CCASE:
SOL (MSHA) V. SOUTHERN OHIO COAL
DDATE:
19940513
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE JUDGES
2 SKYLINE, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 93-233
	:	A.C. No. 33-01173-04015
v.	:	
	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Petitioner;
David M. Cohen, Esq., American Power Service Corporation, Lancaster, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of $5 for an alleged violation of mandatory respirable dust standard 30 C.F.R. 70.101. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Columbus, Ohio. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent violated the cited standard as alleged in the proposal for assessment of civil penalty and (2) the appropriate civil penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act. 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; Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 70.101.

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

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The Commission has jurisdiction in this matter.

2. The respondent is a large mine operator and the Meigs No. 2 Mine is subject to the Mine Act.

3. On August 12, 1992, the Mine Safety and Health Administration ("MSHA") collected samples during one shift at the Meigs No. 2 Mine 4 South Longwall Section, MMU 023-0. Based upon five face occupational samples, the average concentration of respirable dust was 0.8 milligrams per cubic meter of air (Joint Exhibit 1).

4. By a Notice of Option to Submit dated August 20, 1992, MSHA notified SOCCO that, based upon the one sample of August 12, 1992, from the shearer operator, the designated occupation, the quartz percentage was 22%. The Notice provided that SOCCO may submit an additional sample for quartz analysis (Joint Exhibit 2).

5. By a September 17, 1992, notice, MSHA notified SOCCO that the quartz percentage in SOCCO's submitted sample was 10% and that SOCCO had the option of submitting a second sample for quartz analysis, (Joint Exhibit 3).

6. By an October 6, 1992 notice, MSHA notified SOCCO that the quartz percentage in SOCCO's submitted second sample was 10% and that the new respirable dust standard was 0.8 milligrams per cubic meter of air, (Joint Exhibit 4).

7. By a report dated January 13, 1993, American Electric Power Service Corp. Environmental Laboratory determined that there was 4.38% silica, i.e. quartz, in a sample submitted by SOCCO's Meigs Mine No. 2 (Joint Exhibit 5)

8. By a letter from James F. Tompkins, Vice President/General Manager of SOCCO, to Ronald L. Keaton, District Manager of MSHA, dated January 15, 1993, SOCCO's Meigs Mine No. 2 requested a Repeat Respirable Dust Survey based on an in-house determination of a significant reduction of quartz (Joint Exhibit 6).

9. During a January 26, 1993 inspection of the Meigs No. 2 Mine, MSHA Inspector Thomas Zirkle was informed that the Mine had requested a quartz technical inspection.

10. On February 8, 1993, MSHA collected samples during one shift at the Meigs No. 2 mine 4 South Longwall Section, MMU 023-0. Based upon five face occupational samples the average concentration of respirable dust was 1.0 milligrams per cubic meter of air (Joint Exhibit 7).

11. On February 18, 1993, MSHA issued Citation No. 3540906 alleging that five valid respirable dust samples collected during an MSHA inspection of February 8, 1993, showed the average concentration of the section average was 1.0 milligram per cubic meter, which exceeded the allowable standard of 0.8 milligram per cubic meter in the MMU 023-0, 4 South longwall section (Joint Exhibit 8).

12. By a Notice of Option to Submit dated February 19, 1993, MSHA notified SOCCO that, based upon the one sample of February 8, 1993, from the shearer operator - the designed occupation - the quartz percentage was 2% and the operator was afforded the option to submit a sample (Joint Exhibit 9).

13. On February 26, 1993, SOCCO submitted its first optional sample. SOCCO was provided the option to submit a second optional sample, but declined to do so (Joint Exhibit 11).

14. By an MSHA Advisory of Termination of Excessive Dust dated March 4, 1993, MSHA advised SOCCO that the Mine's abatement samples (which also satisfied bimonthly sampling) for January - February 1993 had an average concentration of 0.5 milligrams of respirable dust per cubic meter of air, less than the applicable standard of 0.8, see (Joint Exhibit 10).

15. On March 8, 1993, the Citation was terminated (Joint Exhibit 8).

16. By a Report of Results of Additional Quartz Samples dated March 30, 1993, MSHA notified SOCCO that its first optional sample contained 5% quartz and that the sample with the highest percentage was used to determine the new quartz percentage. The new respirable dust standard was set at 2.0 milligrams per cubic meter (Joint Exhibit 11).

17. As reported on an MSHA Conference Worksheet concerning a May 18, 1993, conference, Citation No. 3540906 was sustained because it complies with current MSHA policy, but the Citation was modified to non-S&S because the environment of the miners was only 2% quartz (Joint Exhibit 12).

The parties further agreed that the violation was timely abated in good faith, and that it resulted from moderate negligence (Tr. 7, 10).

The contested section 104(a) non"S&S" Citation No. 3540906, issued on February 18, 1993, by MSHA Inspector Thomas Zirkle, cites an alleged violation of mandatory respirable dust standard 30 C.F.R. 70.101, and the cited condition or practice is described as follows:

> The results of five (5) valid respirable dust samples collected during an MSHA inspection (Laboratory Report, dated 2-8-93 attached) show the average concentration of the section average was 1.0 mg/m3 which exceeds the allowable standard of 0.8 mg/m3 in the MMU 023-0, 4 South Longwall Section.
>
> The mine operator shall take corrective action to lower the amount of respirable dust and then sample the longwall occupation 044 Longwall shearer operator (tailgate end) each production shift until five valid respirable dust samples are taken and submitted to the MSHA office in St. Clairsville, Ohio. The mine operator shall make available respiratory protection to all workers in the affected area.

Petitioner's Testimony and Evidence

MSHA Health Specialist Thomas Zirkle, testified that his duties include taking respirable dust samples at surface and underground coal mines, and he confirmed that he issued the citation dated February 18, 1993, and that it was based on dust samples that he took on the South Longwall MMU 23, (mechanized mining unit), on February 8, 1993 (Tr. 24). He explained the procedures that he follows in taking dust samples, including the information shown on the laboratory reports and occupation codes associated with his sampling (Tr. 24-28).

Mr. Zirkle stated that during his sampling at the mine he observed the miners working and operating their equipment, took air readings, and checked the water sprays to insure that they complied with the dust control plan, and he explained that the dust sample cassettes are then weighed and analyzed for quartz by a lab technician at the MSHA Pittsburgh Laboratory (Tr. 29-30).

Mr. Zirkle stated that the testing of the five samples that he took reflected an average concentration of 1.0 milligrams of respirable dust per cubic meter of air on the cited MMU section in question. He stated that this exceeded the applicable standard of .8, which reflects a reduced respirable dust standard because of the presence of quartz. He confirmed that he knew from a review of his mine records and file that the cited MMU section was on a .8 standard (Tr. 27-28). He stated that even though the respondent exceeded its dust control plan by having more air velocity and water sprays than required, it still exceeded the allowable respirable dust standard for the period in question (Tr. 30).

Mr. Zirkle stated that when he issued the citation, he was following MSHA procedures and inspection manual guidelines, and he confirmed that the respondent was required to comply with the applicable .8 standard that was in effect on February 8, 1993 (Tr. 31).

On cross-examination, Mr. Zirkle stated that the percentage of quartz in the mine varies with the roof conditions and location of stone which produces more quartz (Tr. 32). Referring to Joint Exhibits 2 through 4, concerning the quartz sampling which reflect the 3rd South Longwall Panel as the sampling location, Mr. Zirkle did not know whether that was the correct location, or whether it should have referenced the 4 South Longwall Panel (Tr. 34). Respondent's counsel confirmed that all of the samples were taken on the 044 occupation, which is the shearer operator, and he suggested that the notation to the 3rd South panel is a typographical error, and that the samples actually apply to the 4 South panel (Tr. 34-35).

The petitioner's counsel confirmed that the three 044 occupation sample results showed the quartz exposure for the designated occupation. Mr. Zirkle stated that once the designated occupation is placed on a particular reduced respirable dust standard because of the presence of quartz, all of the remaining miners on that MMU are also placed on the same standard because of their exposure to that same MMU environment (Tr. 37-40).

Mr. Zirkle confirmed that he was at the mine on January 26, 1993, and that he spoke with safety manager John Merrifield, who informed him that the respondent had requested MSHA to retest the mine for quartz on the cited MMU as well as a second longwall.

Mr. Zirkle stated that he was not aware of this request before he spoke to Mr. Merrified (Tr. 43). He next returned to the mine on February 8, 1993, took some samples, and then issued the February 18, citation based on those samples. He confirmed that the samples reflect the mine conditions on February 8, and not February 18 (Tr. 44).

Mr. Zirkle stated that he was at the mine on February 8, partly for the purpose of determining the quartz content. He explained that he first determines compliance with the respirable dust standard in effect at that time, and after the samples taken that day are analyzed, a new dust standard based on the new quartz content is then established. He confirmed that he took five samples and that the sample for the designated occupation was used to determine the percentage of quartz. He believed the samples were taken on the 4 South Longwall panel (Tr. 45).

