FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 6, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-20
Petitioner	:	A. C. No. 15-13720-03663
v.	:	
	:	Tall Timber Mine
RAWL SALES & PROCESSING CO.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
William C. Miller, II, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed 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 $3,407, for an alleged violation of mandatory respirable dust standard 30 C.F.R. ' 70.100(a), as stated in a section 104(a) AS&S@ citation issued by an MSHA inspector on May 29, 1996. Upon expiration of the initial abatement time, a second inspector issued a section 104(b) non-compliance order on July 10, 1996, which remained in effect for approximately five minutes, and subsequently terminated on July 18, 1996.

The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Pikeville, Kentucky. The parties filed posthearing arguments, and I have considered them in the course of my adjudication of this matter.

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

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory health standard, (2) whether the alleged violation is ASignificant and Substantial@ (S&S), and (3) the appropriate civil penalty to be assessed for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

An additional issue raised in the course of the hearing is whether or not the validity of the uncontested section 104(b) non-compliance order is an issue in this civil penalty proceeding, and whether or not any consideration of the order should be limited to the section 110(i) negligence and good faith civil penalty criteria.

Stipulations

The parties stipulated to the following (Tr. 8-10):

1. The Commission has jurisdiction in this matter.

2. The respondent's history or prior violations is reflected in an MSHA computer print-out covering the period May 29, 1994, through May 29, 1996 (Exhibit P-1).

3. The respondent's overall coal production for the period in question was over 21 million tons as stated in MSHA's attachment to its proposed civil penalty assessment (Exhibit A). The mine production at that time was 898,097 tons.

4. Assuming the violation is affirmed, the petitioner's proposed civil penalty assessment of $3,407, if levied, will not adversely affect the respondent's ability to continue in business.

5. The petitioner's exhibits, P-1 through P-6, were offered and received in evidence without objection.

Discussion

Section 104(a) AS&S@ Citation No. 9981345, issued at 10:05 a.m., on May 29, 1996, by MSHA Inspector Michael Wolford, cites an alleged violation of mandatory respirable dust standard 30 C.F.R. 70.100(a), and the cited condition or practice states as

follows (Exhibit P-2):

> According to advisory No. 0080 dated 05-28-1996, the average concentration of respirable dust analyzed from five valid samples collected by the operator during a bi-monthly period in the working environment of the designated occupation 036 in MMU 003-0 amounted to 2.6 milligrams. Management shall take corrective action to lower the concentration of respirable dust to within the 2.0 milligrams standard and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory.

Inspector Wolford fixed the abatement time as 7:00 a.m., June 19, 1996. Subsequently, additional dust samples were collected and submitted by the respondent to abate the violation. The test results reflected an average respirable dust concentration of 3.6 percent. MSHA Inspector Ronald Hayes then issued a section 104(b) non-compliance withdrawal Order No. 4236728, at 6:15 a.m., on July 10, 1996, closing down the entire 003-0 mechanized mining unit (MMU). The order states as follows (Exhibit P-5):

> Results of the five most recent samples received by MSHA and collected from the working environment of the designated occupation (continuous miner operator 036), in a Mechanized Mining Unit 003-0 shows an average concentration of 3.6 mg/m^3. Due to the obvious lack of effort by the operator to control the respirable dust, during the reasonable period of time set by citation no. 9981345, the citation is not further extended. All miners working on this M.M.U. shall be withdrawn until the violation is corrected.

Inspector Hayes modified his order at 6:20 a.m., on July 10, 1996, and the modification states as follows (Exhibit P-5, second page):

> The operator has submitted and implemented a revised respirable dust control plan, therefore the order is modified to permit M.S.H.A. to collect respirable dust samples on the 003-0 M.M.U. to determine if compliance is attained. The minimum spray pressure is raised from 70 PSI to 80 PSI; the water sprays are changed from FC type to Flat Type sprays.

On July 18, 1996, Inspector Hayes terminated his order, and the termination notice states as follows (Exhibit P-5, third

page):

> The results of 5 valid samples taken by M.S.H.A. showed a section average of 0.442. This is in the allowable limit of the 003-0 M.M.U. dust standard of 2.0.

Petitioner's Testimony and Evidence

MSHA Inspector Michael Wolford testified that he issued his section 104(a) AS&S@ citation on May 29, 1996, and served it by mail on the respondent. He issued the citation after receiving the results of the respondent's then current bi-monthly dust sampling cycle for the designated Ahigh risk@ occupation 036, continuous miner operator, for mechanized mining unit (MMU) 003-0. The average concentration of respirable dust for that occupation was 2.6 percent, which exceeded the section 70.100(a) regulatory allowable exposure limit of 2.0 percent (Tr. 15-16).

Mr. Wolford confirmed that the respirable dust sampling cassette and pump is used by the designated continuous miner operator to monitor his dust exposure during the sampling cycle in order to determine whether the entire mechanized mining unit is in compliance with the 2.0 percent standard. The purpose of the testing is to control the dust exposure and prevent Black Lung disease (Tr. 16-18).

On cross-examination, Mr. Wolford stated that at the time he issued the citation he was a dust specialist. He confirmed that compliance cannot be determined by visual observation, and if a mine has a history of compliance, the only method to alert the operator that he might be out of compliance is by dust sampling. He explained that as a general rule, a mine operator can take corrective action by reviewing the approved mine ventilation plan. He believed that the respondent in this case should have checked the parameters of the ventilation plan, and confirmed that the lack of adequate water supply could result in worst dust problems (Tr. 19-21).

