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SOL (MSHA) V. ENERGY WEST MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 22, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-169
Petitioner : A.C. No. 42-01944-03614
:
v. : Cottonwood Mine
:
ENERGY WEST MINING COMPANY, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Timothy M. Biddle, Esq., Thomas A. Stock, Esq.,
CROWELL & MORING, Washington, D.C.,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA) charged Respondent, Energy West Mining Company ("Energy West") with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et seq. (the "Act").

A hearing was held in Salt Lake City, Utah. The parties filed post-trial briefs.

STIPULATION

1. Energy West is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. Energy West is the owner and operator of the Cottonwood MSID N. 4201944.

3. Energy West is subject to the jurisdiction of the Federal Mine Safety and Health Act.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The citation and order were properly served by a duly authorized representative of the Secretary upon an agent of the respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits offered by the Secretary and by the Respondent are stipulated to be authentic, but no stipulation is made as to their relevancy or the truthfulness of the matters asserted therein.

7. The proposed penalty of \$500.00 [as to Citation No. 9996761] will not affect Respondent's ability to continue in business.

8. Energy West is a large mine operator.

9. Exhibit M-1 is a certified copy of the history of assessed violations and it accurately reflects the history of the mine for the two years prior to the date of the citation.

This case involves the validity of a citation issued under Section 104(a) of the Act and a related order issued under Section 104(b) for an alleged failure to abate.

Citation No. 9996761 issued June 25, 1992, was generated by an advisory of excessive dust relating to MMU(Footnote 1) 015-0 of the Cottonwood Mine.

The advisory provided as follows:

Cassette No.	Date	MRE Equivalent Concentration	Production
46603112	6-11-92	1.8	5630
46603119	6-12-92	2.0	5160
46602829	6-15-92	1.7	6630
46602815	6-16-92	3.0	7300
46603115	6-17-92	2.8	5825
AVG. CONC. 2.2		NORM. PROD. 6109	

(Exhibit M-3)

1 "MMU" is an acronym for Mechanical Mining Unit. (Tr. 65).

The citation issued as a result of the advisory alleged a violation of the respirable dust standard, (Footnote 2) and it reads as follows:

Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the 044 designated occupation in mechanized mining unit 015-0 was 2.2 milligrams which exceeded the applicable limit of 2.0 milligrams. 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 Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.

At the commencement of the hearing, the operator admitted the violation alleged in the citation based on the Secretary's motion to amend the citation to a non-S&S violation. The Secretary agreed to such an amendment based upon affidavits submitted by the operator showing that the miners who were exposed to the levels of respirable dust listed in the citation were all wearing personal protective equipment. (Tr. 33; Ex. M-2). The motions to amend and withdraw the operator's contest were granted.

EVIDENCE

On July 15, 1994, Fred L. Marietti, an MSHA inspector for 15 years, was at the Cottonwood Mine beginning a regular AAA inspection. (Tr. 26, 27).

2 70.100 Respirable dust standards.

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

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His inspection was interrupted when he was recalled to his office to review a computer-generated report of continuing non-compliance on MMU 015. (Tr. 290).

The report read, in part, as follows:

Citation/Order No.		09996761	
Date Issued		06-25-92	
Expiration Date		07-14-92	
Cassette No.	Date	MRE Equivalent Concentration	Production
46602833	7-01-92	3.4	6630
46602834	7-01-92	1.5	7000
46602911	7-02-92	1.1	6000
46602927	7-02-92	2.7	6500
46602931	7-03-92	2.8	6500
AVG. CONC.	2.3	NORM. PROD.	6526

(Exhibit M-4)

After reviewing the two documents, Mr. Marietti returned to Cottonwood and told Energy West they had a "b" order for failing to make a good-faith effort to abate Citation No. 9996761.

