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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CYPRUS EMPIRE CORPORATION,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. WEST 88-247-R
Order No. 3225477; 3/4/88

Eagle No. 5 Mine
Mine ID 05-01370

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

v.

CYPRUS EMPIRE CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 89-13
A.C. No. 05-01370-03580

Eagle No. 5 Mine

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
For Petitioner/Respondent;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, Pennsylvania,
For Contestant/Respondent.

Before: Judge Morris

These consolidated contest and civil penalty proceedings are
before me pursuant to section 105(d) of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

Contestant/Respondent Cyprus Empire Corporation (here-after
"Empire"), challenges the issuance by the Secretary of a citation
and order involving the regulatory standard at 30 C.F.R.
70.100.

After notice to the parties a hearing on the merits was held
in Denver, Colorado. The parties filed post-trial briefs.

Summary of the Cases

On March 4, 1988, MSHA issued Citation Number 9996225 under section 104(a) of the Act alleging a violation of 30 C.F.R. 70.100.

On May 23, 1988, MSHA issued Order No. 3225447 under section 104(b) of the Act. The order caused the production of coal to cease in the longwall section of the mine.

Citation No. 9996225 reads as follows:

Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation, code 044 in mechanized mining unit 001-0 was 2.2 milligrams which exceeded the applicable limit of 2.0 milligrams. See attached computer printout dated March 1, 1988. Management will take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.

Order No. 3225447 reads as follows:

Based on the latest block of 5 samples received, the average concentration of respirable dust was 2.9 milligrams per cubic meter of air on MMU 001-0. The concentration has increased from 2.2 milligrams to 2.9 milligrams since the issuance of the citation. The operator's present approved respirable dust control plan has been unsuccessful in reducing the respirable dust concentrations. Production of coal from this section shall immediately close.

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The regulation allegedly violated provides, in part, as follows:
70.100 Respirable dust standard

(a) Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations).

Stipulations

At the commencement of the hearing the parties stipulated as follows:

1. The Eagle No. 5 mine is owned and operated by Empire.
2. The Administrative Law Judge has jurisdiction over these proceedings. Both Empire and the Eagle No. 5 mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The annual production of the Eagle No. 5 mine is approximately 1.7 million tons and the parties have agreed that Empire is a large operator.
4. The subject Order, Citation, modifications thereto and termination were properly served by a duly authorized representative of the Secretary of Labor upon agents of Cyprus Empire on the dates stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements inserted therein.
5. The imposition of a penalty by the Administrative Law Judge will not affect Empire's ability to continue in business. Empire does not stipulate that the imposition of any penalty is appropriate.

Summary of the Evidence

Lewis Raymond and Phillip Gibson testified for the Secretary.

LOUIS D. RAYMOND has been with MSHA for 27 years. He is the Branch Chief(FOOTNOTE 1) of the Pittsburgh Lab. The facility, with a capacity to process up to 500 to 600 samples per day, primarily weighs respirable coal dust. It also handles data transmission. The weighing branch of the lab has prepared an informational report in booklet form showing the entire proceedings of the dust samples (Ex. P-20).

Coal mine operators are obliged to sample for respirable dust and to submit five valid samples every two months. The samples themselves are taken by attaching a cassette in the breaking zone of a miner. The normal sampling time is 480 minutes which is based on an eight-hour day.

The sample may be invalidated by MSHA if the data card is improperly filled out. The card itself lists certain information such as the cassette number, the mine I.D., the mine name, the date of the sample, the sampling time, the tonnage of that production shift, the type of sample, the MMU number and the occupational code, the certified person and the initial weight of the cassette.

When the samples are received at the lab a certified person takes them to a separate area. The ceiling tape and plug are then removed. The inner portion (capsule) of the cassette is removed with a forceps and the material is placed in trays.(FOOTNOTE 2)

The capsules themselves are then desiccated by being placed in a four-foot vacuum drier for 15 minutes. This procedure removes the surface moisture. If heat was used it would have a tendency to drive off the inherent moisture in the coal. The vacuum changes the water to a vapor and withdraws it.

