for a whole eight-hour period. That's number one. But they did make an analysis of the Ruff-Buff product. That's in evidence and it's been explained by Mr. Slade and others that, you know, this was respirable and it

was within the limits there.

I'm informed that three pounds, every fifty-pound bag would be respirable. So you're talking--three pounds of fifty-pound bags, 6 per cent would be respirable. My colleague wanted me to say that for the record.

Although Ms. Moring testified that samples of some of the silica products were taken and analyzed during the NIOSH survey, the ruff-buff product was not sampled (Tr. 117). With regard to the ruff-buff particle size analysis conducted on the two samples by MSHA's Denver Tech Center, as reflected in the August 31, 1981, memorandum (exhibit P-6), Ms. Moring explained that those test results reflect that 94% of the tested ruff-buff was not considered to be of sufficient size to render it respirable into the lung, but it is still considered to be toxic silica. She also explained that the tests indicated that 98%, of the remaining 6% of tested material would be respirable, and when asked whether the 94% found to be nonrespirable would render it any less a "harmful airborne contaminant", she responded "yes and no", and explained her answer as follows (Tr. 127-128):

THE WITNESS: Yes and no. No, it is not because at a 44 micron particle it cannot be inhaled into deep lung where it would cause damage. Yes, because as a 44 micron particle if any of this spills, gets stepped on, gets run over, whatever, it is reborn, so it can be ground down by these actions.

When asked whether her answer would be different if the ruff-buff tests showed that none of it was respirable, she answer as follows (Tr. 128-129):

JUDGE KOUTRAS: Let me ask the question another way. Let's assume you have sampled the material and found that none of it sifted through and none of it was respirable according to your definition, would an operator be subject to a citation under this particular standard for failure to control airborne, harmful airborne contaminants?

THE WITNESS: I can't answer that.

When asked if she knew what an "air classifier" was, Ms. Moring responded that "it separates the particles by their organic size". When asked whether it was possible for such a device to separate particles so that there would be no "respirable particles", she responded that she was "not that familiar with the air classifier" (Tr. 117-118). She also conceded that she had not looked at or read sections 57.5-1 or 57.5-5 (Tr. 69).

Ms. Moring went on to articulate her concern that the normal activities carried on in the plant around the areas where baggers are located can cause the nonrespirable silica dust to be reentered into the atmosphere, and if changes occur in the particle size it could get into the lungs.

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She also confirmed that NIOSH's concern is over the fact that the entire plant presents a problem with employees being over-exposed to harmful levels of silica dust.

MSHA's position that dust samples and tests are not required to support the citation in this case is further reflected in the following colloquy with Max Slade (Tr. 389-391):

JUDGE KOUTRAS: The reason I brought up this particular example, Mr. Slade, is that I take it them, when I read in these gravity sheets, I mean these narrative statements, the inspector's findings, which parrot the NIOSH study or which parrot some study that says that silicosis is this and this is that, that when the inspectors are obviously doing at this plant, for example, is that they are accepting all of this thing as gospel and they have regurgitated in these statements to support citations of the standard, are they not?

THE WITNESS: I believe, in the case of silica, it is a world-known fact that respirable silica causes silicosis.

JUDGE KOUTRAS: I am not taking issue with that.

THE WITNESS: So it is each inspector using his own individual thoughts and knowledge on the hazards of silica.

JUDGE KOUTRAS: Can an inspector go to this plant and make a determination that silica is not hazardous and not issue a citation?

THE WITNESS: No, sir.

JUDGE KOUTRAS: Why can he not?

THE WITNESS: Well, I guess he could, but he would probably be questioned on it.

JUDGE KOUTRAS: He is not making that as independent judgment. He is accepting a fact that silica is a harmful airborne contaminant.

THE WITNESS: Let me rephrase that. An inspector could go to this plant and say, "Well, I do not think this is a hazard," and not issue a citation on it.

