FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 28, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 97-84-R
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is the decision by Administrative Law Judge Gary Melick to vacate a section 104(b) withdrawal order, 30 U.S.C. ' 814(b), issued by the Department of Labor=s Mine Safety and Health Administration (AMSHA@) against Consolidation Coal Company (AConsol@) for its failure to abate a violation of the respirable dust standard for underground coal mines set forth in 30 C.F.R. ' 70.100(a).[2] 19 FMSHRC 1581,

[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

[2] Section 70.100(a) states in pertinent part:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

30 C.F.R. ' 70.100(a).

1587 (Sept. 1997) (ALJ). The Commission granted the Secretary of Labor=s petition for discretionary review challenging the judge=s decision. For the reasons that follow, we affirm the judge=s decision.

I.

Factual Background

Consol operates the Robinson Run No. 95 Mine, an underground coal mine in Harrison County, West Virginia. Tr. 17. In approximately January 1996, a complaint was filed with MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. ' 813(g), by Ann Martin, a belt cleaner at the mine. Tr. 53; Ex. C-14 at 2. She alleged the presence of excessive dust at her work position on the 5 North Mains No. 2 belt line. Tr. 53, 56-58. On February 20 and March 5, 1996, MSHA Inspector Scott Springer visited the mine and, on each day, he sampled Martin=s work position by placing a dust sampling pump on her. 19 FMSHRC at 1582. The average respirable dust concentration for the two samples was 11.2 milligrams per cubic meter of air (Amg/m^3@), far in excess of the 2.0 mg/m^3 limit set in section 70.100(a). *Id.*

On March 18, 1996, Inspector Springer issued a citation to Consol under section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), for violating the dust standard at Martin=s work position. *Id.* The citation required Consol to take corrective action to abate the violation Aand then sample . . . each day until five valid samples@ were submitted to MSHA. *Id.* The citation set April 1 as the abatement date. *Id.* at 1584.

From March 20 to April 2, 1996, Consol took five respirable dust samples at Martin=s position. *Id.* The average respirable dust concentration was 2.9 mg/m^3, which still exceeded the dust standard. *Id.* On April 16, MSHA Inspectors Charles Thomas and William Ponceroff visited the mine. Tr. 83-85. Inspector Thomas noted that the air velocity had been increased at the 5 North Mains No. 2 belt line tailpiece. 19 FMSHRC at 1584. He observed that the operator had begun to install tamper-proof valves on the sprays used to dampen the belt lines, in order to prevent the sprays from being turned off by unauthorized personnel. *Id.* Inspector Thomas noted that the 5 North Mains No. 2 belt line appeared damp and that Consol had ordered a different type of spray system. *Id.*; Tr. 94.

Consol management told the MSHA inspectors that the new equipment would be installed in time to start sampling on April 22, 1996. Tr. 91. Based on this information, the abatement date was extended to April 30, and Consol was required to take five valid samples, starting on April 22. 19 FMSHRC at 1584; Tr. 144.

On April 17, 1996, Consol contracted dust specialists from Conflow Inc. to help reduce the dust levels at Martin=s work position. Tr. 409-10. On May 6, Inspector Thomas returned to the mine and was told by Dave McCullough, a Consol safety specialist, that Consol had attempted to take dust samples at Martin=s position between April 22 and May 3 but had experienced problems obtaining valid samples. 19 FMSHRC at 1584; Tr. 95-96; Gov=t Ex. 4 at 4. McCullough informed the inspector that the MSHA Pittsburgh laboratory had rejected the April 22 sample because of an invalid occupation code on the sample data card. Tr. 334-35. He also

told the inspector that the April 24 sample was invalid because it had been taken when Martin had not worked her entire shift in the designated area. 19 FMSHRC at 1586; Tr. 336-37. Inspector Thomas examined the mine=s sampling log book and recorded that A[f]our (4) of the five (5) required valid samples were submitted for the [belt cleaner] occupation between 4-16-96 and 5-6-96.@ 19 FMSHRC at 1584. He also noted that some of the samples had been voided, including A4-24-96 cassette number 50-234511 [because the belt cleaner] did not work entire shift at location [and that] . . . the fifth valid sample was submitted but rejected by the computer as invalid code on 4-22-96 and operator became aware [of the rejection on] 5-6-96.@ *Id.* at 1584-85.

