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

PEABODY COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 88-239-R Order No. 3141311; 4/19/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Robinhood No. 9 Mine Mine ID 46-02143

DECISION

Appearances: Thomas L. Clarke, Esq., Peabody Coal Company, Charleston, West Virginia, for the Contestant; Ronald E. Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant against the respondent challenging the validity of a withdrawal order issued pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(b). The contestant also seeks to challenge the underlying section 104(a) citation. The respondent filed a timely answer to the contest, and asserted that the order was properly issued and that a violation of the cited mandatory standard did in fact occur. A hearing was held in Charleston, West Virginia, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this matter.

Issues

The issues in this case are (1) whether the contestant violated the provisions of mandatory respirable dust health standard 30 C.F.R. 70.101, as stated in the contested section 104(a) citation, and (2) whether the inspector who issued the section 104(b) order properly determined that the violation had

not been timely abated and that the period of time for abatement should not be further extended. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq

2. Sections 104(a) and 104(b) of the Act.

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

4. Mandatory respirable dust standard 30 C.F.R. 70.101.

Discussion

During opening statements at the hearing, MSHA's counsel stated that on March 22, 1988, a section 104(a) citation was served on the contestant citing it with a violation of mandatory respirable dust standard 30 C.F.R. 70.101. The contestant did not contest the citation, and it paid the civil penalty assessment for the violation. Although counsel recognizes the fact that the contestant takes the position that the penalty was inadvertently paid, he nonetheless asserted that pursuant to section 105(a) of the Act, since the contestant did not contest the citation or the penalty, the citation has become final and not subject to further review (Tr. 6, 13).

MSHA's counsel stated that after the issuance of the citation, the contestant was afforded time to abate the condition and to come into compliance with the respirable dust requirements. The abatement time was extended, and the contestant submitted dust samples which it had collected on or about April 12-14, 1988. Since these samples exceeded the required dust levels mandated by section 75.101, MSHA Inspector Orville Boggs issued a section 104(b) Order on April 19, 1988, and this order is the subject of the instant proceeding. Counsel stated that the issues presented with respect to the order are (1) whether or not the initial citation was abated within the time fixed by the inspector, and if not (2) whether the failure of the inspector to further extend the abatement time was reasonable or unreasonable in the circumstances (Tr. 7).

Contestant's counsel agreed that the issue presented in this case is whether or not the abatement time for compliance should have been extended further, and whether or not the contested order was appropriate under the circumstances. Counsel asserted that the contestant made every reasonable effort to abate the violation in light of the dust control system in use at the mine,

that MSHA was basically aware of these efforts, and that the time for abatement should have been extended (Tr. 8).

With regard to the payment of the civil penalty assessment for the citation which preceded the contested order, contestant's counsel asserted that payment was made through an inadvertent mistake after MSHA informed the contestant that it would institute a formal collection action for payment of the penalty (Tr. 9).

During a bench colloquy, contestant's counsel confirmed that while the contestant may have doubted the cited respirable dust level of 3.5, that resulted in the issuance of the citation, it did not contest the citation (Tr. 10). Counsel agreed that the order was issued after the contestant submitted additional samples which reflected sample results of 2.6 when tested by MSHA. Counsel asserted that the contestant disagrees with MSHA's test results, and that its own independent weighing of the sampling cassettes at its laboratory reflects compliance with the required MSHA dust standards. Further, counsel asserted that the contestant was making every effort to obtain compliance, and was attempting to isolate any dust problem which resulted in the high sampling results being received by MSHA, but had been unable to do so at the time the order was issued. Counsel asserted that "the inspector knew about this and perhaps even sympathized with our problems" (Tr. 12). Counsel identified the "mechanized mining unit" which was out of compliance as a continuous-mining machine equipped with a scrubbing device which is used for dust control purposes (Tr. 13).

The initial section 104(a) "S&S" Citation No. 9959601, was served on the contestant by certified mail on March 22, 1988, and it cites a violation of mandatory respirable dust health standard 30 C.F.R. 70.101, for the following condition or practice:

> 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 in mechanized mining unit 017-0 was 3.5 mg/m3 which exceeded the applicable limit of 1.5 mg/m3. Management shall 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 Dust Processing Laboratory.

The citation was signed by MSHA Inspector Billy G. Wiley, and he established April 13, 1988, as the abatement time for the violation. Inspector Wiley modified the citation on April 11, 1988, "to allow the operator to send respirable dust samples to the Mt. Hope Respirable Dust Processing Laboratory." The citation was modified again on April 13, 1988, by MSHA Inspector Orville E. Boggs, and the abatement time was extended to

April 18, 1988, "to allow the operator more time to collect the needed respirable dust samples on the MMU 017."

On April 19, 1988, Inspector Boggs issued a section 104(b) Order No. 3141311, withdrawing the 3 North 017-0 section from production, and his reasons for this action are stated as follows in the order:

> Based on the results of five (5) respirable dust samples collected and submitted by the operator on April 13, 14, and 15, 1988, on the designated occupation 036 in MMU 017-0, the average concentration of respirable dust was 2.6 milligrams (mg/m3) which exceeded the applicable limit of 1.5 mg/m3. The operator has failed to adequately control the respirable dust in the working environment of designated occupation 036 continuous miner operators in the 3 North 017-0 section.

On 2:30 p.m., on April 19, 1988, Inspector Boggs modified the order, and the modification states as follows:

> The operator has submitted and implemented a revised respirable dust-control plan. Therefore, this order is modified to permit the operator to collect respirable dust samples on MMU 017-0 to determine if compliance is attained.

The order was terminated by Mr. Boggs on April 21, 1988, and the reason for this is stated as follows on the face of the notification notice:

> Based on the results of six (6) valid samples collected during an MSHA inspection, the respirable dust concentrations on the designated occupation (continuous miner operator -036) in mechanized mining unit 017-0 is 0.7 mg/m3 which is within applicable limit of 1.5 mg/m3. The section average was 0.4 mg/m3.

MSHA's Testimony and Evidence

Donald L. Jennings, MSHA Physical Science Technician, Mt. Hope, West Virginia, testified as to her experience and training, and she stated that her duties include the testing and weighing of respirable dust samples submitted by mine operators and MSHA inspectors for analysis to insure compliance with MSHA's Part 70 respirable dust standards. In addition to the testing of these samples, she is also involved in the calibration and maintenance of the laboratory test equipment. She stated that she is familiar with the dust samples submitted by the contestant on April 12 and 14, 1988, and she confirmed that she weighed and

tested the samples, and she explained the laboratory procedures which she followed, including the use of an air sampling pump, and a balance device. She demonstrated the testing procedures she followed by references to two dust sampling cassettes, and she explained the calibration procedures she followed, and the recording of her test results on certain records which she maintained in the course of her duties. (Exhibits G-1, G-2, G-3 Joint Exhibits 1 and 2).

Mrs. Jennings confirmed that all dust samples received at the laboratory are weighed on the same day they are received, and she explained how she determines and documents the initial weight of the dust sample cassette, the final weight as determined by her laboratory procedures, and the method by which she determines the concentrations of respirable dust as converted to an equivalent MRE concentration as measured with the approved MSHA sampling devices and instruments.

Mrs. Jennings stated that some of the dust cassettes received in the laboratory are scratched and scuffed up, contain holes, and sometimes are broken. She confirmed that appropriate steps are taken to insure against contaminated cassettes (Tr. 15-35).

On cross-examination, Mrs. Jennings stated that she sometimes receives over-sized particles in the samples she receives, and she indicated the cyclonic action of the air pumping device used to test the samples is designed to take up these particles. Although such oversized samples are not considered to be respirable dust, they will be weighed if they are inside the cassette. She also explained the use of a balance and desiccator which is located on a heavy "brinkman table" located in the laboratory, and she did not believe that she made any mistakes in the procedures she follows in weighing and testing the samples and in calculating the results of her weighing and sampling (Tr. 35-45).

Ambrose Kokoski, MSHA mining engineering technician, Mt. Hope, West Virginia, testified as to his background and experience, and he confirmed that he was familiar with the respirable dust samples processed by Mrs. Jennings. He stated that he trained Mrs. Jennings when she was first employed in the Mt. Hope office, and he agreed that the laboratory procedures she followed in weighing and testing the samples in question were correct, and that she routinely follows these procedures for every sample which she processes.

Mr. Kokoski stated he "checked weighed" two of the samples processed by Mrs. Jennings as shown in exhibit G-2, to verify the accuracy of her weighing procedures and documentation, and that he initialed the record verifying the accuracy of her weighing of the samples, and placed a check mark next to the samples which he verified. He stated that he used a different sampling balance

machine in checking her sample weighing results, and that he also initialed the back of the cassette sampling card verifying the results of his weighing of the samples, as shown in exhibit G-1 (Tr. 45-51).

Robert A. Thaxton, supervisory industrial hygienist, MSHA, Mt. Hope, West Virginia, testified as to his background, experience, and education, and stated that he holds a BS degree in Chemistry, with a minor in math, and a Master's degree in Occupational Health and Safety Engineering. He confirmed that the laboratory technicians at Mt. Hope, including Ms. Jennings and Mr. Kokoski, work directly under his supervision.

Mr. Thaxton stated that he was familiar with the dust conditions at the mine in question through his review of respirable dust samples and compliance problems that come to his attention with respect to the mine. He identified exhibit G-4 as a copy of pages from a log book maintained at the lab showing the results of respirable dust sampling for various mining units at the mine, and he confirmed that on the basis of the collected samples for the cited MMU 017 section, the respirable dust standard for this unit was computed at 1.5 milligrams of respirable dust per cubic meter of air, as of August, 1987 (Tr. 51-61).

Mr. Thaxton also identified certain MSHA records concerning respirable dust citations issued at the mine, and he confirmed that he reviewed the FY 1987 compliance records in 1988 to identify the mines which are to be placed under MSHA's "increased awareness" because of a repeat respirable dust non-compliance history. He confirmed that a mine which has two citations in any one year on any one mining entity is targeted by MSHA for increased attention under its "target mine program" for repeat non-compliance (Tr. 64).

