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MSHA V. DRUMMOND COMANY  
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-248
Petitioner	:	A.C. No. 01-00515-03822
v.	:	Mary Lee No. 1 Mine
	:	
DRUMMOND COMPANY, INC.,	:	Docket No. SE 92-253
Respondent	:	A.C. No. 01-00821-03720
	:	Mary Lee No. 2 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner; J. Fred McDuff, Esq., Drummond Company, Birmingham, Alabama, for Respondent in Docket No. SE 92-248; and David M. Smith, Esq., Maynard, Cooper, Frierson and Gale, Birmingham, Alabama, for Respondent in Docket No. SE 92-253

Before: Judge Melick

These consolidated proceedings are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq., the "Act" charging Drummond Company, Inc. (Drummond) with violations of mandatory standards.

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At hearings Drummond admitted the violation charged in the one citation at issue, Citation No. 2805497, and conceded the inspector's findings relating to the violation. Drummond thereafter challenged only Section 104(b) Withdrawal Order No. 3008781, issued for an alleged failure to abate that citation.(Footnote 1) At the conclusion of the Secretary's case-in-chief,

1 Section 104(b) provides as follows:

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) has not been totally abated within the period of time as

Drummond moved for a directed verdict arguing that based on the Secretary's case alone, it was clear that the violation charged was fully abated at the time the Section 104(b) order was issued and that the Secretary was without authority under that section to require it to take the additional specified action beyond what was necessary to remedy and correct the violative condition cited. In a bench decision, the motion was granted. That decision is set forth below with only non-substantive correction.

The motion for directed verdict is granted. The admitted citation underlying the Section 104(b) order in this case provides as follows:

The operator's approved ventilation system, methane and dust and control plan, was not being followed in the 40 north section in that the following conditions were observed in the three right entry face where the continuous miner was cutting coal; One, they had taken a 40 foot cut out of the left side of the face prior to cutting the right side. Two, this was the first cut in by the crosscut, and the line curtain was 25 feet back from the last row of roof bolts. Three, there was seven feet of the wing dropout by the crosscut had been rolled up, therefore short circuiting the air. Four, there was only 145 feet per minuit [sic] at the end of the line curtain. The foreman stated he took a reading and had 245 feet per minuit [sic]. There were no notes to support this reading.

1(...CONTINUED)

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 violations, and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Secretary acknowledges that immediately upon the issuance of the citation the first three of the cited conditions were abated and that, therefore, they are not at issue. It is alleged by the Secretary that only the fourth condition was not abated when the order was issued on July 30, 1991, and was not abated until sometime later when the operator met certain additional criteria required by the Secretary.

The order reads as follows:

The four of the five places examined did not have the required amount of air to cut 40 foot cuts. The two shifts prior cut 40 foot cuts. The day shift cut four places 40 feet, and the evening shift cut two places 40 feet. Therefore, it is determined that the required air quantity and velocity is not being maintained so as to cut 40 foot cuts continuously which is the operator's mining plan. Therefore, the time of abatement cannot be extended.

Nowhere does the order charge, nor is it alleged, that the specific conditions set forth in the underlying citation, and which caused the violation in that citation, continued to exist once the inspector issued that citation. Three of the four conditions were immediately abated, mining was halted in the cited entry, and there is no evidence of any additional mining in the cited entry that was not in full compliance with the ventilation plan. For that matter there are no allegations nor any evidence that any cuts were thereafter taken in violation of the plan. (Footnote 2)

More particularly, Section 104(b) of the Act provides, in part, that 'if upon any follow-up inspection of a coal or other mine an authorized representative of the Secretary finds one, that a

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2 The ventilation plan permitted the operator to take 20 foot cuts with only 200 linear feet of air per minute at the end of the line curtain and 40 foot cuts with 300 linear feet of air per minute at the end of the line curtain. The operator is in no way required by the plan to take 40 foot cuts even if it meets the higher ventilation requirements.

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violation described in a citation issued pursuant to Subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended ...'

That is as far into Section 104(b) as I need to go in this case. I find that on the facts of this case and considering the ventilation plan in effect that, at the time the citation was written, the violation that was specifically charged was, indeed, abated in that the violative conditions in the citation no longer existed. Since mining in the cited 40 foot cut was halted upon the issuance of the citation, and no mining was resumed in violation of the ventilation plan, the citation was clearly abated at that time. There was nothing more for the mine operator then to do to be in full compliance with its ventilation plan and so long as the operator did not violate the ventilation plan thereafter, it could not be deemed to have failed to abate the violation.(Footnote 3)

Under the circumstances, I am going to grant the motion and dismiss the Section 104(b) order that is before me.

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In a motion for settlement considered at hearing in this case, Petitioner proposed a reduction in penalty from \$1,000 to \$750 for the one order at issue, Order No. 2806102. I have considered the representations and documentation submitted in the case and conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An appropriate order directing payment of the proposed penalty will be incorporated in the following Order.

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3 The Secretary is without authority under Section 104(b) to compel performance of additional mining activities or create new requirements beyond what is necessary to abate the precise violation charged. In order to fully abate the citation, the inspector apparently wanted the operator to take 40 foot cuts in his presence with 300 linear feet of air per minute at the end of the line curtain. However, nothing in the ventilation plan requires the operator to take such 40 foot cuts and it may continue to legally take 20 foot cuts with lesser ventilation.

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ORDER

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Order No. 2806102 is affirmed and Drummond Company, Inc. is hereby directed to pay civil penalties of \$750 for the violation charged therein within 40 days of the date of this decision.

Docket No. SE 92-253

Citation No. 2805497 is affirmed and Drummond Company, Inc. is directed to pay civil penalties of \$910.00 for the violation charged therein within 40 days of the date of this decision. Section 104(b) Order No. 3008781 is vacated.

Gary Melick  
Administrative Law Judge  
703-756-6261

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