The Order (No. 3850746) was issued under Section 104(b)(Footnote 3) of the Act on the same day. It provided as follows:

Results of the five most recent samples received by MSHA and collected by the operator from the working environment of the designated occupation, 044-0 in MMU

3 The cited portion of the Act reads:

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

015-0 shows an average concentration of 2.3 mg/m³. Due to the obvious lack of effort by the operator to control the respirable dust, the period of reasonable time for abatement cannot be extended. There will be no mining of coal in MMU 075-0, 11th left longwall section, until the operator submits a plan to the District mine manager for approval to lower the average concentration of respirable dust to the required level.

CASE AUTHORITY

The Secretary relies on Clinchfield Coal Company, 11 FMSHRC 2120 (November 1989).

In support of its position, Energy West relies on a series of Administrative Law Judges' decisions including Peter White Coal Co., 1 FMSHRC 255, 265 (April 1979); Eastern Associated Coal Corporation, Docket No. Hope 76-140, slip op. at 25 (June 22, 1978); Peabody Coal Company, 11 FMSHRC 2068, 2102-2103 (October 1989). Concerning a failure to abate, see also the Commission decision in Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989).

ADDITIONAL EVIDENCE

Fred L. Marietti and Robert Thaxton testified for the Secretary. Garth Nielsen, Bud Warrington, Steve Radmall, Dennis Ardohain, Ed Hickman, Max McCourt, Randy Tatton, and Thomas Hall testified for Energy West.

Inspector Fred L. Marietti issued the 104(b) order. His rationale for doing so will be discussed hereafter.

Robert A. Thaxton, an expert witness and industrial hygienist, reviewed dust samples of the Cottonwood mine and expressed the view that Cottonwood has a relevant history of non-compliance with the regulation. The evidence presented by Energy West will be discussed hereafter.

DISCUSSION

At the outset, it should be noted that the mid-June 1992 sampling for respirable dust was at the longwall in the 4th West section. The early-July 1992 sampling at the same longwall was also in the 4th West section.

On July 10, 1992, a week after the abatement samples were collected, mining was stopped in 4th West and the longwall was moved to 11th Right Section, approximately two miles away.

On July 15, 1992, Inspector Marietti issued Order No. 3850746 and withdrew the miners from 11th Right Section.

In this factual situation, the change of the location of the MMU does not affect the 104(b) order because the entity cited is MMU-015, a longwall. (Tr. 88).

Exhibit M-3 cited above, is a computer generated advisory for excessive dust at Cottonwood. It resulted in the issuance of Citation No. 9996761. Subsequently, on a report of continuing non-compliance dated July 14, 1992, Inspector Marietti issued the 104(b) order on July 15, 1992. (Tr. 29).

It was Mr. Marietti's decision to issue the 104(b) order. His decision was based on several facts. Specifically, he noted that the average dust concentration in the mid-June 1992 sampling was 2.2 mg/m³. However, the early July 1992 sampling for dust showed an increase to 2.3 mg/m³. Further, such a concentration at Cottonwood could affect the health of the miners. (Tr. 35).

In addition, this unit (015-0) had frequently been going out of compliance. Modifications were then made to bring the MMU back into compliance, but such modifications were not being incorporated in the operator's ventilation plan. (Tr. 36, 37). It was obvious to Mr. Marietti that additional sprays, different locations, and increased air were required to be abated. (Tr. 37).

After he had completed the inspection, Mr. Marietti wrote MSHA's District Manager to suggest various recommendations in connection with the operator's ventilation plan. (Tr. 38, 39; Ex. M-5).

The Inspector also talked to the miners at the face. Some of the changes they recommended were on the machine and had been in use. (Tr. 40).

In Mr. Marietti's view, coal production is one of the main reasons the operator comes out of compliance. In reviewing sampling with other inspectors, when the company's production is around 6,000 tons the company is out of compliance but they come back into compliance around 4500 tons. (Tr. 41, 42).

In the Inspector's opinion, the company's ventilation plan was adequate for the lower production but not for 6000 tons. (Tr. 42).

In connection with a previous order, numerous things were done, including the installations of tip sprays, deflectors on the shields to try to help entrain the air into the face.