After 15 minutes the samples are removed and are permitted to acclimate in the air for one hour. The lab environment is controlled at 72 degrees and 50 percent humidity.

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The cassettes are automatically weighed (See figure 5 of Exhibit P-20). A small printed-out sticker is attached. Generally the lab weighs 300 samples a day.(FOOTNOTE 3) Any excessive cassettes are weighed manually. Automatic weighing is more precise than manual weighing.

All data cards are stamped and sequentially numbered. Every sample received is weighed as it is received. The computer selects the first five samples received to determine the average weight. Additional samples are voided as excess (Tr. 72-73).

Exhibit P-18, a computer printout, illustrates how the samples are listed by the computer in the order of the date received by the computer. Certain codes indicate why a sample was voided or was not used.

The lab maintains a quality control over its weighing system: under the system, one cassette out of eight is weighed twice. If the two weighs do not agree the last eight must be reweighed.

The lab also checks the quality of the cassette samples for stability and they are compared to MSHA's weight. If any cassette does not agree within one milligram, then the entire day's production must be reweighed. MSHA technicians in the field also reweigh filters and send in reports. There is also a program to determine whether the information received is correctly entered into the computer.

The main variable is .1 mg/m³; the lab records to the nearest .1 mg/m³.

The method of desiccation used by the lab has been in place since 1970. The method used to weigh samples is an accepted scientific method of doing so and has been studied at this lab by the U.S. Bureau of Standards.

The data cards are removed after the results are recorded. The sample then goes to the data transmission room. In turn, the data goes to the MSHA computer room in Denver.

Mr. Raymond discussed at length the various codes used by the lab to designate the disposition of various samples.

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After the reports are generated they go to the operator and the MSHA field office. Citations are issued when the reports indicate concentrations above 2.0 mg/m³. The operator keeps its own sample sheets and records the results as they are received from MSHA.

Since coal is usually wetted during the mining process, the samples are dried or desiccated to be certain that the excess moisture is removed from the samples. (Excess moisture could establish excessive respirable coal dust). The lab process removes excess moisture but allows inherent moisture to remain. Any sample that appears to have excess moisture is marked as a contaminated sample and not tested by the lab. Also, any sample that contains oversized particles is marked as contaminated. The MSHA lab has determined that 15 minutes is the amount of time to completely dry samples in the desiccator.

Empire requested information regarding its samples and the lab responded (Exhibits P-19, Ex. 27). Empire expressed concern about excess moisture (16% to 40% moisture content).

With Empire's inquiry in mind, Mr. Raymond conducted a study to see if the lab's procedure was adequate. Empire had marked some cassettes as containing excessive moisture. The lab treated them further, using several approaches.

One approach was a heating process to heat the samples for one hour at 105 degrees F. Prior to heating the samples, the lab heated these blank samples to study the effect. They then heated the 11 samples. The blank samples lost .06 milligrams (as indicated on page 2 of Mr. Raymond's memo, Exhibit P-19.) The memo lists the weights of the blanks and the samples after vacuum desiccation and again after heating for one hour. The differences in the samples was negligible.

The eleven samples from Empire, marked "excess moisture", were heated for one hour and returned to the room. The weight difference was .07 mg/m³ and the standard deviation was .08 mg/m³. Mr. Raymond concluded the weight difference was not significant as it was only plus or minus .1 mg/m³. (See Exhibit P-19).

By these tests Mr. Raymond concluded the moisture was being adequately removed by the MSHA vacuum system. This is particularly true since any weight differences are entered as "truncated". For example, if the cassette weighs 2.19 mg it is entered as 2.1. The truncation of weights is to avoid any

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plus or minus errors. The lab does not normally perform this additional heat treatment but the method had been used by Empire at its lab.

In Mr. Raymond's opinion vacuum desiccation is an accurate way of removing moisture.

An additional experiment confirmed Mr. Raymond's opinion: he retrieved a dust sample cassette and placed a 20 mg drop of water on it. This is 10 to 20 times the normal weight differential. The cassette was then treated normally in the vacuum and re-evaluated. It was found the cassette had returned to its initial weight.