Mr. Zirkle stated that when the longwall areas were sampled in August, 1992, as reflected in Joint Exhibits 2 though 4, they were considered "active workings", and those samples established the allowable respirable dust limit of 0.8 milligrams that was in effect on February 8, 1993. However, on February 8, 1993, the previously sampled August, 1992, areas had been mined out and were gob areas on February 8, 1993 (Tr. 46-49). Mr. Zirkle stated that "anywhere you sample on a longwall today is going to be gob area tomorrow" (Tr. 50). He confirmed that but for the application of MSHA's guidelines, since the February 8, 1993, samples showed 2 percent quartz, which was less than 5 percent, the allowable respirable dust limit would have been 2.0 milligrams. He stated that although the February 8, sampling showed 2% quartz and 1.0 milligrams of respirable dust, there would still be a violation until the MSHA labatory finished its analysis of the sample and established the new standard (Tr. 51).

Mr. Zirkle stated that the actual amount of quartz on the MMU on February 8, 1993, was irrelevant in determining whether there was a respirable dust violation that day, and he explained further at (Tr. 51-52):

> Q. You just ignore what the percent quartz is on February 8th?
>
> A. No, we follow the guidelines to determine the final analysis so everybody knows what the quartz is.
>
> Q. So what you are saying is it is not the percent of quartz that the man is breathing on February 8th, 1993 that determines a violation; to determine a violation

you look at actually what the last standard was that was set by MSHA. The actual conditions of the mine are immaterial, is that correct?

A. Yeah.

Mr. Zirkle confirmed that regulatory section 70.101, provides that when there is less than 5% quartz, up to 2.0 milligrams of respirable dust is allowable. He further confirmed that his February 8, 1993, samples were taken in the active workings of the mine, but these were not the same active working areas sampled in August and September, 1992 (Tr. 53). Mr. Zirkle agreed that if a miner is breathing 1.0 milligram of respirable dust in an atmosphere of 2% quartz, he is not being subjected to a health hazard (Tr. 56). He confirmed that his original "S&S" citation was subsequently modified by MSHA to non-"S&S" because of a reduced gravity finding (Tr. 56).

Mr. Zirkle confirmed that he also issued a March 1, 1993, citation for a violation on another MMU (posthearing Exhibit R-1; Tr. 58). He explained that the citation was based on samples submitted by the respondent, and the cited area was on a reduced .9 milligram standard based on the quartz content, and the violation was issued because the sample result indicated 1.4 milligrams of respirable dust, which exceeded the .9 standard. He confirmed that the citation was subsequently vacated at the direction of his supervisor, and he explained the reason for this at (Tr. 60-63; Exhibits R-2 through R-4):

A. I was directed by my supervisor. That's all I can say. It wasn't my choice.

Q. Let me ask you: Was the standard changed because shortly thereafter it was determined by MSHA that the quartz percentage had decreased in that particular MMU?

A. Well, the reason it was vacated is on the -- standard -- the new respirable dust standard of 2.0 milligram was established by the computer during the time the citation was issued for exceeding the nine-tenths that -- I was directed to put that on there. That's why -- the reason they gave me to do it.

Q. Okay. So it was basically changed because there was later a determination that at the time you wrote the violation the quartz was less than it had previously had been?

A. Yes.

* * * * * * *

Q. Mr. Zirkle, I understand that maybe what happened with the SOCCO Exhibits 1 through 4 weren't completely your doing; can you explain why SOCCO Exhibit 1 was vacated but the citation in this particular case was not vacated?

A. Well, I was told this one was vacated. The standard was set before the samples were taken. But in the other case, they wasn't.

Q. Okay. So you are saying in the case that we're discussing today, the 2 percent quartz standard wasn't established at the time the citation was written?

A. Yeah.

Q. Even though the reason why it wasn't established related to the time it took for MSHA to process it, not due to any fault of the operator; is that correct?

A. Right.

In response to further questions, Mr. Zirkle stated that he followed MSHA's policy manual in issuing the prior violation in question, and that the respondent's sample was collected before the new standard was established. He identified Exhibit P-1, as the policy in question that he followed in issuing both of the violations (Tr. 65). He stated that when he conducted his sampling on February 8, 1993, he did not know the percentage of quartz in the samples, but once this was determined, he could have issued a citation anytime after the date of the laboratory determination which was February 9, 1993 (Tr. 65-67). He confirmed that the change in the allowable respirable dust standard for the cited 023 MMU changed from 0.8 to 2.0, on March 30, 1993 (Tr. 68). He further confirmed that on most occasions MSHA considers more than one sample and an operator is afforded an opportunity to submit samples (Tr. 67).

Mr. Zirkle confirmed that he could have waited three or four days before issuing the violation, and had he done so he could have determined from the February 19, laboratory analysis that the quartz percentage for the cited MMU on February 8, was less than 5%, and the respondent would have been entitled to have up to 2.0 milligrams of respirable dust per cubic meter of air (Tr. 71).

Respondent's counsel asserted that if Mr. Zirkle had waited until February 20, he would have known the quartz percentage, and since it was less than 5%, with an allowable respirable dust limit of 2.0, there would be no violation and he would not have issued the citation (Tr. 72).

Mr. Zirkle confirmed that there was no particular time limit in which to issue the violation (Tr. 73); and he indicated that "you issue the citation as soon as you can get back to the mine" (Tr. 70, 73). However, he could not explain the delay in this case (Tr. 75). He agreed that although the respondent had the option of submitting additional samples when it was informed that it was under a 2.0 milligram standard, it would have nothing to gain by doing so (Tr. 73-74). When asked "if it made sense to issue a violation on February 8th based upon the quartz that existed in another area that is gob as of February 8th," Mr. Zirkle responded "that's been the procedure for years" (Tr. 75).

George Niewiadomski, Mine Safety and Health Specialist, MSHA, Arlington, Virginia, was qualified and admitted as an expert in MSHA health regulations and policy (Exhibit P-2; Tr. 77-78). Referring to a document labeled "Coal Mine Health Inspection Procedures", 89-V-1, February 15, 1989, (Exhibit P-3), Mr. Niewiadomski stated that MSHA has been adjusting the applicable respirable dust standard due to high quartz levels since 1971, when the formula it uses was developed by HEW, and that section 205 of the Mine Act states that the Secretary shall apply that formula in his enforcement of Title II of the Act. He further stated that from 1971 through 1985, the standards were adjusted based on MSHA single samples, and that in 1985 the procedures were changed to afford mine operators an opportunity to participate in the standard-setting process by basing the standard on one MSHA sample and up to two operator samples. He stated that "we would never adjust a standard based on a single sample" (Tr. 82-83).

With regard to the instant case, Mr. Niewiadomski stated that the standard was set on October 6, 1992, when "the average of one MSHA sample which initiated the whole process" showed that it contained 22% quartz. No citation was issued on October 6, 1992, because at that point in time it was not known what the standard would be because the respondent was not afforded an opportunity to submit samples and MSHA did not analyze the required samples. In response to a notice sent to the respondent,it submitted its first optional sample, and it showed 10% quartz. Since there was a difference of greater than 2%, the respondent was afforded an option to submit a second sample, and all three samples were used to establish the new average quartz level used to adjust the standard to .8 milligrams. Pursuant to MSHA's policy that has been in effect since 1985, once a standard is established on an entity, such as the MMU 023 in this case, when that MMU moves to a different part of the mine the standard (.8 in this case) moves with the MMU until such time it is adjusted (Tr. 83-85).

Mr. Niewiadomski stated that when Inspector Zirkle took the samples on February 8, 1993, he "only enforced what was in

place", and that the respondent "knew what the standard was and what we knew and it was aware that he had to comply with the .8" (Tr. 85). He further stated that MSHA's procedures and policies were known by the respondent, that they are available to all operators, and he believed they are reasonable. He further stated as follows at (Tr. 86-87):

> That policy very clearly states that whenever an inspector goes out to do a sampling inspection, whether it's something that originated in the office or whether it was a request made by an operator or by a representative of the miner, the inspector must first determine whether or not there is a violation of the standard in place.
>
> Those samples are then subsequently sent to Pittsburgh for quartz analysis. We analyze all samples that have sufficient weight gain and by sufficient weight gain I mean they have at least .5 milligrams of dust on the filter. All samples are analyzed.

Mr. Niewiadomski further explained the sampling of the MMU designated occupations, including the 044 and 041 occupations, and he confirmed that as a result of 5% quartz from the sampling, the new 2.0 milligram respirable dust standard was established and became effective on March 30, 1993 (Tr. 88-91). He also explained MSHA's quartz procedures and policy as reflected in Exhibits P-3 through P-5 (Tr. 94-100).

Mr. Niewiadomski explained the sequence of events in connection with the February 8, 1993 citation issued by Inspector Zirkle. The MSHA laboratory testing report (Joint Exhibit 1), for the five samples taken on August 12, 1992, reflected an average concentration of .8 milligrams of respirable dust, and this was in compliance with the 2.0 milligram standard in place at that time. Subsequent testing analysis for quartz for one of the August 12, samples for the designated 044 occupation on the 023 MMU (Longwall Tailgate operator), indicated 22% quartz, and since this exceeded the 5% threshold, the respondent was informed on August 20, 1992, that it could submit an optional additional sample. No citation was issued for the high quartz concentration at that time because MSHA's procedures required more than one sample to support a violation, and it was premature to ascertain what the standard would be for the occupation in question without additional samples to determine the average quartz level for that environment (Joint Exhibit 1, Tr. 101-103).