On July 15, these things were not in place nor were they incorporated into the ventilation plan. (Tr. 43).

Energy West had been given 21 days to abate the original citation. After the ("b") order was issued, the company abated in eight hours. (Tr. 43, 44).

Mr. Marietti agrees he did not enter the mine nor did he inspect the longwall before issuing his order. Also, he did not ask anyone at the mine why the readings might have increased. (Tr. 47, 48).

The Inspector wrote the format words into his order. There is similar wording in the inspection manual. However, no one told him what to write. (Tr. 53, 54). Exhibit R-1, identified as the Coal Mine Inspector's Manual, suggests similar language to be incorporated when writing an order. (Tr. 54, 55). For their protection, miners are required to wear air stream helmets after the issuance of an order. The Inspector's order required such a wearing of air stream helmets until the ("b") order was lifted. (Tr. 56).

ROBERT A. TRAXTON, an expert witness, studied the Cottonwood dust sampling for two years. His opinion, supported by his bar chart (Ex. M-6) is that the dust sampling concentration increase with coal production.

Mr. Traxton's testimony is hereafter discussed in connection with Energy West's contentions.

CORRECTIVE ACTIONS AND MINING CONDITIONS

As revealed in the testimony of several witnesses for Energy West, in the days that followed the issuance of the citation, the company undertook numerous corrective actions to lower respirable dust concentrations in the 4th West section. As soon as he heard there was a violation on Friday, June 26, 1992, Mr. Randy Tatton and the managers of the Cottonwood Mine met to develop a corrective action strategy. (Tr. 328). The following Monday, June 29, 1993, Mr. Tatton directed one of his Safety Engineers, Mr. Steve Radmall, to do a dust survey using a real time aerosol monitor, or "RAM," "to ensure that all the controls that [the Mine] had in place were functioning properly." (Tr. 329). In addition, on Monday, June 29, 1993, Mr. Tatton and the Mine Superintendent, Mr. Garth Nielsen, unsuccessfully attempted to divert more air into the 4th West section. (Tr. 329-335).

On June 30, 1992, Mr. Radmall conducted a RAM survey of the 4th West section as directed by Mr. Tatton. (Tr. 213, 230). This dust survey involved taking spot measurements of respirable

dust concentrations(Footnote 4) at several locations in the 4th West section. Based on his survey results, Mr. Radmall recommended that the intake air course and stage loader be checked for any dust generation problems. (Tr. 230-231). The RAM check also revealed that dust levels rose dramatically when the longwall shear cut through rock in the mine roof. (Tr. 227).

In the meantime, the miners on the section were put on a dust control alert by the Equipment Overhaul Coordinator, Mr. Bud Warrington, who on Friday, June 26, 1992, informed the Longwall Maintenance Foreman, Mr. Ed Hickman, that "[w]e are out on dust samples," and directed that immediate action be taken to correct one possible source of dust, a baffle on the crusher of the stage loader. (Tr. 188; Ex. R-5). This repair was performed by Tuesday, June 30, 1992, after a new baffle was made. (Tr. 285-286).

Mr. Warrington reiterated his instruction the following Monday, June 29, 1992, adding instructions to "[c]heck everything out that has to do with dust. Make it shine." (Tr. 189-190; Ex. R-5). Mr. Warrington gave this instruction because samples would soon be taken to determine if the dust violation had been abated. (Tr. 190). His instructions were accompanied by a checklist of dust control measures he prepared in May 1991. (Tr. 187; Ex. R-4). This checklist includes adjusting air controls and volumes; changing filters in and otherwise maintaining a scrubber designed to capture dust at the stage loader (Tr. 179-181); running all sprays in the stage loader and in the machine that crushes coal coming off the longwall (the "crusher") (Tr. 181); checking the baffle plates on the crusher that restrict dust from entering the mine atmosphere (Tr. 181); checking the various dust control flaps and baffles on the shear of the longwall machine (Tr. 182-184); watering roadways and walkways (Tr. 184-185); and limiting the use of diesel-powered vehicles on the section (Tr. 185).