JUDGE KOUTRAS: What would be the circumstances under which he would do that?

THE WITNESS: Ignorance on the inspector's part.

JUDGE KOUTRAS: Would part of the answer be that he tested and found that they were in compliance?

THE WITNESS: Oh, yes. If they are in compliance, then they are not exposed to an airborne contaminant.

JUDGE KOUTRAS: But you are saying here that they are under "continuing noncompliance" and on this very day they were out of compliance, with these outstanding citations, and that is why this inspector thought it was not necessary to even take a sample?

THE WITNESS: That is right.

MR. KOUTRAS: All right, just so I understand that.

MR. SMITH: Plus the physical conditions that he observed there on that day of the silica around in the air.

JUDGE KOUTRAS: Now, if Mr. Coghlan produces the mystery witness, who sampled the dust on that day and found that that machine was in compliance, your case goes down the "tube", does it not?

MR. SMITH: It sure would.

MSHA's Metal and Nonmetal Mine Safety and Health Inspection and Investigation Manual, 1981 Edition, contains an entire Chapter 64 dealing with health inspections and testing and sampling procedures. Chapter 65 of the Manual deals with the procedures to be followed by inspectors when issuing citations and orders, and the procedures for issuing citations of health standards are found in Chapter 65, Part II-AA, and the information contained therein at pgs. 65-AA-1 is as follows:

a. Airborne Contaminants

(1) Procedures for Writing Citations

If mine employees are found to be exposed to airborne contaminants in excess of the permissible limit defined in 30 CFR 55/56/57.5-1 and the decision is made to issue a citation 55/56/57.5-1 and 55/56/57.5-5 shall be treated as one standard for purposes of issuing the citation, and only one citation shall be written as a violation of standard 55/56/57.5-1/.5-5.

The body of the citation must contain all pertinent information, such as the TLV or permissible limit, the shift or time weighted average (SWA/TWA), the airborne concentrations of the contaminant, information on personal protection, the source of contaminant, the date of the over-exposure, the date

results were determined and the date the citation is issued and/or the reason for the over-exposure. Obvious deficiencies or breakdown in the control system for the contaminant should also be documented.

Chapter 66 of the Manual is devoted to application of the standards in order to assist inspectors in determining the intent and purpose of any given standard which he may cite. The application for section 57.5-5 is found at pgs. 66-D-1 through D-3, and they are essentially the same as those quoted above, and 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.

There is no credible evidence in this case concerning the mining employment history of any miner whose environment was measured by any respirable dust samples from the ruff-buff bagging machine in question. MSHA's position seems to be that because the shroud may not have been in place when the ruff-buff was bagged, the contamination from that product contributed to the overall silica dust environment of the plant as a whole, as well as in the immediate bagging area, and therefore was obviously out of compliance with the requirements of section 57.5-5. (Tr. 232-236). When asked whether any of the miners whose occupations were out of compliance either before or after the time of his inspection of May 7, 1981, operated the ruff-buff bagging machine which was cited, Mr. Lalumondiere responded that "I don't know who was operating the bagging machine" (Tr. 237). When asked whether any of the social security numbers for the miner occupations which were out of compliance on May 7, 1981, were directly related to the cited ruff-buff bagging machine, Mr. Lalumondiere responded "there would be none of them on that particular bagger, sir, because they would do a respirable dust sampling by using a dust pump to determine the TLV and TWA" (Tr. 237). He also indicated that it would have been "scientifically impossible" for the bagger to be in compliance without a dust shroud (Tr. 238).

Although he confirmed that several occupations and pieces of equipment were out of compliance as of the date of the inspection of May 7, 1981, when asked whether he issued any citations for the "piles of silica dust" he observed that same day, Mr. Lalumondiere stated that he did not. During a colloquy which followed this answer, MSHA's counsel indicated that "they cite somebody for the failure to have the controls. That's the standard. They have to go by what the standards is" (Tr. 235). And, at Tr. 236, where counsel states "you don't cite each little pile by pile. You cite it the way they have to do it within the standards".

