FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

April 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 93-169
ENERGY WEST MINING COMPANY	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners[1]

DECISION

BY: Jordan, Chairman and Doyle, Commissioner[2]

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). The issue is whether an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") abused his discretion when he issued an order, pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), to Energy West Mining Company ("Energy West") based on his determination that an extension in abatement time for a previously cited violation of 30 C.F.R. § 70.100(a) (1995) was not warranted.[3] Administrative Law Judge John J. Morris affirmed the order and assessed a civil

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[1] Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

[2] Chairman Jordan and Commissioner Doyle are the only Commissioners in the majority on all issues presented.

[3] 30 C.F.R. § 70.100(a) provides in part:

> Each operator shall continuously maintain the average dust 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

penalty of $3,000 for the violation. 16 FMSHRC 835 (April 1994) (ALJ). For the reasons set forth below, we affirm the judge's determination that the inspector did not abuse his discretion, vacate the penalty, and remand for reassessment.[4]

I.

Factual and Procedural Background

Energy West operates the Cottonwood Mine, an underground coal mine in central Utah. During mid-June 1992, Energy West took five respirable dust samples, pursuant to 30 C.F.R. § 70.207, for the designated occupation of longwall operator on mechanized mining unit ("MMU") 015-0 in the 4th West Longwall section of the mine.[5] 16 FMSHRC at 839; Ex. M-3; Ex. R-2. The results from those samples showed an average concentration of 2.2 milligrams of respirable dust per cubic meter of air ("mg/m^3"), which exceeded the 2.0 mg/m^3 standard applicable at the mine. 16 FMSHRC at 836-37. On June 25, 1992, MSHA issued Energy West a citation alleging a significant and substantial ("S&S") violation of section 70.100(a). *Id.* at 836; Citation No. 9996761. Energy West was given approximately three weeks, until July 14, to take corrective action to lower dust and to submit five valid respirable dust samples to MSHA's Pittsburgh Respirable Dust Processing Laboratory. 16 FMSHRC at 837; Citation No. 9996761.

Mine management met to develop a corrective action strategy. 16 FMSHRC at 841. Energy West's chief safety engineer, Randy Tatton, and mine superintendent, Garth Nielsen, unsuccessfully attempted to divert more air to the 4th West section by moving curtains. *Id.*; Tr. 329-35. Safety Engineer Steve Radmall conducted a dust survey in the area using a real-time aerosol monitor, or "RAM," which takes instantaneous dust readings, to determine whether dust

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respirable dust per cubic meter of air . . . .

[4] Chairman Jordan, Commissioner Doyle, and Commissioner Marks affirm the judge's determination that the inspector did not abuse his discretion in issuing the order. Commissioner Holen would vacate the order and reverse the judge. Chairman Jordan, Commissioner Doyle, and Commissioner Holen vacate the penalty and remand for reassessment. Commissioner Marks would affirm the penalty.

[5] Section 70.207(a) provides in part:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days . . . .

30 C.F.R. § 70.207(a).

control measures were functioning properly. 16 FMSHRC at 841; Tr. 133-34, 213. Based on the survey results, Radmall believed that there may have been a problem with the stage loader and a dust generation source, such as dry roadways, in the intake air course. 16 FMSHRC at 842; Tr. 217-26, 230-31. He informed Tatton of the results and the efficiency of the stage loader was evaluated and the roadways were watered. Tr. 145-46, 230-31. Roadways were routinely watered in accordance with the ventilation plan. Tr. 360-61; Ex. R-4.