Inspector Thomas extended the abatement date to May 10, 1996, to allow Consol more time to obtain additional samples. Tr. 95-96. From May 3 to May 16, the operator did not take any additional samples because Martin was on sick leave or away on union business. Tr. 345-47. No other miner was assigned to work the 8-hour shift at Martin=s work position during the time she was not at the mine. Tr. 346.

On May 10, 1996, MSHA received a letter from Consol=s mine superintendent, Walter Scheller, stating that the proposed abatement measures were complete. Gov=t Ex. 8 at 3. Also on May 10, MSHA=s Pittsburgh laboratory issued a Report of Continuing Noncompliance (the AMay 10 report@), showing that Consol had submitted five valid samples with an average dust concentration of 2.2 mg/m^3, which still exceeded the dust standard.[3] 19 FMSHRC at 1586; Gov=t

[3] The May 10 report listed the five valid samples as follows:

Cassette No.	Date	MRE Equiv. Concentration
50233806	04-22-96	1.7
50234511	04-24-96	2.2
50234501	05-01-96	2.5
50233800	05-02-96	2.6
50233870	05-03-96	2.0

Ex. 5 at 2. By May 10, MSHA had corrected the invalid occupation code for the April 22 sample and included it as one of the five valid samples in the May 10 report. Tr. 334-36. The report also included, as one of the five valid samples, the April 24 sample which was taken when Martin did not work her entire shift on the 5 North Mains No. 2 belt line. 19 FMSHRC at 1586.

On May 16, 1996, Inspectors Thomas and Ponceroff returned to the mine and discussed with management what abatement steps had been taken. *Id*. at 1585; Tr. 120-21. After traveling the length of the 5 North Mains No. 2 belt line, the inspectors concluded that Consol had not

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Avg. Conc. 2.2

Gov-t Ex. 5 at 2.

made a good faith effort to abate the violation. Tr. 123-24. Inspector Ponceroff issued a 104(b) order[4] to the operator, in which he noted that Athe results of the respirable samples (average) was 2.2 mg/m^3.@ 19 FMSHRC at 1585.

II.

Procedural Background

A. The Underlying Section 104(a) Citation: Docket No. WEVA 96-165

Both the section 104(a) citation and the subsequent section 104(b) order were initially litigated together in Docket No. WEVA 96-165. On September 10, 1996, the Secretary filed a petition for assessment of civil penalty relating to Aeach alleged violation set forth in attached Exhibit A.@ S. Pet. at 1. While the AType of Action@ in the petition was described as A104A **C** 104B,@ Exhibit A included a copy of the 104(a) citation but not a copy of the 104(b) order. *Id.* at Ex. A.

The case was assigned to Administrative Law Judge Melick. During a pre-hearing conference on January 7, 1997, the day of the hearing, a question arose as to the validity of the April 22 sample included in the May 10 report. S. Mot. to Withdraw Mot. to Amend Pleadings at 1-2 (AS. Withdrawal Mot.@); Letter from Secretary to Consol of 1/23/97 (AS. Letter@). During the hearing later that day, the Secretary filed a motion, at the prompting of the judge, to amend her 104(b) order to state that Consol had not submitted five valid samples for the period April 22 to May 3, 1996. Tr. of Hearing on January 7, 1997, at 3-5. The motion was apparently based on the alleged invalidity of the April 22 sample and did not focus on the voided April 24 sample. S. Withdrawal Mot. at 1-3; S. Letter. The judge granted the Secretary=s motion to amend the order and he postponed the hearing. Tr. of Hearing on January 7, 1997, at 5.

In a letter dated January 23, 1997, the Secretary informed Consol that the April 22 sample had been incorrectly classified as a voided sample and that Consol had in fact submitted five valid samples by the abatement date of May 10, 1996. S. Letter. The Secretary did not refer to the April 24 sample. On February 26, 1997, the Secretary moved to withdraw her motion to amend the order, because, she now represented, Consol had submitted five valid samples. S.