Mr. Niewiadomski stated that on September 17, 1992, MSHA notified the respondent that the results of the testing of the previously submitted optional sample of September 11, 1992, for the 044 occupation reflected 10% quartz, and since this differed by more than 2% from the quartz percentage obtained by MSHA's

sampling of August 12, 1992, the respondent was given a further opportunity to submit a second optional sample for quartz analysis by October 2, 1992 (Joint Exhibit 3; Tr. 103). He confirmed that at this point in time, the respondent was not under a reduced standard since the process was still ongoing and MSHA had to wait until the respondent exercised its option to submit another sample before calculating the average quartz level in the designated environment and determining a new standard (Tr. 104).

Mr. Niewiadomski stated that the respondent submitted a second optional sample on September 29, 1992, which reflected a testing analysis of 10% quartz. As a result of the testing of the MSHA sample of August 12, 1992, and the two optional samples taken by the respondent on September 11 and 29, 1992, the respondent was placed on a new respirable dust standard of 0.8 milligrams for the 023 MMU in question, effective October 6, 1992, and this standard applied to the 023 MMU regardless of where it moved to in the mine, and he stated "the standard moves along with the MMU" (Tr. 105). He confirmed that MSHA did not require the respondent to comply with the 0.8 milligram standard on the date that it collected its sample (August 12, 1992), nor would MSHA require the respondent to comply with the 0.8 standard based on its sampling in September, 1992. He stated that "It's very clear when an operator is requested to submit optional samples, those are only going to be used for quartz analysis and not for making compliance determinations" (Tr. 105).

Mr. Niewiadomski stated that Inspector Zirkle took five 023 MMU samples, including the 004 designated occupation, on February 8, 1993 (Joint Exhibit 7), and he knew at that time that the applicable standard for that MMU was still 0.8 milligrams. The calculated sampling average reflected a 1.0 milligram average concentration of respirable dust, and since this exceeded the 0.8 standard that was still in effect, the Inspector determined that the respondent was in violation and issued the citation on February 18, 1993 (Tr. 106).

Mr. Niewiadomski identified Joint Exhibit G, as the notification of the results of MSHA's quartz analysis made on February 19, 1993, for the February 8, 1993, sample and it reflects a test result of 2% quartz for the 023 MMU, and afforded the respondent an opportunity to submit an additional sample by March 6, 1993 (Tr. 107-109). He stated that the respondent could have opted not to submit an additional sample, and in that case the standard would have been adjusted automatically based on the results of MSHA's February 8, 1993, sampling and it was reported as 5% quartz (Joint Exhibit 11). Since the difference between this sample and MSHA's sample was greater than 2%, the respondent was afforded an opportunity to submit a second sample, but declined to do so. Under the circumstances, the new standard was based "on the higher of the two quartz levels, which was

5 percent divided into ten resulting in a 2.0 milligram standard effective March 30, 1993" (Tr. 109-110). He confirmed that if this 2.0 standard had been applied on February 18, 1993, when the citation was issued, the respondent would have been in compliance if the standard were in effect on that day (Tr. 110). He further explained as follows at (Tr. 110-112):

> A. - - - - there is no way to tell on February the 8th whether or not we're going to have 2 percent quartz or 50 percent quartz and so we cannot ascertain prematurely what the standard is going to be. If in fact we had waited, we had waited and no enforcement action was taken, we had waited until the quartz process was fully completed, we could have had a standard that was equal to .8 or lower or maybe higher, but if in fact it was lower and no corrective action was taken, people would have been needlessly overexposed to excessive levels of quartz.
>
> THE COURT: But in fact that wasn't the case here; was that correct? Were they in compliance on February the 8th?
>
> THE WITNESS: No, they were not.
>
> THE COURT: They weren't in compliance with the standard that was carried forward but were they in compliance with the actual quartz exposure that was tested on that day?
>
> THE WITNESS: We would not make a decision on 2 percent either. We would not make a decision on one sample. The process requires the standard to be based on multiple standards. We would not -- just because we have 2 percent, we would not adjust the standard based on that. That was the procedure we used prior to 1985.
>
> THE COURT: I understand that, but logically and realistically, you really, when you are applying a standard that's been carried forward, that actually tested in an environment that's no longer in being, you really don't know -- what are you accomplishing? Are you actually testing what the actual exposure was on the 18th, I mean on the 8th, February the 8th?
>
> THE WITNESS: We're sampling and we're enforcing, I mean, we're sampling to determine whether or not the standard that we know, the standard of record, that the operator knows that we know whether or not that standard is being violated. That's all we really know.

THE COURT: But that standard was based on some other environment, wasn't it, that's no longer in being?

THE WITNESS: It could have been the same environment.

THE COURT: But it isn't.

THE WITNESS: In this particular case, the MMU moved to another. The standard moves with it.

Mr. Niewiadomski identified Exhibit P-6 as a June 16, 1993, quartz analysis of a sample taken by the respondent on June 7, 1993, following the 2.0 milligram standard that became effective on March 30, 1993, and the sample reflected 11% quartz, which would result in a significantly reduced dust standard. However, no citation was issued based on the June 7, sample because the process required additional samples to be used in making a final determination. The respondent took a second sample on June 28, 1993, which indicated 13% quartz, and when averaged with the previous 11% quartz sample, established a new standard of 0.9 milligrams, effective July 2, 1993 (Tr. 116-117).

Mr. Niewiadomski stated that once an inspector takes samples, the entire process for determining a new standard can take from three to eight weeks because sufficient time must be allowed for an operator to collect samples and for the laboratory analysis to be completed (Tr. 119). He confirmed that the quartz content of a sample is used to establish the respirable dust standard because of the hazard associated with silicosis (Tr. 120).

On cross-examination, Mr. Niewiadomski stated that MSHA would never automatically establish a respirable dust standard based on a single quartz analysis unless the operator does not available itself of the opportunity to file another sample, and the time for doing so has expired (Tr. 121). He confirmed that MSHA's policy allows an operator to request a reevaluation of the standard based on changing mine conditions (Tr. 122). He confirmed that Joint Exhibit 6, is a letter dated January 15, 1993, from the respondent to MSHA's District Manager, requesting a reanalysis of quartz based upon changing geological mine conditions (Tr. 123). He explained that in the instant case, the inspector "is conducting a sampling inspection and is making a determination whether the existing standard is being complied with." Although the respondent believed conditions had changed, this cannot be verified until the samples are analyzed for quartz. He agreed that in the instant case the inspection that was conducted after the reevaluation request confirmed that the conditions had changed because of the quartz reduction, and as a result of the February 8, samples, the standard was adjusted as of March 30, after the sampling process was completed (Tr. 123-126).

In response to a question as to whether the quartz percentage of the active mine workings is correlated to the respirable dust in the active workings as of any particular day, Mr. Niewiadomski stated as follows at (Tr. 126-127):

> A. It is intended to be a long-term standard and in the quartz situation, that -- because percent of quartz can vary, then the applicable standard can vary from time to time and that standard really doesn't change and we have recognized that and there's a process in place to make those adjustments.
>
> Q. But that standard doesn't relate to the active workings?
>
> A. Yes, it does.
>
> Q. It relates to the active workings as of the time the sample was taken but not to the time as to when MSHA makes a determination as to what the revised standard is that correct?
>
> A. It would be unrealistic to come up with a standard every day because basically what you are implying is in the case of a longwall as Mr. Zirkle -- Inspector Zirkle indicated, today I'm sampling here. This is my location. Tomorrow, I'm further along and -- it would be unrealistic to say we have a fluctuating standard and no one knows what that standard is. So to provide the maximum level of protection, we have to come up with a reasonable process and we feel that's what it is.
>
> Now I realize that in this particular instance you felt that the citation was not a valid one. But there are two other circumstances that I have talked -- that I have mentioned where in fact there was a quartz problem. We did not go back and cite you for violating that standard.

Mr. Niewiadomski stated that in order for an operator to develop a sound dust control strategy it must know what the standard is going to be that it has to comply with. He stated that section 70.101, states that if there is quartz in the environment, the dust standard will be reduced and the respondent would be expected to comply. The standard "doesn't say on what the quartz percentage was on that very day" (Tr. 129). He stated further at (Tr. 133-134):

> Q. What would have been wrong in this particular instance with Mr. Zirkle having the authority under MSHA policy to say based upon the percent quartz and

the amount of respirable dust in the mine atmosphere on February 8th, 1993, SOCCO was in compliance and no violation should be issued?

> A. Inspector Zirkle is required to enforce the applicable standard. The applicable standard was .8 and Inspector Zirkle in fact did enforce that. He can't -- first of all, he can't make -- ascertain what the standard would be at the time that he collected those samples.
>
> Q. But he can establish that prior to issuing the violation, is that correct?
>
> A. No, he is required to issue the violation as soon as a determination is made that the standard has been violated. Because -- because we need to implement corrective action immediately so people are not needlessly overexposed.