In addition, the equipment overhaul coordinator, Bud Warrington, informed the longwall foreman, Ed Hickman, by notation in a daily maintenance list, that the dust samples had been out of compliance and that resampling would occur the following week. 16 FMSHRC at 842; Tr. 186-87; Ex. R-5, at 2. He listed various maintenance measures that needed to be taken and, as was his daily practice, attached a list of dust control measures that were to be performed. Tr. 186-88, 197; Exs. R-4, R-5. On June 29, Warrington instructed Hickman to "check everything out that has to do with dust" and "[m]ake it shine." 16 FMSHRC at 842. The longwall crew then engaged in various routine maintenance and repair measures, including the maintenance and repair of the stage loader baffle, and changing bits on the longwall shearer. *Id.* at 842-43; Tr. 193-94, 242-51, 260-61, 268-69, 286. On July 1, 2, and 3, Energy West took samples in the 4th West section during five consecutive shifts and submitted them to MSHA. 16 FMSHRC at 839; Ex. M-4; Tr. 164. On July 10, MMU 015-0 was moved to the 11th Right section of the mine. 16 FMSHRC at 839, 843, 844.

On July 15, during a regular inspection, MSHA Inspector Fred Marietti was called from the mine to his field office to examine the results of the abatement samples. *Id.* at 837-38. They showed an increase in dust concentration to 2.3 mg/m^3. *Id.* at 838.

Inspector Marietti returned to the mine and issued a section 104(b) failure to abate order to Energy West. He determined that an extension in abatement time was not warranted because of the increase in dust levels, the frequency of the cited type of MMU going out of compliance, and the operator's failure to incorporate into its ventilation plan actions it previously had taken to bring such equipment into compliance. *Id.* at 840, 847-48; Tr. 36-37.

Energy West increased air velocity and water pressure and added a spray bar to MMU 015-0. Tr. 378. The order was terminated after three samples taken by MSHA showed an average dust concentration for MMU 015-0 of 1.8 mg/m^3. Order No. 3850746-02; Tr. 50-52.

At the hearing, Energy West conceded that it had violated section 70.100(a) as alleged in the citation but disputed that the violation was S&S and challenged the failure to abate order. The judge granted the Secretary's motion to amend the citation to delete the S&S allegation based on affidavits submitted by Energy West that the miners exposed to the violative condition had been wearing RACAL airstream helmets, a type of personal protective equipment that the judge found "provide[s] a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels." 16 FMSHRC at 837, 843.

The judge concluded that the inspector had not abused his discretion in issuing the failure to abate order. *Id.* at 844. The judge agreed that an extension was not warranted given the results of the most recent sampling, the operator's history of excessive dust, a lack of diligence in the operator's efforts to control dust, and the fact that the operator failed to incorporate into its ventilation plan dust control measures previously taken to achieve compliance. *Id.* at 844-45, 847-49. Accordingly, the judge affirmed the citation and order and assessed a civil penalty of $3,000, finding that the violation involved high gravity due to the risk of pneumoconiosis. *Id.* at 849-50.

Energy West filed a petition for discretionary review, which challenged the judge's affirmance of the failure to abate order and his penalty assessment.

II.

Disposition

A. Failure to Abate Order

Energy West argues that the judge erred in finding that the order was valid because Inspector Marietti failed to consider whether any circumstances warranted an extension in abatement time. E.W. Br. at 12-16. It contends that it took extensive abatement measures to achieve compliance and refers to various maintenance and repair measures that were made with respect to the longwall, the RAM survey, attempts to increase air on 4th West, meetings relating to the excessive dust levels, repositioning miners, and the longwall move from 4th West to 11th Right. *Id.* at 17-18. The Secretary argues that substantial evidence supports the judge's determination that the inspector did not abuse his discretion in determining that the time for abatement should not be extended. S. Br. at 4-17 & n.5. He asserts that many abatement measures relied upon by the operator to show its diligence consisted of routine maintenance that the operator would have performed even if its sample results had been in compliance. *Id.* at 10-12. In reply, Energy West asserts that the Secretary failed to recognize that the dispositive issue is the adequacy of the inspector's efforts to determine whether an extension was warranted. E.W. Reply Br. at 1-6.

In contesting a section 104(b) order, the operator may challenge the reasonableness of the time set for abatement or, as here, the Secretary's failure to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989), *citing Old Ben Coal Co.*, 6 IBMA 294, 306-07 (1976); *U.S. Steel Corp.*, 7 IBMA 109, 116 (1976); *Youghiogheny & Ohio Coal Co.*, 8 FMSHRC 330, 338-39 (March 1986) (ALJ). Section 104(b) of the Mine Act provides:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently

> extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring . . . all persons . . . to be withdrawn from . . . such area . . . .