Mr. Thaxton stated that dust samples submitted by mine operators are usually weighed at MSHA's laboratory in Pittsburgh, and that targeted mine samples may also be sent to the Mt. Hope laboratory because that lab has a quicker "turnaround" time for weighing and processing samples (Tr. 66). Mr. Thaxton explained MSHA's target mine program, and he confirmed that he developed the program for MSHA District No. 4. He also confirmed that the contestant's mine was under this program in 1988 and 1989, and that some of its employees who were in attendance at the hearing attended some of the MSHA meeting under this program (Tr. 67-69).

Mr. Thaxton confirmed that the compliance information he reviewed indicates that in FY 1987, the mine received two citations for violations of section 70.101, on the 015 MMU unit. He explained that an MMU, or mechanized mining unit, consists of a continuous-mining machine, shuttle cars, and a roof bolter, and that the dust samples taken and submitted by the contestant are taken only of the designated occupation, which in this case is

the continuous-miner operator. The roof bolter and scoop operator are not sampled because the designated occupation (miner operator) is representative of the "worse case situation" on the entire MMU because the miner operator would be in the highest concentration of dust generated on the unit. Mr. Thaxton concluded that based on the two citations in question, the mine, in 1987, had a problem with respirable dust, and that the two citations represent the amount of high dust levels to which the men on the MMU unit in question were exposed for a 4-month period out of the total 12 months in the year (Tr. 73-74).

Mr. Thaxton identified exhibit G-5, as a compilation of the respirable dust sampling reports concerning the 017 MMU unit at the mine, and he explained that five valid dust samples are required to be collected bi-monthly for the designated occupation, and that an average of five samples taken together will establish an average concentration of dust which is then compared against the actual standard established for the particular MMU in question. He explained the laboratory procedures, including the handling of oversized particles, and he identified the dust sample results used to support the citation issued on March 22, 1988 (Tr. 78). He also identified the samples taken on April 7 and 19, 1988, which indicate average concentrations of respirable dust of 2.5 and 2.6 respectively, both of which still exceeded the 1.5 standard established for the cited MMU in question (Tr. 80).

When asked to comment about the significance of the aforementioned sample results on the 017 MMU, and the contestant's compliance efforts, Mr. Thaxton stated as follows (Tr. 81-82):

> A. The samples of all three groups of samples submitted by the operator all exceeded the standard. Some of the samples did have some variation to them, some being low, some being higher than others. This indicated to us, looking at the reports of the three sets of samples collected by the operator that sufficient action had not been taken to reduce the dust below the standard and the last two surveys were about the same thing, and therefore we had a time period there that I am not sure what would have been done to reduce the dust. Whatever action was taken was significant enough to reduce the dust levels.
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> * * * * * * *
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> A. By them all being above the standards then that indicates to me that the planned parameters for the dust controls that are actually in place on this MMU are probably inadequate or are not being followed on a routine basis. If we had samples that fluctuated dramatically up and down, some being extremely low and

> some being extremely high, then that resulted in an average concentration that exceeded the standard, then we might say that there are some isolated problems in the way that the mine is being operated, the miner is being operated. It may contribute to the dust problem, but with consistent results showing over ten samples, which was ten shifts or ten different days, that the dust concentrations were very uniform, that they were never below the 1.5 standard.

Mr. Thaxton confirmed that he has never been in the Robinhood No. 9 Mine. He stated that the measures taken on an MMU continuous miner to control dust would include ventilation controls around the miner, use of water sprays or wetting agents, and the use of a scrubbing unit. He stated that a complete change over to a scrubbing system on a machine may take 3 weeks, and that simply altering the water sprays may take as little as one or 2 days. If an operator is under MSHA's target program with respect to a non-compliance problem, MSHA would expect it to take stronger action once it is out of compliance and to insure the use of necessary dust controls (Tr. 84).

On cross-examination, Mr. Thaxton confirmed that the MMU unit which was cited in both the disputed citation and order is the 017 unit, and the applicable respirable dust standard established by the appropriate sampling cycles for this unit is 1.5 (Tr. 84). Mr. Thaxton confirmed that the 017 MMU was cited one time in FY 1989 for a violation of section 70.101, and that the citation was terminated when the unit was abandoned and removed from the mine on March 1, 1989. He also confirmed that the unit was cited two times in 1988 for violations of section 70.101 (Tr. 85), and that for the past three fiscal years, the unit has been cited a total of three times for violations of 70.101 (Tr. 90).

Mr. Thaxton confirmed that he had no personal knowledge of the actions taken by the contestant in this case after receiving the citation, and that the basis for any conclusion on his part that the mine might have a particular dust problem is based on the "historical data" from the mine which indicates "that they possibly have problems with this particular MMU because of the repeat non-compliance." In support of his conclusions that there is a "problem," Mr. Thaxton stated that "two violations in any one fiscal year in any one entity indicates a potential for problems on that particular entity" (Tr. 91). He conceded that he does not know what may be the "cause" of any "problem," and he conceded that in order to abate a dust violation, the operator must have some knowledge as to what caused it, and that in order to effectively abate a violation, the operator must have enough time to discover what is causing it (Tr. 91).

Mr. Thaxton stated that when an inspector modifies a citation to permit an operator to take additional samples, he does so because an operator usually indicates that he has adopted some additional dust controls and needs time to obtain and submit additional samples to the laboratory for analyses (Tr. 93). Mr. Thaxton stated that it is normal procedure for an inspector to issue a withdrawal order if he determines that there has been an insufficient effort made to control the dust. In the instant case, he pointed out that the contestant took two sets of samples after being initially cited, and that after the second extension of the citation, which still reflected non-compliance based on the additional sampling, Inspector Boggs determined that the contestant had made an insufficient effort to control the dust (Tr. 94).

Mr. Thaxton confirmed that he did not discuss the violation with Inspector Boggs, and that he (Thaxton) received no information with respect to any particular dust problem which may have caused the contestant to be out of compliance. He confirmed that the only information available to him is the methane dust-control plans that are submitted by the contestant for the MMU in question, including any changes made after a citation is issued, and any new plans which may be submitted (Tr. 95). Mr. Thaxton stated that an operator is required to make some changes in its dust-control plan and sample again, or else they are not given an extension. He confirmed that he saw no meaningful changes made by the contestant in this case, and that the MMU went back out of compliance at the end of the fiscal year, and was abandoned and is no longer available (Tr. 96).

Mr. Thaxton stated that the "target" mine in question is assigned to Madison sub-district office supervisor Henry Keith, and he confirmed that he has memos from Mr. Keith indicating that "he has made contacts with the operator," but has no information as what the problem may be (Tr. 98). When asked whether anyone has ever identified the respirable dust problem in question, Mr. Thaxton responded as follows (Tr. 98):

> THE WITNESS: In some cases. This miner is a continuous miner with a scrubber on it, deep cut. Those miners typically have no problem in maintaining dust compliance. It usually relates to, in this case, this miner having reduced standards, I expect that they are cutting rock. Scrubbers have a harder time being maintained when you are cutting rock. They tend to clog up, they lose their efficiency faster. The fact that they are cutting rock and having the quartz it also reduces the standard and they have less room to work with. Those things are what basically if we are getting citations on that one particular entity.

Mr. Thaxton stated that in the event Inspector Boggs was not aware of any action taken by the contestant to abate the violation, and that if all that was done by the contestant was to take additional samples, the inspector would be justified in issuing a section 104(b) withdrawal order. Mr. Thaxton stated further that MSHA's policy is that if an inspector determines that an operator has made no effort to control dust, and simply submits additional samples, and the samples show continued noncompliance, the inspector is instructed not to extend the abatement time further and to issue a section 104(b) order (Tr. 99).

Gary Turley, MSHA physical science technician, Madison, West Virginia, testified as to his experience and training, and he confirmed that he holds certifications in dust sampling, maintenance, calibration, and noise sampling, and that his duties include the weighing and testing of respirable dust samples submitted to his office laboratory. He confirmed that he is familiar with MSHA's Mt. Hope laboratory and that the Madison facility is essentially the same. He also confirmed that the dust sampling testing procedures which he follows are the same as those performed by Mrs. Jennings at the Mt. Hope Office, that the same type of balance machines are used, and that his testing procedures are routinely made for all of the samples which he tests, processes, and documents.

Mr. Turley stated that he was familiar with the dust samples processed in this case, and he confirmed that the samples taken by Inspector Boggs to abate the contested order were submitted to him for testing and analysis, and that they show compliance with the respirable dust requirements of section 70.101, for the continuous miner occupation on the 017 mechanized mining unit (exhibits G-6, G-7; Tr. 100-103).

Mr. Turley explained that the prior samples were taken to the Mt. Hope laboratory because they were samples submitted by the operator, and that Mr. Boggs' samples were submitted to the Madison laboratory because they were samples taken by Mr. Boggs (Tr. 103).

On cross-examination, Mr. Turley stated that MSHA purchases its dust sampling cassette devices from the MSA Manufacturing Company, and that the cassettes used by Inspector Boggs were obtained from MSHA's Madison Office (Tr. 106).

The parties agreed to the taking of the posthearing deposition of MSHA Inspector Orville E. Boggs, who was unavailable at the hearing.

Inspector Boggs testified as to his experience and training, and he confirmed that he was familiar with the subject mine, has inspected it several times since 1980, and that he was assigned to conduct an inspection at the mine during the spring of 1988.

He stated that the March 22, 1988, respirable dust citation was issued on the basis of computerized information reflecting non-compliance with the respirable dust standard. Mr. Boggs stated that Inspector Wiley informed him of the citation, and that he and Mr. Wiley issued two extensions of the abatement times to allow for more samples to be sent to MSHA's labs (Tr. 3-8).

Mr. Boggs could not specifically recall the reason for his extending the abatement time with respect to the citation, and he speculated that the contestant may have had an equipment breakdown on the section, and if this occurs, the production cycle is stopped, and mining moves to another spare production section. He confirmed that he would not have extended the abatement time if the contestant were not attempting to abate the violation in good faith (Tr. 9).

With regard to the issuance of the contested section 104(b) order, Mr. Boggs stated that he based the order on the fact that the dust samples submitted by the contestant for April 13, 14, and 15, 1988, reflected that the cited section was out of compliance. He stated that he "had no choice but to issue the order" for the failure by the contestant to abate the violation, and he explained as follows (Tr. 10-11):

> Q. Why do you say you had no choice?
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> A. Well, we gave a reasonable time. We gave them a full second cycle. See, they got in trouble in March on their cycle. On their normal cycles, they sampled and they were out of compliance. Something's wrong. So we gave them -- they got the (a) citation, giving them a reasonable time to sample again and get into compliance.
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> Q. Why do you think that that was a reasonable time?
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> A. What did they need? They needed five samples, five valid samples. They had a reasonable time to get it if they would run five sections. If they run five production shifts, they would take those five continuous.