An additional experiment he conducted involved the use of 24 samples and a lot of water. The samples were initially weighed without vacuuming and then heated for in excess of 16 hours at 50 degrees F. It was found that only two of the 24 filters had an additional .1 mg weight. In short, the results were within the plus-minus .1 mg accuracy factor.

Mr. Raymond expressed the opinion that the lab uses scientific methods. Further, the vacuum process is accurate to a degree of scientific certainty.

PHILLIP R. GIBSON, JR. is an MSHA inspector experienced in mining. Mr. Gibson issued the failure to abate order at the Eagle No. 5 mine on May 23, 1988 (Exhibit P-9).

MSHA Inspector Grant McDonald had written the original citation on March 4, 1988. Inspector McDonald is in charge of the respirable dust program for Eagle No. 5 underground coal mine.

The abatement date on the original citation was extended several times.

Inspector Gibson wrote the contested order on May 23, 1988. The order was written without an on-site inspection. The computer printout indicated high concentrations of respirable dust were being generated. The average concentration was going up instead of down. In view of the upward movement of the concentrations Inspector Gibson declined to grant any further extension of the abatement date.

After he wrote the 104(b) order Inspector Gibson went underground and placed the closure order on the shear. The shear was tagged to indicate it was the main source generating the dust.

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Overexposure to coal dust, a serious hazard, can cause black lung disease, also called pneumoconiosis.

On May 24th Inspector Gibson was advised by his superior that the company was in compliance. He then checked and saw that the perimeters of the revised dust plan were in place (as per Ex. P-10). He then allowed mining to be resumed. The termination was based in part on Exhibit P-13, the computer printout showing that the concentrations for the MMU in the longwall were at or below the 2.0 mg/m³ concentration required by the regulation.

In cross-examination Inspector Gibson indicates he is essentially a safety inspector. Further, excessive dust is controlled by trial and error methods. Because the coal dust was increasing the inspector refused to grant a further extension. The concentration rose from 2.2 to 2.9 mg/m³.

The inspector didn't look for inconsistencies in the sampling and he didn't have earlier printouts to be used as a comparison.

Empire's Evidence

Robert Stalter, Samuel Cario and James Dodd testified for Empire.

ROBERT STALTER, a person experienced in mining, serves as Empire's superintendent of safety and loss control.

Mr. Stalter described how the respirable coal dust pumps are calibrated and how the dust samples are taken. Basically, the pumps are attached to the miners and left running until the miner leaves his job site.

When the sampling is completed the MSHA cards are filled out and the cassettes are forwarded to MSHA within 24 hours.

Mr. Stalter is familiar with various sampling procedures and the protection provided for the longwall operators. All shear operators prefer and wear AIRSTREAM helmets. Such MSHA approved helmets filter the air before it enters the face piece. The use of such a helmet alleviates the hazard from respirable dust. Affidavits at the hearing indicated the operators were all wearing helmets when they were sampled (Exhibit E-8 through E-14).

The shear operators prefer the AIRSTREAM because it is a full-face piece. The witness has seen only one shear operator

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without an AIRSTREAM helmet. MSHA's approval of the helmet has its limitations: some shear operators chew tobacco and they must lift the face shield to spit.

Empire now samples its miners for respirable coal dust. The in-house sampling is then verified by a nearby lab known as CT&E, which has duplicated the MSHA lab. CT&E gives Empire the initial weight and the company determines the concentrations.

Mr. Stalter agrees excessive coal dust is a hazard; however, he believes 2.0 mg. is not excessive.

Mr. Stalter's work duties include taking and testing samples.

MSHA samples were taken at the tailgate because the highest concentration was at that location. The longwall is 750 feet long.

SAMUEL L. CARIO, a person experienced in mining, is Empire's longwall coordinator. Mr. Cario received the citation from Inspector McDonald. The inspector suggested the company take a second set of samples.

In order to reduce the dust Mr. Cario studied changes at the shear. The final decision involved the use of belting. Empire obtained several extensions from MSHA.