30 U.S.C. § 814(b). The Act does not address the extent of an inspector's inquiry in making the determination of whether abatement time should be extended. Nor is the extent of inquiry addressed in legislative history. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 618 (1978); H.R. Rep. No. 563, 91st Cong., 1st Sess. 8, 31 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Coal Mine Health Safety Act of 1969*, at 1038, 1061 (1975) ("*Coal Act Legis. Hist.*"); S. Rep. No. 411, 91st Cong., 1st Sess. 37, 89, *reprinted in Coal Act Legis. Hist.* at 163, 215.

The Commission has recognized that the "Secretary . . . possesses enforcement discretion to extend the time for abatement if [he] believes it reasonable . . . ." *Clinchfield*, 11 FMSHRC at 2132. Therefore, in reviewing an operator's challenge to the Secretary's failure to extend abatement time, the Commission considers whether the inspector abused his discretion in issuing the order. The Commission has noted that "abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (October 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985).

We conclude that substantial evidence supports the judge's determination that Inspector Marietti did not abuse his discretion when he issued the order.[6] The judge found, and substantial evidence supports his finding that, prior to determining "that the period of time for the abatement should not be further extended," Inspector Marietti considered the fact that, during the three week abatement period, excessive dust concentrations had not diminished but had, in fact, increased; that the number of individual samples out of compliance had increased from two out of five to three out of five; and that Energy West had been cited frequently for failure to comply with

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[6] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

section 70.100(a).[7] 16 FMSHRC at 840, 845, 848, 849; Exs. M-3, M-4, M-6; Tr. 35-36.

In addition, substantial evidence supports the judge's finding that Energy West "made only a minimal and inadequate effort to control dust." 16 FMSHRC at 847. Many of the actions cited by Energy West as evidence of diligence consisted of maintenance that the operator would have performed in any event. Warrington attached a list of dust control measures to his maintenance report every night, and those measures were routinely performed. Tr. 186-87, 197. Those measures included adjusting air controls and volumes, checking scrubber filters at the stage loader, and checking sprays. Ex. R-4. In addition, Energy West witnesses testified that other measures that had been taken were considered routine, including the maintenance and repair of the baffle (Tr. 193), watering the roadways (Tr. 360), changing bits on the longwall shearer (Tr. 260), and changing scrubber filters (Tr. 309). Although the operator was aware that conditions were becoming more difficult in 4th West as mining progressed, it chose to rely on existing dust controls without making changes to engineering controls. Tr. 195, 236, 362, 368.

We also reject Energy West's argument that the judge erred in failing to consider its move of the MMU as part of its abatement efforts.[8] PDR at 14. Apparently the inspector was unaware of the movement of MMU 015-0 at the time he issued the order. 16 FMSHRC at 844; Tr. 47. If the MMU was moved as a further abatement measure, that fact could have been brought to MSHA's attention at the time of the move. We perceive no obligation on the inspector's part to ascertain, before issuing the order, that the MMU had not been moved.[9]

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[7] Chairman Jordan observes that in her dissent, Commissioner Holen contends that "the Commission's requirement of an investigation into conditions at the mine before issuance of an imminent danger order applies with greater force to an inspector's exercise of discretion in issuing a failure to abate order." Slip op at 14-15. Unlike section 104(b), however, section 107 requires the inspector to "determine the extent of the area of such mine throughout which the danger exists" and to include in the order "a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited form entering." 30 U.S.C. § 817(a), (c). Therefore, she does not agree with her dissenting colleague's contention that section 104(b) imposed an obligation on Inspector Marietti to "ascertain Energy West's efforts to abate the citation or the facts and circumstances surrounding the operation of the MMU" before issuing an order under that provision. Slip op. at 15.