[4] Under section 104(b) of the Mine Act, if an MSHA inspector finds, during a follow-up inspection, that a violation described in a 104(a) citation Ahas not been totally abated within the period of time as originally fixed therein or as subsequently extended, and . . . that the period of time for the abatement should not be further extended,@ the inspector shall issue a withdrawal order to the operator. 30 U.S.C. ' 814(b).

Withdrawal Mot. at 2-3. Again, the April 24 sample was not mentioned. The judge granted the Secretary=s motion to withdraw her motion to amend the order. On March 11, 1997, the judge issued an order that he lacked jurisdiction over the section 104(b) order because it was not attached to the Secretary=s petition for assessment of a civil penalty.

The hearing on the 104(a) citation was resumed on March 18, 1997, and was concluded on the following day. The judge issued his decision on June 19, 1997, affirming the 104(a) citation that Consol violated the dust standard, based on the February 20 and March 5 samples taken by MSHA. 19 FMSHRC 1174, 1176 (June 1997) (ALJ). In his discussion of the good faith attempt to achieve rapid compliance criterion for penalty assessment purposes, the judge found that Ain order to abate the violation the operator was required to obtain >five valid samples= of the subject belt examiner and to submit those samples to the Pittsburgh respirable dust processing laboratory.@ *Id.*

2. 104(b) Withdrawal Order: Docket No. WEVA 97-84-R

On March 14, 1997, Consol filed a notice of contest with the Commission, challenging the validity of the 104(b) order.[5] Administrative Law Judge Melick was assigned the case. Consol filed its brief on August 15, 1997, arguing that the Secretary did not have a legal basis for issuing the 104(b) order because she did not have the required five valid samples needed to determine if the violation had been abated by the abatement date. C. Post-hearing Br. at 4-6. Consol contended that one of the five samples used by MSHA, the April 24 sample, was invalid because it had been taken outside the designated work area. *Id.* at 4-5. Furthermore, Consol argued that, even if the Secretary had shown that the violation had not been totally abated by the abatement date, its abatement efforts justified a further extension of the abatement period rather than the issuance of a 104(b) order. *Id.* at 11-12.

In a letter dated August 21, 1997, the Secretary informed the judge that the parties had agreed to forgo a hearing and to use the record developed in the underlying 104(a) citation case (Docket No. WEVA 96-165) as the record in the 104(b) order case (Docket No. WEVA 97-84-R). In her brief to the judge filed on August 25, 1997, the Secretary argued that MSHA had a legal basis for issuing the 104(b) order because it had five valid samples which showed that Consol had failed to abate the violation by the abatement date. S. Post-hearing Br. at 10. She asserted that, based on the sample evidence, she had established a prima facie case that Consol did not abate by the abatement date and that Consol had failed to rebut the prima facie case. *Id.* at 10-12. The Secretary did not dispute that the April 24 sample was obtained when the belt cleaner had not worked her entire shift in the designated area. *Id.* at 12-13. However, she argued that

[5] On March 25, 1997, the Secretary moved to dismiss Consol=s notice of contest, claiming it was not filed in a timely manner under 29 C.F.R. ' 2700.25. On April 29, 1997, the judge issued an order denying the Secretary=s motion on the ground that Consol=s failure to timely file was caused by the Secretary=s failure to properly include the 104(b) withdrawal order in her September 9, 1996, petition for assessment of a civil penalty.

Consol could not claim that the sample was invalid because it had failed to inform the MSHA laboratory that the sample was invalid. *Id.* at 12-14. Furthermore, she argued that MSHA properly declined to extend the abatement period for a third time because Consol had failed to take adequate corrective measures. *Id.* at 17-25.