Mr. Hickman assumed personal responsibility to see that these corrective actions were being thoroughly carried out. (Tr. 287). From June 29 through July 1, 1992, Mr. Hickman performed several repairs and maintenance checks on the longwall equipment in 4th West. (Tr. 284-291). Other miners working on the longwall took numerous corrective actions as well.

MR. DENNIS ARDOHAIN, a Longwall Section Foreman, testified that he and his crew "spent quite a bit of time chasing down dust parameters [i.e., controls] ... we may have missed." (Tr. 241).

4 RAM sampling results provide what is essentially a "snapshot" of dust concentrations at any given moment. In contrast, dust samples collected for analysis by MSHA provide an average figure for the eight hours sampled. (Tr. 237-238).

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On every swing shift (i.e., 4 p.m. until midnight) from June 26, to July 3, 1992, Mr. Ardohain supervised various equipment repairs to ensure that dust generation was kept to a minimum, including changing the bits on the longwall shear, cleaning the shields and wetting the section, and checking and repairing sprays. (Tr. 242-251).

MR. MAX McCOURT, the Longwall Service Foreman, performed repairs to control dust generation on every graveyard shift from June 29 to July 2, 1992, including changing filters on the stage loader scrubber, installing a dust control flap on the longwall shear, installing a new cover on the stage loader, and checking and repairing sprays. (Tr. 299-305).

Energy West also relied on administrative measures to limit the miners' exposure to respirable dust. These measures included providing Racal airstream helmets to all miners working on the section. (Tr. 252, 327-328; Ex. M-2). These helmets provide a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels. (Tr. 403-404). The positions of miners on the longwall face also were routinely changed to minimize their exposure to respirable dust, since some areas are dustier than others on a longwall. (Tr. 251-252).

Energy West's corrective actions were taken in the face of very difficult mining conditions specifically, severe geological problems. (Tr. 131). Mr. Nielsen, the Mine Superintendent, described these conditions as "some of the worst that we'd had in a long time." (Tr. 143). Mr. Ardohain testified that the conditions were "about the worst I can remember since I had been at the Cottonwood Mine." (Tr. 255).

MOVE TO 11th RIGHT

Mining conditions were so bad in 4th West that on July 10, 1992, a week after abatement samples were collected on the section, mining was stopped, leaving 100 feet of the panel unmined. (Tr. 144, 164). The longwall equipment was moved to the 11th Right Section, approximately two miles from 4th West (Tr. 147). Conditions on 11th Right were dramatically different from 4th West. Most notably, where 4th West was dry, 11th Right was very wet. (Tr. 147-149, 343-344). In addition, unlike 4th West, where face burst and rock in the roof were problems, on 11th Right, problems were encountered with the top, resulting in lower production. (Tr. 379).

ENERGY WEST CONTENTIONS

Energy West argues it met all of the abatement requirements of Citation No. 9996761 therefore the 104(b) order should be vacated.

The citation required Energy West to "take corrective action to lower the respirable dust." It is true that the operator took some corrective action but it did not lower the dust. In fact, the dust concentration was 2.2 mg/m³ and it increased to 2.3 mg/m³. (See Exs. M-3 and M-4).

Energy West further argues that Inspector Marietti abused his discretion by failing to consider whether the circumstances warranted an extension of the abatement period. In support of its position, Energy West cites a number of Judges' decisions and the MSHA Policy Manual at I.15 (July 1988).

Abuse of discretion may be broadly defined to include errors of law. See generally *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-186 (1973); *NL Industries, Inc., v. Department of Transportation*, 901 F.2d 141, 144 (D.C. Cir. 1990); *U.S. v. U.S. Currency*, in the amount of \$103,387.27, 863 F.2d 555 (7th Cir. 1988); *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985) ("abuse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law"), *Utah Power and Light Company, Mining Division*, 13 FMSHRC 1617 (October 1991).