[8] The citation and order arose from samples taken pursuant to 30 C.F.R. § 70.207, which requires the sampling of MMUs, rather than 30 C.F.R. § 70.208, which requires sampling of designated areas. Under section 70.207, MSHA tracks the MMU itself, rather than its location, to evaluate the cutting characteristics and dust controlling capabilities of the equipment. Tr. 65. Thus, the subject of the sampling was MMU 015-0, rather than its location.

[9] Chairman Jordan notes that, in any event, Energy West's abatement sampling on July 1-3, *before* it moved the longwall, along with the evidence describing the severe conditions the

Thus, we conclude that substantial evidence supports the judge's determination that Energy West failed to act diligently.

In sum, we conclude that the judge's determination that the inspector did not abuse his discretion in issuing the failure to abate order is supported by substantial evidence. Accordingly, we affirm the judge's determination upholding the order.

B. Assessment of Civil Penalty

The judge assessed a civil penalty of $3,000, finding that the gravity of the violation of section 70.100(a) was high, given the risk of pneumoconiosis and that such violations are generally considered to be S&S. 16 FMSHRC at 850. Energy West argues that the judge erred because he ignored evidence demonstrating a decreased exposure to respirable dust. E.W. Br. at 23.

In considering the gravity of a violation, the Commission has generally considered the likelihood of an occurrence of the hazard against which a standard is directed and the severity of the resulting injury. *See Penn Allegh Coal Co.*, 4 FMSHRC 1224, 1227 (July 1982); *Pyro Mining Co.*, 6 FMSHRC 2089, 2092 (September 1984). Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987).

Here, the longwall crew members affected by the violative conditions had been wearing personal protective equipment, the Secretary withdrew his S&S allegation because of this fact, and the judge found that those helmets "provide a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels." 16 FMSHRC at 837, 843. There is 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.[10] Accordingly, we vacate the penalty and remand for consideration of that evidence in the assessment of an appropriate civil penalty.[11]

III.

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operator was experiencing in 4th West (Tr. 143-44) suggests that the move was not part of an attempt to abate the dust violation.

[10] Chairman Jordan notes that there is also no indication that, in making his gravity finding, the judge considered the evidence relied upon by her dissenting colleague, Commissioner Marks.

[11] The judge stated that the Secretary had proposed a civil penalty of $500. 16 FMSHRC at 836. In fact, the Secretary had proposed a civil penalty of $3,105 and it appears that the penalty proposal was not reduced after the Secretary withdrew the S&S allegation. S. Proposal for Penalty at 2; S. Post-Hrg. Br. at 1; PDR at 7; E.W. Br. at 11.

Conclusion

For the reasons discussed above, we affirm the judge's determination that the inspector did not abuse his discretion in issuing the section 104(b) order. We vacate the penalty and remand for reassessment.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

The majority has voted to affirm the judge's determination to uphold the subject section 104(b) order. I concur.

The majority has voted to vacate the judge's civil penalty assessment of $3,000, concluding that the judge failed to properly analyze the gravity criterion of section 110(i), 30 U.S.C. § 820(i). I disagree and therefore dissent. The judge's determination that the gravity of the violation was high is correct and supported by substantial evidence. I therefore affirm his high gravity conclusion.

In concluding that the gravity of the violation was high, the judge stated:

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

16 FMSHRC at 850. The judge's determination is correct and entirely consistent with Commission case law recognizing 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).

However, the majority bases their vacation of the judge's high gravity conclusion on their determination that the judge failed to consider the following *evidence*: that affected longwall crew members had been wearing helmets; that the Secretary withdrew his S&S allegation because of the helmet use; and that the judge found that the helmets provided a dust-free air supply to miners that reduced the dust exposure to insignificant levels.

The majority's reliance upon the foregoing is misplaced, and its conclusion that affected miners wore helmets is in error.

My review of the record precludes me from determining that no miner was exposed to the dangerous respirable dust levels that gave rise to the subject violation. Energy West's expert, Thomas Hall, admitted that during a relevant visit to the mine he observed maintenance workers on the subject section who were not wearing a helmet. Tr. 416-17. Garth Nielsen, Energy West's Superintendent at the subject Cottonwood Mine, conceded that a significant number of miners, 10%, do not wear the helmets. Tr. 140. This was also confirmed by construction foreman Dennis Ardohnin who conceded that some of his mechanics do not wear the helmets. Tr. 252.