Mr. Boggs could not recall whether or not the contestant ever discussed any equipment problems with him, or informed him that additional time was required to abate the condition. He recalled that the contestant discussed the matter with his supervisor Henry Keith, but he could not recall being present during this discussion. Mr. Boggs confirmed that he was at the mine between the time the citation and the order were issued, but he was not sure whether he was on the cited section, could not recall discussing the problem with the contestant during this time, and could not recall the contestant ever seeking his advice on the dust problem (Tr. 13).

Mr. Boggs confirmed that he discussed the matter with Mr. Keith, but could not recall Mr. Keith mentioning anything to him about any of his discussions with the contestant. Mr. Boggs stated that he did not inform Mr. Keith that he was going to issue the order, but did discuss it with him after he had issued it (Tr. 14). Mr. Boggs believed that he gave the contestant a reasonable time to take additional samples and obtain the results, and in response to a hypothetical question stated as follows (Tr. 15-16):

> Q. Let me ask you a hypothetical question here. Suppose the company said, "Well, look, something has come up or we are having problems with the machinery. We need an extra week. We want to change the machinery. It takes about a week, and then we want to take our samples after that." Would your normal practice have been to give them that additional time, or would you just have given them the time to take the samples?
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> A. If they could justify it, they would have got an extension. Equipment break down, strikes, whatever, if it's beyond the company's control, it's something that they don't do intentionally, then that justifies more time, an extension.
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> Q. You had already given them more time before the
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> B-Order was issued?
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> A. Yes, I had. It could have been extended again if they had justified it.
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> Q. You cannot recall their justifying it or saying anything?
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> A. No.

Mr. Boggs confirmed that after a respirable dust inspection on April 20, 1988, and the results of a laboratory report of April 21, 1988, the cited section came into compliance with an average dust concentration of .4 for the section (Tr. 18). He identified a copy of a report of a respirable dust conference held with his supervisor and other MSHA officials, and he confirmed that MSHA must approve dust-control plan changes submitted by the operator to control respirable dust on the section. In this case, he confirmed that the PSI for each water spray was changed from 50 PSI to 60 PSI, and that someone was assigned to monitor the dust samples (Tr. 19-20).

Mr. Boggs stated that pursuant to MSHA's criteria with respect to respirable dust orders, the issuance of a section

104(b) order requires an operator to make dust control changes, and once an order is issued, the operator's dust-control plan must be improved. After changes are made, additional dust samples must be taken, and the operator must show that it is making changes and improvements to bring it into compliance. After the changes are made and approved by MSHA, the order is modified to permit coal production to continue, and dust samples are taken. The sampling is conducted by MSHA, and Mr. Boggs confirmed that he took the samples which resulted in the abatement of the order (Tr. 22). Other than the two changes he testified to, he could not recall any other changes made by the contestant in this case which may have affected the respirable dust on the section (Tr. 23).

On cross-examination, Mr. Boggs stated that if he were the contestant and received a section 104(a) citation for non-compliance with the respirable dust standards, he would have assigned someone to the sampling pumps to make sure that they were properly taken care of. He would also pay close attention to the ventilation on the section, and the mining machine water pressure and spray operation, and would check the water pressure and monitor the ventilation air and make adjustments as necessary (Tr. 24-26).

Mr. Boggs did not believe that the contestant assigned anyone other than the section boss to do the things he would have done. He confirmed that the checking of the dust pumps would not affect the amount of respirable dust in the air, and would only affect the measurement read-out of the instrument. Although MSHA's dust standards allow two milligrams of dust in the air, in this case where quartz is present, the allowable dust limit is 1.5 milligrams (Tr. 29).

Mr. Boggs stated that there were three working sections in the mine, and although a working section is one of the places that he would be concerned about as an inspector, he doubted that he was on the 017 Three North Section from March 7, through April 29, 1988 (Tr. 23). He could not recall discussing any dust control problems on the section with the contestant, and he did not believe that anyone asked him for any assistance because the contestant has an experienced safety department and does not necessarily ask for a lot of advice (Tr. 35).

Mr. Boggs could not recall making any comments about the reliability of the dust sampling results from MSHA's Pittsburgh laboratory, but he did recall hearing comments from contestant's employees Dennis Jarrell and Denver Carter, who complained that "they didn't think that they were being done right by Pittsburgh" (Tr. 36). Mr. Boggs recalled that these individuals were complaining because the MSHA individual doing the weighing of the samples was new "or something to that effect." Mr. Boggs could

not recall the specific complaint, but confirmed that the contestant requested that someone weigh the samples, and that is why his office sent them to the Mt. Hope laboratory (Tr. 37).

Mr. Boggs stated that prior to the issuance of the order, he could not recall discussing with Mr. Carter or Mr. Jarrell, or anyone else at the mine, any efforts by the contestant to come into compliance. He confirmed that he issues four or five section 104(b) orders annually, and only if they are justified. He stated that before issuing such an order, he considers whether the operator made a diligent effort to abate the violation in a reasonable time, taking into account the availability of manpower (Tr. 38).

Mr. Boggs confirmed that the modification of the order allowed mining to continue, and he believed that in order to lift a section 104(b) order, or to modify it to allow mining to continue, the Act requires the mine operator to submit a modification to its dust-control plan (Tr. 40). When asked whether or not it is standard MSHA procedure for an inspector to issue a section 104(b) order if an operator fails to come into compliance after he submits dust samples taken subsequent to the issuance of the initial section 104(a) citation, Mr. Boggs responded as follows (Tr. 42-43):

> A. I'm not sure where it's written. It's standard operating procedure, though, for us. It's just like any other violation. If you write a violation, give a company a reasonable time to abate the violation. Then if he does not take a reasonable effort to abate that violation in the reasonable time given, that is known as failure to abate, which results in a B-Order, which ceases operations until the violation is corrected. It applies to any violation we write.
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> Q. Is that standard operating procedure the reason why you said, and I think these were your words, "I have no choice?"
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> A. No, I was going by the law. If I had the Act and my Notice and Order Abiding Manual and my CFR 30 with me, I could read it out as Congress wrote it. But I don't have it with me. That's what Congress stated when they wrote the Act in 1977, revised it.

Mr. Boggs confirmed that after the citation was issued, he did not return to the cited section because he was apparently working in another section of the mine. He could not recall anyone asking him to return to the cited section to determine if there were any problems, and if he had been asked, he would have done so. If he had observed anything that would have helped abate the violation, he would have probably offered his advice,

even though "they don't always take our advice" (Tr. 44). Mr. Boggs stated that as long as an operator is making a reasonable effort to abate a cited condition, he would grant an extension of the abatement time, even though the condition may not be completely abated. In the case at hand, he knew of no efforts made by the contestant to change the conditions that would have resulted in the abatement of the citation (Tr. 45).

Contestant's Testimony and Evidence

Stephen W. Richards, Safety Supervisor, testified as to his background and experience. He confirmed that the principal point of production of dust is at the face where coal is being extracted. He stated that the mining machine used on the 017 unit was a Joy 12-CM-7 equipped with a flooded bed scrubber, and he explained the probable dust sources and methods of controlling it with the scrubber which he characterized as "the state of the art dust collecting system" (Tr. 108-119).

Mr. Richards stated that respirable dust non-compliance associated with the machine scrubber system is a cause for concern and is not taken lightly. In such instances, the scrubber is checked in its entirety, and the ventilation system and individual administrative controls are examined in order to identify and correct the problem (Tr. 120).

Mr. Richards stated that with the use of the scrubber system, and based on samples taken by the contestant and MSHA, it is not uncommon to have dust samples ranging from .5 to 1.5 milligrams. Without the scrubber system, past samples have shown over 3.0 milligrams of dust (Tr. 121).

Mr. Richards "suspected" that the non-compliance problem may have been caused by the use of old dust cassettes which were stored for approximately a year at the Robinson No. 8 Mine which had worked out and was shut down. He speculated that the age of the cassettes may have affected the accuracy of the weight of the dust samples used to determine compliance (Tr. 123).

Mr. Richards explained the changes made to come into compliance, including the increase of the water supply line to the mining machine, and increasing the water pressure from 50 to 60 PSI, examining the different components of the scrubber system, and reviewing the dust-control plan with appropriate mine personnel to insure that they were aware of their dust monitoring responsibilities (Tr. 124).

Mr. Richards confirmed that after the abatement of the order, the mining machine was again out of compliance, and it was replaced with a rebuilt one. He also confirmed that the scrubbers were installed on the machines when they were out of compliance (Tr. 125). He stated that personal respirable dust

protective respirator devices are available to miner's working on the MMU, but they are not required to wear them (Tr. 128).

On cross-examination, Mr. Richards stated that the old dust cassettes were approximately a year old, but he had no personal knowledge as to whether or not the cassettes used for the dust samples taken by the contestant on March 22 and April 7, were the old ones or new ones. It was his understanding that the old cassettes were used to sample the dust, but he was not the individual who picked out the cassettes or assembled the cassette samplers used to sample the dust (Tr. 130). Mr. Richards explained what was done after the order was issued, including the change of water pressure in the machine, and changing the dustcontrol plan to reflect the changes in the water pressure being used to control the dust. He confirmed that no changes were made to the machinery because the water pressure already exceeded the minimum dust plan requirements and no machine changes were required (Tr. 132).

Mr. Richards could offer no explanation as to the precise problems which resulted in non-compliance, and he confirmed that after the order was issued, the mining machine was replaced, and to his knowledge, abatement was achieved, and no further problems were encountered (Tr. 135).

Mr. Richards explained that as part of the efforts to determine whether the old cassette sampling devices were the cause of the high dust sample readings, the contestant started weighing the cassettes in its coal laboratory but they were criticized by MSHA for doing this. He stated that the cassettes were being pre-weighed and post-weighed on scales which were representative of the scales used by MSHA, and a qualified person was performing the weighing. However, MSHA refused the contestant's requests to verify the questionable dust samples which were being tested and processed during the month or so that the contestant was attempting to come in compliance and abate the citation (Tr. 137).