In this case, the record shows there was a continuing dust violation from mid-June until early July 1992. Given this information, Inspector Marietti properly exercised his discretion. In my view, no circumstances existed that would cause the Inspector to conclude otherwise.

Energy West further argues that mining conditions in 4th West justified an extension of the abatement period for the citation. In support of its position the operator cites a series of Judges' decisions. *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330, 339 (March 1986); *Freeman Coal Mining Corp.*, 1 IBMA 1.27 (1970); *Consolidation Coal Company*, 3 FMSHRC 2201, 2205 (Sept. 1981); *Consolidation Coal Company*, 4 FMSHRC 747.752 (April 1982).

Specifically, had Inspector Marietti conducted an inspection of MMU 015-0, he would have discovered that the miners operating the longwall were using airstream helmets. In addition, he would have discovered that the longwall had been moved two miles to the right because of the adverse mining conditions. (Tr. 144).

It is the Judge's view that no extension of the abatement period would have been justified. The use of air helmets is not a remedy authorized under 70.100(a). Further, when adverse mining conditions cause excessive dust, those conditions should be addressed by the operator. Finally, in this case, the Inspector's opinion focused on those facts which indicated that the cause of the excessive dust concentration was MMU-015. As a result, it is not relevant that the MMU had moved to 11th Right.

To justify the Order in this case, the Secretary relies on the "history of excessive dust"; the relationship of production to dust levels; changes in MMU numbers; dust sample results and the diligence of Cottonwood's efforts to control respirable dust; a claim that Cottonwood refused to adjust its ventilation plan and accusations that Cottonwood acted in "bad faith."

EXCESSIVE DUST

Energy West identifies the "history of excessive dust" as a basis relied upon by the Secretary to justify the order in this case. Energy West argues that no case law is offered to suggest that the factors offered by the Secretary are legitimate grounds for stopping operations.

The evidence, partially from Exhibit M-6, (Footnote 5) shows dust sampling on 22 dates from April 16, 1991, to May 13, 1993. The operator was out of compliance on 11 of the 22 samplings. A record of being out of compliance 50 percent of the time establishes a history of excessive dust.

RELATIONSHIP OF COAL PRODUCTION TO COAL DUST

It is a fact that less production can mean less dust. (Tr. 380). However, the detailed evidence in this case fails to establish a credible relationship between production and coal dust.

A review of the time line sampling Chart A (Footnote 6) for MMUs 012, 013, 014, 015, and 016 is warranted since the evidence indicates that all MMUs are basically similar. However, the review indicates production is unrelated to coal dust when dust sample results are compared with production figures. Further, the time line sampling chart fails to establish any credible conclusion in support of Mr. Marietti's opinion that Cottonwood can handle the respirable dust generated by 4500 tons of production but it tends to go out of compliance at 6000 tons.

5 The bottom of M-6 lists five separate MMUs. Above the MMUs are the respirable dust sampling dates. At the top of the chart corresponding to the dates are the dust sampling concentrations. The colored overlay on M-6 shows coal production.

6 Chart A, the timeline sampling history at the Cottonwood Mine is the third page of Exhibit M-6.

REDUCING PRODUCTION TO COME INTO COMPLIANCE
THEN
RESUMING HIGHER PRODUCTION

The Secretary asserts that Energy West has a history of reducing production long enough to come into compliance then resuming higher production. (Brief 3, 5).

No evidence supports the Secretary's position. In addition, a review of the timeline sampling indicates lower dust sample results can occur when production is higher. Exhibits M-6 and M-4 show the following:

Date	Sample Result	Production (Tons)
4-16-91	5.7 mg/m3	4,875
5-08-91	2.1 mg/m3	5,710
4-28-92	1.4 mg/m3	6,526
6-17-92	2.2 mg/m3	6,109
7-01-92	1.5 mg/m3	7,000
7-01-92	3.4 mg/m3	6,630

Ex. M-6 (average sample results for MMU 014-0 and MMU 015-0);