The majority's reliance on the fact that the Secretary withdrew his S&S allegation is misplaced. My review of the record causes me to conclude that the Secretary has failed to adequately explain the basis for its withdrawal of the S&S allegation, and therefore, I certainly see

no reason why the Commission should further compound the error by relying on that action to support its vacation of the judge's independent determination.

In support of his motion to withdraw the S&S allegation, the Secretary relied on two affidavits executed by two longwall foremen employed by Energy West. Ex. M-2. The affidavits purport to assure the Secretary that no miners were exposed to the violative high levels of respirable dust *during the time of the sampling. See* Tr. 13. The affidavits are significant only because of what they do not state. There is no indication that *all* miners who may have worked in the vicinity of the cited MMU, *during the time that the violative condition existed* (almost four weeks) wore helmets. Rather, the affiants merely state that "[d]uring June 1992 . . . all members of [their] crew . . . on the 4th West longwall section wore RACAL airstream helmets at all times." Ex. M-2, at 1 & 2. There is no indication that the members of the two crews, supervised by affiants, were the only miners who worked in the vicinity of the cited MMU. Moreover, the vague reference to June 1992, does not cover the relevant time period, that is the time that elapsed from June 25, 1992, the day the citation was issued, to the day the subject order was terminated, July 22, 1992.

The logic justifying the Secretary's acquiescence on S&S is further obscured when one considers his counsel's statement to the judge made contemporaneously with the motion to withdraw the S&S designation:

> [T]here may be some testimony later today with regard to the wearing of air stream helmuts (sic) at this mine, and that's going to go to the seriousness of the violation with regard to the penalty and the B order . . . . [b]y changing this designation to a non S and S, the Secretary in no way gives up MSHA's position that even a small exposure to respirable dust is a serious violation, and that particular issue is presently on appeal before the Commission in a Consolidation Coal case, and *I don't wish to address that issue in this particular case.*

Tr. 13-14. (emphasis supplied). In response to a question from the judge, the Secretary's counsel further stated:

> [T]he issue I believe that's before the Commission . . . is how much of an exposure (sic). We now have a case in front of the Commission where the exposure was just brief. Someone on the section may have taken their respirator off or come on the section to do maintenance work for a short time, and that's the issue that's been raised by Consolidation Coal and that's the issue on appeal, and *that may have been an issue here but I don't want to address it in this case*.

Tr. 14-15 (emphasis supplied).

Based on the foregoing, it is certainly clear why the judge would not have placed any reliance, as I don't, upon the Secretary's withdrawal of the S&S designation. As described above, the evidence does indicate that not all miners availed themselves of the helmets.

Moreover, there is no reliable evidence establishing the efficacy of the helmets. Energy West's own expert, Hall, provided testimony that failed to establish the precise effect use of the helmet would have on the miner's respirable dust exposure. He cited "workplace protection factor[s]" ranging from 250 to 10. Tr. 403, 426. However, the record does not contain any meaningful explanation of the significance of those numbers or their relationship to respirable dust exposure. Further, the evidence does indicate that the helmets' benefit, whatever that may be, could be nullified, if a miner wearing a helmet had temporarily raised the shield during a dust "face burst." Tr. 408. Also, Hall conceded that the effectiveness of the helmet is conditioned upon a variety of factors, including the batteries, gaskets, flow rate, and the type of work the miner is performing. Tr. 412-13. No evidence regarding those factors was offered.

For the foregoing reasons I conclude that substantial evidence supports the judge's gravity conclusion, and I therefore affirm it.

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Marc Lincoln Marks, Commissioner

Commissioner Holen, concurring in part and dissenting in part:

I agree that, given the disposition of the majority, the penalty assessed[1] by the judge should be vacated and that, on remand, he should consider evidence in the record that he ignored regarding the gravity of the violation.[2] Slip op. at 7-8. I respectfully dissent, however, from their opinion that the judge's decision upholding the order should be affirmed. Slip op. at 7. I would reverse.

