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IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION

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

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

MASTER DOCKET NO. 91-1

AMENDED PREHEARING ORDER ADOPTING
PLAN AND SCHEDULE OF DISCOVERY

I hereby adopt as an order of the Review Commission the plan and schedule of discovery submitted by counsel for the Secretary on June 18, 1991, with the following revisions which resulted from discussions at a Prehearing Conference on June 19, 1991, and the Secretary of Labor's Motion to Amend Prehearing Order Adopting Plan and Schedule of Discovery.

Introduction

The purpose of this plan is to avoid delay by providing a mechanism to fairly and efficiently conduct discovery regarding the Secretary of Labor's (hereinafter "the Secretary") allegations of alterations of coal dust filter media. This plan and schedule is intended to apply, to the extent feasible, to discovery in all cases pending before the Federal Mine Safety and Health Review Commission (hereinafter "the Commission") involving altered dust filter media. The plan and schedule of discovery provides for complete and effective discovery while minimizing the duplication of effort and unnecessary delay to the parties and the Commission. Adoption of this plan will provide for the economy of scarce judicial resources and prevent unnecessary disruption of enforcement functions of the Mine Safety and Health Administration, United States Department of Labor.

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The parties submitting this plan have acknowledged that there may be fundamental distinctions in some cases and that there must be an opportunity for case-specific discovery. Other than as provided for in this plan, all case-specific discovery will be conducted under individual docket numbers.

All parties agree that the approval of this plan does not constitute a waiver of any party's right to assert any defense or privilege which is otherwise applicable.

References to "operators" in this document refer to: 1) any party designated as a contestant in a notice of contest previously filed with the Commission; and 2) any party designated as a respondent in the civil penalty proceedings filed by the Secretary of Labor. References to "other parties" includes references to: 1) operators and 2) all intervenors.

References to "dust filter media" mean the filter and the backing pad from the coal dust sample cassette identified in each citation.

Summary of the Plan

The plan and schedule of discovery provides for the issuance of a generic docket number applicable to discovery of facts and conclusions common to all of the citations at issue before an administrative law judge. The plan and schedule also provides for discovery of facts and conclusions which are not common to all citations and therefore outside of the scope of the generic docket number. Other than as specifically provided for in this plan,

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case-specific discovery will be conducted under individual docket numbers.

The plan contemplates that, within five (5) days of the date of its adoption, or by June 25, 1991 whichever is later, all other parties will be provided with complete access to all non-privileged documents possessed by the Secretary that are properly subject to discovery. The plan also provides that the other parties may take the depositions of Robert Thaxton on July 24th through July 26th and Lewis Raymond on July 29th and 30th in order to discover generally how the Secretary made her determination that the weights of the samples at issue were altered. The plan further provides that the other parties may examine, pursuant to certain limitations, the dust filters applicable to their respective cases and may subject the dust filters to non-destructive testing. Examination of these filters is to be completed by October 30, 1991.

Other than the two depositions mentioned above, all depositions of witnesses will begin only after discovery by interrogatory and document production is completed on August 30, 1991. The depositions of individuals with first-hand knowledge regarding the dust sampling and the designation of the dust filters at issue as altered will precede the depositions of other individuals. Joint Depositions of fact witnesses will be taken between October 7, 1991 and November 22, 1991.

All expert witnesses will be required to prepare a written report summarizing their credentials, all opinions to which they

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will testify in these matters, and the basis for such opinions. These reports must be exchanged by December 16, 1991. The depositions of expert witnesses will be taken between January 6, 1992 and February 14, 1992.

Upon the completion of the discovery specifically provided for in this plan, counsel for the Secretary and the other parties will meet to discuss proposing an order and schedule of trials and a plan and schedule for case-specific discovery in those matters.

I. ADOPTION OF A GENERIC CAPTION AND MASTER DOCKET NUMBER

A. To the extent feasible, all contest and civil penalty cases which involve altered dust filter media will carry a generic caption and master docket number to encompass discovery in all related litigation. Parties may serve pleadings, motions, and notices regarding discovery without having to list each party, citation number, and docket number. The generic caption and master docket number will be used in all pleadings, motions, or notices issued during the joint round of discovery. All motions or other pleadings relating to joint discovery and filed pursuant to the approved joint discovery plan shall be served on all other parties, including all operators.