Mr. Wolford stated that the MMU unit consisted of a continuous miner machine, two shuttle cars, and two roof bolting machines. He confirmed that he was not involved in the abatement of the violation. He stated that he based his AS&S@ finding on the fact that respirable dust non-compliance violations are routinely found to be significant and substantial violations because they contribute to black lung, and that in this case he believed that one miner, namely the designated miner operator,

would be affected by the violation. He further stated that he based his moderate negligence finding on his belief that the respondent should have been aware that the unit was out of compliance, and that this amounted to ordinary negligence. He confirmed that he had previously inspected the mine for approximately one year, and it had always been in compliance with the dust standard (Tr. 24-27; 75).

Ronald Hayes, MSHA Dust Specialist, testified that he issued his section 104(b) non-compliance order on July 10, 1996, after receiving the results of the respondent's dust sampling on the cited mechanized mining unit. He noted the fact that a prior section 104(a) citation was issued by Inspector Wolford, with an abatement date of June 19, 1996, because the sampling in support of that citation reflected an average dust concentration of 2.6 percent, which exceeded the 2.0 percent regulatory standard. Since the respondent's dust sample results of June 19, 1996, reflected an increased average dust concentration of 3.6 percent, rather than a decrease, he concluded that there was an Aobvious lack of effort@ to achieve compliance and wrote the order and took it to the mine and personally served it on mine superintendent Lynn Hatfield
(Tr. 30- 34).

Mr. Hayes stated that he modified his order five minutes after he issued it, so that MSHA could conduct additional dust sampling under normal mining conditions to determine whether the respondent's revised dust control plan achieved compliance. He noted that the respondent raised its minimum water sprays pressure from 70 p.s.i. to 80 p.s.i., and changed the type of water sprays that it had been using in the past (Tr. 34-36).

Mr. Hayes confirmed that the July 10, 1996, additional MSHA sampling results reflected an average dust concentration of 0.442 percent, and resulted in compliance. He subsequently terminated his order on July 18, 1996. He believed that the corrective action taken by the respondent to accomplish compliance should have been taken at the time the initial citation was issued by Inspector Wolford (Tr. 47). Mr. Hayes confirmed that the mine was in compliance on July 10, 1996, when he issued the section 104(b) order (Tr. 47-48).

On cross-examination, Mr. Hayes reiterated that he based his conclusion of an Aobvious lack of effort@ by the respondent to achieve timely compliance on the fact that the initial 2.6 percent sample results increased to 3.6 percent after additional sampling. He stated that there was Aa lack of something somewhere@ or that the respondent Adidn't do something.@

He could not recall what the respondent may have done to achieve compliance, and he confirmed that he based his order strictly on the 3.6 percent sampling results of June 19, 1996. He further confirmed that he made no inquiries to determine the respondent's compliance efforts and that Mr. Hatfield offered no explanations. The second sample results of 3.6 percent was the sole determining factor that prompted him to issue the order (Tr. 37-40). The order is issued Aautomatically@, and he has no discretion to do otherwise (Tr. 42-43). He explained his conclusion that there was an Aobvious lack of abatement effort@ by the respondent as follows at (Tr. 47-50):

> JUDGE KOUTRAS: Now, you=re not suggesting that during that time that the operator wasn=t doing anything?
>
> A. No, I=m not. I=m not suggesting one thing or the other.
>
> JUDGE KOUTRAS: You have no knowledge of what they were doing to try to bring them into compliance?
>
> A. I hadn=t even been there yet, not until July 10th. No contact with them as far as I know.
>
> JUDGE KOUTRAS: Is it possible that when you went there on July 10th and issued this order that the mine was, in fact, in compliance on that day?
>
> A. It=s possible that they were then because I was running samples.
>
> JUDGE KOUTRAS: You ran samples that day and they reflected a rather drastic reduction to 0.442 right?
>
> A. Yes.
> JUDGE KOUTRAS: So that would indicate that they were in compliance on July 10th; would it not?
>
> A. Yes, it did.
>
> * * * *
>
> JUDGE KOUTRAS: Have you ever conducted a regular inspection?
>
> A. Yeah, prior to being in dust.
>
> JUDGE KOUTRAS: Have you ever issued a section 104(b)

order on a regular inspection?

A. Yes, I have.

JUDGE KOUTRAS: And what criteria do you follow in issuing --- to issue a 104(b)?

A. Evidence usually showing that they didn=t comply with what the citation says.

* * * *

JUDGE KOUTRAS: And how would you develop that evidence?

A. Well, the one I issued there would be available. They might talk to the operator and ask him why.

JUDGE KOUTRAS: But that didn=t happen in this case?

A. Yeah.

JUDGE KOUTRAS: Is that right? In this case you didn=t inquire of the operator why he wasn=t in compliance and all that business before issuing the order?

A. No, I didn=t.

JUDGE KOUTRAS: Is that the accepted way of doing it, do you know?

A. That=s the accepted way of doing things, yes, Your Honor.

JUDGE KOUTRAS: On respirable dust?

A. Yes, it is.

JUDGE KOUTRAS: But different on other inspections?

A. Yes, it is. Respirable dust you go on the evidence of what the operator runs and sends to you. That=s the evidence you go on.

JUDGE KOUTRAS: But you had no evidence that there was an obvious lack of effort, other than the test results?

A. That=s all, yes.

Mr. Hayes confirmed that non-compliance with the 2.0 percent dust standard cannot be determined by visual observation. He stated that he reviewed the respondent's prior dust compliance record for the prior year and it did not disclose any violations of section 70.100(a), during the prior six sampling cycles over a 12 month period. He further confirmed that if the June 19, 1996, sampling results had reflected a dust concentration of 2.3 percent, he would still have issued his order. He explained that the delay from July 10, 1996, when he modified the order, to July 18, 1996, when he terminated it, was due to a two-week mine vacation period and training that he was taking. He further believed that all respirable dust non-compliance violations are Aautomatically@ considered AS&S@ violations (Tr. 40-55, 63, 75-76).