Mr. Richards stated that he and two other individuals who worked with him had one or two conferences at MSHA's sub-district office, and on one occasion visited Mr. Thaxton at MSHA's laboratory building in an effort to look at the lab and to weigh the contestant's samples, but received no help or assistance from MSHA (Tr. 138).

Mr. Richards was of the opinion that Inspector Boggs issued the order as a "procedural and prudent thing to do," and did not consider the contestant's abatement efforts, or the amount of resources being used to abate the citation (Tr. 139).

Mr. Richards stated that after exhausting all efforts to dismantle the mining machine, insuring that it met the manufacturer's specifications, reviewing the dust-control plan with appropriate personnel, and assigning a crew to periodically monitor the situation, the contestant sought assistance from Mr. Thaxton to help them in looking at the samples and correcting the problem (Tr. 140).

Dennis Jarrell, mine safety supervisor, stated that he reports to Mr. Richards. He stated that after sampling the 017 unit during the bi-monthly period of March and April, 1988, Inspector Henry Keith called him on March 22, and advised him that the unit was out of compliance and that he was to resample the unit. Upon receipt of the call, Mr. Jarrell met with the mine manager, and special attention was given to the machine scrubber system. In addition, management decided to pre-weigh and post-weigh the sampling devices, and meetings were held with the section foreman and miners working on the unit in an effort to determine the reasons for being out of compliance (Tr. 146-151).

Mr. Jarrell stated that before taking the second set of samples from March 28 through 31, the 017 MMU was checked out, and no visual or mechanical problems were found. He explained what was done in an attempt to find the problem, including the weighing of the sample cassettes in order to obtain a representative sample (Tr. 157).

Mr. Jarrell stated that based on the pre-weighing and post-weighing of the second March-April samples submitted to MSHA to abate the citation, it was determined that the average set of samples indicated .6 milligrams of dust (Tr. 157). Contestant's counsel confirmed that these same samples were submitted to MSHA, and MSHA's test results indicated an average concentration of 2.5 milligrams of dust (exhibit G-5, Tr. 158). Mr. Jarrell explained the method used to weigh the sampling devices in question in an effort to find out the overall weight gain (Tr. 158-161).

Mr. Jarrell stated that after calculating the weight gain for the second set of samples in question, the contestant calculated an average respirable dust concentration of 1.5 milligrams. He stated that "I'm thinking at that point in time had our records been valid we would have been in compliance, we don't know" (Tr. 164).

Mr. Jarrell stated that Mr. Keith called him again on April 7, and advised him that the second set of samples still indicated non-compliance. Further management meetings were held, and on April 8, Mr. Jarrell and Mr. Richards went to Mt. Hope to meet with Mr. Thaxton. Mr. Jarrell took 12 dust sample cassettes with him, and five additional cassettes were weighed at the

contestant's lab and at MSHA's Mt. Hope lab. All of these samples were of the same weight. Once they were pre-weighed, Mr. Jarrell requested MSHA to post-weigh them, but MSHA would not do it. After the five samples were taken on April 12 through 14, using the five pre-weighed cassettes, MSHA did not post-weigh them as Mr. Jarrell thought they would, and on April 18, Mr. Keith called him again and advised him that the unit was still out of compliance (Tr. 168).

Mr. Jarrell stated that on April 19, he went to MSHA's office and agreed under protest to revise the dust-control plan, to increase the water pressure from 50 PSI to 60 PSI, to assign someone to monitor the samples spontaneously on the continuous miner, and to weigh all samples (Tr. 168).

Mr. Jarrell stated that Inspector Boggs came to the mine on April 20 and sampled the unit, and that his sampler weighing method was the same one used by the contestant, with similar results (Tr. 169). Mr. Jarrell confirmed that the old sampler cassettes were discarded, and that the contestant still does not know what caused the high dust readings (Tr. 170). Mr. Jarrell stated that he discussed the problem with Inspector Boggs, and that he (Boggs) could not see any problem and speculated that the samples may have been "miss-weighed in Pittsburgh" (Tr. 174).

Mr. Jarrell stated that if the order had not been issued, and the abatement time extended, the old sample cassettes would have been discarded and different cassettes would have been used (Tr. 179). He confirmed that he first suspected that there may have been a problem with the cassettes in mid-March, 1988, after the citation was issued, and after the first sampling cycle results were received. Mr. Jarrell also "suspected" that MSHA's Pittsburgh laboratory may have had some erratic weighing results, but he was not certain that this was the case (Tr. 180-181).

Mr. Jarrell stated that Mr. Boggs issued the order upon instructions from his supervisor Henry Keith, and that he was present when Mr. Keith instructed Mr. Boggs to issue the order and to abate it because the contestant was going to upgrade the dust-control plan to increase the water pressure from 50 PSI to 60 PSI. Mr. Jarrell stated that Mr. Keith did not suspect there was a water spray problem, but focused on that part of the dust plan "because it was the simplest thing to do" (Tr. 185).

Mr. Jarrell stated that Inspector Boggs and Mr. Keith said nothing to him to indicate that they were not satisfied with his efforts to abate the citation (Tr. 185). Mr. Jarrell believed there was a problem with the sampling, and he also believed that Mr. Keith also believed it (Tr. 186).

Rodney Barker, day shift maintenance foreman, testified that he has 17 to 18 years of experience, and has worked at the mine

for 9 years. He stated that the 017 mechanized mining unit operated on the afternoon and evening production shifts, and that it was idle during the day shift. Mr. Barker confirmed that he was responsible for the maintenance of the unit, which consisted of a continuous-mining machine, roof bolter, and scoop or shuttle car. He stated that prior to the respirable dust sampling cycle, and for the first 5 days of sampling, the continuous-mining machine was cleaned and maintained on a daily basis. Maintenance work was performed on the miner dust scrubber unit, and the machine water sprays were cleaned and serviced on a daily basis. Mr. Barker stated that he did not speak with any of the MSHA inspectors who issued the citation and order in this case (Tr. 198-204).

Timothy Bailey, laboratory technician confirmed that he pre-weighed and post-weighed some of the dust sampling cassettes used by the contestant to sample dust from April 12 to 14, 1988. These were the samples which were pre-weighed at the MSHA lab, but not post-weighed by MSHA, and they were the samples which resulted in the issuance of the order (Tr. 205-208).

On cross-examination, Mr. Bailey confirmed that the sample cassettes were weighed with the red plugs removed, and the cassettes were not passed through a desiccator. Mr. Bailey identified the balance which he used to weigh the cassettes in question, and he confirmed that it is accurate to four decimal points, and reads out in milligrams (Tr. 210-211).

Robert Thaxton was recalled by MSHA, and he stated that the balance described by Mr. Bailey was similar in design to the MSHA balance used at the Mt. Hope laboratory. MSHA's balance is a different model which weighs to the nearest thousands of a milligram, while the contestant's balance weighs to the nearest tenth of a milligram (Tr. 213). Mr. Thaxton observed that the balance used by Mr. Thaxton did not have a calibration sticker reflecting when it was last calibrated, and it appeared to have been used for other dust sampling, which creates dust and dirt which might produce erroneous dust samples. He also observed Mr. Bailey carrying the balance into the courtroom under his arm, and he stated that the balances used by MSHA are never transported in this manner because it may destroy the internal weights and calibration of the unit. Although the removal of the plug prior to weighing the cassette is not prohibited, its possible that Mr. Bailey may have inadvertently contaminated the dust inside the cassette (Tr. 215).

Mr. Thaxton stated that at the time Mr. Jarrell and Mr. Richards brought their samples to the MSHA lab to pre-weigh the cassettes, he advised them that this was an inadequate method of determining whether respirable dust was on the cassette. Mr. Thaxton confirmed that when Mr. Jarrell and Mr. Richards mentioned the fact that the old cassettes may have had erroneous

initial weights, the seven cassettes which they brought to the lab were opened up and the filters were weighed to determine whether the initial weights were correct. The results showed little to no difference in the initial weights, and Mr. Thaxton stated that the cassettes "were o.k." (Tr. 216).

Mr. Thaxton explained further that the Mt. Hope lab was not permitted to certify all of the old cassettes which may have been used by the contestant. On advice of the Pittsburgh lab, the Mt. Hope laboratory could not weigh the samples exposed to mine dust because the balances would have been exposed to dust contamination resulting in erroneous balance readings. Accordingly, Mr. Jarrell and Mr. Richards were not permitted to weigh the entire cassettes, but the internal filter packages were weighed as usual. Mr. Thaxton stated that persons other than authorized lab personnel were not permitted in the lab while dust samples were being processed because body temperatures will affect the balance readings, people moving around will cause air currents, and unauthorized people in the lab can detract from the lab technician's concentration (Tr. 217-218).

Mr. Thaxton questioned the method used by the contestant to establish the gross weight of the filter cassette in its entirety, and he believed it was an inappropriate method of trying to determine respirable dust (Tr. 220).

With regard to MSHA's policy concerning the necessary action required of a mine operator to prevent a mine closure and withdrawal of miner's, Mr. Thaxton stated as follows (Tr. 232-233):

> JUDGE KOUTRAS: Do you know whether there is any policy in the district office with regard to respirable dust with regard to what an operator has to do as a minimum before--to prevent the actual shut-down and withdrawal of miners?
>
> THE WITNESS: In response to the order the policy is that they obtain an updated plan which would result in compliance or the inspector must detail in this modification of the order controls that are changed in order to obtain compliance.
>
> In our district with the relatively closeness of each field office and subdistrict offices to the mines, we opt to use the plan route as opposed to writing all that on the modification of the order.
>
> JUDGE KOUTRAS: The inspector is not here to defend himself. I will still ask you, does it make sense just to say, "Well, pick something out in your plan. I need something, some modification and that way we won't have to close you down." Does that make sense?

> THE WITNESS: They had already been closed down. The only thing that was doing was allowing MSHA to modify the order to take samples. The order was issued and the section was closed.