Mr. Niewiadomski confirmed that once the respirable dust standard is established for the MMU, the standard would follow the MMU, even if it were moved to another mine. He stated that the geological conditions in the other mine "are probably the same". He explained that an evaluation of the environmental conditions would be done subsequent to the move, and not before, but that an operator could request a reevaluation if he can provide evidence that its dust controls warranted such a reevaluation. However, notwithstanding any reevaluation request, the inspector must enforce the standard of record (Tr. 135-136). He further explained as follows at (Tr. 141):

> THE WITNESS: I want to clarify something. We have over a thousand reduced dust standards in place. We do thousands of quartz analyses, and as far as we know this policy is well understood and everyone knows that there are established procedures how a standard is set. They know exactly how samples are used and they know exactly what standards are being enforced and we make it very clear, even in policy, the policy manual, which was issued back in '88, exactly -- when you have a reduced dust standard in place, how our samples are evaluated based on that reduced dust sample because the operator collects bimonthly samples. He collects additional samples. He may collect citation samples. So that's pretty clearly explained which standard applies when.

Respondent's Testimony and Evidence

Stephen Doe, employed by the respondent as a Senior Geologist, testified that he holds a B.S. Degree in Geology from

West Virginia University, and has taken graduate courses at Ohio University. He is certified by the American Institute of Professional Geologists, and has been employed by the respondent for eleven years. He confirmed that he is familiar with the roof conditions at the mine in question, and that he has walked the entries and "mapped the roof rock types, the lithologies and I also drill core holes". This information will indicate what the future mining conditions will be with regard to the quartz that is in the mine atmosphere (Tr. 147).

Mr. Doe stated that the normal mine roof is limestone, and that quartz is related to the sandstone systems that are in the roof above the coal seam. He confirmed that the respondent occasionally takes samples of its own to determine the quartz content in the mine atmosphere. He identified Joint Exhibit 5, as a sample analysis by the respondent's laboratory of the quartz percentage in the mine atmosphere on January 18, 1993, the date the sample was taken. The report reflects a 4.38 percent quartz content (Tr. 148).

On cross-examination, Mr. Doe stated that the sample in question was received on January 8, 1993, but he did not know when it was taken. Although Mr. Doe stated that the reports shows the sample was taken on the "230 South Longwall, tailgate operator", a handwritten notation on the document shows "237 (South) L/W tail operator" (Joint Exhibit 5, Tr. 149). Although he indicated that at the time the sample was taken, the mine roof was limestone and the bottom was sandstone, he confirmed that he did not take the sample and did not know what dust controls were in place at that time (Tr. 151).

Discussion

The essential facts in this case are not in dispute. Based upon five (5) respirable dust samples taken by MSHA on August 12, 1992, in the 4 South Longwall Section from Mechanized Mining Unit (MMU) 023-0, MSHA determined that the average concentration of respirable dust in that location was 0.8 milligrams per cubic meter of air. One of the five samples was from the longwall shearer operator, the "designated occupation" that was determined by the samples to have the greatest respirable dust concentration. That sample was analyzed for quartz content, and it was determined that the quartz percentage was 22%.

Pursuant to MSHA policy, the respondent was afforded an opportunity on August 20, 1992, to submit an additional sample for quartz analysis, and it did so. The sample was determined to contain 10% quartz. On September 17, 1992, the respondent was given the option to take and submit a second sample for quartz analysis, and it did so. That sample showed 10% quartz content. Based upon an average of the three quartz sample percentages and the application of the formula found in 30 C.F.R. 70.101, MSHA

established a new respirable dust standard of 0.8 milligrams per cubic meter of air, and the respondent was informed of this by an MSHA notice of October 6, 1992.

Subsequent to MSHA's notification to the respondent of the newly established 0.8 standard, the respondent submitted a sample to its laboratory for analysis and it was determined in a January 13, 1993, report that there was 4.38% silica (quartz), in the sample submitted. Thereafter, on January 15, 1993, the respondent wrote to MSHA's district manager requesting a "Repeat Respirable Dust Survey" to determine the quartz content in the active longwall section, and this request was based on the respondent's in-house determination of a significant reduction of quartz. Inspector Zirkle was informed of this request during a mine inspection on January 26, 1993.

In the course of the inspection on February 8, 1993, which was unrelated to the respondent's request for a dust survey, Inspector Zirkle collected five face occupational samples during one shift on the 4 South Longwall Section MMU 023-0. The sampling results showed that the average concentration of respirable dust was 1.0 milligrams per cubic meter of air, which exceeded the allowable standard of 0.8 milligrams per cubic meter of air in the 4 South Longwall Section MMU-023-0. The analysis for the sample taken from the shearer operator designated occupation reflected a quartz percentage of 2%.

On February 18, 1993, Inspector Zirkle issued the disputed citation based on the results of the five respirable dust samples that he collected on February 8, and he did so because the sample results of 1.0 milligrams per cubic meter of air exceeded the existing allowable standard of 0.8 milligrams that was in place at that time.

Pursuant to section 70.100, the respondent is required to maintain the average concentration of respirable dust during each shift to which each miner in the active workings of the mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. However, pursuant to section 70.101, if the respirable dust in the atmosphere of the active workings contains more than five percent quartz, the respondent is required to comply with a reduced dust standard computed in accordance with section 70.101. In the instant case, the February 8, quartz sample for the designated occupation reflected two percent quartz, which was less than the five percent that would ordinarily trigger a reduced respirable dust standard for compliance with section 70.101. Under the circumstances, the respondent believes that it was entitled to rely on a two percent respirable dust standard because the quartz content in the sampled atmosphere was less than five percent.

Even though the February 8, 1993, respirable dust samples taken by the inspector reflected 1.0 milligrams per cubic meter of air, which was below the normal 2.0 milligram standard, MSHA refused to vacate the citation and held the respondent to the 0.8 milligram reduced standard and required it to meet that reduced standard in order to abate the violation.

On February 19, 1993, MSHA notified the respondent of its option to submit an additional sample for quartz analysis, and it did so. The respondent subsequently declined an invitation to submit a second optional sample, and on March 4, 1993, MSHA advised the respondent that its abatement samples had an average concentration of 0.5 milligrams of respirable dust per cubic meter of air, less than the applicable standard of 0.8 milligrams, and the citation was terminated on March 8, 1993, MSHA notified the respondent that its new respirable dust standard was 2.0 milligrams.

The respondent availed itself of an MSHA citation conference on May 18, 1993. The violation was sustained "because it complies with current MSHA policy", but the citation was modified from "S&S" to non-"S&S", because the environment of the miners was only 2% quartz.

Petitioner's Arguments

MSHA states that the facts in this case are not in dispute and that the critical issue is whether or not its policy and procedure with respect to the application and enforcement of mandatory standard 30 C.F.R. 70.101, as stated in its Program Policy Manual, Health Manual, and other memoranda is consistent with the regulatory language (Exhibits P-1, P-3 through P-5).

MSHA asserts that pursuant to the requirements of section 205 of the Mine Act, it has applied the appropriate formula found in section 70.101, to insure the health of coal miners, by reducing the standards for respirable dust when excessive levels of quartz are detected in the atmosphere of any mine working place, and that it has determined the procedures to be followed in implementing such a formula, citing American Mining Congress v. Marshall, 671 F.2d 1251, 1256 (10th Cir. 1982).

MSHA believes that its action in reducing the dust standard for the cited MMU 023-0 when the mine atmosphere was found to include greater than 5 percent quartz is reasonable and entirely consistent with the plain wording of both the standard and the Mine Act. MSHA maintains that it must apply section 70.101, in a realistic setting, and must formulate a policy and procedure which can be complied with and enforced. To do this, MSHA concludes that it must establish a standard which is known to the respondent so it may establish dust controls and a dust control

mine atmosphere supports its position. MSHA points out that in this case it is undisputed that the 0.8 milligram dust standard applicable to MMU 023-0 was established on October 6, 1993, on the basis of an MSHA dust sample that had a quartz content of 22 percent (collected on August 12, 1992) and two operator optional samples that had a quartz content of 10 percent each (collected on September 11, 1992 and September 29, 1992, respectively). Accordingly, MSHA concludes that its action in reducing the dust standard for MMU 023-0 "when" the mine atmosphere was found to include greater than 5 percent quartz is entirely consistent with the plain wording of both the standard at issue and the Mine Act. Further, as previously argued, MSHA believes that interpreting "active workings" as following the MMU is reasonable and entirely consistent with the regulation and the Act.

In response to the respondent's argument that neither the inspector nor MSHA's conference officer thought the 2.0 quartz atmosphere on February 8, 1993, presented a health hazard to miners, MSHA asserts that what these individuals thought is irrelevant and that they were not qualified to give an opinion as to the health consequences of exposure to quartz. Although MSHA maintains that the classification of the violation was wrongly changed from S&S to non-S&S, it does not believe this is relevant because the S&S classification is not an issue in this case. MSHA also believes that the violation issued by Inspector Zirkle in March, 1993, is also irrelevant.

In response to the respondent's argument that MSHA should have sampled in response to its January 15, 1993, request, and that it was unfair to cite it when it requests a resurvey, MSHA asserts that it did not have the resources to resurvey at the time it was requested, and that its policy clearly states that even in a resurvey the inspector will first determine compliance with the applicable standard of record. MSHA believes this is fair because that standard of record is known by the operator and the operator is aware that it must comply with that standard.

Respondent's Arguments

The respondent asserts that for purposes of determining the average concentration of respirable dust in the mine atmosphere for compliance with section 70.101, the samples must be taken at approximately the same time and location in which the sample to determine the percentage of quartz in the mine atmosphere of the active workings is taken.