Bench Ruling Regarding Respondent=s Motion to Dismiss

At the conclusion of the petitioner=s case, the respondent=s counsel moved for a directed verdict on the ground that Inspector Hayes acted arbitrarily when he issued the section 104(b) non-compliance withdrawal order, and failed to consider the degree of danger any extension of the abatement time would cause miners, the respondent=s diligence in attempting to meet the initial abatement time, and the disruptive effect that the extension would have (Tr. 78-79).

The respondent=s counsel stated that the respondent is not contesting the violation or the citation and concedes a violation of section 70.100(a), but challenges the propriety of the inspector issuing a section 104(b) order based simply on the respirable dust sample test results (Tr. 78-79).

In opposition to the motion, the petitioner=s counsel took the position that the section 104(b) order is not in issue in this penalty case because of the failure by the respondent to contest it within 30 days as required by Commission Rule 20, 29 C.F.R. ' 2700.20. In support of his argument, counsel stated that the issuance of a section 104(b) withdrawal order based solely on the results of dust sampling is Aunique@ (Tr. 56). Counsel asserted that it is clear that the citation was not timely abated and Athere was no application for an extension of the abatement@ (Tr. 56-57). Counsel took the position that the validity of the order is not in issue in this case, Aonly the question of good faith abatement@ (Tr. 74). He further argued that there was no evidence regarding the diligence of the respondent to abate the violation, and that the order was made a matter of record in this case to show a lack of good faith compliance by the respondent in

connection with the section 104(a) citation (Tr. 80-81). The respondent=s motion to dismiss was denied.

Respondent's Testimony and Evidence

Mine Superintendent Lynn T. Hatfield testified that he was aware of the May 29, 1996, citation issued by Inspector Wolford and took steps to achieve compliance by checking the ventilation and fans, changing the continuous miner water lines from 1 1/4" to 1 1/2", replacing and aligning broken miner bit lugs, and replacing a valve on the miner hydraulic cutting head that was reportedly cutting into the mine roof. He stated that the mine ventilation plan could not be changed without MSHA's approval, and that the stated adjustments were made while the additional dust sampling was taking place (Tr. 82-85).

Mr. Hatfield stated that the additional dust samples were submitted on June 19, 1996, and that he was aware of the sample results before July 10, 1996, when Inspector Hayes came to the mine and served his order. He explained that his Pikeville office informed him of the results of the sampling and that a new ventilation plan needed to be submitted. He contacted the MSHA office and submitted a new ventilation plan on June 21, 1996, which was approved on June 26, 1996, but not received by the mine safety office until July 8, 1996. Although he was informed verbally that the plan had been approved sometime after June 21, 1996, he indicated that the plan could not be implemented until the written approval was received (Tr. 86-88).

Mr. Hatfield stated that the miners were on vacation for a two week period which ended on July 10, 1996, and that no coal production was taking place during the vacation period. There were only 11 miners working at the mine doing maintenance work. He stated that all of the changes that were made to address the violation were made and in effect on July 8, 1996, and he had no reason to believe that the mine was still out of compliance. He alluded to certain water supply problems for the continuous miner machine caused by attempts to service another MMU unit mining in another area of the mine, and candidly conceded that his attempts at finding and correcting the dust problem seemed to make matters worse (Tr. 89-91).

On cross-examination, Mr. Hatfield reiterated his efforts to abate the initial citation, including the replacement of old continuous miner water sprays with new ones, changing the miner filters and cutting bit lugs, and repairing the HIC valve that controls the height of the miner cutting head that was reported by the miner operator to be cutting into the top. He further

stated that he had 6,000 cfm's of air behind the ventilation curtain, tightened the ventilation curtains, and made fan adjustments in an effort to address the problem (Tr. 91-94).

Mr. Hatfield believed that the decision to change the size of the miner water lines may have resulted in the dust exposure increase from 2.6 to 3.6 percent, and that it became evident that the ventilation plan needed to be changed. He also believed that the water line changes and miner cutting head valve problem may have contributed to the increased dust level. He explained that a single water line supplied both MMU continuous miner machines and could have affected the water sprays. He stated that he did not know that the cited unit was still out of compliance, but decided to change the water sprays and spray pressure when the 3.6 sample results were received, and these measures achieved compliance (Tr. 94-96).

Mr. Hatfield stated that he was in the process of changing the water lines when the
2.6 test results were received, and since he did not believe that these results were particularly unusual, he did not contact MSHA. He further stated that he did not know who was conducting the on-shift examinations during the abatement period and did not recall speaking to the examiner. He explained that he was in communication with the continuous miner operator because that was where the dust problem existed (Tr. 96-107). He further stated that he tightened and adjusted the ventilation fan belts to prevent any slippage, and he did not know what caused the mine to be out of compliance when the dust test results reflected 2.6 and 3.6 percent
(Tr. 107).

The Petitioner=s Arguments

The petitioner points out that the respondent has conceded the validity of the citation, and offered no proof that the citation was not properly characterized as Asignificant and substantial@ or the result of the respondent=s moderate negligence. Under the circumstances, the petitioner asserts that the only issue in this case is the validity of the section 104(b) order issued by Inspector Hayes. Contrary to the position stated by counsel during the hearing, the petitioner does not now take the position that the respondent is foreclosed from challenging the validity of the order in this civil penalty proceeding notwithstanding the fact that it did not file a timely contest regarding the order.