Factual Background

The facts surrounding the instant section 104(b) order, 30 U.S.C. § 814(b), are largely undisputed. On June 25, 1992, the Mine Safety and Health Administration ("MSHA") issued a section 104(a) citation, 30 U.S.C. § 814(a), to Energy West, as a result of air sampling that revealed an average respirable dust concentration of 2.2 milligrams of dust per cubic meter of air ("mg/m^3") for the designated occupation of longwall operator on mechanized mining unit ("MMU") 015-0, which was then located in the 4th West Longwall section of the Cottonwood mine. Ex. M-3; Ex. R-2.

Following the citation, Energy West took numerous actions to lower respirable dust in the 4th West section. 16 FMSHRC at 841. On June 26, Energy West's chief safety engineer, Randy Tatton, immediately met with mine managers to develop a corrective action strategy. *Id.*; Tr. 328. On June 29, Tatton directed one of his safety engineers to evaluate existing controls with a real time aerosol monitor ("RAM") to ensure that all dust controls were in place and functioning properly. 16 FMSHRC at 841; Tr. 329. Based on the evaluation, it was recommended that the intake air course and stage loader be checked for dust generation problems. 16 FMSHRC at 842; Tr. 230-31. The RAM survey also revealed that dust levels rose significantly when the longwall shearer cut through rock in the mine roof. 16 FMSHRC at 842; Tr. 227-28. Tatton and Mine Superintendent Garth Nielsen attempted to divert more air into the 4th West section but were unsuccessful. 16 FMSHRC at 841; Tr. 329-35.

Also on June 26, Energy West's equipment overhaul coordinator, Bud Warrington, put miners in the section on a dust control alert. 16 FMSHRC at 842. He included special instructions on his maintenance list to repair the baffle on the stageloader in addition to a list of maintenance measures designed to control dust that had been previously prepared for the maintenance foreman, Ed Hickman. 16 FMSHRC at 842; Tr. 178-84, 186-88; Exs. R-4 and -5. On June 29, Warrington repeated the baffle repair instructions, stated that sampling would occur

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[1] The penalty is for the underlying violation, not the failure to abate order.

[2] Commissioner Marks, dissenting on the penalty issue, concludes that the Secretary failed to adequately explain the basis for withdrawing his S&S allegation. Slip op. at 9-10. Commission precedent, however, establishes that the Secretary has unreviewable discretion to vacate citations. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993).

on Monday (July 1), and instructed that everything with regard to dust be checked. 16 FMSHRC at 842; Ex. R-5 at 2. The longwall maintenance crew changed the bits on the longwall shearer, checked and repaired sprays, cleaned and washed shields, and changed dust filters. 16 FMSHRC at 842-43; Tr. 242-51, 287-90, 299-305. Hickman assumed personal responsibility to see that corrective actions were carried out thoroughly. 16 FMSHRC at 842; Tr. 287.

On July 1, 2, and 3, Energy West took abatement samples for MMU 015-0 and submitted them to MSHA's Pittsburgh laboratory. 16 FMSHRC at 839; Tr. 164; Ex. M-4. On July 10, because of the presence of sandstone in the coal seam and the attendant dust when the miner cut into it, Energy West removed the MMU from the 4th West section with a hundred feet of coal remaining and moved it two miles away, to the 11th Right section. 16 FMSHRC at 839, 843, 844; Tr. 131-33, 144, 147, 164. Conditions in that section were significantly different--the area was wetter, thus generating less dust. 16 FMSHRC at 843; Tr. 147-49, 293-94.

