

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 15, 1992

IN RE: CONTESTS OF RESPIRABLE) MASTER DOCKET NO. 91-1
DUST SAMPLE ALTERATION)
CITATIONS)

ORDER GRANTING CONTESTANTS' MOTION
TO PRODUCE DUST FILTERS FOR DEPOSITION

On May 13, 1992, R. Timothy McCrum, Laura Beverage and William **Althen**, representing certain mine operators, and Patrick Zohn representing the Secretary of Labor initiated a telephone conference call to resolve a dispute as to whether the Secretary need produce certain requested dust sample filters to used by counsel for the operators during the deposition of the Secretary's expert witness, Dr. Marple, scheduled to commence May 18, 1992. Mr. McCrum seeks to have the Government produce 60 cited filters, 2 filters included in the PHTC October 1989 report, 33 "no - call" filters, and 16 MSHA inspector filters. Ms. Beverage seeks to have the Government produce 60 filters which the Government previously produced in May 1991 as representative of the cited filters, and 17 filters used in the deposition of Robert Thaxton.

Counsel for the operators argued that a comparison of the cited filters and Dr. **Marple's** experimental filters and an examination of Dr. **Marple's** expert opinions as related to representative cited filters is critical to an effective deposition.

Counsel for the Secretary argued that under II. D. 10.b. of the Discovery Plan, questions of an expert witness relating to specific citations fall outside the scope of the Joint Discovery Phase of the Plan. He stated that Dr. **Marple's** conclusions are solely based on the 740 test filters which will be available. He also asserted that transporting the filters could result in damage or deterioration, and that preservation of the filters was still necessary because of potential criminal proceedings.

As I stated in my orders of March 19, 1992 and March 26, 1992, which granted the Secretary's motion to have access to certain documents and experimental filters of the mine operators' experts, expert opinion evidence will likely be critical to the proper resolution of these cases. Therefore, expert witness depositions are extremely important. To the extent that

documents and exhibits assist in and enhance expert witness depositions they are also extremely important. I am persuaded that the filters requested by counsel for the operators may assist in the effective and productive deposition of **Dr. Marple**. I further conclude that questioning Dr. Marple concerning his expert opinion by seeking to compare representative cited filters with his experimental filters is properly a part of Joint Discovery under the Discovery Plan.

Therefore, the Secretary is ORDERED to produce and make available the requested filters to be used in the deposition of Dr. Marple, under the following conditions.

1. The petri dish covers and backing pads may only be removed by MSHA personnel.
2. If the MSHA representative determines in the case of a particular filter, that removing the petri dish cover or backing pad will affect the integrity of the filter, it shall not be removed.
3. In the event that any damage or dust dislodgement results to any filter, the photographs of that filter will be admissible in evidence.


James A. Broderick
Administrative Law Judge

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