The petitioner states that the disposition of this case is

controlled by the recent decision of the Court of Appeals, for the D.C. Circuit in the case of Energy West Mining Company v. FMSHRC, No. 96-1243, slip op. (D.C. Cir. April 25, 1997), and that the presiding judge need look no further than this case to find the basis for upholding the validity of the section 104(b) order.

The petitioner submits that a section 104(b) withdrawal order presents a unique set of circumstances in the context of abatement of dust sampling violations. As an example, the petitioner states that although Mr. Hayes testified that he relied exclusively on the results of dust samples from the May-June 1966, bi-monthly sample period, as stated in the June 19, 1996, Aadvisory@ showing 2.6 respirable dust, in excess of the 2.0 regulatory maximum, it is clear that analyzing the facts of this case, and comparing them to the facts of Energy West, that additional factors emerge which on the face of the record justify the issuance of the order by Mr. Hayes.

An Aadditional@ factor cited by the petitioner is the increased level of dust concentrations evidenced by the second set of dust samples communicated to MSHA in the June 19, 1996 Aadvisory@ reflecting a 3.6 average dust concentration. These samples were taken to abate the initial citation.

The petitioner maintains that regardless of whether an inspector articulates all of his bases for issuing a section 104(b) order or testifies that he relied exclusively on the results of the second sampling, the Commission must apply an objective standard and analysis to its consideration of the validity of the 104(b) order, and should analyze all of the factors surrounding the issuance of the order to determine whether there are objective bases for a finding that the section 104(b) order was validly issued without regard to the subjective intent of the issuing inspector.

In this case, however, the petitioner further takes the position that the threshold issue to be determined by the presiding judge before examining any other factors in determining whether the inspector properly exercised his discretion in issuing the section 104(b) order is the question of whether or not the operator communicated a request for an extension of the abatement time to the inspector. In support of this argument, the petitioner cites the following statement by the Court:

We also agree with the Commission that the burden

rested on Energy West to bring to MSHA=s attention any specific abatement measures justifying extension of the abatement period, particularly in the face of what appeared to be deteriorating mine conditions.

The petitioner asserts that in this case, the respondent made absolutely no effort to communicate to Mr. Hayes that it had acted to abate the violation or that it desired to have the abatement period for the original 104(a) citation extended. Instead, it chose to alter its ventilation plan in order to achieve compliance with section 70.100(a), and never sought to have the abatement time extended. Relying on the Court=s decision in Energy West, the petitioner concludes that before an operator may challenge the validity of a 104(b) order, it must first establish that it communicated to MSHA its desire and reasons for seeking the extension of the abatement time for the original citation. Since the respondent knew shortly after the second sample results came back on June 19, 1996, that it had not achieved compliance, and opted to submit a new ventilation plan to fix the problem, without communicating to Mr. Hayes or to any other MSHA official that it wished an extension of the abatement period, the petitioner concludes that Mr. Hayes was justified in issuing the order effectively mandated by the June 19, 1996, sampling results.

Finally, the petitioner submits that the Court=s decision in Energy West stands for the principle that MSHA is not required to offer to the operator what the operator itself does not seek. Accordingly, the petitioner concludes that the respondent=s challenge to the section 104(b)

order should be denied when it only communicated its dissatisfaction with the order by way of a notice of contest filed some four months after the fact.

The Respondent=s Arguments

The respondent states that upon receiving the initial section 104(a) citation on May 29, 1996, it took various steps to correct the violation, including checking the ventilation system and fan, tightening the fan bolts, checking the belts for slippage, checking, aligning, and replacing continuous miner cutting head bit lugs, changing the cutting head HIC valve to prevent cutting into the mine roof, checking and replacing the miner water sprays, and changing the miner filters.

The respondent asserts that it collected five additional dust samples during June 7, through June 14, 1996, and following

a notification that it was still out of compliance, and with the help and advice from MSHA, submitted a new ventilation plan in an attempt to correct the problem. Further, at the suggestion of MSHA, the type of water sprays were changed, and superintendent Hatfield determined on his own to increase the miner spray pressures from
70 pounds to 80 pounds. The new plan was submitted on June 21, 1996, and after it was approved on July 8, 1996, it was immediately implemented by Mr. Hatfield. The respondent further states that prior to the mid-May 1996, sampling the mine had been in compliance with section 70.100(a) for over a two-year period and a total of approximately 12 sampling periods.

The respondent contends that the section 104(b) order was improperly issued by Inspector Hayes and that he should have extended the abatement period of the section 104(a) citation. In support of its contention, the respondent cites Peter White Mining Corporation, 1 FMSHRC 255, 265 (April 1979), where Judge Fauver vacated a section 104(b) order because the inspector failed to give any consideration to the extension of time allowed for abatement of the citation. The judge found that such consideration was a basic requirement for the issuance of such an order.

The respondent further cites United States Steel Corporation, 1 MSHC 1490
(November 29, 1996), holding that an inspector=s authority under Section 104(b) in deter-
mining whether the abatement time for the violation should be extended, or an order of withdrawal issued, carries the implication that it will be exercised reasonably, not arbitrarily or capriciously, and Eastern Associated Coal Corporation, 1 MSHC 1665 (June 22, 1978), involving a challenge to the inspector=s failure to extend the abatement time for a violation of section 70.100(b), and which resulted in the issuance of a section 104(b) order. In the Eastern Associated case, Judge Stewart held that such an order should be based on the prevailing circumstances, including the initial sampling processing time, the time required to evaluate the samples and make changes, the time to review the results of additional samples, and the degree of hazard presented. The judge noted that the operator could not evaluate the efficacy of its repairs until the results of dust sampling analysis had been received.