With regard to the reasonableness of the actions taken by the contestant to abate the citation, Mr. Thaxton stated as follows (Tr. 233-235):

> JUDGE KOUTRAS: You understand the issue in this case. I've got to make a judgment here as to whether the operator took reasonable action to abate the original citation. After hearing all of the testimony, do you have an opinion on that?
>
> THE WITNESS: The only opinion that I can draw from the information that we have available from respirable dust samples and from hearing what was said is whatever action was taken when MSHA was there resulted in compliance, why couldn't it have been done when the citation was issued to start with.
>
> It may have been in the past maybe the plan parameters weren't being followed exactly. Maybe somebody was putting too much air up there that it overcame the scrubbers. Maybe the people weren't standing exactly where there were -- we don't know.
>
> When the operator is taking his samples, it is up to him to see that the plan parameters are being followed. When our inspector is there, he is supposed to see that the plan parameters are being followed. Mr. Boggs would have to tell you what he actually observed.
>
> MR. GURKA: I'd like to ask Mr. Thaxton, before the order was issued, the company said they had done everything, there was nothing else possible they could do. In your opinion, given that set of circumstances, would it still be reasonable to go ahead and issue the (B) order or do you think they should have been given additional time?
>
> THE WITNESS: Given the results of the samples that had been submitted by the operator we didn't see where a significant effort was being made on the operator's part to come back into compliance.

Mr. Richards was recalled by the contestant and he denied that Mr. Thaxton said anything about the Pittsburgh laboratory advising Mr. Thaxton not to post-weigh the contestants cassettes.

Mr. Richards stated that he was under the impression that Mr. Thaxton's staff would cooperate and help solve the suspicion that the cassettes may have been contaminated and post-weigh the cassettes (Tr. 236). Mr. Richards confirmed that he was not aware of the fact that MSHA conducted tours of the Mt. Hope laboratory, and that he was simply told he could not see the lab, and it was his understanding that he was not allowed in under any circumstances (Tr. 236-238).

Mr. Thaxton was recalled by the court, and he confirmed that the Mt. Hope laboratory is a "controlled environment" and that only "authorized personnel" are permitted to enter the lab. He also confirmed that he informed Mr. Richards that he would try to post-weigh samples, but after subsequently speaking to the Pittsburgh lab, he was informed not to post-weigh the full cassette capsule by placing them in the balance with dirt on them. Mr. Thaxton stated that he had no weighing problem with the samples the contestant was using for its own benefit because they were clean. He confirmed that he may not have informed Mr. Richards that he could have a tour of the lab (Tr. 241).

In response to further questions, Mr. Thaxton stated as follows (Tr. 241-243):

> JUDGE KOUTRAS: Do you have an opinion as to whether the testimony that you've heard today about Peabody's concern with regard to the possible problem with the cassette to be reasonable or valid, or do you think it is just something they are trying to conjure up here? Try to beat the rap so to speak?
>
> THE WITNESS: I purchase cassettes for our entire district. I buy cassettes and have used them for two or three years. They are that old. We have never had a problem with any of our cassettes. They are checked by manufacturers through our Pittsburgh lab. Eight percent of the cassettes are sent in for verification of the initial weights. We have never had any problem with MSA cassettes in the past.
>
> JUDGE KOUTRAS: Were they using MSA cassettes?
>
> THE WITNESS: Yes, sir. It is the only approved cassette assembly at this time.
>
> JUDGE KOUTRAS: You've heard their testimony that they explored every reasonable possibility: the scrubbers, the machines, the men, everything. They thought it might be possible that there was something wrong with the cassettes. They went to MSHA for some assistance and they were turned away and that made them feel pretty bad.

> Now they are defending this thing on the basis that MSHA wouldn't help them and they didn't get any cooperation. They say, "we did everything that we thought was reasonable and we don't understand why this guy dropped an order on us."
>
> THE WITNESS: Like they stated, they brought 12 cassettes into us when they thought the cassettes were a problem. We did open up seven of the cassettes, weighed the internal package and did not find a significant difference between the initial weights of those cassettes. From that we gathered that the filters were indeed . . .
>
> JUDGE KOUTRAS: Let me ask you this one more time. Do you know of any policy in the district office with regard to the enforcement of respirable dust samples, and whether the inspectors are instructed if the samples show non-compliance after the initial citation, they are to issue an order.
>
> THE WITNESS: Only if they determine that significant action is not being taken by the operator to be in compliance.
>
> JUDGE KOUTRAS: Here you have a case where the inspector was on scene and the mine operator both agree that there is no problem. They can't find a problem.
>
> THE WITNESS: That is quite possible. The inspector is not trained actually to go in and take the system apart. He may or may not be able to see anything.

Findings and Conclusions

The undisputed facts in this case establish that a section 104(a) "S&S" Citation No. 9959601, was issued by MSHA Inspector Billy G. Wiley on March 22, 1988. The citation was served on the contestant by mail, and it was based on the fact that five valid dust samples collected by the contestant for the designated occupation in mechanized mining unit 017-0, exceeded the requirements of mandatory health standard 70.101. As a result of the citation, the contestant was required to "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." Inspector Wiley fixed the abatement time as April 13, 1988.

The contestant concedes that it did not contest the citation or the proposed civil penalty assessment for the violation, and that the penalty was paid. However, contestant asserts that the

payment of the penalty was an inadvertent mistake, and that it was paid when it received a collection letter from MSHA in which legal action to collect the penalty was threatened. Citing the Commission's decisions in Old Ben Coal Company, 7 FMSHRC 205 (February 1985) (footnotes 4 and 6), and Rivco Dredging Corp., 10 FMSHRC 624 (May 1988), contestant takes the position that an inadvertent or mistaken payment of a civil penalty assessment should not pose a technical obstacle to a decision on the merits of a contested withdrawal order.

In support of its contention that the civil penalty assessment for the citation was paid by mistake, contestant submitted an affidavit executed by its counsel Eugene P. Schmittgens, Jr. Mr. Schmittgens explains that a review of his file with regard to the civil penalty mine identification assessment control number 46-012143-03580, dated June 13, 1988, reflects a notation that Order Number 09959601 was marked DNP (Do not pay), and that the proposed civil penalty amount of $620 was deducted from the total proposed penalty for the order and underlying citation. Mr. Schmittgens explains further that upon receipt of a letter from MSHA's collections office September 8, 1988, advising the contestant that MSHA had received a partial payment for the case, and that it was to remit an additional $620 under threat of a collection action if it did not do so, payment was made. Mr. Schmittgens asserted that the payment was the result of an administrative error, oversight or mistake, and that at no time was any action contemplated by the contestant which would be inconsistent with its right to contest the section 104(b) order which is in issue in this case.

MSHA concedes that the Notice of Contest filed by the contestant preserved its right to contest the section 104(b) order. However, MSHA takes the position that the contest filed by the contestant was filed too late to preserve its right to contest the section 104(a) citation. MSHA points out that the contestant failed to timely contest the section 104(a) citation which was issued on March 22, 1988, and that when it filed its Notice of Contest on May 19, 1988, while it preserved its right to contest the section 104(b) order, the contest was too late to preserve its right to contest the citation. MSHA further points out that the contestant had a second chance to contest the citation when the civil penalty proceeding was initiated, but that it failed to request a hearing on the merits of the violation, and subsequently paid the civil penalty assessment for the violation in question.

Recognizing the fact that the Commission has held that an operator's right to contest a violation is not extinguished when a civil penalty is paid by genuine mistake, MSHA concludes that on the facts of this case, there was no such mistake on the part of the contestant. Citing the decisions in Coal Junction Coal Company, 11 FMSHRC 502 (April 1989), Camp Fork Fuel Company,

11 FMSHRC 496 (April 1989), and Westmoreland Coal Company, 11 FMSHRC 275 (March 1989), MSHA point out that in each of these cases, the operator paid the penalty after it had timely requested a hearing on the violations in question. In the instant case, MSHA argues that the contestant did not timely request a hearing on the violation described in the section 104(a) citation, and that it would be absurd to allow it to resurrect its right to contest the violation simply because it "mistakenly" paid the assessed penalty after its right to contest the violation had expired. MSHA concludes that the contestant's mistake was not in paying the penalty, but in not requesting a hearing in the first place, and that since neither the citation or the penalty were contested, the citation has become a final order of the Commission pursuant to section 105(a) of the Act, and it is not subject to further review.

Section 105 of the Act provides an operator with two opportunities to contest and request a hearing concerning the issuance of a section 104(a) citation. It may seek review of an abated citation pursuant to section 105(d) before a civil penalty assessment is proposed by MSHA, and it may seek review pursuant to section 105(a) by contesting the proposed civil penalty assessment when such a proceeding is filed by MSHA. However, if an operator fails to contest a civil penalty proposed for a citation, section 105(a) expressly provides that both "the citation and the proposed assessment of penalty shall be deemed the final order of the Commission and not subject to review by any court or agency." Further, an operator's payment of a proposed penalty constitutes an admission of the underlying violation and precludes the operator from continuing a pending section 105(d) contest of the violation. Old Ben Coal Company, supra, 7 FMSHRC at 209. "For purposes of the Act, paid penalties that have become final orders pursuant to section 105(a) reflect violations of the Act and the assertion of violation contained in the citation is regarded as true" Id. See also Amax Coal Co. of Missouri, 4 FMSHRC 975, 978-79 (June 1982); Ranger Fuel Corporation, 10 FMSHRC 612 (May 1988).

On the facts of the instant proceeding, it seems abundantly clear to me that the contestant failed to avail itself of two opportunities granted by the Act to contest the allegation of violation made in the section 104(a) citation in question. Instead, it paid the civil penalty proposed for the violation, and I cannot conclude that such payment was inadvertently or mistakenly made. The facts here show that the contestant never requested to be heard on the citation, and information provided by the affidavit executed by Mr. Schmittgens leads me to conclude and find that the "DNP (Do not pay)" notation referred to therein makes specific reference to the order and not the citation. In any event, I agree with MSHA's position on this issue, and I conclude and find that while the contestant has preserved its right to challenge the legality of the section 104(b) order, both

the validity of the citation and the civil penalty proposal for the violation stated therein are final under section 105(a) of the Act and not subject to review. Accordingly, the contestant's arguments to the contrary ARE REJECTED.

The Section 104(b) Order

The principal issue presented in this case is whether or not Inspector Boggs acted reasonably in issuing section 104(b) Order No. 3141311, and declining to further extend the period of time for abatement of the conditions cited in the section 104(a) Citation No. 9959601.