On the 20th Empire began to develop a plan (Ex. 21). The plan, submitted to MSHA on the 23rd, provided for the installation of a curtain on the third shield and an additional spray on the shear. The changes were not tested before the failure to abate order. After the 104(d) order company representatives met with MSHA personnel in Denver. MSHA declined to approve the plan until additional changes were made. MSHA finally approved the plan (Ex. E-23).

Mr. Cario could not evaluate the effect of the required changes. But MSHA officials issued their approval. Before the company could resume production, MSHA's approval(FOOTNOTE 4) and the dust plan had to be physically returned to the mine site (Ex. E-23).

Empire's program requires the shear operators to wear AIRSTREAM helmets. Spare helmets are kept on the section. Production is shutdown if helmets are not available.

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JAMES B. DODD, Empire's Superintendent of Mining, develops methane ventilation and dust control plans. The witness submitted an amendment to the dust control and ventilation plan to MSHA (Ex. E-23). Originally the witness believed they would have time to develop a plan before a failure to abate order would issue.

MSHA thought the company's initial proposal was inadequate. Empire agreed to MSHA's counter-proposal to increase the sprays and the psi pressure.

After MSHA's approval the plan was carried back to the mine at Craig, Colorado.

The implementation of the changes was not successful. MSHA was advised and on the 25th a new plan was submitted. MSHA approved the revised plan (Ex. E-25).

There were so many changes it was difficult to see the contribution of each change.

Correspondence from Empire to MSHA's representative, John M. DeMichiei(FOOTNOTE 5) addresses the issues of moisture in the cassettes and the requirement of numerous controls without being able to test the results (Ex. E-27).

The dust control in the longwall is not an exact science and dust problems are solved by trial and error.

Further Findings and Evaluation of the Evidence

Certain threshold issues here involve whether MSHA properly selected Empire's respirable dust standards for sampling; further, whether MSHA adequately dried the respirable dust samples and, finally, whether the citation and order were properly issued under section 104(a) and 104(b) of the Act.

The uncontroverted evidence shows that in February 1988 Empire submitted seven respirable dust samples of the longwall shearer operator on the tailgate side to MSHA in compliance with 30 CFR 70.100.

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Section 70.207 requires each operator to submit five respirable dust samples to MSHA. However, it is the usual industry practice to submit seven samples to avoid not having submitted enough if any samples are voided (Ex. E-5).

The results of the samples as submitted were determined by MSHA to be as follows:

Cassette	Date	MRE (Equivalent Concentration)
46024406	2-12-88	3.0 mg/m3
46024205	2-16-88	2.1 mg/m3
46024403	2-17-88	2.2 mg/m3
46024231	2-18-88	0.4 mg/m3
46024209	2-18-88	2.5 mg/m3
46024254	2-22-88	1.0 mg/m3
46024225	2-23-88	3.3 mg/m3(P-2).

On March 1, 1988, MSHA sent Empire an "Advisory of Excessive Dust." The advisory stated that cassette number 46024209 had been voided for insufficient production (Ex. P-2). The advisory did not list the sample for February 22, 1988, which showed a concentration of 1.0 mg/m3 (Ex. E-2, P-18).

If the February 22 sample, rather than the later February 23 sample, had been included in MSHA's calculations the average concentration would have been 1.7 mg/m3. On this basis the concentration would be within the limits of the regulation (Tr. 94-5, Ex. E-2, P-18).

On March 4, 1988, MSHA Inspector Grant McDonald issued Citation No. 9996225 pursuant to section 104(a) of the Act for a violation of the respirable dust standard (Ex. P-1).

The citation directed Empire to sample each production shift until five valid samples were taken and submitted to MSHA.

After the citation was issued Empire raised with MSHA the absence of the February 22 sample. (Empire did not know of the exact concentration of the February 22 sample until the hearing (Tr. 160, Ex. E-5, P-18)).

The Secretary's standard concerning collection of the samples is contained in 30 C.F.R. 70.207. It provides, in part, as follows:

Designated occupation samples shall be collected on consecutive normal production shifts each of which is worked on consecutive days.