Citing the dictionary definition of the word "when", the first word in section 70.101, as "at or during the time that," and the definition of the phrase "active workings," the respondent concludes that the concentration of respirable dust must be determined during the time that the percentage of quartz is determined.

taken is unrealistic. However, MSHA points out that this is exactly what is being advanced by the respondent in this case. MSHA believes that not knowing what standard to comply with or to enforce on any particular day would create an untenable situation from a compliance and enforcement standpoint, and would be unreasonable.

MSHA further explains that following established procedures, the respondent was given the opportunity to submit an optional sample, which was taken on June 28, 1993, and submitted to MSHA for analysis. That sample contained 13.8 percent quartz, and in accordance with established MSHA procedures, since the 2 samples were within 2 percent, they were averaged and a new standard of 0.9 milligrams was set and became effective on July 2, 1993. From March 30, 1993 to July 2, 1993, the respondent was on a 2.0 milligram standard, and even though the designated MMU occupation was exposed to 11 percent quartz on June 6, 1993, the respondent did not receive a citation nor was the dust standard adjusted based on that sample because this would be inconsistent with established policy.

MSHA concludes that its current dust standard setting procedure is fair because operators had adequate notice of how the standard would be adjusted and that it would be applied to everyone, and on any given day, operators and MSHA know what standard is in effect. MSHA believes that the procedures, known to everyone since 1985, have a scientific basis, and constitute a reasonable approach to enforcing Section 70.101, since everyone knows to what standard they are held, and because specific features of the program are advantageous to the operator.

As a further safeguard for operators, MSHA points out that to ensure that the quartz levels at entities on a reduced dust standard are periodically evaluated and that operators are not unduly penalized by a reduced standard that may no longer be valid, MSHA procedures also provide for automatic reevaluation of quartz levels every six months. If an entity is on a reduced standard and has not been sampled by MSHA during a six month period, an operator's bimonthly sample is automatically selected by the computer for quartz processing to determine whether the applicable dust standard should be adjusted. Additionally, should conditions change that may significantly impact the amount of quartz dust in the work environment to which miners are exposed, operators can request MSHA to resample as the respondent did in this case. But MSHA makes it clear that an inspector will first make a determination of compliance with the existing standard.

MSHA argues that its policy is not inconsistent with the requirements or language of section 70.101. MSHA asserts that the statutory and regulatory requirement for a reduced dust standard "when" there is greater than 5 percent quartz in the

dust control plan, daily. MSHA concludes that if it were to do this, the respondent would cry "foul," and would argue that this constant monitoring would be an impossible burden and it would have no up-to-the-minute knowledge of changes in conditions, and would have no knowledge of whether or not it was on a reduced standard. MSHA points out that it does not obligate an operator to comply with an unknown, and concludes that the existing procedures that it follows in adjusting dust standards are reasonable because mine operators always know to what standard they are being held, thereby assuring that miners are protected on a continuous basis as the Act requires.

MSHA points out that the contested procedure in question has been in place since 1985, has been followed consistently and applied to everyone, and reflects its interpretation as to the intended meaning and application of Section 70.101. As such, MSHA concludes that it is entitled to considerable deference. MSHA points out further that prior to 1985, dust standards were adjusted based solely on the results of MSHA samples, with no operator participation in the process. The current procedure establishes a dust standard to be complied with on a continuous basis based on the results of up to three samples (one MSHA and up to two operator samples). Operators know what standard they are being held to on any given day and, as set forth in the Program Policy Manual, know how respirable dust samples taken by either MSHA or the operator will be processed against a reduced dust standard.

MSHA states that in this case, the respondent knew it was on a reduced standard of 0.8 milligrams on February 8, 1993, and knew it had to comply with that standard. Following the established procedures referred to in MSHA's policy and health manuals, the February 8th inspector sample, which indicated 2 percent quartz, triggered a computer message to the respondent affording it the opportunity to submit a quartz sample. The respondent opted to participate by collecting a sample on February 26, 1993, which was found to contain 5 percent quartz. Not until March 30, 1993, was the dust standard for MMU 023-0 adjusted back to 2.0 milligrams.

MSHA further explains that it conducted another inspection in June 6, 1993, and the 2.0 milligram standard was in effect at that time. The average of the five inspector dust samples was less than the applicable standard, and following established procedures, one of the samples was analyzed for quartz and was found to contain 11 percent quartz. However, the standard was not reduced based on that sample's quartz content, nor was a citation issued for exceeding the reduced standard based on that sample because the respondent was aware of only the particular standard in effect at the time the sample was taken. Requiring the respondent to maintain compliance with a standard to be established at a later date on the day the particular sample was

miners will not be exposed to the same levels of quartz. MSHA concludes that in order to provide the maximum level of health protection on every shift it is not unreasonable to have the respirable dust standard follow the unit upon which it was established, as provided for in MSHA's Health Manual (Exhibit P-3 at paragraph 8, pg. 1.26), and as stated by Mr. Niewiadomski that "... when MMU 023 moves to a different part of the mine, the standard moves with that entity until such time when that standard is adjusted." (Tr. 85).

MSHA points out that in American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982) the Tenth Circuit upheld its "designated area sampling" program which was designed to measure the concentration of respirable dust to which coal miners were exposed as they worked and traveled in outby areas. The Court held that this method, although not perfect, was not beyond the scope of MSHA's discretion, stating as follows.

> Since there is no perfect sampling method, the Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy. The Secretary is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust. On this record, the difference between area and personal sampling is not shown to be so great as to make the Secretary's choice of an area sampling program irrational. American Mining Congress, at 1256.

MSHA acknowledges that its interpretation of "active workings" as following the MMU may not be perfect. However, it takes the position that it is rational and well within its discretion, and maintains that in light of the need for the respondent to comply with a set standard, and the need for an inspector to enforce a set standard, this interpretation of "active workings" is the only viable one. MSHA further believes that if there is evidence that the operating conditions in the area of the mine where the MMU has moved to do not pose a quartz risk, it has procedures in place which the respondent is familiar with, by which it can request a reevaluation of the quartz levels in the environment.

MSHA maintains that if it were to follow the respondent's logic the standard would need to be adjusted whenever MSHA detected a quartz level of over 5 percent. This could result in the issuance of dust citations if the actual dust concentration exceeded the adjusted standard. In this case, a citation would have issued after the August 12, 1992, sample of 22 percent quartz. Therefore, to comply with section 70.101, as the respondent interprets it, the respondent would have to monitor dust daily and would have to change its dust controls, and its

of controlling weight unless it is plainly erroneous or inconsistent with the regulation." (citation omitted). MSHA concludes that its interpretation of section 70.101, is neither erroneous nor inconsistent with the regulation, although the respondent argues that its interpretation of "active working" is unreasonable.

In reply to the respondent's contention that since the 0.8 milligram reduced standard was established from a sample collected on August 12, 1992, from an area that was an "active workings" at that time, but not an "active workings" on February 8, 1993, MSHA must use samples collected on February 8, 1993, to determine compliance with section 70.101, MSHA asserts that the respondent would never be on a reduced standard, and it concludes that the respondent's argument is flawed in two respects: the reduced standard was not established solely from the August 12, sample, and following the respondent's reasoning "active workings" could never be measured because it changes from day to day.

MSHA states that the reduced dust standard was not established from a sample collected on August 12, 1992, and that this sample began a process within which the respondent was able to and did participate. MSHA points out that the August 12 sample was sent to Pittsburgh to be analyzed for quartz, and on August 20, 1992, it was determined that the designated occupation miner was exposed to 22 percent quartz, well over the 5 percent quartz permitted by the standard. The respondent was immediately notified of this and given the opportunity to submit an optional sample, and no citation was issued even though the designated occupation was exposed to 22 percent quartz on August 12, 1992. The MSHA Program Policy Manual and Health Manual was followed. The respondent submitted its own sample on September 17, 1992, which indicated 10 percent quartz. Since there is more than a 2 percent difference between 10 percent and 22 percent, the respondent was given the opportunity to submit a second optional sample, and it did so. This sample revealed 10 percent quartz. On October 6, 1992, the standard was reduced to 0.8 mg/m3 and this reduction was based upon one MSHA sample and two of the respondent's samples. Again, no citation was issued based upon that 22 percent exposure because at that time, the respondent did not know of the overexposure, and MSHA believed it would be unfair to hold the respondent to a standard it did not know.

MSHA argues that the mine "active workings" change from day to day on a longwall and would be impossible to measure. It believes that a reasonable determination of the "active workings" in the case of respirable dust sampling is to follow the mechanical mining unit (MMU). Since the same type of coal extraction equipment is involved in the MMU, and since the same occupations are working that MMU, including the designated occupation, MSHA concludes that there is no reason to assume that

plan to decrease the amount of respirable dust a miner inhales. MSHA further concludes that it must also establish this standard so that it is able to enforce section 70.101, and that without a known respirable dust standard, it would be impossible to enforce this regulation.