In his decision of September 15, 1997, the judge concluded that the Secretary failed to show that Consol did not abate the violation by the abatement date. 19 FMSHRC at 1585. He concluded that the April 24 sample was invalid and, as a result, MSHA did not have the required five valid samples to issue the 104(b) order. *Id.* at 1585-86. He also concluded that Consol gave MSHA sufficient notice that the April 24 sample was invalid. *Id.* at 1586.

III.

Disposition

The Secretary contends that the judge erred in vacating the 104(b) order. S. Br. at 8. She asserts that, in order to show the validity of the 104(b) order, she needed to prove that Consol did not totally abate the underlying violation by the abatement date. *Id.* at 7. The Secretary argues that, because Consol failed to obtain five valid samples, she could not determine whether or not the violation had been totally abated. *Id.* at 9. Accordingly, the Secretary asserts that the burden of proof should shift to Consol to prove that it totally abated the violation by the abatement date (the Ashift-in-burden theory@). *Id.* at 9-10.

Alternatively, the Secretary argues that she established a prima facie case that Consol did not totally abate the violation by the abatement date and that Consol failed to rebut her prima facie case. *Id.* at 16; S. Reply Br. at 5. Furthermore, she contends that MSHA was correct not to extend the abatement date for a third time because Consol did not make a good faith effort to abate the violation. S. Br. at 17-21. The Secretary requests that the Commission reverse the judge=s decision vacating the 104(b) order and remand the case to the judge for assessment of a civil penalty. *Id.* at 22.

Consol argues that the judge correctly vacated the 104(b) order. C. Br. at 12, 17-18. It asserts that the Commission should not consider the Secretary=s shift-in-burden theory because it was not argued before the judge. *Id.* at 10-13. Consol also argues that the Secretary has not demonstrated the required preponderance of evidence to support her prima facie case that Consol failed to abate the violation by the abatement date. *Id.* at 17. Consol requests that the Commission affirm the judge=s decision vacating the 104(b) order. *Id.* at 18.

In reply, the Secretary contends that the judge was given sufficient notice of her shift-in-burden theory because she argued below that Consol had the burden to inform MSHA of any sampling problems. S. Reply Br. at 7.

The question on review is whether the judge erred in vacating the 104(b) order on the

grounds that the Secretary did not have a legal basis for issuing the order as a result of Consol=s failure to submit five valid dust samples.

A. Whether the Burden of Proof Shifts to Consol

Under the Mine Act and the Commission=s procedural rules, A[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass.@ 30 U.S.C. ' 823(d)(2)(A)(iii); 29 C.F.R. ' 2700.70(d). *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (holding that the Commission is barred from considering the Secretary=s theory because it was not raised before the judge); *Union Oil Co. of Cal.*, 11 FMSHRC 289, 300-01 (Mar. 1989) (declining consideration of the Secretary=s argument because it was not made before the judge). Upon reviewing the Secretary=s post-hearing brief, we find the Secretary did not argue her shift-in-burden theory before the judge.

We do not agree with the Secretary=s assertion that, because she argued below that Consol was required to inform MSHA of any problems with dust samples, the judge was given notice of her shift-in-burden theory. S. Reply Br. at 7. The requirement to inform MSHA about sampling problems is not similar to the burden of proving that the violation had been totally abated by the abatement date. In addition, Consol never disputed before the judge that it was required to inform MSHA of sampling problems and the Secretary never raised the issue below of shifting this requirement to another party.

The Secretary has also not shown good cause under section 113(d)(2)(A)(iii) why the Commission should still consider her belatedly-raised theory. 30 U.S.C. ' 823(d)(2)(A)(iii). The Secretary had ample opportunity to argue her theory before the judge. When she filed her post-hearing brief, she had notice there was an issue as to whether five valid samples had been obtained. Consol notified Inspector Thomas that the April 24 sample was invalid. 19 FMSHRC at 1586. The Secretary filed a motion to amend the 104(b) order to reflect that five valid samples had not been obtained by Consol between April 22 and May 3, 1996. For reasons never fully explained, she then changed her mind and withdrew the motion to amend. In addition, Consol clearly argued in its post-hearing brief, filed ten days before the Secretary=s brief, that it did not obtain five valid samples between April 22 and May 3, 1996. C. Post-hearing Br. at 5-6.

