

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 18, 2023

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

AMERICAN TRIPOLI,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2023-0196  
A.C. No. 23-00504-577169

Mine: MOSenecaMfr LLC dba American  
tr

**ORDER ON MOTION TO EXPEDITE**

Before the Court is Respondent, American Tripoli’s “Motion to expedite proceedings with respect to certain enforcement actions.” (“Motion”). Pursuant to 29 C.F.R. §§ 2700.10 and 2700.52, American Tripoli (“Tripoli”) “specifically requests that a hearing on Citation Nos. 9539786 and 9539787 and Order Nos. 9539789 and 9539790 be heard on an expedited basis,” and it adds that because of “its factual similarity in allegations, Citation No. 9539788 should also be included in the expedited proceeding.” Motion at 1. Thereafter, the Secretary filed its Opposition to the Motion. (“Opposition”). The Court held a conference call on December 7, 2023, to better understand the controversy. (“Conference Call”)

For the reasons which follow, the Court **GRANTS** the Motion for an **EXPEDITED PROCEEDING** for the purpose of a hearing on the citations and orders identified above. The Court notes that there is the related Secretary’s Motion to Compel Discovery, which was filed on November 30, 2023. A ruling on that discovery motion will be forthcoming. Because the Court is issuing its Order for Docket Reallocation today, that discovery issue will be limited to Citation Nos. 9539786, 9539787 and 9539788 to the new docket, along with all related actions such as the (b) orders and the numerous modifications to them. Following its ruling on the Secretary’s Motion to Compel Discovery, the Court will be promptly arranging a conference call to establish a date for the commencement of a hearing regarding these matters.

## Background

Briefly stated, first there is **Citation No. 9539786**, which alleges a violation of 30 C.F.R. § 56.5001(a) and 30 C.F. R. 56.5005.<sup>1</sup> The former standard speaks to the requirement that “exposure to airborne contaminants ... shall not exceed the TLV's established by the American Conference of Governmental Industrial Hygienists.” *Aluminum Company of America*, 15

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<sup>1</sup> The full text of these provisions appears here: 30 C.F.R. § 56.5001(a), titled, “Exposure limits for airborne contaminants,” provides “Except as permitted by § 56.5005 - (a) Except as provided in paragraph (b) of this section, the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled “TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973,” pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental industrial Hygienists by writing to 1330 Kemper Meadow Drive, Attn: Customer Service, Cincinnati, OH 45240; <http://www.acgih.org>”, or may be examined in any Metal and Nonmetal Mine Safety and Health District Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.”

30 C.F.R. § 56.5005, titled “Control of exposure to airborne contaminants,” provides “Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted, engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Respirators approved by NIOSH under 42 CFR part 84 which are applicable and suitable for the purpose intended shall be furnished and miners shall use the protective equipment in accordance with training and instruction.

(b) A respirator program consistent with the requirements of ANSI Z88.2–1969, published by the American National Standards Institute and entitled “American National Standards Practices for Respiratory Protection ANSI Z88.2–1969,” approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 25 W. 43rd Street, 4th Floor, New York, NY 10036; <http://www.ansi.org>”, or may be examined in any Metal and Nonmetal Mine Safety and Health District Office of the Mine Safety and Health Administration.

(c) When respiratory protection is used in atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment.”

FMSHRC 1821, n.6. The latter standard requires the use of respirators “which are applicable and suitable for the purpose intended.” *Couer-Rochester* 1995 WL 502650, (Aug. 1995) (ALJ).

As mentioned, Tripoli’s Motion also seeks to include Citation No. 9539788 in its motion. That citation cites 30 C.F.R. §56.5002. That standard is brief. Titled, “Exposure monitoring,” it provides “Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.”