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The thrust of Empire's argument is that if MSHA had based its calculations on consecutive production shifts then the February 22, 1988, sampling would take precedence over the later sampling. Given such a sequence, Empire would have been in compliance with the regulation.

I reject Empire's position. MSHA's lab expert Raymond indicated the samples, if otherwise valid, are stamped and weighed in the sequence they are received. Cassettes in excess of the required five are automatically rejected from the computer's calculations. The operator benefits from being able to submit seven samples, two in excess of the required five. Accordingly, Empire's actions created the situation and Empire cannot complain of MSHA's unbiased approach, a first-come first-weighed basis.

I appreciate the situation: the February 22 sample was not used for the initial set of results because it reached the computer after the February 23 sample. At the same time it cannot be used for abatement because it was received before the citation was issued. However, as noted, the paradox was caused by Empire's submission of excessive samples. It was not caused by MSHA's approach to weighing the samples.

Empire further contends that MSHA failed to properly dry the samples.

Empire's evidence that MSHA's procedures were inadequate arises mainly from the fact that the Occupational Safety and Health Administration (OSHA) requires respirable dust standards to be dried for 24 hours (Ex. E-30). In contrast, MSHA only dries the samples at its weighing branch for 15 minutes.

On this credibility issue I credit the testimony of MSHA's expert Raymond.

Mr. Raymond indicated the surface moisture is removed when the cassettes are placed in a four-foot vacuum drier for 15 minutes. Several quality controls of MSHA's procedures exist in its lab.

When Empire complained that excessive moisture was not being properly dried from its cassettes, Mr. Raymond conducted several experiments. The summary of the evidence sets forth in detail Mr. Raymond's testimony. Expert testimony is commonly given greater weight than lay testimony, U.S. Steel Corporation v. OSHRC, 537 F.2d 780, 783 (Ord Cir. 1976). In this case I find the expert testimony of Mr. Raymond to be credible and persuasive.

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Empire's evidence of OSHA's filter weighing procedures arise from Empire's Exhibit E-30, the OSHA Industrial Hygiene Technical Manual. On page II OSHA requires, in part, that it is necessary to "desiccate all filters at least 24 hours before pre-sample and post-sample weighing."

I do not find OSHA's procedures to be controlling or persuasive. There is no reason to remove inherent moisture in respirable coal dust because when the standard was set it took in account such moisture. OSHA also tests a broader number of substances than respirable coal dust. Hence, by desiccating for an hour it may be attempting to break down the substances for further chemical testing. In addition, there is no evidence here showing the similarities, or differences, between the filters themselves.

Further, as indicated, I credit the testimony of Mr. Raymond when he concluded that the method used at the MSHA lab in Pittsburgh is a valid scientific approach.

At the hearing, Empire's evidence established the company took samples to its own lab known as CT&E. At this lab the company obtained different results as compared to the MSHA lab.

I reject Empire's evidence because the Empire samples were taken of the headgate operator on the longwall while MSHA's samples were taken of the tailgate operator.

An additional threshold issue is whether the citation and order herein were properly issued under section 104(a) and 104(b) of the Act.

Section 104(a), under which the citation herein was issued, provides as follows:

Sec. 104.(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation,

or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Section 104(b), under which the order herein was issued, provides as follows:

(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Section 104(f), which Empire claims to be the relevant enforcement section of the Act, provides:

(f) If, based upon samples taken, analyzed, and recorded pursuant to section 202(a), or samples taken during an inspection by an authorized representative of the Secretary, the applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded and thereby violated, the Secretary or his authorized representative shall issue a citation fixing a reasonable time for the abatement of the violation. During such time, the operator of the mine shall cause samples described in section 202(a) to be taken of the affected area during each production shift. If, upon the expiration of the period of time as originally fixed or subsequently extended, the

Secretary or his authorized representative finds that the period of time should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until the Secretary or his authorized representative has reason to believe, based on actions taken by the operator, that such limit will be complied with upon the resumption of production in such mine. As soon as possible after an order is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person, or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. While at the mine, such persons may require the operator to take such actions as they deem appropriate to insure the health of any person in the coal or other mine.