B. In any civil penalty proceeding in which the Secretary's allegation regarding altered dust filter media has been previously contested, the Secretary of Labor shall file the Petition for Assessment of Civil Penalty (hereinafter "the Petition") under the master docket number and the individual docket number assigned by the Commission. The Secretary shall serve the Petition, a copy of

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this Plan and Schedule of Discovery, and a copy of the list of documents available in the document repository upon each Respondent. All proceedings under Petitions so filed shall be governed, to the extent feasible, by the terms of this Plan and Schedule of Discovery.

C. In any civil penalty proceeding arising out of a citation alleging an alteration of a respirable dust sample issued by the Secretary on April 4, 1991, the Secretary of Labor shall file the Petition for Assessment of Civil Penalty (hereinafter "the Petition") under the master docket number and the individual docket number assigned by the Commission. The Secretary shall serve the Petition, a copy of this Plan and Schedule of Discovery, and a copy of the list of documents available in the document repository upon each Respondent. All proceedings under Petitions so filed shall be governed, to the extent feasible, by the terms of this Plan and Schedule of Discovery.

D. Contests of citations issued after April 4, 1991 to any of the other parties which involve allegations of the alteration of respirable dust samples, as well as all civil penalty proceedings arising out of such citations, shall be governed, to the extent feasible, by the terms of this Plan and Schedule of Discovery.

II. DISCOVERY UNDER THE GENERIC CAPTION AND MASTER DOCKET NUMBER

A. Creation of a Document Repository

1. The Secretary will create a document repository in Arlington, Virginia, where all documents to be made available by the Secretary during discovery will be indexed, described, and

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filed in a central location. The document repository will contain authenticated copies of all discoverable non-privileged documents in the Secretary's possession or control relating to altered dust filter media as well as photographs of each dust filter. The document repository will include scientific reports relied upon by the Secretary in determining to issue the citations involved here. The document repository will be available for the other parties to use within five (5) days of the entry of an order adopting this plan, or by June 25, 1991, whichever is later. A copy of the list of documents available in the document repository will be sent to all other parties by June 21, 1991.

2. The other parties will be required to avail themselves of the documents in the document repository before filing further requests for production of documents. The Secretary will arrange for one copy of each requested document relevant to that party's citations to be made available to that party, without cost, upon ten (10) working days written notice. The other parties may also request copies of specific documents in the document repository by mailing a letter which specifically identifies the documents from the list provided by the Secretary. Such requests should be addressed to the Secretary's counsel. The Secretary will provide such documents within ten (10) working days of receipt of the request.

3. The Secretary will also compile a list, including the origin, date, recipient, brief description, and title, of any document deemed by the Secretary not to be discoverable or which is

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otherwise privileged. The Secretary will on or before July 1, 1991, mail to all other parties copies of the list of documents she deems privileged or otherwise not subject to discovery and a statement of the basis for the claimed privilege. A copy of this list will be kept in the repository for examination and copying by the other parties.

4. Parties desiring physical access to the document repository will be expected to consult with the Division of Mine Safety and Health, Office of the Solicitor to insure that sufficient space is available to accommodate all interested parties at the requested time. Parties should call 703-235-1153, at least twenty-four (24) hours in advance of their expected arrival, to arrange for access to the document repository.

5. The document repository will be available from June 25, 1991 to August 30, 1991.

B. Testing of Dust Filters

The Secretary will make available for photographing and nondestructive testing the dust filter media which are the basis for the Section 104(a) citations and associated civil penalties issued to the other parties. The production of these dust filters will be limited as follows:

1. The dust filter media shall be made available first to the coal mine operator (or designated representative) named in the relevant citation. The other parties shall have access to each other's dust filter media only upon receipt by the Secretary's counsel of written permission from the counsel for the operator

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named in the relevant citation. Upon the refusal of written permission by another party, or other inability to obtain the other party's permission, any party may move the administrative law judge for an order providing the moving party with access to the dust filter media of another party.

2. All dust filter media shall be made available in Arlington, Virginia, at a location designated by the Secretary for photographing, examination, and nondestructive testing.

3. Any party may request in writing that the Secretary transfer its dust filter media to the Denver Health Technology Center, Denver, Colorado, for photographing, examination, and nondestructive testing. Such requests must be received by the Secretary's counsel by July 25, 1991. The Secretary must complete the transfer of the dust filter media by August 8, 1991. All dust filter media for which no written request to transfer is received by July 25, 1991, shall remain in Arlington, Virginia@

4. Photographing, examination, and nondestructive testing may only be conducted in the presence of a representative of the Secretary. The Secretary's right to select a representative of her choice is not limited in any respect. The operators must provide their own equipment, chemicals, and other necessary materials needed to conduct their nondestructive testing. The operators must also provide for the safe removal and disposal of all waste materials which result from the nondestructive testing.