The full text of the alleged violation contained in the section 104(a) Citation No. 9539786, stated:

The Mill Associates were exposed to a shift-weighted averages of 1.64 mg/m<sup>3</sup>, [**‘mg/m<sup>3</sup>’** stands for one-thousandth of a gram per cubic meter of air] 1.33 mg/m<sup>3</sup>, and 1.77 mg/m<sup>3</sup> respirable silica-bearing dust on 03/21/2023. This exceeded the Threshold Limit Value (TLV) of 0.15 mg/m<sup>3</sup> times the error factor (1.20 for respirable free silica dust sampling and analysis). A Respiratory Protection Program (RPP) meeting the requirements of ANSI Z88.2 - 1969 was not in place. The operator's RPP was deficient in that; the mine operator had not conducted their own sampling as required, there was no-one administering the program (the program states that it will be administered by the Safety Manager, a position that is currently open at the mine), the miners have not been medically evaluated to be able to wear a respirator, the respirators listed in the plan were not approved at the miner's exposure level, and the miners had not been fit tested. The abatement date has been set to allow the operator time to: correct their RPP to be compliant with ANSI Z88.2-1969, have all affected miners medically evaluated to be able to wear a respirator, and to provide approved, fit tested, respiratory protection for all affected miners (Any powered air-purifying respirator with a high-efficiency particulate filter (PAPR), or Any supplied-air respirator operated in continuous-flow mode). The mine operator must establish engineering controls to reduce the silica-bearing dust exposure to less than the TLV.

Petition at 85.

The 104(a) citation listed the injury or illness as “highly likely” and “permanently disabling,” and consequently as “significant and substantial.” The negligence was listed as “high.”

Then there is **Citation No. 9539787**, another 104(a) citation. It alleged the same standards alleged to have been violated in Citation No. 9539786 – 30 C.F.R. § 56.5001(a) and 30 C.F.R. 56.5005. The full text of the alleged violation contained in that section 104(a) citation stated:

Standard 56.5001(a)/56.5005 was cited 1 time in two years at mine 2300504 (1 to the operator, Oto a contractor). The Operations Manager was exposed to a shift-weighted average of 0.5 mg/m<sup>3</sup> of respirable silica-bearing dust on 03/21/2023. This exceeded the Threshold Limit Value (TLV) of 0.15 mg/m<sup>3</sup> times the error factor (1.20 for respirable free silica dust sampling and analysis). A Respiratory Protection Program (RPP) meeting the requirements of ANSI Z88.2-1969 was not in place. The operator's RPP was deficient in that; the mine operator had not

conducted their own sampling as required, there was no-one administering the program (the program states that it will be administered by the Safety Manager, a position that is currently open at the mine), the miner had not been medically evaluated to be able to wear a respirator, the respirators listed in the plan were not being fit tested each time they were donned, and the miner had not been fit tested. The abatement date has been set to allow the operator time to: correct their RPP to be compliant with ANSI Z88.2-1969, have the miner medically evaluated to be able to wear a respirator, and to provide approved, fit tested, respiratory protection for the affected miner (Any particulate respirator equipped with an N95, R95, P95, N99, R99, P99, N100, R100, or P100 filter). The mine operator must establish engineering controls to reduce the silica-bearing dust exposure to less than the TLV.

Petition at 87.

The issuing inspector evaluated the gravity, and negligence the same as he had for Citation No. 9539786, similarly marking alleged violation as “significant and substantial.”

**Last there is Citation No. 9539788**, which is of a piece with the two citations identified above. Recall that the operator requested that standard’s inclusion in its motion. Citing 30 C.F.R. §56.5002, as pertinent here, that standard requires dust surveys to be conducted as frequently as necessary to determine the adequacy of control measures. That citation, at least as alleged on its face, made out a violation as it asserted no dust surveys were being conducted:

The mine operator was not conducting dust surveys in the mill building to ensure the provided dust collection and ventilation controls were adequate to prevent overexposure to silica-bearing dust. Elevated dust levels above the TLV were present in the mill building on 03/21/2023 (citations#: 9539786 and 9539787). The initial abatement date has been set to allow the mine operator time to survey their current dust collection and ventilation systems and to make arrangements for dust sampling and analysis.

Petition at 89.