Although it is true that at the time the citation was issued, respondent was out of compliance with the required TLV dust levels for several occupations and equipment, the fact is that MSHA permitted the plant to remain operational by extending the abatement times, and in one instance cited during the hearing, one citation was issued on March 11, 1981,

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and the abatement times were extended to July 6, 1982, a period of 16 months. When asked whether the respondent's noncompliance record is based on the fact that respondent was doing nothing to control its dust levels, MSHA's counsel responded that respondent was "not doing enough" (Tr. 481).

The fact that the respondent today is still mining the same silica it was mining in 1979 does not necessarily mean that in any given case the silica dust is in fact a "harmful airborne contaminant" subject to a citation or closure order. In response to this very same question, NIOSH expert witness Moring stated that "it can be with appropriate levels" (Tr. 60). She also confirmed that she had no knowledge regarding any dust control improvements or dust surveys made at the plant since the 1979 survey, and that her testimony was based on the prevailing conditions as of the 1979 survey period (Tr. 110-112).

After careful review and consideration of all of the evidence and testimony in these proceedings, as well as the arguments presented by the parties, I conclude and find that 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. In my view, in order to support a violation, MSHA must take into account the prevailing conditions as of the time a citation is issued, and without testing, sampling, or consideration of any improved dust control measures taken by an operator, I fail to comprehend how it can expect to establish a violation.

Respondent TAMMSCO's failure to attach the dust shroud to the ruff-buff bagging machine.

The effectiveness of a dust shroud, and the fact that it is an acceptable and feasible engineering measure for the control of harmful levels of silica dust is not in dispute. Further, the parties are in agreement that the citation of May 7, 1981, was issued because of the alleged failure by the respondents to insure that the dust shroud was on the machine when the bagged ruff-buff material which Mr. Lalumondiere observed during his inspection was bagged. MSHA's evidence in support of the citation consists of certain "admissions" purportedly made by Mr. Schmarje to Inspector Lalumondiere during the inspection of May 7, 1981, in the presence of Mr. Slade and Supervisory Inspector Raymond Roesler. In support of these "admissions" by Mr. Schmarje, Inspector Lalumondiere made reference to certain bags of ruff-buff material which he found stored on some pallets on May 7, 1981. He noted the dates stamped on those bags, and he claims that Mr. Schmarje admitted that the ruff-buff had been bagged by the machine in question on the dates stamped on those bags, and that he also admitted that on each days the materials were bagged, the machine was used without the shroud attached to it.

MSHA's position is that Mr. Schmarje admitted that the dust shroud in question was never on the ruff-buff bagging machine, and since this was the case, any material bagged by that machine was bagged without the required engineering control. Respondent denies that this is the case, but suggests that for a few days prior to the inspection the shroud was off the machine, and the reason it was off was because it had been damaged by a forklift and had to be removed for repairs. Respondent also suggests that any bagging of ruff-buff which may have taken place during a day or two while the damaged shroud was off the machine came about during the "necessary work" required to remove the silica from the machine in order to facilitate the repairs and that these were "exceptional circumstances".

At the hearing held in this case, Mr. Laumondiere testified that while he did not tour the entire warehouse, there were seven pallets near the bagger, with fifty bags of material per pallet, and one pallet had seven bags of material at the bagger, and the dates on those bags were 11/12/80, 12/12/80, 12/17/80, 1/8/81, 3/27/81, and 5/5/81 (Tr. 211). He confirmed that he asked Mr. Schmarje about these bags, and that Mr. Schmarje admitted that the bagger was used on the dates indicated to bag the product, that he knew the shroud was not in place, and that the dust collector had not been hooked up because the bagger was going to be moved as soon as the stockpile was built up (Tr. 212). Mr. Lalumondiere could not recall whether the dust control plan was discussed with Mr. Schmarje at the time of the inspection, and the bagger was not in use that day. Abatement was achieved by installing a shroud and tying it to the dust collecting system, and he abated the citation when he went back to the plant on May 11, 1981 (exhibit P-8, Tr. 213). A maintenance man told him that the shroud which had been lying by the door was the one which was installed and that this took about two hours (Tr. 214).