The Commission has generally considered the overall enforcement scheme of the Act. Nacco Mining Company, 9 FMSHRC 1541 (1987) Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (1981). In reviewing the structure of the Act the Commission noted that it provides "for increasingly severe sanctions for increasingly serious violations or operator behavior." Sections 104(a) and 110(a) provide that the violation of any mandatory standard requires the issuance of a citation and assessment of a monetary civil penalty. Under section 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanctions of a withdrawal order is required, and a greater civil penalty is assessed. Under section 104(d), if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and

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has resulted from the operator's unwarrantable failure to comply with the standard, a citation noting those findings is issued. Section 104(d) citations carry enforcement consequences potentially more severe than "section 104(b)" sanctions. If further unwarrantable failure violations occur within 90 days of the citations issued under 104(d), unwarrantable failure withdrawal orders are triggered. Issuance of the withdrawal orders does not cease until an inspection of the mine discloses that no unwarrantable failure violations exist.

Only section 104(a) of the Act authorizes the issuance of a citation. Such a citation may include any violation of a regulation or of the Act itself. In view of the established case law, it is apparent that MSHA properly issued its citation under section 104(a). For the reasons previously stated, it further properly issued its withdrawal order under section 104(b).

In her citation in the instant case the Secretary could have alleged a violation of section 104(f) of the Act but instead she alleged a violation of her regulation, 30 C.F.R. 70.100. Empire claims that MSHA's enforcement of the respirable dust standard deprived the company of certain remedies provided under Section 104(f). Specifically involved is a matter of assistance by MSHA to the operator. On this point Empire relies on that portion of section 104(f) which provides that:

As soon as possible after an order [of withdrawal] is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person, or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. (Emphasis added)

I agree with Empire that the requirements of the Secretary's regulation must be read in conjunction with section 104(f) of the Act. It is a clearly established principle of statutory construction that specific language in one provision controls over general language in another provision. *General Electric Company v. Occupational Safety and Health Review Commission*, 583 F.2d 61, 65 (2d Cir. 1978); *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 877, n. 26 (2d Cir. 1973); *Sutherland Stat. Const.* 47, 17-20, (4th Ed).

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The issue then evolves whether Empire triggered the obligation of MSHA to furnish assistance to deal with the respirable dust concentrations. I conclude the record does not support Empire's claim. The conversation about assistance from MSHA is totally lacking in any reference to the statutory requirements of section 104(f) (Tr. 120-121, 220-223). But in any event the request was made on May 20, 1988 and the 104(b) failure to abate order was issued on May 23, 1988 (Ex. P-9).

The obligation to furnish assistance under 104(f) can arise only after an order of withdrawal had been issued to Empire.

Since Empire raises the lack of assistance from MSHA to defeat the citation it is obliged to prove that it fits the statutory requirements. It has not done so.

Empire further contends that if a violation exists it should not be designated significant and substantial.

Empire's view that the violation was not S&S is based on the Commission's decision in Consolidation Coal Company, 8 FMSHRC 890 (1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987). In support of its position Empire relies on the following portions of the Commission decision:

We also find repeated observations in the legislative history that a respirable dust standard at or below 2.2 mg/m³ would produce no danger of miner's developing disability disease. 8 FMSHRC at 897.

The Commission also commented as follows:

With regard to its ultimate decision to adopt a 2.0 mg/m³ respirable dust standard, Congress recognized that in a dust environment below approximately 2.2 mg/m³, there would be virtually no probability of a miner's contracting complicated coal worker's pneumoconiosis, even after 35 years of exposure at that level. H. Rep. No. 563, supra, at 18, reprinted in 1969 Legis. Hist. 1197-98. The legislative also reflects awareness that a standard at or below 2.2 mg/m³ would produce no danger of miners developing disability disease. Id; 1969 Legis. Hist. 1277. 8 FMSHRC at 896.

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The Commission has also noted that a "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., supra

In Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In view of case law as enumerated by the Commission it is apparent that Citation 9996225 was erroneously designated as an S&S violation. This designation should be stricken: the evidence indicates the respirable dust concentration was 2.2 mg/m³. Such a concentration fails to establish elements (3) and (4) of the Mathis Coal formula.

