

CCASE:  
CONTESTS OF RESPIRABLE  
DUST SAMPLE ALTERATION  
CITATION  
DDATE:  
19920604  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

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

ORDER GRANTING IN PART AND DENYING  
IN PART MOTION TO COMPEL FURTHER RESPONSES

On April 20, 1992, Contestants represented by the law firm Jackson & Kelly (Contestants) filed a motion to compel further responses by the Secretary of Labor (Secretary) to Contestants' discovery requests. The motion was supported by a memorandum. At my request, the Secretary filed with me copies of the Secretary's responses to the first and second sets of discovery. She requested that she be permitted to file a response to the Contestants' motion by May 22, 1992. I later orally extended the time without objection by Contestants to May 29, 1992. However, the Secretary has not filed a response to the motion.

Contestants' motion is based in part on the fact that on March 19, 1992, the Department of Labor, Office of Inspector General (OIG) withdrew the claim of privilege previously asserted with respect to discovery requests involving dust samples taken by MSHA inspectors. In addition, Contestants seek an order compelling further responses to certain interrogatories as to which, they assert, the Secretary has made inadequate responses.

INVESTIGATIVE PRIVILEGE-OIG

Interrogatory 12, First Set, asks the Secretary to identify all inspector dust samples taken from Consolidation Coal Company (Consol) during the period 1988 to date, including the name of the inspector who took the sample. The Secretary's objection that disclosing the identity of the inspectors is protected by the OIG investigative privilege was sustained in my order issued December 30, 1991. After the OIG withdrew its claim of privilege, the Secretary on April 23, 1992, disclosed the identity of the inspectors submitting samples exhibiting AWC characteristics during the period in question. I conclude that this is an adequate response to the interrogatory. My order of December 30, 1991, held that the request for information as to all inspector samples during the period was overly broad.

Interrogatory 13, First Set, also seeks the identity of the inspectors and other persons having contact with or

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responsibility for samples examined for AWC. My order of December 30, 1991, upheld the Secretary's objection to identifying the inspectors and upheld the objection to the remaining part of the interrogatory as being overly broad and unduly burdensome since it was not limited in time. On April 23, 1992, the Secretary disclosed the identity of MSHA inspectors and field offices involved in processing samples found to have AWC. I conclude that this is an adequate response to the interrogatory.

Interrogatory 14, First Set, also asks among other things for the identity of inspectors who took samples from Consol during the period 1988 to date which were found to have AWC. The Secretary's amended response discloses the identity of the inspectors and other information withheld because of OIG privilege claims. I conclude that this is an adequate response to the interrogatory.

Request for Production 3, First Set, asks for all documents relating to any investigation from 1988 to date of the subject of this proceeding. My order of December 30, 1991, upheld the Secretary's objection that the request was overly broad and unduly burdensome. Contestants' motion states that it is unclear whether the Secretary relied on the OIG investigative privilege in withholding any requested documents. The Secretary replied that she did not withhold any document sought in this request for production in reliance on the OIG privilege. I conclude that the Secretary has adequately responded to the request.

Document 445 includes dust data cards concerning samples taken by MSHA inspectors from August 1989 to June 1991. The Secretary asserted the OIG investigative privilege. On May 30, 1992, the Secretary sent copies of Document 445 and available MSHA inspector sample custody sheets to Contestants. I assume that this responds to Contestants' request for production of Document 445.

#### INADEQUATE RESPONSE

Interrogatory 3, Second Set, asks the Secretary to describe all procedures to examine inspector or other MSHA generated samples for AWC. The Secretary responded by referring to the protocols in Repository Documents 13 and 177, and the depositions of Thaxton and Raymond. Contestants' motion argues that the Secretary has not identified the procedures used to ensure that all MSHA samples were, in fact, examined for AWC. I conclude that the Secretary's response is adequate. She was not asked for information as to procedures to assure that all MSHA inspector samples were examined, but only for the procedures actually followed in examining MSHA samples for AWC. The response - referring to the documents describing the protocols - is an adequate response.

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Interrogatory 7, Second Set, asks the Secretary to distinguish each of Contestants' cited filters from the experimental filters produced in the West Virginia University study and the Pittsburgh Health Technology Center study. The Secretary's response is that the cited filters differ from the experimental filters in that the former show evidence that the filter media were intentionally altered. This answer is not responsive. The interrogatory is obviously asking the Secretary for the physical distinctions, if any, between the two sets of filters. I will order her to further respond.

Interrogatory 14, Second Set, asks the Secretary to state and identify all facts, documents, physical evidence, and individuals whose testimony will support the Secretary's negative response to requests for admissions, and to summarize the expected testimony of prospective witnesses and content of documents which support the Secretary's responses. The Secretary's response to the interrogatory states that her denials are self-explanatory and are supported by the deposition testimony of MSHA officials and employees, the exchange of expert reports, the deposition of experts, and the Secretary's response to Interrogatory 6. She also objects to being requested to identify witnesses at this time. I conclude that the Secretary has adequately responded to this extremely broad interrogatory.

ORDER

Accordingly, the motion to compel further responses to discovery requests is GRANTED with respect to Document 445. The Secretary is ORDERED to place Document 445 in the Document Repository. The motion is GRANTED with respect to Interrogatory 7, Second Set, and the Secretary is ORDERED to further respond to that interrogatory.

The motion to compel further responses is DENIED with respect to Interrogatories 12, 13, and 14, First Set, Request for Production 3, First Set, and Interrogatories 3 and 14, Second Set.

James A. Broderick  
Administrative Law Judge