All three citations were issued on the same day, April 30, 2023, and within an hour of one another and they all involved the mill building. All provided the same abatement date, April 7, 2023.

### **Respondent’s Motion**

Respondent’s Motion states that, as a consequence of the above-described citations, and more particularly as a result of the issuance on April 12, 2023, of section 104(b) orders, Order Nos. 9539789 and 9539790,<sup>2</sup> issued in the wake of and associated with Citation Nos. 9539786 and

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<sup>2</sup> The texts of the 104(b) orders are reflected here: Order No. 9539789 stated in relevant part: “No apparent effort was made by the operator to; correct their Respiratory Protection Program (RPP) to be compliant with ANSI Z88.2-1969, have all affected miners medically evaluated to be able to wear a respirator, to provide approved, fit tested, respiratory protection for all affected

9539787 for the alleged lack of any effort to correct the defects identified in those citations, the mine is unable to continue to operate. That the mine cannot operate in any meaningful production capacity is not contested by either side; the orders have effectively shut the operation down. Conference Call at 4.

Both Orders were subsequently modified 12 times. Subsequent Action Nos. 9539789-02 through 9539789-13 and Subsequent Action Nos. 9539790-02 through 9539790-13. That these modifications occurred are also uncontested.

Respondent asserts that it “provided miners with medical evaluations and respiratory protection, performed troubleshooting on the Mill Building, performed remedial work and implemented controls, which MSHA recognized,” citing Respondent’s Exhibit C at 2-4; and Exhibit D at 2-4. Respondent also states that “[o]n April 27, 2023, MSHA modified both Order Nos. 9539789 and 9539790 to allow production to resume by issuing Subsequent Action Nos. 9539789-05 and 9539790-05,” citing Exhibit C at 5; Exhibit D at 5. Motion at 5.

Respondent then states that “[o]n October 11, 2023, MSHA reversed course and issued Subsequent Action Nos. 9539789-08, -09 and -10 and 9539790-08, -09 and -10, which modified Order Nos. 9539789 and 9539790, respectively, and prohibited any production activities in the Mill Building. ...[and that] [a]s a result, since that time, production at American Tripoli has ceased.” *Id.*, citing Exhibit C at 8-10; Exhibit D at 8-10.

It is Respondent’s contention that the civil penalty docket is the appropriate venue for challenging Order Nos. 9539789 and 9539790 and the subsequent actions for each and that MSHA’s “subsequent action modifications prohibiting production activities, are invalid, unreasonable and contrary to law and fact.” *Id.*

Respondent reports that the parties have attempted to negotiate a plan by which American Tripoli would be able to operate pending termination of Citation Nos. 9539786 and 9539787 (and, correlatively, Order Nos. 9539789 and 9539790) but such negotiations have not yielded a resolution. *Id.* at 6.

In sum, Respondent declares that “expedition of the proceeding relative to Citation Nos. 9539786 and 9539787 and Order Nos. 9539789 and 9539790 is necessary. Given that American Tripoli is presently prohibited from engaging in production, if an expedited hearing is not granted, American Tripoli will be irreparably harmed,” and therefore it requests a hearing on those matters. *Id.* at 6.

### **The Secretary’s Opposition to the Motion to Expedite**

The Secretary’s Opposition to the Motion to Expedite (“Opposition”) raises three contentions: the Respondent’s window of time to challenge the 104(b) orders expired; it would be premature to have a hearing on Citation Nos. 9539786 and 9539787 because necessary discovery, including a pending motion to compel, is ongoing; and it would be wasteful to have a hearing on only some of the citations/orders in this docket. Opposition at 1.

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miners, or to establish engineering controls to reduce the silica-bearing dust exposure.” Order No. 9539790, essentially declared the same thing. Motion at 3-4.