Section 104(a) of the Act, 30 U.S.C. 814(a), provides in part as follows:

> 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 abatement of the violation.

Section 104(b) of the Act, 30 U.S.C. 814(b), provides as follows:

> If, upon any follow-up inspection of a . . . mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to [section 104] . . . 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) of this section, 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.

In this case, the section 104(a) citation was issued on March 22, 1988, and Inspector Wiley fixed the initial abatement time as April 13, 1988. He required the contestant to take the necessary corrective action to lower the respirable dust exposure, and to sample each production shift until five valid dust samples were taken and submitted to MSHA's Pittsburgh laboratory. Mr. Wiley subsequently modified the citation to permit the contestant to submit the samples to MSHA's Mt. Hope laboratory, and this modification was served on the contestant by mail on

April 11, 1988, 2 days before the abatement period was due to expire. The original abatement date remained unaffected by this modification.

On April 13, 1988, the date fixed for abatement of the citation, Inspector Boggs modified the citation in order to allow the contestant more time to collect the respirable dust samples for the cited MMU 017-0 unit, and he extended the abatement time five (5) additional days to April 18, 1988. Thereafter, on April 19, 1988, at 9:55 a.m., Inspector Boggs issued the contested section 104(b) withdrawal order, and the reason stated for this action is that "the operator failed to adequately control the respirable dust in the working environment of designated occupation 036 continuous miner in the 3 North 017-0 section." At 2:00 p.m. that same day, Inspector Boggs modified the order in view of the contestant's submission and implementation of a revised respirable dust-control plan, and the modified order allowed the contestant to continue to operate in order to collect dust samples on the cited unit to determine whether compliance had been attained. Mr. Boggs subsequently terminated the order at 4:50 p.m., on April 21, 1988, after the sample results for six valid samples collected during an MSHA inspection confirmed that the cited unit was in compliance.

The contestant argues that an inspector's determination to issue a section 104(b) withdrawal order must be based upon the facts confronting him at the time regarding whether an additional abatement period should be allowed, Old Ben Coal Company, 6 IBMA 294, 1 MSHC 1452 (1976). In making such a decision, contestant asserts that the inspector must exercise his discretion in a reasonable manner, and that any decision not to extend the abatement time must be reasonably made, and it cannot be arbitrary or capricious, United States Steel Corporation, 7 IBMA 109, 1 MSHC 1490 (1976); Peter White Coal Mining Corporation, 1 FMSHRC 255, 1 MSHC 2086 (1979).

The contestant asserts that on the facts of this case, Inspector Boggs abrogated his responsibility to make an informed judgment of all of the facts and circumstances necessary to any reasonable determination as to whether or not the time for abatement should be extended. Contestant asserts that Mr. Boggs' own testimony clearly shows that while he had an opportunity to acquaint himself with the facts, he neglected to do so. In support of this argument, contestant points out that Inspector Boggs was present at the mine on 8 of the 20-work days between the issuance of the citation and the order, and despite the fact that he knew that the mine had only three working sections, and that a working section is one of the places with which he was concerned, he did not visit the cited 017 unit in March or April, 1988, until after he issued the order. The contestant further points out that Mr. Boggs never discussed with the contestant a

respirable dust problem on the section, or efforts being made by the contestant to abate such a problem during this time.

Contestant concludes that at the time he issued the order, Inspector Boggs, by his own testimony, had no facts upon which to make a finding that the period for abatement of the citation should not be extended. Despite being present at the mine and having the information at his fingertips, contestant maintains that Mr. Boggs made no effort to inform himself of the nature of the problem on the 017 unit, or the efforts being made to control respirable dust there. Instead, without even discussing the matter with his supervisor, contestant concludes that Mr. Boggs cavalierly issued the order upon the bare knowledge that measurement of the dust samples taken on April 11 through 15, 1988, did not show compliance with the applicable dust standard. Contestant further concludes that Mr. Boggs gave no consideration to the second part of section 104(a), whether the time to abate should be extended, and because he ignored the facts which confronted him and acted in an arbitrary and capricious manner, the order must be vacated.

Contestant argues that the time for abatement of the violation should have been extended. In support of this conclusion, contestant argues that where the action that is required of an operator to achieve abatement is known, sufficient time to accomplish abatement may be considered to be reasonable abatement. However, in a case where the operator must first determine what action is necessary to achieve abatement, reasonable time must necessarily include both sufficient time for the operator to determine what action is necessary and sufficient time to accomplish that action. Additionally, in the case of a citation issued for an average concentration of respirable dust that exceeds the applicable standard, contestant suggests that the abatement time must also include sufficient time to take the required number of samples and have them processed by MSHA. In the present case, contestant maintains that even if Inspector Boggs had attempted to inform himself of the facts pertinent to the decision of whether to extend the abatement time, he considered only the time necessary to take five valid samples to be reasonable, and completely disregarded other factors.

Contestant argues that the cited MMU 107 represented a state of the art dust control system, and that at the time the citation was issued, it was already taking extraordinary measures to insure that this system was working properly. Because there appeared to be no problem in the actual control of respirable dust, contestant suspected that the violation arose from a problem in the testing or measurement of respirable dust, and while continuing its efforts to maintain MMU 017 in top operating condition as it had before receiving the citation, it directed its abatement efforts toward determining the cause of the problem in the testing and measurement area. Specifically, it considered

whether the problem had been caused by inaccuracies in the manufacturer's initial weights for the dust sampling cassettes used in determining weight gain and dust concentration; whether a physical change or deterioration in the cassettes had occurred due to their age; and whether MSHA had possibly made errors in its processing of samples.

Contestant maintains that all of its abatement efforts, including the meetings with mine personnel, the review of the ventilation and dust-control plan with the employees involved, the efforts at maintaining the dust control system, and the efforts to determine where a problem existed in the testing and measurement of dust, were all communicated to MSHA, and according to the testimony of the contestant's safety manager, Inspector Boggs was kept informed of these efforts. Contestant points out that it also met with Mr. Thaxton and with MSHA's subdistrict manager for the specific purpose of discussing the cause of the problems on the cited unit.

Contestant argues that despite its good faith efforts in attempting to abate the violation, Inspector Boggs followed MSHA's "standard operating procedure" in issuing the order, claiming that he had "no choice" but to issue the order by simply relying on his determination that a reasonable time for the contestant to abate the violation was merely the time required to take five valid samples over five continuous shifts. Contestant maintains that in complete disregard of the circumstances, and its abatement efforts, MSHA's "standard operating procedure" requiring the issuance of an order when an operator does not come back into compliance with the respirable dust standard and that a change be made in the ventilation and dust-control plan, regardless of the effect of such a change on dust control, gave the inspector "no choice" but to issue the order.

Finally, contestant argues that in addition to the reasonableness of the abatement time, and the operator's abatement efforts, another factor which should be considered in this case is the relative hazard to which the contestant's employees on the cited 017 unit were exposed, Eastern Associated Coal Corp., 1 MSHC 1165 (June 22, 1978); Youghiogheny & Ohio Coal Company, 8 FMSHRC 330, 3 MSHC 2179 (1986). Contestant asserts that there was little or no hazard posed by an extension of the abatement time, and although the figures for respirable dust that MSHA measured were in excess of the standard, there is no evidence that these figures actually resulted from excessive levels of respirable dust in the air on the 017 unit. To the contrary, contestant concludes that all of the evidence in the record points toward a problem in measurement of respirable dust, and that the only thing that Mr. Boggs testified that contestant had not done that it might have tried in order to abate the violation was to assign a person other than the section foreman to monitor the dust sampling pumps. Contestant points out that Mr. Boggs

conceded this would only have had a possible effect on testing and measurement and not on the actual levels of dust (Tr. 28). Therefore, contestant concludes that the employees on the 017 unit would suffer no harm by an extension of abatement time to enable the contestant to determine how to effectively measure levels of respirable dust to achieve compliance with the applicable standard.

Contestant concludes that it made diligent, good faith efforts to control respirable dust and to abate the respirable dust violation on the cited 017 MMU, and that the order was issued by MSHA in accordance with some "standard operating procedure" which considers only failure to attain compliance, and ignores the operator's abatement efforts, the real nature of the problem that led to the violation, and the fact that minimal or no harm was posed to the miners. Contestant concludes that such rigid inflexibility in enforcement is not contemplated by the Act and should not be permitted in this case, and that a reasonable time to abate a violation should include sufficient time for the operator to determine what action is necessary to achieve abatement and to perform that action, not just the amount of time necessary to take the required samples and to have them processed by MSHA. The nature of the problem in this case and the diligent, good faith efforts of the contestant make it reasonable for an extension of time to abate to have been given, especially when the extension poses little or no hazard to miners.

MSHA takes the position that Inspector Boggs acted reasonably in not extending the time for abatement of the citation. Citing United States Steel Corporation, 7 IBMA 109 (1976); Youghiogheny and Ohio Coal Company, 8 FMSHRC 330, 339 (1986); and Consolidation Coal Company, 3 FMSHRC 2201, 2204 (1981), MSHA states that three factors are generally considered in determining whether the decision not to extend the abatement time was reasonable, and it takes the position that these factors indicate that Inspector Boggs acted reasonably in this case. The factors cited are as follows:

1. The degree of danger that any extension would have caused to miners;

2. The diligence of the operator in attempting to meet the time originally set for abatement; and

3. The disruptive effect an extension would have had upon operating shifts.

MSHA argues that any extension of the abatement period would have increased the miners' exposure to the hazards of excessive concentrations of respirable dust. Although recognizing the fact that the harmful effect of any one incident of exposure to excessive concentrations of respirable dust is negligible, MSHA

points out that such exposure nonetheless is presumed to be a significant and substantial hazard. The miners on the cited 017-0 unit were not wearing protective equipment, and there is no other evidence indicating that their exposure would not significantly and substantially contribute to respiratory disease.

MSHA asserts that the subject mine, and the cited 017-0 unit in particular, have a history of excessive levels of respirable dust, and extending the abatement period would have increased the miners' cumulative exposure to this hazard (exhibit G-4, Tr. 64, 90-91). MSHA agrees that if the dust samples submitted by the contestant reflected inaccurate measurements, rather than excessive concentrations of respirable dust, and the respirable dust on the cited unit had in fact been below the applicable limit, there would have been no harm in extending the abatement period. MSHA states that there is no credible evidence to support any assertion that the dust samples were inaccurate, and it points out that the contestant has not contested numerous prior citation for excessive dust at the mine and the cited 017-0 unit.