In a pretrial deposition taken on June 29, 1982, Inspector Lalumondiere testified that the ruff-buff bags which contained the dates in December, January, and March, and which he found on the "partial pallet" by the ruff-buff bagging machine on May 7, 1981, the date of his inspection, were not among those on that pallet, but were among those stacked on the seven pallets stored in the warehouse. He also testified that the dates found on the partial pallet by the machine were all dated May 5, 1981. When asked why he had listed the December, January, and March dates as being found on "one pallet", he replied "no reason whatsoever. That's just rough draft field notes that I have" (Deposition transcript pgs. 64-68).

In a post-hearing deposition taken by petitioner on November 3, 1982, Inspector Lalumondiere identified copies of his "field notes" made during his inspection of May 7, 1981, and he confirmed that at that time Mr. Schmarje admitted to him, in Mr. Max Slade's presence, that the dust shroud was not on the ruff-buff machine at the time it was used to bag the materials shown by the dates on the bags he found stored on the pallets. Mr. Lalumondiere stated that at no time did Mr. Norton or Mr. Schmarje, or anyone else at the plant, tell him that the machine

had been damaged (Tr. 3). When asked why his "field notes" (exhibit P-15) do not reflect the admissions by Mr. Schmarje, he responded as follows (Tr. 5-8):

A. Well, I don't make notes of the exact conversation that took place between the two of us. This is notes here that are strictly worth only something to me. I can go back through these and recollect things that went on during that time. And...

Q. In other words, you prepared these notes strictly for yourself, not for somebody else to cross examine, is that right?

A. That's true.

Q. Now, you wouldn't have ... you put down there certain dates that you found the pallets, which indicated to you that the Ruff Buff bagging machine was operated, is that correct, sir?

A. These were dates that material had been bagged and stacked on pallets and stamped with these dates. And on these, I can remember from looking at these dates ... after we talked to Schmarje, he said that's the way they do it. They stamp the dates on them when they bag. He said on these dates they had run the Ruff Buff bagger. And when we asked him about the shroud on it, he said, no, he had never had it on.

Q. Now, it wouldn't have been a violation if the shroud had been on. So, you just didn't put that down, is that right? In other words, what does that indicate to you? My question to you originally was, why didn't you put Mr. Schmarje's admission down in your notes?

A. Like I said, I didn't put down word for word. I put on here, on the second page back here, that the Ruff Buff bagger had never been hooked up to the dust collector.

When shown a copy of Special Investigator Haeuber's deposition which makes reference to a memorandum prepared after speaking with him, Mr. Lalumondiere was asked whether that memorandum confirms that Mr. Schmarje admitted that the shroud was not in place when the bagger was being used. Mr. Lalumondiere responded as follows (deposition pg. 8):

Q. And does this confirm what you just said a while ago, that Mr. Haeuber...Mr. Schmarje, rather, did admit that the shroud was not in place when the bagger was being used, the Ruff Buff bagger?

A. It says it's indicated to his... to him that he knew the condition existed, yes. That Mr. Schmarje stated to me that he knew the condition existed.

MSHA Supervisory Inspector Raymond Roesler did not testify at the hearing in this case. In his deposition of June 29, 1982, he makes reference to some "field notes" which he made on May 7, 1981 when he accompanied Mr. Lalumondiere on the inspection in question. He confirmed that he told Mr. Lalumondiere to count the pallets which contained ruff-buff and to note the dates shown on the bags. He confirmed that he observed some pallets some 15 feet north of the bagging machine, and one partial pallet by the machine itself "with some bags on it that had just been bagged a couple of days prior" (Deposition pg. 67). When asked if she remembered the dates on that partial pallet, Mr. Roesler responded--"I couldn't say offhand", "It could be the fifth", and he stated further that "I don't remember what the conversation was" (Tr. 86). In short, it seems clear to me that Mr. Roesler simply had no recollection as to the dates on any of the bags found on the pallets in question.