Based on the foregoing, the Commission will not consider the Secretary=s shift-in-burden theory because the Secretary failed to raise it before the judge.

A. Whether the Secretary Established a Prima Facie Case that Consol did not Abate the Violation

We also find unpersuasive the Secretary=s alternative argument that she had established a prima facie case that Consol failed to abate the violation by the abatement date. S. Br. at 16. When she made this argument to the judge, she based it on her claim that there were five valid samples and their average concentration exceeded the dust standard. S. Post-hearing Br. at 10-17. The Secretary makes a similar prima facie claim on review but she does not explicitly argue that Consol took five valid samples. S. Br. at 16; S. Reply Br. at 5. We assume that, as with her argument before the judge, the Secretary on review is basing her prima facie claim on the assertion that Consol submitted five valid samples and the average concentration of the samples exceeded the dust standard.

When reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means A>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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is undisputed that Martin, the belt cleaner, did not work her entire 8-hour shift in the designated area on the day that the April 24 sample was taken. Tr. 110-11. It is also undisputed that, in order to obtain a valid dust sample, the designated area must be sampled continuously for the entire shift. 30 C.F.R. ' 70.201(b). Accordingly, there is substantial evidence to support the judge=s conclusion that the April 24 sample was not valid. 19 FMSHRC at 1586. Because the April 24 sample comprised one of the five samples used in the May 10 report, we also find that there is substantial evidence that, contrary to the Secretary=s prima facie claim, the Secretary did not have the required five valid samples needed to show that Consol failed to abate the violation by the abatement date.

Our holding is a narrow one. We do not mean to suggest that the failure to take five valid samples is generally a valid defense to a 104(b) order issued for failure to abate a violation of section 70.100(a). On the contrary, proof of failure to take necessary samples required to terminate a dust citation will in most such cases establish the basis for a 104(b) order. Thus, when the Secretary became aware that the April 24 sample was not valid, she had the option, but chose not to use it, of amending the withdrawal order to state that it was issued because Consol failed to obtain five valid samples (a requirement stated in the original 104(a) citation). Even in the absence of a formal amendment, if she had at least litigated this theory before the judge, the Secretary could have defended her withdrawal order on the undisputed basis (C. Post-hearing Br. at 5-6) that Consol did not obtain five valid samples. *See Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (holding that where issue is actually litigated, formal amendment of pleadings is unnecessary). It is the Secretary=s unexplained decision to eschew this argument that leads us to affirm the judge=s dismissal of the 104(b) order.

IV.

Conclusion

For the foregoing reasons, we affirm the judge=s decision vacating the 104(b) order.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, dissenting:

The judge=s determination in this case amounts to a holding that an operator=s failure to produce five valid respirable dust samples, after receiving two extensions to do so, is a defense to issuing a failure to abate order. Because I cannot subscribe to such an illogical result, I dissent.

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 issued pursuant to subsection (a) of this section has not been *totally abated* within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he *shall* determine the extent of the area affected by the violation and *shall promptly issue an order* requiring the operator of such mine . . . to immediately cause all persons . . . to be withdrawn . . . .

30 U.S.C. ' 814(b) (emphasis added).

On March 18, 1996, the Department of Labor=s Mine Safety and Health Administration (AMSHA@) issued Consol a respirable dust citation under 30 C.F.R. ' 70.100(a) on the grounds that the dust samples showed an average concentration of 11.2 mg/m^3 for a certain occupation and set the time for abatement as April 1. Gov=t Ex. 4 at 1. It is undisputed that between March 20 and April 2, the average respirable dust concentration was 2.9 mg/m^3, which still exceeded the dust standard and MSHA extended the time for abatement to April 30. *Id.* at 3. On May 6, Consol reported that it had experienced problems obtaining valid samples and the abatement day was extended to May 10. 19 FMSHRC at 1584; Tr. 95-96; Gov=t Ex. 4 at 4. The average of these problem samples was 2.2 mg/m^3. 19 FMSHRC at 1585-86. From May 3 to May 16, *the operator did not take any additional samples*. Tr. 345-47. On May 16, MSHA inspectors returned to the mine and concluded that Consol had not made a good faith effort to abate the violation. 19 FMSHRC at 1584; Tr. 120-21, 123-24.