With regard to the contestant's diligence in attempting to abate the citation, MSHA agrees that immediately after the citation was issued, the contestant attempted to abate the violation by thoroughly inspecting and repairing its mining equipment, dust scrubbers, and ventilation system on the cited unit, and that the abatement time was extended to allow the contestant to take additional samples. MSHA states further that by April 19, 1988, the contestant had determined that there was nothing more it could do underground to abate the violation, and MSHA suggests that it does not appear that the contestant had done everything possible to achieve abatement. In support of this conclusion, MSHA points out that Inspector Boggs suggested the assignment of a miner to monitor the pumps, and that Mr. Thaxton observed that the contestant did not balance its scrubber system (Dep. Tr. 27-28; Hrg. Tr. 228-29). MSHA also points out that the contestant had no problem coming into compliance once the order was issued (Tr. 233-34).

MSHA asserts that while the contestant may have been diligent in inspecting its mining equipment, it was lax in checking its sampling cassettes. MSHA points out that within an hour of the issuance of the citation, the contestant had suspected that the cassettes it was using had deteriorated due to age, and instead of using newer cassettes, or submitting the suspected ones to MSHA or an independent lab for analysis, it pursued an amateurish and inadequate investigation into the reliability of its old cassettes. Further, although the contestant's safety supervisor admitted that the contestant had suspected the filters to be defective, he did not really check them. MSHA concludes that had Inspector Boggs extended the abatement time, the only action the contestant would have taken would have been to use new

cassettes, and there is no credible excuse for its not having done so previously. MSHA further states that the pattern of dust concentrations analyzed during the abatement period supports the conclusion that the contestant was not making any progress in abating the violation (Tr. 81-82; 234-235).

With regard to the disruptive effect of the order, MSHA argues that the issuance of the order did not disrupt production on the cited unit because the unit was normally idle for maintenance during the day shift, and the order was modified 5 hours later the same day to allow mining and sampling to continue.

In response to the contestant's assertions that it received little or no cooperation from MSHA during its efforts to determine whether or not its sampling cassettes were defective, MSHA states that the contestant never expressed any dissatisfaction with the assistance provided by MSHA regarding its mining equipment, dust scrubbers, or ventilation system. MSHA asserts that Inspector Boggs made numerous visits to the mine during the period set for abatement, and although he did not inspect the 017 unit, he went out of his way to visit this area in an attempt to assist in abating the violation (Tr. 183). MSHA concludes that Mr. Boggs was no more successful at trouble-shooting than contestant's experts were, and that it does not appear that the contestant requested very much help with its underground mining operations (Dep. Tr. 35). MSHA further concludes that its failure to come up with a solution to the dust problem does not mean that it was not being cooperative or unreasonable.

In response to the contestant's dissatisfaction with the response it received from MSHA's laboratory personnel, MSHA points out that it agreed to weigh some filters from old cassettes to see if the weights reported by the manufacturer were accurate, and it pre-weighed some cassettes for use in subsequent samplings. MSHA admits that it refused to weigh these cassettes after sampling, and refused to allow the contestant's representatives to witness its laboratory analysis of the filters, but it maintains that given the sensitivity of its laboratory equipment, and the fear of contamination, its refusals were reasonable in the circumstances. Conceding that there may have been some misunderstanding over what could be done at its Mt. Hope Laboratory, MSHA states that it cooperated and assisted with the contestant's officials as much as possible.

Contrary to the contestant's assertions, MSHA argues that it was more than reasonable in giving the contestant the opportunity to abate the violation, and that the contestant was given a second chance when MSHA extended the time for abatement on April 13, even though a set of samples that exceeded the applicable standard had already been submitted during the original abatement period. Furthermore, MSHA states that it was quite lenient with the contestant after the order had been issued in

that knowing that the contestant had already reviewed the conditions on the cited unit, and that any defect in its sampling procedure would be eliminated because MSHA would be collecting the samples to determine whether the order should be lifted, MSHA accepted minor changes in the dust-control plan and promptly modified the order to allow mining to continue.

MSHA agrees that neither party in this case has been able to identify the problem that caused excessive concentrations of respirable dust in the sampling taken prior to April 20, 1988. In response to the contestant's insistence that the condition on the cited unit were the same on April 20 as they were when the previous samples were taken, and that the only difference was that the samples of April 20 were taken by MSHA personnel using cassettes supplied by MSHA, MSHA points out that Inspector Boggs recalled that the contestant may have installed a larger hose between the water supply and the continuous-mining machine (Dep. Tr. 39). MSHA concludes that unless the contestant made some other undisclosed changes, it is likely that the violation was caused by the contestant's improper sampling methods, its defective cassettes, or decreased production at the time of MSHA's sampling (Hrg. Tr. 78-79, 96). MSHA points out that because the serial numbers on the cassettes used by MSHA on April 20, 1988 are lower than the serial numbers on the cassettes the contestant had been using, the cassettes used by MSHA were probably older than the ones being used by the contestant (Tr. 243, exhibits G-1, G-5, G-6). MSHA concludes that any defects in the contestant's cassettes would have been caused by its storage and handling, rather than just the age of the cassettes.

MSHA further points out that subsequent to the termination of the contested order, the contestant was again cited for several violations of the respirable dust standards on its 017-0 unit (Tr. 84-85; exhibit G-4, pg. 3), and that the last citation was abated by the abandoning of its "state of the art" equipment (Tr. 112, 124-125). Since the contestant had already done everything it planned to do in regards to the dust concentrations on the cited unit, and since there is no credible excuse for continuing to use suspect sampling cassettes, MSHA concludes that the decision not to extend the time for abatement any further was more than reasonable.

There is no dispute that the cited respirable dust violation was not abated at the time Inspector Boggs issued the contested order, and the parties are in agreement that the cause of the high sampling results obtained by the contestant was never discovered. The critical issue is whether or not the inspector acted unreasonably in not extending the time for abatement, and whether the issuance of the order was arbitrary. Although MSHA is correct that the three factors stated in the Youghiogheny and Ohio Coal Company case, supra, namely (1) the degree of danger that any extension in the abatement time would have caused to

miners, (2) the operator's diligence in attempting to meet the initial abatement time, and (3) the disruptive effect that an extension of time would have had upon operating shifts, are factors to be considered in determining whether any decision not to extend the abatement time was reasonable, the threshold question in this case is whether or not Inspector Boggs made more than a cursory decision not to extend the time, or simply arbitrarily decided to issue the order without consideration of these or other factors.

In Peter White Coal Mining Corporation, 1 FMSHRC 255 (April 24, 1979), Judge Fauver vacated a section 104(b) order on the ground that the inspector failed to give any consideration to the extension of time allowed for abatement of the citation. The judge found that such consideration was a basic requirement for the issuance of such an order.

United States Steel Corporation, 7 IBMA 109 (November 29, 1976, 1 MSHC 1490 (1976)), involved a citation for a violation of respirable dust standard 30 C.F.R. 70.250. It was held that as a matter of law, an inspector's authority under section 104(b) in determining whether the abatement time for the violation should be extended, or an order of withdrawal issued, carries the implication that it will be exercised reasonably, not arbitrarily or capriciously. In that case, although the inspector made inquiries into the operator's abatement efforts, and was aware of certain mitigating circumstances, he nonetheless issued a withdrawal order. The presiding judge held that the inspector's issuance of the order was unreasonable and he vacated it. On appeal, his decision was affirmed.

In Consolidation Coal Company, 1 FMSHRC 2638 (October 1979) Judge Broderick vacated a section 104(b) order after finding that the operator had done substantial work to abate the cited condition and that the work was ongoing when the inspector next returned to the mine to check on the abatement. Under these circumstances, Judge Broderick concluded that the abatement time should have been extended.

Eastern Associated Coal Corporation, 1 MSHC 1665 (June 22, 1978), decided by former Commission Judge Forrest Stewart, concerned an operator's challenge to the initial abatement time fixed by an inspector to abate a respirable dust violation of 30 C.F.R. 70.100(b), and a challenge to the inspector's failure to further extend the abatement time, which resulted in the issuance of a section 104(b) order. Judge Stewart held that such an order should be based on the prevailing circumstances including the initial sampling processing time; the time required to evaluate the samples and make changes; the time to review the results of additional samples; and the degree of hazard presented. Judge Stewart noted that the citation was issued

solely on the basis of an MSHA computer print-out reflecting non-compliance with the applicable dust standard, that there was no communication between the operator and MSHA concerning whether the time set for abatement was sufficient considering the existing circumstances, that no inspection was made, and that the initial abatement time was the "standard" amount of time set in all respirable dust cases, i.e., the time determined by the inspector to sufficiently allow for the taking and receipt of results of post-notice respirable dust samples taken by the inspector.

On the facts of the Eastern Associated case, which indicated that the operator was experiencing adverse mining conditions, was shut down for a period of time due to a strike, experienced difficulties in obtaining repair items for its equipment, needed additional time to evaluate the results of its dust sampling in order to decide where the corrective action was needed, and the short term dust exposure hazard to miners, Judge Stewart found that the inspector failed to give adequate consideration to all of these circumstances, and he vacated the order based on his finding that the inspector should have allowed additional abatement time and extended the time rather than issuing a withdrawal order.

Mr. Boggs' belief that the contestant was given a reasonable time to abate the violation was based solely on his view that the time allowed for additional sampling and the receipt of the results was ample and reasonable. He confirmed that his normal practice in deciding whether or not to extend the abatement time is based on whether or not an operator can justify the additional time because of equipment breakdowns, strikes, or other circumstances beyond the operator's control, and that in this case, he would have extended the time if it were justified. I fail to understand how Mr. Boggs could have made any informed judgment as to whether or not the abatement time should have been further extended when he made no further inquiries as to the contestant's abatement efforts, made no effort to determine what the contestant was doing in its attempts to abate the violation, and simply concluded that no further time would be permitted because MSHA's "standard operating procedure" left him no choice but to issue the order simply because the additional sampling showed non-compliance. I find no rational basis for an inspector to automatically issue a section 104(b) withdrawal order simply because an operator's sampling results reflects continued non-compliance with the dust standards. If this were the case, an inspector could refuse to further extend any abatement time for any violation simply because an operator has not abated the condition within the initial time fixed for abatement, completely ignoring the circumstances presented, or the three factors alluded to by the aforementioned case law.