All of this came about in the connection with the Secretary's issuance of the two citations referenced above (i.e. Citation Nos. 9539786 and 9539787) and the orders which followed in the wake of those citations. The citations and orders emanate from the allegations that the Respondent failed to have a compliant respiratory protection program. The Court agrees with the Respondent that Citation No. 9539788 should be included in this motion to expedite, as it is closely related to those other two citations. Certainly, the allegations and the orders pertain to very serious health matters, involving respirable silica dust.<sup>3</sup>

As the Secretary notes, the two citations assert that the Respondent's operations manager was exposed to dust levels three times the threshold limit value ("TLV") and that mill associates were exposed to dust levels ten times the TLV. Opposition at 1-2. The 104(b) Orders were issued about two weeks after the citations. Those two Orders asserted that

[n]o apparent effort [had been] made by the operator to correct their Respiratory Protection Program (RPP) to be compliant with ANSI Z88.2-1969, have all affected miners medically evaluated to be able to wear a respirator, to provide approved, fit tested, respiratory protection for all affected miners, or to establish engineering controls to reduce the silica-bearing dust exposure.

Order No. 9539789. (Order No. 9539790 uses the same language and therefore not repeated.)

The Orders *did not* remain static. Both were modified fourteen (14) times.<sup>4</sup> The Secretary states that it afforded the Respondent "nearly six months" to correct the dust exceedance issues but that the Respondent failed to act in "good faith or take reasonable steps to repair its dust collection system during this time period." *Id.* at 2. By the Secretary's account, it was then "left with no choice but to issue a modification to the 104(b) Orders that prohibited all dust producing activity in the mill building until engineering controls were established and the miners' respirable silica dust exposure had been reduced to below the threshold limit value." *Id.*

The Secretary asserts that the Respondent's real objective is to have the orders modified so that it can resume its mining operation. As mentioned, the Secretary contends the Respondent failed to challenge the orders within the time allowed. The Secretary maintains that it has been

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<sup>3</sup> It is noted that silica dust is particularly harmful. "Silica dust is 20 times more toxic than coal dust and causes severe forms of black lung disease even after a few years of exposure." Leah Willingham and Matthew Daly, *After decades of delays and broken promises, coal miners hail rule to slow rise of black lung*, AP, Aug. 5, 2023, <https://apnews.com/article/black-lung-silica-dust-coal-mining-west-virginia-be722098fcf2a20b16bd73ca12c06c7e>.

On July 13, 2023, MSHA issued a proposed rule to reduce the permissible exposure limit to respirable crystalline silica. <https://www.federalregister.gov/documents/2023/07/13/2023-14199/lowering-miners-exposure-to-respirable-crystalline-silica-and-improving-respiratory-protection>

<sup>4</sup> See, for example, Order No. 9539790-14, issued 12/05/2023.

more than reasonable in this matter as it made several modifications to the orders in April and July 2023 but that its patience ran out because the Respondent

failed to take any measurable steps to control respirable dust and install engineering controls in an attempt to terminate the citations ... [and] “also failed to consistently require miners to use respiratory protection exposing them to unacceptable levels of silica dust and serious health risks.

*Id.* at 4.

That asserted inaction left MSHA with no choice but to

prohibit ‘all dust producing activity in and around the Mill Building until all feasible engineering controls have been installed or repaired and personal respirable dust sampling by MSHA has shown that the engineering controls were effective and miners’ respirator silica dust exposure is below the [threshold value limit].’

*Id.* (bracket in original).

The Court notes the serious contention made by the Secretary that

[t]o date, *over seven months after the 104(b) Orders were first issued*, no consultant or expert has observed the mill running and therefore has not had the opportunity to fully address what engineering controls are necessary to correct the silica dust exposure.

*Id.* (emphasis in Opposition).

As noted, the Secretary contends that the Respondent failed to timely contest the 104(b) orders in this matter and that failing to timely contest is a jurisdictional bar to review. The Secretary also asserts that an expedited hearing on the citations should wait until discovery is completed. While the Secretary asserts that the Respondent’s reliance on the Commission’s decision in *Maple Creek*, 29 FMSHRC 583 (July 2007) (“*Maple Creek*”) is inapplicable to this matter, the Secretary’s fallback position is that if the case does support the proposition that the Commission has jurisdiction over orders not contested, then the Commission’s decision was wrongly decided and the Commission must defer to the Secretary’s view. *Id.* at 8.