On July 15, MSHA Inspector Fred Marietti, while conducting a regular inspection of the mine, was called by his supervisor to return to the MSHA field office to review the laboratory report of Energy West's abatement samples. 16 FMSHRC at 837-38; Tr. 28-29. The sampling yielded an average dust concentration of 2.3 mg/m^3. 16 FMSHRC at 838; Tr. 32; Ex. M-4. After reviewing the results, the inspector returned to the mine and immediately issued a section 104(b) failure to abate order, Tr. 33-34. The order stated that the time for abatement should not be extended because of "an obvious lack of effort by the operator to control the respirable dust." Order No. 3850746. The language was taken from the Coal Mine Inspector's Manual. 16 FMSHRC at 841; Tr. 53-55. Marietti based his determination not to extend the abatement time on the fact that dust levels had increased relative to the prior cited sample results, on previous conversations with other inspectors to the effect that the type of mining unit involved had been out of compliance before, and on Energy West's failure to incorporate into its ventilation plan actions that it had taken to bring mining units into compliance. 16 FMSHRC at 840; Tr. 34-37. Marietti did not inspect the longwall or enter the mine before he issued the order. 16 FMSHRC at 841. Nor did he make any inquiries concerning why the sample readings may have increased or concerning the operator's efforts to abate the citation. *Id.*; Tr. 47-48. When he wrote the 104(b) order, Marietti had no specific knowledge of sampling results from the MMU 015-0 prior to the June 1992 citation. Tr. 48. The inspector entered the mine, observed the MMU, and spoke with miners regarding compliance measures only *after* he had decided to issue the order. Tr. 40.

In order to lift the order, Energy West increased air velocity and water pressure and added sprayers to the MMU. Tr. 377-78. Inspector Marietti then allowed Energy West to resume production. Tr. 378; Ex. M-5. The order was terminated on July 22, after three samples taken by MSHA showed an average concentration of 1.8 mg/m^3. Tr. 44, 51-52; Ex. M-5.

Analysis

Section 104(b) provides that an inspector shall issue an order requiring all persons to be withdrawn from an area affected by a violation, if, during a follow-up inspection, he finds:

> (1) that a violation described in a citation . . . has not been totally abated within the period of time originally fixed therein or as subsequently extended, and
> (2) that the period of time for the abatement should not be further extended . . . .

30 U.S.C. § 814(b). Thus, the statute expressly requires an inspector to make a determination that a violation has not been timely abated *and* that an extension is not warranted before issuing an order.

In contesting a section 104(b) order, an operator may challenge the reasonableness of the time set for abatement or the Secretary's refusal to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989) (citations omitted). The Commission's focus in such a proceeding is on whether the inspector acted reasonably in determining that the abatement time should not be extended. *See Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (December 1993) (having determined a hazard existed, inspector acted reasonably in not extending abatement time). The Commission has set forth its test for whether an inspector acted reasonably or abused his discretion in issuing a withdrawal order in cases addressing imminent danger withdrawal orders. *See, e.g.*, *VP-5 Mining Co.*, 15 FMSHRC 1531, 1537 (August 1993) (Secretary met his burden of proving that inspector reasonably concluded hazard was imminent); *Island Creek Coal Company*, 15 FMSHRC 339 (March 1993). *Island Creek* involved an inspector's issuance of an imminent danger order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), which provides that an inspector may require the removal of miners from areas in which conditions exist that could cause death or serious physical harm before abatement (*see* 30 U.S.C. § 802(j)). 15 FMSHRC at 339-40, 345.

Commission precedent has emphasized that, because an inspector must decide quickly and without delay whether a hazard presents an imminent danger, *Island Creek*, 15 FMSHRC at 346-47, he "must have considerable discretion in issuing imminent danger orders," *id.* at 348, *citing Rochester & Pittsburgh*, 11 FMSHRC 2159, 2164 (November 1989). The Commission has also held, however, that such discretion, even in imminent danger situations, is not without limit. An inspector must make a reasonable investigation of the surrounding facts. "[A] judge 'should make factual findings as to whether the inspector made a reasonable investigation of the facts . . . and whether the facts known to him, or reasonably available to him, supported issuance of the . . . order.'" *Island Creek*, 15 FMSHRC at 346, *quoting Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (August 1992). Clearly, conditions raising the possibility of an imminent danger pose more compelling circumstances for immediate inspector action. Thus, the Commission's requirement of an investigation into conditions at the mine before issuance of an imminent danger order applies

with greater force to an inspector's exercise of discretion in issuing a failure to abate order.