Empire also argues that it provided personal protective equipment to its miners and, further, it contends section 104(f) does not designate a respirable dust violation as S&S. Since the allegations concerning S&S are to be stricken, it is unnecessary to consider these additional issues.

Empire also argues the 104(b) order was improperly issued because Inspector Gibson made no investigation; further, an extended abatement time would not endanger the health and safety of the miners and, in addition, the inspector failed to consider the difficulty of abating the condition.

These arguments are rejected. Inspector Gibson relied on the report from MSHA's lab in Pittsburgh. This constituted

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a sufficient investigation particularly where the respirable coal dust concentrations are rising rather than falling. In support of its position, Empire cites McCoy Elkhorn Coal Corporation, 2 FMSHRC 3196, 3207 (1980) (Steffy, J.); U.S. Steel Corp., 2 FMSHRC 1515, 1520 (1980) (Stewart, J.); David Cabrera, Inc., 2 FMSHRC 338, 341 (1980); (Merlin, J.); Old Ben Coal Co., 6 IBMA 292 (1976); and Consolidation Coal Company, 2 FMSHRC 2665, 2667 (1980) (Merlin, J.); Reliable Coal Corp., 1 IBMA 97, 113 (1972); Freeman Coal Mining Corp, 1 IBMA 1, 27, (1970); Consolidation Coal Company, 2 FMSHRC 2665, 2667-8 (Merlin, J.); Consolidation Coal Company, 1 FMSHRC 1638, 1640-1 (Broderick, J.); Consolidation Coal Company, 4 FMSHRC 747, 752 (1982) (Koutras, J.); Youghiogheny and Ohio Coal Company, 8 FMSHRC 330, 339 (Maurer, J.).

The above cases do not cause me to conclude that Inspector Gibson abused his discretion. There had already been a number of extensions to the original abatement date as noted, *infra*. Further, the dust concentrations were obviously rising.

Empire states it was diligent in attempting achievement. I conclude otherwise.

The initial citation was issued on March 4, 1988, based on samples taken in February 1988. An abatement date of March 28 was set. New samples taken March 28 indicated Empire remained out of compliance. The abatement date was further extended to April 22, 1988. A few days before April 22 the inspector had difficulty sampling and an extension of the abatement date was allowed until May 14. By May 14 additional sampling showed a significant increase, to an average concentration of 2.9 mg/m³. Finally, the 104(b) order was issued some 80 days after the initial citation. At about this point in time Empire acted and presented its amended dust plan to MSHA. The changes made by the company were not expensive and they took approximately four hours to be put into place (Tr. 215). On the foregoing evidence, I am unable to conclude that Empire acted diligently. In sum, this violative condition should have been remedied before 80 days had expired.

Civil Penalty

The statutory criteria to assess a civil penalty is contained in section 110(i) of the Act.

The criterion of gravity and negligence have already been discussed in the context of the S&S findings and in the failure to abate findings.

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The parties have stipulated that Empire is a large operator and that imposition of a penalty will not affect its ability to continue in business. The operator's history is favorable to Empire: it paid 126 violations in the previous two years. Four violations of this specific regulation were paid in that period. On balance, I deem that a civil penalty of \$100 is appropriate.

For the foregoing reasons I enter the following:

ORDER

1. The contest filed by Cyprus Empire Corporation in WEST 88-247-R is dismissed.
2. The designation of Citation No. 9996225 as a significant and substantial violation is stricken.
3. Citation No. 9996225, as amended, is affirmed and a civil penalty of \$100 is assessed.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Chief, Weighing Branch, Dust Division, Pittsburgh Health Technology Center.

~FOOTNOTE_TWO

2. See Figure 3A and 3B of Exhibit P-20.

~FOOTNOTE_THREE

3. The correct measure of coal dust concentration is # mg/m3. Occasionally, the shorthand of # mg is used.

~FOOTNOTE_FOUR

4. As required by 30 C.F.R. 75.316.

~FOOTNOTE_FIVE

5. MSHA District Manager, Denver, Colorado.