When asked what he would have done to achieve abatement, Inspector Boggs stated that he would have assigned someone to make sure the dust sampling pumps were properly taken care of, that he would have paid close attention to the ventilation on the section and the continuous-mining machine water spraying operations, and that he would have checked the water pressures on the machines, and monitored the ventilation for any necessary adjustments. However, since Mr. Boggs did not communicate further with anyone at the mine, and did not visit the working section where the cited unit was operating, even though he was in the mine conducting inspections during the abatement period, he obviously had no information as to whether or not the contestant was doing any of the things that he suggested. Any involvement by Mr. Boggs came after the order was issued. I can only conclude that his decision that a further extension of time was not justified was based solely on his belief that he was required to issue an order, regardless of any abatement efforts by the contestant, if the additional sampling showed non-compliance. I find such a procedure to be arbitrary on its face.

On the facts of this case, I agree with the contestant's assertion that Inspector Boggs did little or nothing to ascertain all of the facts and circumstances before issuing the order. By his own admission, Mr. Boggs confirmed that he had "no choice" but to issue the order, and his decision to do so was based solely on the fact that the dust samples submitted by the contestant for April 13 through 15, 1988, reflected that the cited unit was still out of compliance. Mr. Boggs believed that the contestant was given a reasonable time to abate the violation because it was allowed additional time to collect and submit dust samples to MSHA, and he confirmed that he would not have extended the citation abatement time if the contestant were not attempting to abate the violation in good faith. He further confirmed that it was MSHA "standard operating procedure" for an inspector to issue a section 104(b) order after additional sampling reflects non-compliance, and that after an order is issued, an operator is required to make changes in its ventilation and dust-control plan, in addition to further sampling.

I take note of the fact that the inspector who issued the initial citation and fixed the abatement time for April 13, 1988, subsequently modified it to permit the contestant to submit dust samples to MSHA's Mt. Hope Laboratory rather than to its Pittsburgh laboratory. This modification was made on April 11, 1988, 2 days before the expiration of the initial abatement time. Since the contestant had to sample over five consecutive working shifts, and since it was sampling during the period April 11 through 15, 1988, it had 3 days subsequent to the taking of the last sample to receive and consider the sampling results before the expiration of the extended abatement time on April 18, 1988, which was given by Mr. Boggs. Mr. Boggs concluded that this was ample and reasonable time to abate, and his conclusion in this

regard was obviously made without any knowledge of the contestant's abatement efforts, and was based solely on the results of the sampling.

MSHA's Supervisory Industrial Hygienist Thaxton confirmed that he did not discuss the violation with Inspector Boggs. Mr. Thaxton also confirmed that pursuant to MSHA's policy, if an inspector determines that a mine operator has made no effort to control dust, and simply submits additional samples, the inspector is instructed not to extend the abatement time further and to issue a section 104(b) order. In the instant case, Mr. Thaxton further confirmed that if Inspector Boggs was unaware of any action by the contestant to abate the violation and come into compliance, he would be justified in issuing a section 104(b) order if the only action taken by the contestant was to take additional samples.

Mr. Thaxton took the position that since the contestant took "whatever action" was necessary to abate the order, it could have done so when the citation was issued. Like Mr. Boggs, Mr. Thaxton's belief that the contestant made no significant compliance effort was based on the samples which it had submitted. However, Mr. Thaxton conceded that he had never been in the mine, never discussed the violation with Mr. Boggs, and had no idea what was causing the problem. He speculated that the contestant may not have been following its dust-control plan, may have introduced too much ventilation which may have reduced the efficiency of the scrubbers, and that the individuals being monitored for dust may not have been positioned properly. He stated that "when our inspector is there, he is supposed to see that the plan parameters are being followed. Mr. Boggs would have to tell you what he actually observed." Based on the record in this case, I cannot conclude that Mr. Boggs saw anything relating to the contestant's abatement efforts until after the order was issued. Mr. Thaxton agreed that in order to cure a dust problem, the operator must know what caused it, and that it must have enough time to discover the cause.

The credible testimony of contestant's safety supervisors Richards and Jarrell reflect that during the abatement period the contestant was making an effort to ascertain the cause of the dust problem, including the dismantling of the mining machine, reviewing and discussing its ventilation and dust-control plan with its employees, monitoring its operations, and meetings with MSHA officials. Maintenance foreman Barker testified that he had four maintenance people working on the cited unit on a daily basis cleaning and servicing the miner machine scrubber system prior to the sampling in March, 1988, and during the sampling of April 12 and 14, 1988. Laboratory technician Bailey confirmed that he preweighed and post weighed some of the sampling cassettes used during the April, 1988 sampling.

The record establishes that after exhausting all of its efforts to isolate the possible cause of the high dust sampling results, the contestant focused its efforts on pursuing its belief that one of MSHA's Pittsburgh laboratory technician's may have miscalculated the sampling results, or that the sampling cassettes used in the sampling by the contestant were either defective or contaminated. Inspector Boggs recalled that he heard some comments by contestant's personnel complaining about their belief that a new employee at the MSHA Pittsburgh laboratory may have made a mistake in the sampling, and that at the request of the contestant, some of the samples were allowed to be submitted to the Mt. Hope laboratory. At page 21 of its post-hearing brief, MSHA conceded that "it is likely that the violation was caused by Peabody's improper sampling methods, its defective cassettes, or decreased production at the time of MSHA's sampling." Under all of these circumstances, the contestant's suspicions that the defective sampling cassettes may have caused the high sampling results from its testing is plausible and reasonable, and I find no basis for concluding that the contestant advanced this theory as a delaying tactic or to avoid compliance.

Although it is true that the contestant suspected that its cassettes may have been defective after the citation was issued in March, 1988, the fact that it did not discard them because it had a large supply and they were expensive cannot detract from its good faith effort to ascertain whether the cassettes were in fact defective. Although one may agree that the contestant's methodology in attempting to determine whether the cassettes were defective was somewhat amateurish and inadequate, I cannot conclude that its efforts in this regard were less than reasonable or lacking in good faith.

Mr. Richards testified that he made one or two trips for conferences at MSHA's sub-district office, and also visited the Mt. Hope laboratory in an effort to have the sample cassettes weighed to determine whether they were defective. Mr. Jarrell confirmed that he and Mr. Richards visited the Mt. Hope laboratory on April 8, 1988, to weigh some dust samples. He also confirmed that after the five samples taken on April 12 through 14, 1988, were taken with the pre-weighed cassettes weighed at the Mt. Hope laboratory and the contestant's laboratory, he believed that MSHA's Mt. Hope laboratory would post-weigh them as a means of confirming whether they were contaminated or defective, but it did not do so. Mr. Thaxton confirmed that he informed Mr. Richards that he would try to post-weigh the samples, but subsequently declined to do so on advice of the Pittsburgh laboratory, and MSHA concedes that there may have been some misunderstanding over what could be done at the Mt. Hope facility (Brief, pg. 20). Mr. Jarrell confirmed that if the order had not been issued, the old sample cassettes would have been discarded (Tr. 179).

Under all of the aforementioned circumstances, I conclude and find that the contestant was making a diligent effort in its attempts to ascertain the cause of its dust sampling results which placed the cited unit out of compliance, and was attempting in good faith to meet the April 18, 1988, abatement time fixed by Inspector Boggs. While it may be true that the only action that the contestant would have taken would have been to discard the old cassettes and use new ones, I cannot conclude that the fact that it did not do so was unreasonable or inexcusable.

With regard to the degree of danger that any extension of the abatement time would have caused the miners, MSHA takes the position that the mine and the cited 017-0 unit in particular, have a history of excessive levels of respirable dust, and that the contestant has not contested numerous prior citations issued for excessive dust levels of respirable dust on the cited unit in question. The fact is that MSHA's evidence establishes that the cited 017-0 unit was previously cited on November 17, 1987, for a violation of section 70.207(a), for failing to take bimonthly samples, and was again cited on December 17, 1987, and February 1, 1989, for violations of section 70.101, for being out of compliance with the applicable respirable dust standard established for the particular work shifts cited (exhibit G-4). Thus, with the exception of the uncontested citation which preceded the order issued in this case, the contestant has been cited with two violations for exceeding the dust limits on the 017-0 unit. I cannot conclude that the cited 017-0 unit has "a history" of "numerous" violations on this unit.

With regard to the overall respirable dust record for the entire mine, the information which appears on exhibit G-4, shows that with the exception of sampling which occurred on March 11, 1988, reflecting 1.7 mg/m3 for the 019-0 MMU unit for designated occupation 046, seven additional units which were sampled during various times in 1987 and 1988, including the 017-0 unit, were all in compliance with the established 1.5 mg/m3 standard. The information also reflects that prior to March 22, 1988, MMU 015-0 was cited three times in 1987 for violations of section 70.101.

MSHA agrees that if the dust samples submitted by the contestant in this case reflected inaccurate measurements rather than excessive concentrations of respirable dust, there would have been no harm in extending the abatement period. MSHA also agreed that it was likely that the violation was caused by the contestant's improper sampling methods or defective cassettes, and this lends credence to the contestant's arguments that there may have been a problem in the measurement of respirable dust, rather than excessive levels of respirable dust in the air on the 017-0 unit, and that an extension of the abatement time to enable the contestant to determine how to effectively measure levels of

respirable dust to achieve compliance would not have exposed the employees on the unit to any harm.

After careful consideration of all of the evidence in this case, I cannot conclude that MSHA has advanced any probative or reliable evidence to establish that the extension of the abatement time would have adversely affected the safety of the miners on the unit in question, or that the contestant failed to diligently pursue the abatement of the violation. I further conclude and find that the failure by the inspector who issued the order to give any consideration to the contestant's abatement efforts, or to consider any hazard resulting from the extension of the abatement time, renders the order invalid. Under all of these circumstances, the contested order IS VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Contestant's Contest IS GRANTED.

2. The contested section 104(b) Order No. 3141311, April 19, 1989, IS VACATED.

George A. Koutras
Administrative Law Judge