Ex. M-4 (abatement sample results for MMU 015-0). Applying the Secretary's hypothesis, one would predict that when Energy West decreased production on MMU 014-0 between April 16 and May 8, 1991, and on MMU 015-0 between April 28 and June 17, 1992, and on July 1, 1992, the sample averages or results would have decreased correspondingly. As demonstrated from the results above, this was not the case. Levels of respirable dust in an underground coal mine are affected by many factors other than production--a good example is the adverse mining conditions encountered by Cottonwood in its 4th West longwall section (Tr. 398, 402). In addition, the testimony of Dr. Hall that face bursts and other conditions in 4th West increased dust levels. An underground coal mine is "a very dynamic environment in which the conditions change on a relatively frequent basis" (Tr 397), and many of these changes in conditions affect respirable dust levels and sample results (Tr. 135-136, 398, 402). This is borne out by the testimony of several witnesses regarding the dramatic difference in mining conditions between 4th West and 11th Right (Tr. 147-149, 207, 294, 307, 343-344), and the fact that Cottonwood came into compliance with relative ease once the longwall began operating in less adverse conditions in 11th Right. (Tr. 277-278).

In connection with reducing production then resuming higher production, the Secretary cites the transcript at pages 46, 42,

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and 78 to support this position. The transcript does not support the Secretary's view:

At page 36, Inspector Marietti is discussing changes in the MMU ventilation plan. This issue is discussed infra.

At page 42 Inspector Marietti is discussing dust parameters and concludes that their ventilation plan is adequate for lower production but not for 6000 tons. For the reasons previously stated, I have rejected this portion of the Inspector's opinion.

At page 78, expert witness Thaxton is discussing timeline sampling from Exhibit M-6. For the reasons previously stated, I have rejected Mr. Thaxton's opinion of the data.

In sum, the transcript references do not support the Secretary's allegations.

COTTONWOOD'S EFFORTS TO REDUCE DUST AND CHANGING MMU NUMBERS

The Secretary further argues that Cottonwood does not make a diligent or good faith effort to reduce dust at the mine but instead, makes a minimal effort to control dust. In support of his position, the Secretary cites the transcript at pages 37, 39-40, 76.

The evidence fairly shows that Cottonwood made only a minimal and inadequate effort to control dust and failed to adjust its ventilation plan to reflect any modifications.

Inspector Marietti testified:

Q: All right. So are you saying that they did things to keep down the dust, but those things were not in their ventilation plan?

A: That's right.

Q: Now, why would that make a difference?

A: Well, it's obvious to me that these additional requirements are needed, additional sprays, different locations increased air, if that's necessary, different things of that nature are required to abate the order. Or in the past, it's only evident to me that they - that it should be incorporated into the ventilation plan and the MMU to keep the mining environment of the health of miners and keep the dust less than the two milligram standard or less - less than that standard. (Tr. 37).

Further, Mr. Marietti related a conversation with Mr. Randy Tatton, Energy West's manager of health, safety, and training. (Tr. 316).

- Q. And what did you discuss with Mr. Tatton on that day?
- A. I discussed, you know, the non-compliance there and we discussed some things that I told him that I can remember that I said, "I'd like to see you incorporate these things in your MMU ventilation plan requirements." And he told me that they didn't want to include that stuff in there because they didn't want to get violations, and if they did, that they would have nowhere to go to abate the violation. And I told him, I says, "Well, my problem with it is, you know, you're telling me that you need these things in there but you don't want to put them in the ventilation plan because if they're not working, you're afraid you'll get a violation." But I said, "It's apparent to me that you need these in here because every time you get a citation or an order, you have to use these things or they're used to bring out a compliance." (Tr. 41, 42).

Mr. Marietti's testimony is further supported by his memorandum to MSHA district manager on August 13, 1992. (Ex. M-5).

Mr. Tatton confirmed the Inspector's testimony. He stated: "if we were to get parameters in our plan that were at the very max, then, you know, we have nowhere to go. We need that flexibility and we do at all times operate at our minimums and when we shouldn't be penalized for doing something better." (Tr. 372).