5. The request of the operator for the production of the dust filter media must be made in writing to the Secretary's counsel and

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be received at least five (5) days in advance of the requested date for production. The request must state specifically: 1) the dust filter media the operator proposes to examine; 2) the names of the individuals to examine the dust filter media; 3) the specific examination procedures and the equipment, chemicals, and/or processes that the dust filter media will be subject to; 4) the equipment, chemicals, and materials the operators will use to perform the nondestructive testing; 5) an agreement that the operator will safely remove and dispose of all waste materials which result from the nondestructive testing; and, 6) the date, time, and anticipated duration of such examination.

6. The request must certify that the procedures, chemicals, and processes that the dust filter media will be subject to will not destroy or alter the dust filter in any material respect. The parties acknowledge that should the dust filter media be destroyed or materially altered during the operators' photographing, examination, or testing, the photograph of that dust filter media previously taken by the Secretary shall be admissible in these proceedings.

7. If counsel for the Secretary believes that the examination or the procedures, chemicals, and processes could result in the dust filter media being destroyed or altered, the Secretary shall promptly notify the requesting party of the basis for the Secretary's belief and the parties shall attempt to resolve the issue. Issues which cannot be resolved expeditiously may be submitted to the administrative law judge for resolution.

8. The operators' right to review and conduct nondestructive testing will be subject to reasonable limitations in terms of the duration of tests and the number of tests. The operators acknowledge that the Secretary may impose reasonable limitations, consistent with her obligation to maintain a chain of custody for each of the dust filter media, upon the number of parties conducting examinations or testing at one time. If the Secretary and the operators cannot expeditiously resolve any disputes regarding the duration or number of tests, the matter may be submitted to the administrative law judge for resolution.

9. Where the operators desire to conduct testing of the dust filter media which requires equipment which cannot be utilized at the location provided by the Secretary, the Secretary will make reasonable efforts to cooperate in such testing. If the Secretary and the operators cannot expeditiously resolve any disputes regarding such tests, the matter may be submitted to the administrative law judge for resolution.

10. The photographing, examination, and nondestructive testing of the dust filter media shall be completed by October 30, 1991.

11. The parties recognize that additional examination and testing of dust filter media may be necessary following the depositions of the Secretary's expert witnesses. The Secretary agrees to make reasonable efforts to comply with such requests. If the Secretary and the operators cannot expeditiously resolve any disputes regarding such tests, the matter may be submitted to the

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administrative law judge.

C. Expert Witnesses

The provisions of this Plan and Schedule shall be applicable to all expert testimony offered by the Secretary or the other parties at any trial involving altered dust filter media. Testimony of expert witnesses for the Secretary and other parties will be taken subject to the following limitations:

1. The Secretary and the other parties will exchange lists of all experts they anticipate using at trial. These lists are to be exchanged by December 2, 1991. Any additions or deletions in these lists must be served on opposing counsel within ten (10) days of a party's decision to add or delete an expert witness.

2. Expert witnesses will be required to prepare a written report stating their credentials, all opinions or conclusions to which the expert expects to testify at trial, and a summary of any test, study, results, or evaluations which form the basis for such conclusions or opinions. These reports shall be served upon opposing counsel by December 16, 1991.

3. All costs associated with the depositions of experts, including expert fees for testifying, shall be controlled by Rule 26(b)(4) of the Federal Rules of Civil Procedure except when otherwise agreed to by the parties.

4. Depositions of experts shall be held where the expert is located, unless the party on whose behalf the expert will testify agrees to provide the expert at some other location. In this situation, the costs of having an expert travel to such other

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location (and any associated travel expenses) shall be borne by the party on whose behalf the expert will testify.

5. Depositions of "case specific" expert witnesses may be noticed during the period for case specific discovery beginning in March 1992. Expert witnesses may be retained after and as a result of case specific discovery.

D. Sequence of Discovery

The First or Joint Phase

1. No depositions, except those provided for below in paragraph D. 2, shall be taken until such time as discovery through requests for admissions, interrogatories, the document repository, and requests for production of documents are completed. Except for good cause shown, responses to requests for admissions, answers to interrogatories, inspection of the document repository, and responses to requests for production of documents shall be completed by September 13, 1991. Motions to compel shall be filed by October 4, 1991. The pendency of any such motion shall not delay the implementation of any subsequent provision of this plan and schedule of discovery.