Citing the testimony of its expert witness George Niewiadomski that compliance and enforcement of a reduced respirable dust standard can only be achieved if the standard is known, MSHA asserts that the establishment of such a known standard is accomplished by following a reasonable and fair process set out in its Health Manual. MSHA explains that when a dust sample indicates that exposure to quartz is over 5 percent, it notifies the operator of the results of the quartz analysis and the operator is given an option to take a sample and send it to Pittsburgh to be analyzed for quartz, and no citation for a violation of section 70.101 is issued. If the difference between these two samples is more than 2 percent quartz, the operator is given a second option to submit another sample, and up to three samples may be averaged to determine the average quartz percentage which is used to establish the dust standard. Only after this process is completed is the operator placed on a reduced dust standard. At that point, the reduced dust standard is known to the operator and to MSHA. The operator can then determine the controls needed to comply with this standard and the MSHA inspector then knows what standard is to be enforced. When the inspector samples in the future, whether it is a regularly scheduled sampling, or a reevaluation requested by the operator, he must first determine whether the operator is complying with the standard in place. If the operator fails to comply with the reduced standard, a citation will be issued. MSHA states that this procedure is clearly stated at paragraph 6, page 1.24, of its Health Manual (Exhibit P-3).

MSHA further argues that it is well established that its interpretation of a regulation must be given great deference, citing Secretary of Labor v. Cannelton Industries, 867 F.2d 1432, 1435 (D.C. Cir. 1989), where the court stated that "the legislative history of the Mine Act indicates that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts. S.Rep. No. 181, 95th Cong., 1st Sess. 49 (1977) reprinted in 1977 U.S. Code Cong. & Admin. News 3401, 3448."

In those instances where MSHA and a mine operator may both have reasonable interpretations of a regulation, MSHA concludes that its interpretation is preferred, citing Secretary of Labor v. Western Fuels-Utah, 900 F.2d 318, 321 (D.C. Cir. 1990), where given a choice between competing interpretations of 30 C.F.R. 48.2 "Supervisory personnel" exception, the court held that i must defer to MSHA's interpretation, stating that "It is well settled that an agency's interpretation of its own regulation is

The respondent maintains that the citation was not issued based upon the concentration of respirable dust and percentage of quartz in the mine atmosphere of the active workings on February 8, 1993, but rather, MSHA issued the citation based upon the average concentration of respirable dust on February 8, 1993, and the percentage of quartz in the mine atmosphere at a different location during August and September 1992. The respondent points out that the percentage of quartz in the mine atmosphere of the active workings of the MMU 023-0 on February 8, 1993, was deemed by MSHA to be irrelevant in determining whether a violation of section 70.101 occurred on that day.

In further support of its position, the respondent relies on the reference in section 70.101 to the quartz content of the respirable dust in the mine atmosphere of the active workings and the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed. "Acting workings" is defined by section 70.2(b) as "any place in a coal mine where miners are normally required to work or travel." The evidence establishes that the area in which the sample was taken that established the respirable dust standard that the respondent allegedly violated on February 8, 1993 (i.e., the area in which MMU 023-0 was operating during August and September 1992) was part of the gob area on February 8, 1993, and the respondent maintains that this area was unquestionably not an area where miners were normally required to work or travel on February 8, 1993. However, the MSHA samples that were taken on February 8, 1993, that determined an average concentration of respirable dust of 1.0 milligrams and two percent quartz were from the active workings.

Respondent asserts that it did not violate section 70.101, on February 8, 1993. In support of its position, the respondent relies on the fact that based on the February 8, 1993, MMU 023-0 samples, MSHA determined that the average concentration of respirable dust was 1.0 milligrams per cubic meter of air, and determined the quartz percentage to be two percent, and the inspector acknowledged that this was the case. However, the respondent points out that if the mine atmosphere contains two percent quartz, then according to section 70.101, it would be allowed up to 2.0 milligrams of respirable dust per cubic-meter of air.

The respondent concludes that on February 8, 1993, when the respirable dust in the mine atmosphere of the active workings of MMU 023-0 contained less than five percent quartz, it was in fact maintaining the average concentration of respirable dust in the mine atmosphere during the shift in which the sample was taken in the active workings below two milligrams per cubic meter of air as measured with an approved sampling device, and as determined by MSHA. Accordingly, no violation of Section 70.101 occurred as alleged in the citation.

The respondent argues that contrary to the inspector's testimony, MSHA's health specialist George Niewiadomski stated that according to MSHA policy MSHA cannot make a determination of the quartz percentage in the cited area on February 8, 1993, based upon the one sample taken that day, and that the standard would be based on multiple samples. Respondent emphasizes MSHA's contention that it could not readjust the respirable standard to 2.0 milligrams based upon the February 8, 1993 sample because, as the inspector stated, "You got to go through the guidelines." (Tr. 50).

The respondent asserts that there are many occasions in which MSHA establishes a new standard based upon one sample. It cites Mr. Niewiadomski's testimony that a quartz determination is based upon one sample when the operator does not submit any optional samples, when an optional sample lacks adequate weight for purposes of testing for quartz, or when the operator's sample is damaged in transit. Acknowledging the fact that MSHA policy allows it the right to submit one or two optional samples, the respondent believes that there is no incentive for it to do so if the quartz is determined to be less than five percent by MSHA's analysis. Based upon the one MSHA analysis of two percent quartz, the respondent would have the reduced standard eliminated and be placed again on the 2.0 milligrams per cubic meter of air respirable dust standard. Even if it had submitted two more samples for quartz analysis and MSHA determined that these two samples contained zero percent quartz, the respondent points out that it would still have been placed on the 2.0 milligram standard.

The respondent confirms that in this case it did submit a first optional sample but not a second one, and that it did so because it was informed by the MSHA district office that the quartz percentage would not be determined by the February 8, 1993 sample, but rather on a rolling basis. The respondent concludes that neither MSHA's district office nor the respondent understood the policy MSHA was enforcing and that the confusion created by the existing policy is evidenced by MSHA's need to bring a specialist from Arlington, Virginia to the hearing to explain the policy.

The respondent asserts that MSHA does establish a new respirable dust standard based upon one quartz analysis if the operator does not submit additional samples. Since an operator would receive no benefit from submitting additional samples when MSHA's quartz analysis determined the mine atmosphere to contain less than five percent quartz, the respondent believes it would be reasonable for MSHA to then eliminate the reduced standard requirement for the operator as of the date MSHA took the sample. In this case, the respondent points out that while MSHA took a sample evidencing two percent quartz on February 8, 1993, the

respirable dust standard was not adjusted to the 2.0 milligram standard until March 30, 1993, when it was officially notified of the new standard.

The respondent argues that MSHA's respirable dust compliance policy is inconsistent with the requirements of section 70.101, for determining the amount of quartz in the active workings. The respondent maintains that it is the MSHA samples that were taken on February 8, 1993, in the active workings of the 4 South Longwall Panel, and not those taken in August and September 1992, that were relevant for determining compliance with this section. Yet, MSHA policy required that compliance be based upon a sample taken approximately six months earlier in an area that was no longer part of the active workings as of February 1993.

The respondent takes the position that MSHA's policy fails to achieve the stated purpose to protect miners, and that MSHA has acknowledged that the actual amount of quartz present in the mine atmosphere of the cited MMU on February 8, 1993, is irrelevant to determining whether a violation of the respirable dust standard existed on that day. Even though it is undisputed that the amount of quartz in the atmosphere varies with the location in the mine, respondent believes that MSHA's policy does not take this into account, and, as Mr. Niewiadomski testified, the established quartz standard remains even if the MMU is moved to another mine. Conceding that it could request another survey if it provides evidence justifying a reevaluation, the respondent believes it could easily be several months before a new standard would be established following such a request.

The respondent argues that the obvious intent of the regulation is to provide for the miners to breathe a smaller concentration of respirable dust when the percent of quartz in the mine atmosphere at the active workings is higher and to provide for the issuance of a violation when the concentration of respirable dust is higher than section 70.101 permits, based upon the percent of quartz present. However, in this case, the respondent points out that it received the Citation despite the mine atmosphere at MMU 023-0 on February 8, 1993, being well in compliance with section 70.101, when the mine atmosphere contained only two percent quartz and the average concentration of respirable dust was only one milligram, one-half of the concentration deemed acceptable in a mine atmosphere containing as high as five percent quartz.

The respondent concludes that MSHA has basically acknowledged the failure of its policy to protect miners, and points out that the citation in this case was modified to non-"S&S" because the mine environment was only two percent quartz, and the inspector was of the opinion that breathing one milligram of respirable dust in an atmosphere of two percent quartz does not subject one to a health hazard.

The respondent cites the fact that MSHA vacated a citation issued in a similar situation. Respondent states that on March 1, 1993, Inspector Zirkle issued a violation based upon the result of five respirable dust samples collected by the respondent during the January/February 1993 bi-monthly sampling cycle. The average concentration of respirable dust for the applicable mechanical mining unit was 1.4 milligrams per cubic meter of air which exceeded the reduced standard then in effect of 0.9 milligrams per cubic meter of air. However, based upon the 3% quartz found in MSHA's sample from the same MMU on February 5, 1993, and the 2% quartz found in the operator's first optional sample of February 26, 1993, MSHA vacated the citation and acknowledged that the quartz percentage at the subject location was sufficiently low at the time the samples were taken that the reduced standard was applicable (Exhibits R-1 through R-4; Tr. 59-63).

The respondent states that the amount of quartz in the mine varies with the mine location and is dependent upon the material in the roof, bottom, and face areas. Respondent points out that the amount of quartz that will be encountered can be approxi-imately determinated by its geologist Steve Doe as he explained in the course of the hearing, and that based on the anticipated mining conditions, it submitted a sample to its laboratory. The laboratory analysis showed 4.38 percent quartz in the sample, and as a result, the respondent's general manager sent a letter to MSHA's district manager on January 15, 1993, requesting a repeat respirable dust survey (Joint Exhibit 6). However, the standard was not revised until more than two months later.