## **Analysis**

### **The challenge to jurisdiction over the 104(b) withdrawal orders**

The Court does not agree with the Secretary’s position that the Respondent’s failure to challenge the 104(b) withdrawal orders within 30 days of their initial issuance, April 12, 2023, removes Commission jurisdiction over those orders. The Court relies upon the language of Sections 104(b) and 105(d) and the reasoning of the Commission in its *Maple Creek* decision. Once the Secretary launches actions under those provisions, the matters are then in the Commission’s hands. As noted in *Maple Creek*,

The Commission is clearly charged with administering the provisions of sections 105(a) and 105(d) of the Mine Act, which address the challenge of enforcement actions of the Secretary, the initiation of cases before the Commission, and the Commission's administration of hearings concerning the validity of those enforcement actions. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53, 56-59 (D.C. Cir. 1988) (where language of Mine Act was indecisive, court deferred to Commission's interpretation of section 104(d) regarding the issuance of withdrawal orders). As the Supreme Court stated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), the Commission was established as an independent review body to "develop a uniform and comprehensive interpretation" of the Mine Act (citing Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n before the Senate Comm. on Human Res., 95th Cong. 1 (1978)). Moreover, the question of how the procedures set forth in sections 105(a) and 105(d) are to mesh and how the Commission will conduct hearings involves a major policy component, which the Commission is uniquely qualified to establish.

Id. at \*6.

Accordingly, per that decision, "a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d)." *Id.*

**The Secretary's claim that it would be premature to have a hearing because necessary discovery must occur first.**

The Secretary has filed a Motion to Compel Discovery. Although the Court's decision on the discovery motion is addressed in a separate issuance, a few remarks are in order. This is not a typical case. The orders issued by MSHA have shut down production at the mine and that status is not disputed. Given the seriousness of the action taken by virtue of the MSHA orders, a production shut down of the mine product, it is the Court's view that the Secretary should be prepared to defend both the citations and the ensuing orders from the time they were issued. The assertion that the Secretary needs to first conduct "necessary discovery" is questionable, at least under circumstances when a mine is shut down.

Further, even presently, the Secretary's ability to have the citations and the orders upheld should not be difficult, assuming that it can establish the facts alleged in the citations and that those facts make out violations of the cited standards and then establish that, upon a follow-up inspection, the violations described in such citations have not been totally abated within the period of time allowed, and that the bases establishing that the period of time for the abatement should not be further extended, all by a preponderance of the evidence, the withdrawal orders would be upheld.

The contentions in the citations and the orders emanating from those citations, if established, represent serious health violations. That said, shutting down a mine from production is a serious action in its own right.



The Court has the authority to expedite proceedings before it. 29 C.F.R. § 2700.52. The decision to expedite is left to the Court's discretion.

Accordingly, based upon the reasons articulated above, the Court has determined that expedition of these proceedings is appropriate in this instance. To that end, the Court will be promptly arranging a conference to establish a date for the commencement of a hearing for these matters.

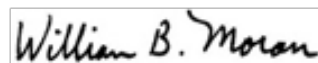
**The Secretary's claim that it would be wasteful to have a hearing on only some of the citations/orders in this docket.**

This claim is the weakest of the bases sought by the Secretary to avoid an expedited hearing and may be disposed of easily. While, ideally, hearing all citations within a given docket is preferred, the reality here is that the citations and orders sought for expedited review have a profound effect on the mine's operation by preventing production. The need for expedited review of those limited but profound matters clearly outweighs postponement of the hearing.

### **Conclusion**

Accordingly, based on the foregoing discussion, the Respondent's Motion to Expedite is **GRANTED**. As noted, upon issuance of the Court's Order on the Motion to Compel Discovery, a conference call will be scheduled to set a date and location for the expedited hearing.

**SO ORDERED.**



William B. Moran  
Administrative Law Judge

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