Further, MSHA's *Program Policy Manual* ("*Manual*") states that an inspector, in determining whether an extension of abatement time is justified, is to engage in a review process that involves factual considerations other than the existence of a continuing violation. It provides in part:

> Upon expiration of the time fixed for abatement, *the inspector should review the circumstances*, and if circumstances so justify, extend the abatement period. If no extension of time is justified, and the violation is unabated, the inspector shall issue a withdrawal order under section 104(b).

Volume I, at 15 (July 1, 1988) (emphasis added). Although the *Manual* is not considered binding, the Commission has referred to it as evidence of MSHA's policies and practices. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 n.4 (April 1994) (citations omitted).

The judge determined that Inspector Marietti had not erred in issuing the failure to abate order. 16 FMSHRC at 848-49. He found that the increase in dust concentrations indicated the operator had not made an "effective" effort to correct the violation. *Id*. at 849. As to Energy West's argument that the inspector had abused his discretion by failing to consider whether circumstances warranted an extension of the abatement period, the judge held that, in light of the "continuing dust violation from mid-June until early July 1992 . . . no circumstances existed that would cause the inspector to conclude" an extension was warranted. *Id.* at 844.

The judge erred, in my opinion, in finding that a continuing violation alone is sufficient to support a determination that an extension of abatement time is not warranted and in failing to address the reasonableness of the inspector's inquiry. *See* 30 U.S.C. § 814(b)(2); *Island Creek*, 15 FMSHRC at 346-47. The judge's post hoc rationalization, based on the trial record, that "no extension of the abatement period would have been justified," 16 FMSHRC at 844, cannot correct the inspector's failure to inquire into current mining conditions prior to issuing the section 104(b) order.[3]

The inspector looked only at the laboratory results for the abatement dust samples and the June samples that were cited. He did nothing to ascertain Energy West's efforts to abate the citation or the facts and circumstances surrounding the operation of the MMU, but copied form language from a manual to charge Energy West with "an obvious lack of effort" to control respirable dust. Energy West responded to the citation by taking general dust control measures and it took steps to address particular problems with its equipment. The inspector did not go to the mine, other than to deliver the completed order, or talk to anyone at the mine prior to issuing

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[3] Much of the Secretary's brief addresses whether substantial evidence supports the *judge's* determination that the abatement time should not be extended. *See* S. Br. 6-17.

the order. He did nothing to ascertain whether miners were subjected to a hazard (they were wearing personal protective equipment), *see* Tr. 52; Ex. M-2,[4] or that the MMU was no longer located in the 4th West section, but had been moved to a less dusty area two miles away. All this information was pertinent to the matter of whether the abatement time should have been extended. *See Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163 (inquiry in issuing imminent danger order is whether the condition would pose a hazard, given continued normal mining operations).[5]

The majority opinion affirms the judge on substantial evidence grounds, rather than focusing on whether the inspector abused his discretion and whether he made a reasonable investigation of the facts. Slip op. at 5-7. In simply reviewing the judge's factual determinations, that opinion implicitly approves his erroneous analysis.

On this record, I cannot say Inspector Marietti acted reasonably. Accordingly, I would vacate the order and reverse the judge.

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Arlene Holen, Commissioner

[4] The Secretary amended the citation to delete the "S&S" designation because all miners exposed to the cited respirable dust levels were wearing personal protective equipment. 16 FMSHRC at 837.

[5] As to the inspector's awareness that Energy West had not incorporated into its ventilation plan steps it had taken in addressing respirable dust citations, the appropriate response would have been through the ventilation plan approval process. *See* 30 C.F.R. § 75.370. While the contents of a plan are the result of consultation between the Secretary and the operator (*see, e.g., Penn Allegh Coal Co.,* 3 FMSHRC 2767, 2770-73 & n.8 (December 1981)), "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." *UMWA v. Dole,* 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong. 1st Sess. 25 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 613 (1978). 30 C.F.R. § 75.370(f) provides for review by the Secretary of ventilation plans every six months to assure their suitability to current mining conditions.