Many of the modifications made to abate the order were of such a nature that they could have been in place to deal with the mining conditions involved in 4th West.

Section 104(b) of the Act requires the authorized representative of the Secretary to set a reasonable time for abatement, and determine if an extension of time is warranted if the violation had not been abated during that time. The Inspector must determine whether or not the violation is serious and whether or not the company has made a diligent, good faith effort to abate during the time designated. Section 104(b) requires that if "an authorized representative of the Secretary finds (1) that a violation described in a citation ... (a) has not been totally abated within the period of time as originally fixed therein ..., and (2) that the period of time for the abatement should not be further extended ... " he shall issue a failure to abate order." Here, Inspector Marietti found that the citation had not been abated, since the level of excessive dust had risen to 2.3 milligrams rather than decreased to below the required 2.0 milligrams, and that the period of time for abatement should not be further extended. He determined that the original amount of time given for abatement was reasonable and that a "b" order was justified under the circumstances. (Tr. 36-40).

In the absence of a diligent or good faith effort to abate a violation within a designated time, withdrawal orders may be

properly issued. It is not enough that any effort to abate is made, it must be a diligent effort. Issuance of an order is reasonable when only a token effort has been made. Republic Steel Corporation, 3 FMSHRC 1099 (April 1981). A 104(b) order is also properly issued when good faith efforts have not been exercised and a valid reason for an extension has not been given before an order has been issued. Consolidated Coal, 2 FMSHRC 2862 (October 1980).

Inspector Marietti realized, upon review of the records, that during the 21-day abatement period, the level of respirable dust had not been diminished in any respect, but indeed had climbed. It is more than reasonable to assume that if a diligent effort had been made that it would be reflected in the sample results. That is, the abatement samples (Ex. M-4) would show a decline in respirable dust, rather than an increase. (Tr. 80-81). In addition, if a diligent effort to control dust had been made by the operator, the individual samples should have improved over the abatement time. (Tr. 81). Instead, the individual number of samples that were out of compliance had increased from two to three. An increase in the average concentration and an increase in the individual concentrations clearly indicate that the mine made little effective effort to correct the respirable dust violation. (Tr. 81).

Even if the dust was caused by adverse mining conditions, these conditions are not a defense recognized by 70.100.

The Secretary, citing the transcript at 37-40 and 76, also asserts Cottonwood often changes the MMU numbers in order to avoid dust history.

The transcript at pages 37-40 reveals the testimony of Inspector Marietti concerning what was not in the operator's ventilation plan. In addition, he discussed his conversation with miners at the face. The transcript at page 76 does not deal with changing MMU numbers but deals with dust controls. As the Secretary knows, any change in an MMU is subject to proper MSHA approval. (30 C.F.R. 75.370).

In sum, the Secretary failed to prove that Energy West modified its MMU numbers to avoid dust history.

For the reasons stated herein, the citation and order herein are AFFIRMED.

CIVIL PENALTY

Section 110(i) of the Act mandates consideration of certain criteria in assessing appropriate civil penalties.

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The record reflects that Energy West is a large mine operator. (Stip. 7).

The payment of the proposed penalty should not affect the operator's ability to continue in business.

The operator's prior history indicates it was assessed and paid 268 violations in the two-year period ending June 24, 1992.

Energy West was negligent in permitting the 2.2 mg/m3 respirable dust concentration; further the operator was negligent in failing to lower the dust concentration.

The gravity of the violation is high since respirable coal dust can cause pneumoconiosis over a period of time. Generally, such a violation is considered to be "S&S".

Energy West is not entitled to statutory good faith since it failed to abate the original citation.

The judge believes a civil penalty of \$3000 is appropriate herein.

Accordingly, for the foregoing reasons, I enter the following:

ORDER

Citation No. 9996761 and Order No. 3850746 are AFFIRMED and a penalty of \$3,000 is ASSESSED.

John J. Morris
Administrative Law Judge

Distribution:

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