Finally, the respondent cites the presiding judge=s decision in Peabody Coal Company,
11 FMSHRC 2068 (October 1989), vacating a section 104(b) order issued following non-compliance with a section 104(a) citation

issued for an alleged violation of section 70.101, and quotes as follows from that decision at 11 FMSHRC 2102:

> I find no rational basis for an inspector to automatically issue a section 104(b) withdrawal order simply because an operator=s sampling results reflects continued non-compliance with the dust standards. If this were the case, an inspector could refuse to further extend any abatement time for any violation simply because an operator has not abated the condition within the initial time fixed for abatement, completely ignoring the circumstances presented * * * *.

The respondent maintains that Inspector Hayes failed to conduct a follow-up mine inspection as required by the Act, and failed to inquire of mine personnel as to what steps had been taken to abate the violation. Further, the respondent points out that Mr. Hayes based the issuance of his order strictly on the second set of dust samples, and had no facts to make an informed decision prior to issuing the order.

The respondent contends that the inspector was of the mistaken opinion that if the second set of samples indicated non-compliance, the issuance of the order was automatic and that he had no discretion to extend the abatement time further. The respondent concludes that the inspector=s belief is clearly wrong and in direct contravention of its cited cases and that the issuance of the order was improper.

The respondent rejects any suggestion that the disputed order was appropriate because of the danger any extension posed to the safety of miners. The respondent concludes that if safety had been a concern to the inspector, he would not have permitted 20 to 21 days to pass before issuing his order, he could have issued it in a more timely manner, or if he were unavailable, another inspector could have issued it.

The respondent states that it was permitted, with the exception of approximately five minutes while shut down by the order, to resume and continue to operate until the results of the third set of samples was analyzed and determined to be well within compliance, and that extending the abatement time would not have altered its conduct in any manner. The third set of samples would have been taken, the section would have continued to operate, the sample analysis would have indicated compliance, and the citation would have been terminated. The respondent emphasizes the fact that it had not been cited for excessive dust levels in the entire two-year period preceding the issuance of

the order, and the mine had no dust problem history.

The respondent maintains that simply because the dust concentration was greater on the second set of samples does not justify the issuance of the order. The respondent argues that the instant case is factually distinguishable from Energy West Mining Company, where the dust samples from a mechanized mining unit indicated an average concentration of 2.2 milligrams, and the sample taken to terminate the citation showed an average of 2.3 milligrams. In that case, the inspector issued a ' 104(b) order based upon the second set of samples and the fact that the mine had been frequently out of compliance. The respondent points out that Judge Morris relied upon two grounds in upholding the issuance of the ' 104(b) order, namely, the fact that the operator had made only minimal and inadequate efforts to control the dust and had a prior history of being out of compliance with the dust standard.

The respondent maintains that, as previously detailed, it took numerous and extensive steps prior to the issuance of the order to correct the dust problem, and did more than simply check the ventilation plan parameters to assure the system was functioning as required. Unlike the mine in Energy West, which had a history of being out of compliance on 11 of 22 dust samplings over a two-year period, the respondent points out that its mine had no previous history of dust problems and had no dust violations for the previous two years. The respondent concludes that the Energy West decision is distinguishable on both the grounds upon which it was decided and does not control the outcome in the instant case.

Finally, the respondent contends that the question of whether it had complied with the on-shift examination requirements of section 75.362(a)(2), raised for the first time by the petitioner at the hearing, is not an issue in this case. The respondent asserts that it was not cited for a violation of this section and was not aware that this was an issue.

Findings and Conclusions

The undisputed facts establish that the section 104(a) AS&S@ Citation No. 9981345, was issued and served by certified mail on the respondent on May 29, 1996, for a violation of the respirable dust requirements found at 30 C.F.R. ' 70.100(a). The citation was based on the fact that five valid dust samples collected by the respondent for the designated occupation in mechanized mining unit 003-0, amounted to 2.6 milligrams, exceeding the 2.0

milligram
section 70.100(a), standard. The respondent has conceded the validity of the citation and does not dispute the fact that the dust sampling results establish a violation in this case. Accordingly, the citation citing a violation of section 70.100(a), IS AFFIRMED.

The Section 104(b) Order

Pursuant to Commission Rule 20(a), 29 C.F.R. ' 2700.20(a), an operator may contest the reasonableness of the abatement time associated with a section 104(b) withdrawal order. However, pursuant to Rule 20(b), the contest must be filed within 30 days of the receipt of the order.

Pursuant to Commission Rule 21, 29 C.F.R. ' 2700.21, the failure by an operator to timely contest a section 104 citation or order does not preclude the operator from challenging, in a penalty proceeding, Athe fact of violation or any special findings . . . . including the assertion . . . . that the violation was of a significant and substantial nature or was caused by the operator=s unwarrantable failure to comply with the standard@.

As noted earlier, at the hearing in this matter, the petitioner took the position that the validity of an uncontested section 104(b) withdrawal order cannot be challenged in a civil penalty proceeding. However, in its posthearing brief, the petitioner changed its position and asserts that the respondent is not foreclosed from challenging the validity of the order in this case. I note in passing, however, that the Secretary=s Arlington, Virginia Solicitor=s Office, in a recent contest case before Chief Judge Merlin, took the position that an operator may not obtain review of an uncontested section 104(b) order in a civil penalty proceeding seeking a penalty assessment for a violation noted in the underlying unabated section 104(a) citation. Consolidated Coal Company, Docket No. WEVA 97-84-R. In that case, Judge Merlin, on April 29, 1997, denied the Secretary=s motion to dismiss the untimely contest challenging the validity of the order. Judge Merlin concluded that the intent of Commission Rule 21 is to secure review of special findings.