2. The Secretary shall make Robert Thaxton, District 4, Coal Mine Safety and Health, available for deposition on July 24, 25, and 26, 1991, and Lewis Raymond, Pittsburgh Health Technology Center, Mine Safety and Health Administration, available for deposition on July 29 and 30, 1991. These depositions shall be conducted at a suitable location designated by the Secretary in the

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Washington, D.C. area. These two depositions shall be taken pursuant to the terms of paragraph D. 10 below.

3. The Secretary will initiate discovery by admissions, interrogatories, and request for production of documents and things of the other parties under the generic docket number within 15 days of the entry of the order adopting this discovery schedule or July 15, 1991, whichever is later.

4. The Secretary will, on or before July 1, 1991, identify all persons, including employees of the Secretary, who were involved in the receipt and processing of the dust filter media which led to the citations at issue.

5. The Secretary will, on or before July 1, 1991, identify all persons, including employees of the Secretary, who made the determination that the dust filter media at issue each had been altered.

6. The operators will, on or before August 30, 1991, identify, for each dust sample the Secretary has alleged was altered in the contested citations, those employees of the operator who were responsible for: (a) the dust sampling program at each mine; (b) the identity of the person who signed each dust data card; (c) the identity of the person responsible for the custody and control of each dust cassette after it had been removed from the miner or the designated sampling area; (d) the identity of the person responsible for the transferring of each dust cassette from the operator to MSHA; and, (e) a general description of the process

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of the dust sampling program at each mine subject to the master docket.

7. All parties desiring to take the deposition of potential fact witnesses as a Joint Deposition shall notify the Secretary and the other parties in writing of the names of such witnesses by September 13, 1991. All parties may, by October 4, 1991, supplement their lists of potential fact witnesses identified from written discovery responses. With the exception of persons listed as witnesses by a party, or persons named by the Secretary or the other parties as required by paragraphs four (4), five (5), and six (6) above, such notifications shall include a brief recital of the reasons for the taking of the deposition. On or before October 14, 1991, the Secretary will notify all parties in writing of the names of any fact witnesses from whom the Secretary desires to take a deposition as a Joint Deposition. Joint Depositions will not be limited only to the witnesses listed in paragraphs II., D. 4, 5, and 6 above. Additional Joint Depositions will only be allowed if a party is permitted to amend its list of potential witnesses.

8. The depositions of the employees of the Secretary shall be taken in a sequence beginning with the lower level employees and proceeding up the chain of command. This is to insure that the individuals with first-hand knowledge will be deposed first and to reduce the necessity for repeatedly deposing individuals with important enforcement responsibilities.

9. The depositions of witnesses will be taken in two phases. The first phase of depositions will be taken under the generic

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caption and master docket number referred to above and will be limited to Joint Depositions. The Joint Depositions of fact witnesses shall be taken prior to such depositions of expert witnesses.

a. Depositions of the Secretary's witnesses will be taken as Joint Depositions if the Secretary names the witness pursuant to paragraphs four (4) or five (5) above, or otherwise indicates that the witness is expected to testify in more than one proceeding pending before the Commission. The date and locations of Joint Depositions of the Secretary's non-expert witnesses will be proposed in writing by the Secretary within ten (10) days of the closing of the notice period for Joint Depositions (see paragraph 7 above). The Secretary will consult with opposing counsel prior to proposing such dates and locations. The other parties may file written objections to the proposed dates and locations with the administrative law judge. If written objections to the proposed dates and locations are received, the administrative law judge shall set the dates and locations of the depositions by order.

b. The deposition of a witness for the other parties will also be taken as a Joint Deposition if the witness is listed as a potential witness for more than one party, or if the witness is identified as an expert pursuant to paragraph C. 1 above. The date and locations of Joint Depositions of the other parties' non-expert witnesses must be proposed in writing by the parties within ten (10) days of the closing of the notice period for Joint Depositions (see paragraph 6 above). The other parties will consult with each

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other and the Secretary's counsel prior to proposing such dates and locations. The Secretary may file written objections to the proposed dates and locations with the administrative law judge. If written objections to the proposed dates and locations are received, the administrative law judge shall set the dates and locations of the depositions by order.