With regard to the so-called admissions by Mr. Schmarje concerning the dust shroud in question, apart from the fact that he confirmed that the shroud was not on the bagging machine in question on May 7, 1981, and apart from the fact that he confirmed that he saw a shroud lying on the floor on a previous occasion when he visited the plant, Mr. Roesler did not testify as to any admissions purportedly made by Mr. Schmarje to Mr. Lalumondiere on May 7, 1981. As a matter of fact, Mr. Roesler conceded that on May 7, 1981, Mr. Schmarje made no statements to him concerning the use of the machine (Tr. 93). He also stated that while Mr. Lalumondiere may have spoken with Mr. Schmarje that day, he (Roesler) could not remember any conversations with Mr. Schmarje, and stated "chances are very great that I probably didn't" (Tr. 94). Further, when asked whether he was present during any conversations between Mr. Slade, Mr. Lalumondiere, and Mr. Schmarje on May 7, 1981, concerning the ruff-buff machine, Mr. Roesler replied "I was with him, but I couldn't say for sure what was even said", and that he couldn't remember (Tr. 94).

In view of the foregoing, it seems clear to me, that contrary to any inference that Mr. Roesler may have heard Mr. Schmarje make certain admissions concerning the dust shroud, Mr. Roesler could not recall any such admissions or conversations which purportedly took place on May 7, 1981, at the time of the inspection and the issuance of the citation.

With regard to Max Slade's corroboration of Mr. Schmarje's "admissions", his testimony on this point is as follows (Tr. 334):

Q. Did you overhear Mr. Schmarje admit that the pallets that were dated indicated that the Ruff-Buff bagging machine was operated on those dates?

A. When the pallets were discovered, Mr. Schmarje was overseeing the repair of the two-spout bagger. We went to him and spoke about the condition around the Ruff-Buff bagger and Mr. Lalumondiere asked him about the dates on the pallets. I heard him say that, yes,

that was the date that this material was bagged and he

asked him why the shroud was not in place and he says, "well, we only use it for a short time and, besides, I wanted to get some material stockpiled, so we could move the bagging machine."

Q. Did you overhear Mr. Schmarje indicate that they were going to continue to use it to stockpile?

A. He said that he wanted to get a stockpile built up so they could take a few days to move the machine.

Inspector Lalumondiere's field notes, as well as his inspector's statement (exhibit R-7), make no mention whatsoever of any "admissions" by Mr. Schmarje concerning the use of the cited bagging machine without the shroud attached. In addition, I find Mr. Lalumondiere's testimony of record, including his depositions, to be contradictory and confusing with respect to his documentation of the dates found on the bagged ruff-buff materials. I also find it quite surprising that during the special investigation conducted by Mr. Haeuber he asked no specific questions concerning the dates on the bagged materials. Except for a general question of Mr. Schmarje as to how much ruff-buff was stored in the warehouse, the copy of his interview with Mr. Schmarje contains no questions concerning all of the dates testified to by Mr. Lalumondiere.

The special investigation conducted by Mr. Haeuber in this case leaves much to be desired. Aside from the fact that none of the statements are sworn, signed, or dated, some of the critical issues are developed by broad and general "questions and answers". The lack of procedures concerning tape recording of the interviews has resulted in serious questions of credibility and accuracy with regard to the information being developed. Mr. McKee claims he did not understand some of the key questions asked and stated that he was confused. Mr. Schmarje's edited version of his interview (exhibit R-13), was never submitted, and Mr. Schmarje complained that many of the questions were leading, and that his answers were taken out of context. Mr. Norton's statement was subsequently corrected and edited.