Black Diamond Coal Mining Co., 5 FMSHRC 764 (April 1983), is a civil penalty case concerning proposed penalty assessments for two violations cited in two section 104(d)(1) AS&S@ orders. In view of the operator=s failure to timely contest the orders, I declined to consider the merits of the inspector=s unwarrantable

failure findings in the context of the penalty proceeding, but nonetheless considered the evidence in this regard as part of the negligence criterion found in section 110(i) of the Act. The Commission affirmed my decision, Black Diamond Coal Mining Company, 7 FMSHRC 1117 (August 1985), and stated as follows at 7 FMSHRC 1122, fn. 7:

> The issue Black Diamond raises **C** the impact of special findings in a withdrawal order upon a civil penalty proposed by the Secretary for the violation alleged in the order **C** is different than the issue of whether the merits of such special findings may be challenged in a civil penalty proceeding when the operator has not sought review of the order pursuant to section 105(d). We leave consideration of the latter issue to a case in which it is squarely presented.

Bethlehem Mines Corp., 6 FMSHRC 1011, 1039-1041 (April 1984), concerned a civil penalty proceeding for a violation cited in a section 104(a) citation, followed by a section 104(b) order for untimely abatement. Absent any evidence of a timely contest of the order, and taking into account that MSHA=s proposed civil penalty assessment was limited to the citation, and did not include the order, I concluded that the validity of the order, including the question of whether or not the inspector abused his discretion in not extending the abatement time, was not directly in issue. However, I considered the operator=s abatement efforts in connection with the elements of good faith compliance and negligence pursuant to section 110(i) of the Act, and took this into consideration in the penalty assessment for the violation.

In Quinland Coals, Inc., 9 FMSHRC 1614 (September 1987), the Commission held that the failure by an operator to timely contest a section 104(d)(1) order alleging a violation and containing special AS&S@ and unwarrantable failure findings, did not preclude the operator from challenging such special findings in a subsequent civil penalty proceeding. The Commission noted the Ainterdependent nature@ of special findings and a penalty assessment and further noted that a Aa special finding is a critical consideration in evaluating the nature of the violation and bears upon the appropriate penalty to be assessed@, 9 FMSHRC 1621, 1623. The Commission stated as follows at 9 FMSHRC 1623:

> * * * * Because of the interdependent nature of special findings and the penalty assessment provisions of the Mine Act, it is appropriate to allow contest of such findings in a civil penalty proceeding and not to preclude this challenge because the operator failed to

contest the validity of the order in which the findings are contained within 30 days of its issuance.

In Moline Consumers Company, 12 FMSHRC 1953 (October 1990), I imposed a penalty assessment of $50, for a section 104(a) non-@S&S@ guarding violation. With respect to the disposition of a section 104(b) order which was issued following the failure of the mine operator to timely abate the cited condition, I noted the absence of any evidence that the respondent timely contested the issuance of the order and concluded that the validity of the order was not directly in issue. However, I further concluded and found that since MSHA considered the issuance of the order as part of its proposed penalty assessment for the violation, particularly with respect to the question of negligence and good faith compliance, the order was relevant to my consideration of the penalty assessment criteria found in section 110(i) of the Act.

Energy West Mining Company, 16 FMSHRC 835 (April 1994), is a civil penalty case in which former Commission Judge John Morris affirmed a violation of 30 C.F.R. ' 70.100(a), cited in a section 104(a) citation issued by an inspector after he found that the designated MMU longwall operator occupation was out of compliance with the applicable 2.0 mg/m3 standard. The five dust samples taken by the mine operator showed an average dust concentration of
2.2 mg/m3. Subsequent samples taken during the abatement period of approximately three weeks given by the inspector should an increase in the dust concentration to 2.3 mg/m3. The inspector refused to extend the abatement period further and issued a section 104(b) withdrawal order. The parties stipulated that the judge had jurisdiction and that the citation and order were properly issued and served on the operator. It would appear that the issue of the reviewability of the uncontested section 104(b) order was not specifically raised, and the judge=s decision is silent with respect to this question.

In Energy West, the inspector=s determination that an extension of the abatement time was not warranted was based on increased dust levels as reflected by the subsequent dust samples taken to abate the initial section 104(a) citation, frequent prior MMU citations for violations of section 70.100(a), the increase in the number of abatement samples that were out of compliance, and the operator=s failure to incorporate changes to its ventilation plan that it had made previously to bring the cited MMU into compliance.

On appeal, the Commission affirmed the judge=s decision

upholding the violation, as well as the section 104(b) order. However, the Commission vacated the $3,000, penalty assessment and remanded the case for reassessment in view of the judge=s apparent failure to consider evidence of a gravity level lower than Ahigh@ as found by the judge, 18 FMSHRC 565 (April 1996). No mention is made of any review problem with respect to the section 104(b) order.

In upholding the judge=s determination that the inspector did not abuse his discretion in issuing the order, the Commission pointed out that the inspector relied on several factors (enumerated above) to support his determination that the initial abatement time should not be further extended. The Commission rejected the operator=s contention that the judge erred in failing to consider that it moved the MMU as part of its abatement efforts, a fact apparently not communicated to the inspector when he issued the order. In this regard, the Commission noted that the mine Act and legislative history does not address the extent of an inspector=s inquiry in determining whether the abatement time should be extended, and it concluded that the inspector was not obliged to ascertain, before issuing the order, that the MMU had not been moved.
18 FMSHRC 565, 570-71 (April 1996).