The respondent believes it is clear that MSHA policy does not provide for there to be any correlation between the concentration of respirable dust and the amount of quartz that the miner is breathing in the active workings, and it points to the testimony of Mr. Niewiadonski that the entire process from the time the inspector takes a sample until a new standard is established can be from three to eight weeks, and this time is required in order for an operator to be able to collect and mail optional samples and have those samples analyzed. Respondent also believes that the February 8, 1993, quartz sampling was the result of chance rather than a response to its request. The respondent concludes that but for the chance quartz analysis of February 8, an even greater time would have expired before its request and MSHA's response.

The respondent argues that "the absurdity of the MSHA policy" is further exemplified by the procedure by which an operator is granted a repeat respirable dust survey. The respondent states that according to MSHA policy, "In those instances when a mine operator or miner representative makes a justifiable request for a repeat respirable dust survey to determine quartz content, MSHA will collect samples to first

determine whether there is compliance with the applicable dust standard before submitting for quartz analysis," (Exhibit P-3, paragraph 6, p. 1.24, Tr. 97). If there is a violation of the existing standard at the time of the repeat respirable dust survey, the inspector will issue a citation and require corrective action to be taken so that the operator will be in compliance with the then existing standard (Tr. 97-99).

The respondent further asserts that after an operator has presented a "justifiable request" for a repeat survey, which request would presumably be based upon the operator having acquired evidence that the reduced quartz standard should no longer be applicable due to changed mining conditions, MSHA will issue a violation if the operator is not in compliance with an outdated standard based upon a quartz percentage determined in an area that the operator believes to have had considerably more quartz than the area in which the operator is then mining. Thus, by requesting a survey, the respondent concludes that an operator is exposing itself to the issuance of a violation based upon a standard that the operator (and most likely in many situation MSHA) believes to be no longer applicable. Then, if a violation is issued, the operator must comply with the no longer applicable reduced standard. The respondent finds it difficult to comprehend how this policy promotes the health of the miners.

The respondent states that in the instant case MSHA took the samples on February 8, 1993, issued the violation on February 18, 1993, and issued a notice on February 19, 1993, that the quartz percentage was 2% based on the sample taken on February 8. The respondent points out that there is no particular time period during which an inspector is required to issue a citation, and had the inspector here waited until February 19, 1993, or had he been immediately notified of the results of the analysis of the quartz sample, he would have known both the quartz percentage and the average concentration of respirable dust in the mine atmosphere at the cited location on February 8, 1993, prior to issuing the citation. The respondent submits that in order for MSHA to act in accordance with 70.101, the inspector should have then not issued the citation, although this is contrary to MSHA policy.

In response to MSHA's argument that enforcement "works both ways", and that it cannot tell on the date it takes the sample what the quartz percentage is going to be, and thus must enforce the standard that was previously established, the respondent asserts that by simply waiting until the quartz analysis is completed MSHA can at least determine in situations in which the sample has less than 5% quartz and the average concentration of respirable dust is less than the 2.0 milligram standard that no citation is warranted.

Considering how rapidly mining conditions change, the respondent maintains that MSHA is not making a determined effort to bring the time in which the average concentration of respirable dust is determined as close as possible to the time in which the quartz percentage is determined. Even though the inspector testified that he conducted sampling at the Meigs No. 2 Mine approximately 12 times per year, according to MSHA policy, MSHA determines quartz percentage only two times per year. Based upon the MSHA district manager's letter of February 23, 1993, advising that its request for a dust reevaluation "will be complied with as soon as the work load permits", the respondent concludes that months could easily pass before a justifiable request for a repeat survey to determine quartz percentage would be acted upon by MSHA.

Responding to Mr. Niewiadomski's testimony that MSHA does not know the quartz percentage in the mine atmosphere as of the date it takes the samples to determine the concentration of respirable dust, the respondent believes that MSHA could have known in this particular case because during a January 26, 1993, inspection of the mine, the inspector was informed that the respondent had requested a quartz technical inspection, and this was almost two weeks before the inspector took the samples to determine compliance with the standard that was established the previous August.

The respondent points out that MSHA has acknowledged that a policy interpretation that is inconsistent with the regulation is not controlling. The respondent asserts that while section 70.101, requires a correlation in time and location between the quartz percentage in the active workings and the concentration of respirable dust in the active workings, MSHA's interpretation of this section does not. The respondent maintains that MSHA's interpretation clearly ignores the percent of quartz in the mine atmosphere at the time during which the samples that provide the basis for a violation are taken. Citing American Mining Congress v. Marshall, 671 F.2d 1251, 1256 (10th Cir. 1982), where the court ruled that a new procedure instituting a "designated area sampling" program was proper, the respondent noted that the court observed that such a program was ". . . . designed to measure the concentration of respirable dust to which miners are exposed as they work and travel in outby areas."

On the facts of this case, the respondent concludes that MSHA's policy is not fair, logical, or reasonable, because the respirable dust standard was based upon the percentage of quartz present in an abandoned area that was mined six months earlier, and MSHA's method imposes a standard unrelated to the miner's exposure. The respondent points out that based upon changed mining conditions, it knew more than a month prior to the issuance of the citation, that the quartz percentage used by MSHA in determining compliance with 70.101, did not approximate the

miner's exposure and so informed MSHA. Yet, according to its policy MSHA is bound to not revise the standard which it may have already determined to be outdated since the repeat respirable dust survey is done when it receives a "justifiable request."

The respondent argues that while the clear objective of section 70.101, is for miners to breath a lesser concentration of respirable dust when the percent of quartz is higher, MSHA's policy is not in harmony with this objective.

The respondent maintains that MSHA'S interpretation of section 70.101, impermissibly broadens the meaning of "active workings". The respondent attacks the correctness of MSHA's contention that the respondent's interpretation of "active workings" is impracticable because the respondent would not have knowledge of the applicable standard that it must meet if it were continually changing, that the phrase "active workings" is not intended to mean "any place in a normally required to work or travel," as defined by section 75.2, but rather the area in which the mechanical mining unit (MMU) was previously in operation, and MSHA's presumption that since the same equipment and occupations follow the MMU, there is no reason to assume that miners will not be exposed to the same levels of quartz.

In response to MSHA's contentions, the respondent argues that the percent of quartz in the mine atmosphere is related to the geological conditions, not the MMU. While the respondent may not be able to determine on a daily basis the exact percentage of quartz in the mine atmosphere, it maintains that it does know when geological conditions have changed and the quartz percentage has greatly increased or decreased, but that MSHA's policy ignores these changes. Because MSHA only takes samples for quartz percentages two times a year, the respondent concludes that it can easily take two months thereafter for a new quartz percentage to be established, and it is unlikely that MSHA policy ever results in a correlation between the quartz percentage and the amount of respirable dust in the mine atmosphere. Recognizing that MSHA policy acknowledges that changed mining conditions result in changes in the level of quartz by providing for rechecking the quartz percentage every six months and supposedly rechecking upon an operator's request, the respondent believes that the checks are too infrequent to accurately reflect mining conditions.

The respondent concludes that based on the MSHA samples taken on February 8, 1993, only MSHA policy and not section 70.101, was violated. Since it believes that the policy is inconsistent with both the plain language and purpose of section 70.101, and should not be enforced, the respondent maintains that the citation should be vacated and no penalty should be assessed.

The respondent suggests that MSHA can readily implement three improvements to its policy to reflect the requirements of section 70.101: (1) MSHA could more rapidly respond to an operator's request for a repeat respirable dust survey and expedite the process of establishing a new standard when it is appropriate; (2) MSHA could more frequently determine quartz analysis by making such a determination each time it checks to determine compliance by sampling for the average concentration of respirable dust; and (3) MSHA should not cite an operator when the operator has requested a repeat respirable survey and determines that the quartz percentage and the amount of respirable dust in the active workings as of the day the samples are taken are in compliance with the formula set forth in 70.101

Findings and Conclusions

The fundamental statutory Mine Act requirement with respect to the respirable dust standard is that the average concentration of dust be continuously maintained at or below 2 milligrams per cubic meter of air (2.0 mg/m3). Section 202(b)(2) of the Act, 30 U.S.C. 842(b)(2) provides in relevant part as follows:

> . . . 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 such mine is exposed at or below 2.0 milligrams of respirable dust . . . (emphasis added).

The statutory limitation of 2.0 milligrams of respirable dust is codified as part of MSHA's mandatory regulations at 30 C.F.R. 70.100(a), which provides as follows:

> (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). (Emphasis added).

Pursuant to section 205 of the Act, whenever the respirable dust in the mine atmosphere contains more than 5 percent quartz, the 2 milligram standard must be lowered, and the operator is required to maintain the respirable dust below the 2 milligram average concentration. Section 205 of the Act, provides as follows:

> In coal mining operations where the concentration of respirable dust in the mine atmosphere of any working place contains more than 5 percent quartz, the Secretary of Health, Education and Welfare shall prescribe an appropriate formula for determining the applicable respirable dust standard under this title for such working place and the Secretary [of Labor] shall apply such formula in carrying out his duties under this title. (Emphasis Added)

The regulatory lowered respirable dust standard when more than 5 percent quartz is present is codified at 30 C.F.R. 70.101, the regulation allegedly violated by the respondent i this case, and it states as follows:

> When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the 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 is exposed at or below a concentration of respirable dust, expressed in milligrams 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), computed by dividing the percent of quartz in to the number 10. (Emphasis added).