The evidence in this case supports a finding that at the time of the inspection on May 7, 1981, the cited ruff-buff machine was not in use and that the dust shroud was not attached to the machine. However, I cannot conclude that MSHA has established through any credible testimony or evidence that the dust shroud was never installed on the machine, and that Mr. Schmarje knew it. In this regard, I take note of the fact that the record in this case suggests the existence of an "old" and "new" ruff-buff bagging machine, as well as the existence of an "old" and "new" dust shroud, and at times the witnesses were confused as to which was which. Further, while there is testimony that Inspector Lalumondiere observed a shroud lying on the floor during inspections prior to May 7, 1981, Mr. Lalumondiere conceded that he may have been confused when he gave his deposition (Tr. 225-230), and during the hearing the parties agreed that the shroud which was described as "lying on the

floor" was not the device the inspector had in mind at the time the citation was issued (Tr. 224).

I can find no credible evidence in this case to support a conclusion that Mr. Schmarje in fact admitted to Inspector Lalumondiere on May 7, 1981, that the shroud was off the machine on each of the days that the ruff-buff materials were bagged. Petitioner's counsel conceded as much (Tr. 498), but he argued that on each occasion prior to the time the dates were detected on May 7, 1981, when Mr. Lalumondiere was at the plant and saw the shroud on the floor, Mr. Schmarje's response was that the bagging machine was not being used. Counsel conceded that the reason the inspector did not issue previous citations when he observed the shroud lying on the floor and off the machine is that if the machine is not in use when he is there, there is no way he can prove a violation. Further, counsel pointed out that on each occasion when the inspector observed the shroud on the floor, he took Mr. Schmarje's word that the machine was not in use. However, when he found the stamp-dated bags during his inspection of May 7, 1981, he concluded that the machine had been used on the dates stamped on the bags which were stored on the pallet next to the machine, and when he confronted Mr. Schmarje, the inspector claims he (Schmarje) admitted that the materials were bagged with the shroud off and that he knew it (Tr. 498-501).

Although the record adduced in these proceedings does support a conclusion that the bagged ruff-fubb materials observed by Inspector Lalumondiere on May 7, 1981, were bagged by the cited machine on the dates stamped on the bags, except for the ones dated May 5, 1981, I cannot conclude from the evidence presented by MSHA that on each of the other dates the materials were bagged without the use of a shroud.

With regard to May 5, 1981, I believe that the record supports a conclusion that the dust shroud was off the machine that day, and that the bagger was used to bag ruff-buff without the shroud in place. Since the plant in question is a relatively small operation, and since it is obvious that Mr. Schmarje was directly involved in its operations, and was directly responsible for supervising the workforce, I find it rather incredible that at the time of the inspection of May 7, 1981, he was totally oblivious or ignorant of the fact that a forklife had struck and damaged the cited bagger. Since he and MSHA have obviously been at odds with each other about the dust problems over a long period time, it seems to me that both Mr. Schmarje and Mr. Norton would have initiated an inquiry immediately on May 7th to document the fact that the shroud had "just been damaged a few days before". After viewing respondent's witnesses on the stand during their explanation of the purported damage to the bagger and shroud, I simply do not believe their account of the purported accidental striking of the ruff-buff bagging machine two days before the citations were issued.

In addition to my rejection of the respondent's testimony concerning the alleged damage to the shroud, I take note of the fact that part of the respondent's defense in this case is the assertion that the applicable dust control plan in effect at the time the citation issued was one in which protective shrouds are

not mentioned at all. In view of the fact

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that the respondent has consistently taken the position that the ruff-buff machine is not used on a regular basis, and has consistently maintained that the material and product is the coarsest produced in the plant, one can reasonably conclude that it is more likely than not that at the time the ruff-buff was bagged on May 5, 1981, two days before the inspection, it was bagged without the shroud attached, and that Mr. Schmarje was aware of this. The "accidental striking of the bagger by a fork-lift" defense simply supports the conclusion that the shroud was off the bagger on May 7, 1981, and that respondents knew or should have known that it was not on the machine.