Energy West=s further appeal to the U.S. Court of Appeals for the D.C. Circuit was denied, Energy West Mining Company v. FMSHRC, and the Secretary of Labor, No. 96-1243, slip op. (D.C. Cir. April 25, 1997). The Court affirmed the Commission=s determination that an inspector can rely on increased dust levels determined by dust samples to support his decision not to extend the abatement time and to issue a section 104(b) withdrawal order without further inquiry concerning the operator=s abatement efforts.

In the instant case, the initial section 104(a) citation was issued by Inspector Wolford on
May 29, 1996, and he fixed the abatement time as 7:00 a.m. on June 19, 1996. The respondent took five additional dust samples that day, and the test results reflected an increased dust concentration from 2.6 to 3.6 for the cited MMU, and Mr. Hayes confirmed that he received the test results by computer that same day (Tr. 33-34).

The disputed order was not issued until July 10, 1996, and Mr. Hayes confirmed that it was Aautomatically@ issued solely because of the increased second dust sample results of June 19, and that he had no discretion not to issue the order (Tr. 42-43). The petitioner=s counsel attributed the delay from June 19 to

July 10, 1996, to a mine vacation period for part of this time, and the fact that Mr. Hayes had taken over the dust sampling program from Mr. Wolford only a short time after the issuance of the original citation. However, Mr. Hayes further attributed the delay to the fact that he was in training and on leave (Tr. 46).

Mr. Hayes asserted that he had no knowledge as to what steps the respondent may have taken to achieve compliance before July 10, and he confirmed that he was not suggesting that the respondent was not doing anything to achieve compliance (Tr. 47). As a matter of fact, he believed it was possible that the mine was in compliance on the very day he issued his order on July 10, because he was taking dust samples at that time and the test results reflected a drastic dust concentration reduction from 3.6 to 0.442. He agreed that this would indicate that the mine

was in fact in compliance on that day (Tr. 47-48). He admitted that he had no evidence apart from the test results to support the Aobvious lack of effort@ notation that he made on the face of his order (Tr. 50).

Mr. Hayes stated that after he modified the order to facilitate the taking of samples, he allowed the unit to stay in production and did not reinstate the order Abecause we have no idea of knowing whether they=re going to be out or in@ (Tr. 60), and that Ayou give that benefit of a doubt that they are there, you know, in good faith . . . . because they=ve done something to comply@
(Tr. 61) (emphasis added).

In response to a question as to whether it was conceivable or possible that the respondent had taken reasonable steps to abate the citation prior to the issuance of his July 10, 1996, order Mr. Hayes responded as follows at (Tr. 39):

> A. If he took any other steps he didn=t volunteer to tell me that he=d done other things when I got there at that mine. If he had, I would noted it in my notice. It=s not there so he did not tell me anything that he had done prior to the (b) order.

The record reflects that Mr. Hayes modified his 104(b) order five minutes after he issued it so that dust sampling could be accomplished under active working conditions. I take note of the fact that on the face of his modified order, Mr. Hayes noted that the respondent submitted and implemented a revised respirable dust control plan, that the types of water sprays that were in

use were changed, and that the water spray pressures were raised from 70 psi to 80 psi. When asked if the respondent had explained to him on July 10, about any efforts made to achieve abatement, Mr. Hayes responded AJust this right here is all. Just what I wrote on the modification@. He also confirmed that prior to going to the mine, his dispatcher told him that the mine ventilation plan had been submitted to raise the water spray pressures (Tr. 64-65). Mr. Hayes admitted that prior to going to the mine on July 10, he knew that the respondent had changed its ventilation plan and had an MSHA approved modified plan in place. He also knew that the water sprays had been changed, and that the water spray pressures had been increased (Tr. 53-54; 64).

In view of the foregoing, it seems obvious to me that Mr. Hayes had knowledge of the respondent=s abatement efforts before he issued his section 104(b) order, and I find his denials to the contrary because he had not noted them in his order to be incredible. Under the circumstances, I find that the fact that superintendent Hatfield did not tell Mr. Hayes what he already apparently knew is irrelevant. Further, given the fact that Mr. Hayes= practice was to automatically issue section 104(b) orders based solely on dust sample results, I find it reasonable to conclude that Mr. Hayes would have issued his order regardless of what abatement efforts may have been communicated to him by Mr. Hatfield.

The Commission=s decisions in Black Diamond Coal Mining Co. and Quinland Coals, Inc., supra, concerned Aspecial@ S&S and unwarrantable failure findings noted in a section 104(d)(1) notice and a section 104(d)(1) order. In the Energy West Mining Company case, although the D.C. circuit characterized the Apaper@ issued by the inspector as a section 104(d)(1) AS&S@ citation, it was in fact a section 104(a) AS&S@ citation (pg. 3, slip op.), and as previously noted, the issue concerning the reviewability of the uncontested section 104(b) order was never specifically raised or questioned.

I recognize the fact that a section 104(b) order is an Aenforcement action@ pursuant to the Act. However, I cannot conclude that such an order includes any Aspecial findings@ such as AS&S@ and Aunwarrantable failure@. A section 104(b) order is a non-compliance order for failure to timely abate a violation noted in a section 104(a) citation. An operator may contest the reasonablesness of the abatement time, but must do so within 30 days of the receipt of the order. Since the respondent in this case failed to timely contest the order, I conclude and find that it is precluded from now challenging the merits or the validity

of the order. However, since the order had a direct impact on the proposed penalty assessment, as discussed below, I will consider the respondents=s abatement efforts in connection with the section 110(i) good faith compliance penalty assessment criterion in assessing a de novo penalty for the violation that has been affirmed.