The inspectors issued the section 104(b) order at issue, reciting in extensive detail that an adequate effort was not made to abate the original March 18, 1996 citation. Gov=t Ex. 9. The order stated:

> Upon investigation of the changes after the second continued noncompliance, the following conditions were observed: a tamper proof intentional shutdown of the spray system for the No. 2, 5-N belt was not installed. Two of the 3 sprays (top) were shut off. The top belt was dry from the No. 64 crosscut to the No. 91 crosscut, a distance of 2,700 feet. The water spraying system for

> the 8D beltline did not have a water spray for the top surface of the top belt. The valve to prevent intentional shutdown of the water spraying system was connected to a hose, but not installed in the water system. A citation for float coal dust was issued at the 8-D belt transfer where coal is dumped on the No.2, 5 North beltline. The tamper proof valve to prevent intentional shutdown of the sprays for the 7-D system was not installed to prevent the sprays from being shut off. Two of the three bottom sprays were turned off. The 9-D beltline also dumps coal on the 5N, No. 2 beltline. A top spray was not installed to spray the top surface of the top belt. Management was aware that the valve to minimize intentional shutdown was being defeated by using an acetyline wrench. This had occurred on at least 2 occasions. Measures were not implemented to prevent this from happening. Management has failed to assure that the new system for the water were installed and properly maintained. No other means of evaluation were implemented by the company.

19 FMSHRC at 1585. The order also stated that the average result of the respirable dust samples was 2.2 mg/m^3. *Id.*

I conclude that, on May 16, 1996, despite the fact that the MSHA inspectors may have incorrectly relied on this 2.2 mg/m^3, it was undisputed that A[a]n adequate effort was not made to abate@ the citation. *Id.* As the judge found, MSHA granted the operator a second extension because it was having problems obtaining valid samples. *Id.* at 1584-85. Consol, however, failed to take another sample during the second extension period. Under the plain terms of Mine Act section 104(b), the citation had not been Atotally abated.@ Thus, the MSHA inspectors were well within their discretion to issue the section 104(b) order. *See Energy West Mining Co. v. FMSHRC*, 111 F.3d 900, 902-04 (D.C. Cir. 1997) (holding that inspector=s decision to issue section 104(b) order was subject to review for abuse of discretion).

Section 70.201(d) provides: ADuring the time for abatement fixed in a citation for violation of section 70.100 (Respirable dust standards) . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken.@ 30 C.F.R. ' 70.201(d). Consol violated the standard=s unequivocal requirement that an operator sample each production shift until five valid respirable dust samples are taken. The risk of failing to take valid samples should of course be bourne by the operator. *See Harlan Cumberland Coal Co.*, 19 FMSHRC 1521,1524 (Sept. 1997) (AAny risk that the samples might not reach MSHA properly lies with the operator.@). For this reason, I cannot agree with the majority and uphold the dismissal of a withdrawal order that was well within the discretion of the two MSHA inspectors to issue, given the operator=s less than rigorous attempt to sample each production shift.

Although the Secretary may have been mistaken in failing to amend the order to allege

that Consol had failed in obtaining five valid samples, it is undisputed that Consol failed in that duty. Thus the judge=s holding exalts form over substance and produces the absurd result that an operator=s failure to comply with the respirable dust standard may serve as a defense to a withdrawal order. Because the record compels the conclusion that Consol failed to adequately abate the respirable dust citation, I would reverse the judge=s dismissal of the withdrawal order at issue. *See American Mine Servs., Inc.*, 15 FMSHRC 1830,1834 (Sept. 1993) (holding that where the record can support only one conclusion, remand to the judge for reconsideration would serve no purpose).

Marc Lincoln Marks, Commissioner

Distribution

W. Christian Schumann, Esq.
Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Elizabeth Chamberlin, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041