In view of the foregoing, I conclude and find that MSHA has established that the dust shroud in question was not on the cited ruff-buff bagging machine on May 7, 1981, and that the machine was used to bag the ruff-buff product on May 5, 1981, without the shroud attached. I further conclude and find that MSHA has not established through any credible evidence that the cited ruff-buff bagger was used prior to May 5, 1981, without the dust shroud attached.

Insofar as Mr. Schmarje is concerned, I conclude and find that MSHA has established that when the ruff-buff bagger was used to bag the materials on May 5, 1981, that Mr. Schmarje knew, or had reason to know, that the bagger was used without the dust shroud attached. As to any times prior to May 5, 1981, I cannot conclude that MSHA has proved its case against Mr. Schmarje by a preponderance of any credible evidence.

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. The gravamen of the offense here is the assertion that the respondent failed to utilize an acceptable engineering dust control measure, namely the shroud, on the bagging machine which was cited, and to that extent MSHA has established this allegation. However, since MSHA failed to sample or test the ruff-buff product, and since I have concluded that such tests were required to establish that the product was in fact a harmful airborne contaminant within the meaning of MSHA's air quality standards at the time the citation issued on May 7, 1981, the fact that the shroud was not on the machine makes no difference. In short, I believe that MSHA must prove that a contaminant is harmful within the meaning of its standards as part of its requirement that an operator take appropriate control measures.

ORDER

In view of the foregoing findings and conclusions, Citation No. 0501241, issued by Inspector Lalumondiere on May 7, 1981, charging the respondents with violations of 30 CFR 57.5-5, IS VACATED, and MSHA's proposals for assessment of civil penalties against the named respondents in these proceedings ARE REJECTED, and these proceedings are DISMISSED.

Postscript

In my view, the record in this case is an example of the futility of MSHA's silica dust enforcement efforts at the plant in question, and citing the plant manager and a bagging machine that is seldom used is not going to solve the problem. The lack of viable mandatory standards to require the respondent to adopt a dust control plan which can be enforced, as well as the lack of an enforceable mandatory standard requiring the respondent to adopt and maintain a dust clean-up program, has resulted in protracted piece-meal enforcement spanning a period of some ten years.

Subsequent to the 1979 NIOSH study and plant closure, MSHA's enforcement efforts have focused on individual pieces of equipment and selected critical occupations. Citations issued for noncompliance appear to be routinely extended for long periods of time to afford the respondent additional opportunities to come up with feasible engineering controls or to await the results of long-delayed dust sampling. Each time a withdrawal order is issued or threatened, the respondent manages to somehow come into compliance, thereby averting plant closure.

No recent overall dust survey has been made at the plant since the 1979 NIOSH study and the survey conducted by MSHA's Denver Technical Support Group. While I have no reason to question the particular expertise of MSHA's NIOSH witnesses who testified in these proceedings, I do take note of the fact that Ms. Moring has not been back to the plant since the 1979 survey (Tr. 92), and Dr. Richards has never visited the plant (Tr. 150). Absent any current studies or information concerning the apparent on-going dust problems, and absent any indication on the effect of respondent's dust control efforts, as recognized by MSHA's own technical support evaluation, as of the date of the 1981 date of the citations in question in these proceedings, MSHA's attempts to achieve realistic compliance by focusing on the plant manager hired in 1980, and one isolated bagging device seems to be an exercise in futility. In my view, respondent's irregular use of the cited ruff-buff machine, and the payment of a civil penalty on behalf of its plant manager, is an insignificant price to pay for a dust problem which this record suggests has been present since the day the plant began operation in 1973.

George A. Koutras
Administrative Law Judge

* Cert. denied, No. 82-1433, May 16, 1983.