30 C.F.R. 70.207(a) requires a mine operator to take bimonthly samples of respirable dust from the designated occupation in each mechanized mining unit (MMU). A mechanized mining unit is defined in relevant part by section 70.2(h), as "a unit of mining equipment including hand loading equipment used for the production of material." The designated occupation is defined in section 70.2(f), as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." In the instant case the MMU consists of the longwall tail shearer, shield puller, headgate operator, mechanic, and foreman (Joint Exhibit-1), and the designated high risk occupation is the tail shearer.

MSHA's policies and procedures with respect to a reduced dust standard due to excessive levels of quartz are set out in four exhibits consisting of a February 15, 1989, six-page portion of MSHA's Coal Mine Health Inspection Procedures (Exhibit P-3); two pages from the July 1, 1988, Program Policy Manual (Exhibit P-1); a one-page Policy Memorandum No. 85-7c, dated November 12, 1985 (Exhibit P-5); and a four page memorandum HQ-85-133-H, dated November 11, 1985 (Exhibit P-4).

~1129

MSHA's inspection procedures provide in relevant part at pgs 1.26 and 1.27 (Exhibit P-3):

> 8. MSHA's procedures for applying a reduced standard will parallel those of issuing citations on an MMU. This includes keeping the reduced standard, as well as any citations issued for exceeding the reduced standard, with an entity when it moves to a new location. Some situations that may occur as sampling results are received and entities move to new locations are addressed in the following:
>
> a. An MMU is operating in location 1 under a reduced standard and is moved to location 2 (for example, 3000 feet away). The reduced standard remains in effect on that MMU in location 2. If subsequent sampling by MSHA or the operator indicates a violation of the reduced standard at location 2, the inspector issues a citation.
>
> b. An MMU is operating in location 1 under a reduced standard and a citation is in effect. Mining is completed in location 1 and the MMU is moved to location 2 (for example, 3000 feet away). The citation remains in effect until the violation is abated.
>
> 9. Revaluation of an entity's airborne quartz levels may become necessary because of the following:
>
> a. Changing conditions - such as cutting more or less roof or bottom variation in the coal seam parting, etc. - have resulted in increased or decreased quartz content.
>
> b. Improved dust controls - mine operator requests MSHA to resample because of improved mining methods, ventilation controls or engineering controls.

The evidence in this case establishes that the 0.8 milligram standard for the cited MMU was based on dust samples collected by

MSHA on August 12, 1992, and subsequent samples submitted for quartz analysis during August and September 1992. The respondent was notified on October 6, 1992, that the 0.8 milligram standard applied to the MMU. It is undisputed that the reduced respirable dust standard for the cited MMU was the result of levels of quartz in excess of five percent at the sampled MMU atmosphere. Accordingly, I conclude and find that there is a direct correlation between the presence of quartz at the MMU location where sampling is done and any reduced dust standard that may follow from such sampling.

In the instant case, the respondent is charged in a citation issued on February 18, 1993, with an alleged violation of section 70.101, that purportedly occurred on February 8, 1993, when the results of five valid respirable dust samples collected that day by MSHA reflected an average concentration of respirable dust of 1.0 mg/m3, which exceeded the allowable standard of 0.8 mg/m3 that had previously been established for the cited MMU as the result of sampling that took place some six months earlier beginning on August 12, 1992.

The term "active workings" is defined by section 70.2(b), as "any place in a coal mine where miners are normally required to work or travel". Although the evidence in this case establishes that the reduced 0.8 milligram respirable dust standard for the cited MMU was based on sampled quartz levels taken during August and September 1992, when the MMU was located in the active workings of the mine, when the citation was issued on February 8, 1993, the prior MMU location was a gob area and no longer part of the mine active workings where miners were required to work or travel. Even though the evidence establishes that the average concentration of respirable dust on the MMU on February 8, 1993, was 1.0 milligrams, and that the reduced quartz level of 2 percent would normally have allowed for 2.0 milligrams of respirable dust at that location, the inspector ignored this and issued the violation because the respondent exceeded the previously fixed reduced standard of 0.8 milligrams, based on quartz sampling at the earlier active working area which no longer existed when the violation was issued.

Inspector Zirkle confirmed that even though the respondent had more than complied with its approved dust control plan by increasing the air velocity and adding additional water sprays, it still exceeded the 0.8 milligram standard that he applied when he issued the violation on February 8, 1993, pursuant to MSHA's policy procedures that require him to consider the fact that the reduced dust standard in place at that time moves with the MMU and remains in place regardless of the actual mine atmosphere conditions at the new MMU location, and the decreased levels of quartz exposure at that location.

Inspector Zirkle agreed that the quartz percentage in the mine varies with the roof conditions and the presence and location of stone which produces quartz when it is cut (Tr. 32). Mr. Niewiadomski agreed that quartz levels can vary significantly and he confirmed that the mine conditions had changed on February 8, 1993, as reflected by the sampling on that day which indicated a reduction in the quartz present in the MMU atmosphere (Tr. 108, 124). Notwithstanding these changed mining and atmospheric conditions, and the increased air velocity and water sprays in excess of the approved dust control plan, the inspector considered the atmosphere of that unit to be irrelevant to any determination of a violation in this case.

As noted earlier, Mr. Niewiadomski agreed that quartz levels can vary significantly and he believed that it was important that any sampling that is done is representative of typical mining conditions (Tr. 108, 144). Under the circumstances, I find it difficult to comprehend the logic of MSHA's policy interpretation that the "active workings" follow the MMU, and that once a reduced respirable dust standard based on the level or percentage of quartz present in the MMU atmosphere is established, that standard follows the MMU to the new location regardless of the presence or absence of quartz at that location. Indeed, under MSHA's policy interpretation, if the MMU in this case were moved to another mine the reduced allowable average respirable dust exposure standard would move with it without regard to the atmospheric quartz environment at that new location, and the respondent would be held accountable and liable for a penalty assessment for not complying with a standard at that location based on a quartz exposure that may not exist. I cannot reconcile this contradictory logic, nor can I conclude that such a procedure provides a credible or probative evidentiary basis for establishing non-compliance and proving a violation in this case.

As correctly stated by MSHA, the Tenth Circuit in American Mining Congress v. Marshall, supra, held that the Secretary had discretion to adopt the "designated area sampling" program to measure the concentration of respirable dust to which coal miners are exposed as they go about their daily business. I agree that the Secretary need only show a rational basis for such a program as long as it is reasonably calculated to prevent excessive exposure to respirable dust. However, on the facts of the instant case, I cannot conclude that MSHA's policy interpretation of "active workings" as following the MMU, when applied in an enforcement action seeking to hold the respondent accountable for a violation of section 70.101, for exceeding the lowered respirable dust standard due to the presence of quartz is rational, particularly since it requires the inspector to ignore the absence of quartz, or reduced quartz exposure at the MMU location where the alleged violation occurred.

It seems clear to me that the objective and intent of the requirement found in Section 70.101, for maintaining a reduced respirable dust exposure level when quartz is present, is to insure that miners are protected from the hazards associated with breathing respirable dust containing quartz levels in excess of five percent in the atmosphere of the active workings. What troubles me in this case is that the alleged violation is based on a reduced quartz respirable dust standard that was based on sampling that occurred some six months earlier on an MMU in an active working area that had been mined out and no longer existed when the MMU moved to a new location where further sampling established reduced levels of quartz and compliance with the newly computed standard at that location. In short, on the facts of this case, it would appear to me that miners working at the cited MMU location on February 8, 1993, were not in fact exposed to hazards associated with breathing respirable dust containing quartz levels in excess of 5 percent in the environment of that MMU at that particular location.

I conclude that in order to establish a violation of section 70.101, in this case, MSHA must prove by a preponderance of the credible evidence that on February 8, 1993, the respirable dust in the active workings atmosphere where the cited MMU was located contained more than 5 percent quartz, and that the respondent failed to maintain the average concentration of respirable dust in the active working mine atmosphere at that location at or below a concentration computed in accordance with the formula found in section 70.101, based on the presence of quartz in excess of five percent.

Based on the facts and evidence adduced in this case, I find that on February 8, 1993, the day of the alleged violation, the respirable dust in the mine atmosphere of the cited MMU active workings contained less than 5 percent quartz, and that the respondent maintained the average concentration of respirable dust in the mine atmosphere during the shift in which the sample was taken in the active workings below 2 milligrams per cubic meter of air. Under the circumstances, I find that the respondent was in compliance with the cited standard and that MSHA has failed to prove a violation. Accordingly, the contested citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) non-"S&S" Citation No. 3540906, February 18, 1993, citing an alleged violatin of 30 C.F.R. 70.101, IS VACATED, and the petitioner's civil penalty proposal IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Bldg., 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

David M. Cohen, Esq., American Power Service Corp., One Memorial Drive, Box 700, Lancaster, OH 43130 (Certified Mail)

/ml