The proposed penalty assessment of $3,407, is based on a Aregular assessment@ computed pursuant to the petitioner=s regulatory penalty assessment criteria and procedures found in Part 100, Title 30, Code of Federal Regulations. The proposed assessment filed by the petitioner reflects a total of 63 Apoints@ based on the respondent=s size, prior history of violations, negligence, gravity, and good faith abatement. Based on the Penalty Conversion Table, at section 100.3(g), the 63 points converts to a monetary proposed penalty assessment of $3,407. Ten of the 63 penalty points were assigned pursuant to section 100.3(f), because of the respondent=s failure to abate the violation within the time fixed by the inspector. Although this section provides for a 30% penalty reduction for timely abatement, no reduction was made in this case. Further, in the course of the hearing, petitioner=s counsel stated that the order was made a part of the record in this case to establish a lack of good faith compliance by the respondent in connection with the section 104(a) citation (Tr. 80-81).

The section 104(a) citation issued by Inspector Wolford required the respondent to Atake corrective action to lower the concentration of respirable dust@ and Athen sample@ and submit the valid samples to MSHA=S dust processing laboratory. I find that this is precisely what the respondent in this case did to address the dust problem.

In this case, I conclude and find that the credible and unrebutted testimony of mine superintendent Hatfield establishes that the respondent initiated a course of corrective action that it reasonably believed addressed a dust problem that had never been previously experienced in the mine. In order to cure such a problem, the respondent must know what caused it, and must be given enough time to discover the cause. The fact that the steps taken by the respondent to address the problem subsequently resulted in an increased, rather than decreased dust concentration, does not, in my view, detract from the respondent=s good faith effort to timely correct and abate the cited violation. Indeed, Inspector Hayes admitted that even though he stated on the face of his order that there was an Aobvious lack of effort@ by the respondent to control the dust, he was not suggesting that the respondent did nothing. He

further conceded that he had no evidence of any Alack of effort@ other then the dust sample results, and admitted that it would appear that the mine was probably in compliance when he issued his section 104(b) withdrawal order (Tr. 47-50). Under all of these circumstances, I conclude and find that the respondent acted in good faith and took reasonable steps in its attempt to address its very first respirable dust problem, and its efforts in this regard are reflected in the reduced penalty assessment that I have imposed for the violation in question.

Size of Business and Effect of Civil Penalty on the Respondent=s Ability to Continue in Business.

Based on the stipulations by the parties, I conclude that the respondent, as a corporate operator, is a large mine operator, and that its Tall Timber mine is a relatively large operation.
The parties stipulated that the proposed penalty assessment of $3,407, will not adversely affect the respondent=s ability to continue in business. Accordingly, I conclude and find that the penalty I have assessed will not adversely affect the respondent=s ability to continue in business.

History of Prior Violations

The parties have stipulated to the respondent=s history of prior violations is reflected in an MSHA computer print-out (Exhibit P-1). The print-out reflects that for the two-year period prior to the issuance of the May 29, 1996, citation in this case, the respondent paid civil penalty assessments for 236 of the 237 listed violations. The only exception is the instant contested case which concerns the only listed violation that resulted in the issuance of a section 104(b) order. All of the 236 prior violations are section 104(a) citations, 146 of which are Asingle penalty@ $50 assessments. Further as previously noted, there are no prior section 70.100(a) respirable dust violations included as part of the mine history. One prior violation noted is for violation of section 70.101, for respirable dust (with Quartz present), a single-penalty citation assessed at $50 and paid by the respondent. For an operation of its size, I cannot conclude that the respondent=s compliance history warrants any additional increase in the civil penalty assessed by me for the violation in question.

Gravity

The Commission has recognized that any violation of section 70.100(a) is serious and presumptively S&S. Consolidation Coal

Co., 8 FMSHRC 890, 899 (June 1986), aff:d 824 F.2d 1071 (D.C. Cir. 1987).

In the Energy West Mining Company case, 18 FMSHRC 565 (April 1996), Judge Morris affirmed an AS&S@ violation of section 70.100(a), and assessed a $3,000 civil penalty after finding that the gravity of the violation was high, given the risk of pneumoconiosis, and the fact that such section 70.100(a) violations are generally considered to be S&S. The Commission affirmed the violation, but vacated the penalty assessment and remanded the case to the Judge to consider the fact that the Secretary withdrew his S&S allegations because the affected miners were wearing personal protective equipment (helmets) which the Judge found provided Aa virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels@. The Commission observed that there was no indication in the judge:s analysis that he considered this evidence in determining that the violation was of high gravity or in assessing the civil penalty, 18 FMSHRC 571-572.

As noted earlier, the respondent did not contest the issuance of the section 104(a) AS&S@ citation.. Further, the respondent did not address this issue in its posthearing brief, and presented no evidence to rebut the inspector:s credible AS&S@ finding. Under the circumstances, the inspector:s AS&S@ finding IS AFFIRMED.

Negligence

Inspector Wolford testified that he had previously inspected the mine for approximately a year and found that it was always in compliance with the cited standard section 70.100(a) (Tr. 24). He confirmed that he based his moderate negligence finding on his belief that the respondent should have been aware that the cited MMU was out of compliance, and that this amounted to ordinary negligence (Tr. 75). The respondent:s compliance history for the two-year period prior to the May 29, 1996, citation issued by Inspector Wolford reflects no prior violations of section 70.100(a). I conclude and find that the violation resulted form the respondent:s failure to exercise reasonable care, and the inspector:s moderate negligence finding IS AFFIRMED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil

penalty assessment of $1,200, is reasonable and appropriate for the violation in this case.

Order

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Section 104(a) AS&S@ Citation No. 9981345, May 29, 1996, citing a violation of mandatory health standard 30 C.F.R. ' 70.100(a), IS AFFIRMED.

2. The respondent IS ORDERED to pay a civil penalty assessment in the amount of $1,200, for the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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