10. Joint Depositions will be taken pursuant to the following procedures and limitations.

a. All Joint Depositions will be recorded by a certified court reporter and videotaped if requested by a party. The party making the request shall bear the cost of videotaping. The party noticing the deposition will be responsible for all fees associated with the certified court reporter.

b. The Joint Depositions will be limited to testimony that is common to all of the cases. In the case of expert witnesses, such Joint Depositions will be limited to the witness'expertise, methodology, data, conclusions, and the basis for such conclusions. Questions relating to specific citations will not be appropriate, unless the expert has such knowledge.

c. At all Joint Depositions of a witness for the Secretary the operators' counsel shall determine in advance the lead questioner and shall draw lots for the order of questioning by other operators' counsel. Questioning will be permitted by intervenors' counsel at the conclusion of the operators' questioning. Cumulative and repetitive questions from different counsel and parties will not be allowed.

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d. At all Joint Depositions of a witness for a party other than the Secretary, only the Secretary, the parties retaining the individual as a witness, and the representative of miners in the subject mine, if the representative of miners at the subject mine has chosen to intervene pursuant to applicable Review Commission rules, shall be allowed to participate. The United Mine Workers of America (UMWA) filed an intervention on June 24, 1991, for mines in which it is the representative of the miners.

11. Subpoenas shall not be necessary to require the attendance of any salaried employee of a party or retained expert to testify at a deposition. Subpoenas for entities or individuals requiring the attendance of witnesses and the production of documents at deposition will be available upon the filing of a notice of depositions and a written request for a subpoena which specifies the individual and/or the things sought. A copy of such written request shall be served upon all counsel served with the notice of deposition.

12. The Joint Depositions of non-expert witnesses shall be completed by November 22, 1991. Additional depositions may be permitted only for good cause shown.

13. All parties desiring to take the deposition of an expert witness as a Joint Deposition shall notify the Secretary and the other parties, in writing of the identity of the expert by December 24, 1991. The party noticing such a deposition shall confer with counsel of the party offering the expert testimony for the purpose of fixing the dates and locations of the depositions.

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If the parties cannot agree, the administrative law judge shall set the dates and locations of the depositions by order.

14. The Joint Depositions of all expert witnesses shall be completed by February 14, 1992. Additional depositions may be permitted only for good cause shown.

15. Joint Depositions may be used, consistent with the Federal Rules of Evidence and Federal Rules of Civil Procedure, at the trial of any proceeding subject to the master docket number.

E. Notices

Notices of all proceedings under this plan shall be sent to all parties.

F. Filing of Discovery

Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, discovery requests and responses will not be filed with the Commission except in connection with a motion seeking a ruling on a discovery dispute.

III. CASE SPECIFIC DISCOVERY AND ORDER OF TRIALS

Counsel for the Secretary and the other parties shall meet, within ten (10) days of February 14, 1992 for the purpose of discussing and proposing to the administrative law judge a proposed order and schedule of trials and a plan and schedule for case-specific discovery in such matters. A discovery conference shall be held on March 2, 1992, at a time and location specified by the administrative law judge, to discuss the order and schedule of trials and a schedule for case-specific discovery.

IV. DISCOVERY FOR NEW PARTIES

1. Operators who were parties in this case prior to June 28, 1991 (the date of the issuance of the Plan and Schedule of Discovery), shall serve responses to the Secretary's written discovery on or before September 20, 1991.

2. Operators who become parties in this case between June 28, 1991 and September 17, 1991, shall serve responses to the Secretary's written discovery within 40 days of September 17, 1991.

3. Operators described in numbered paragraph 2 above shall have the same 40 day period to utilize the document repository and to serve written discovery requests on the Secretary. The Secretary shall respond to such written discovery requests within 30 days of service.

4. Operators described in numbered paragraph 2 above shall be permitted to examine and test their filter media in accordance with the Plan and Schedule of Discovery within the same 40 day period. Western operators may request transfer of their dust filters to the Denver Health Technology Center within the same 40 day period, for testing in accordance with the Plan and Schedule of Discovery. If the filters are transferred to Denver, the testing shall be completed on or before November 30, 1991.

5. Operators described in numbered paragraph 2 above shall identify their employees involved in dust sampling in accordance with paragraph II.D.6 of the Plan and Schedule of Discovery within the above mentioned 40-day period.

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6. Operators who become parties to this case after September 17, 1991, shall serve responses to the Secretary's written discovery requests, shall utilize the document depository, shall serve written discovery requests on the Secretary, shall be permitted to examine and test their filter media, and shall identify their employees involved in dust sampling within 40 days of the date they become parties in this case.

V. AMENDMENTS TO PLAN

Amendments to this Discovery Plan and Schedule may be granted, for good cause shown, upon the motion of any party.

James A. Broderick
Administrative Law Judge