FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 29, 1996

AMAX COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 95-403-R
	:	Order No. 4264060
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Wabash Mine Mine ID 11-00877

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corp., Pittsburgh, Pennsylvania for Contestant;
Christine M. Kassak, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois for Respondent.

Before: Judge Melick

This case is before me 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," and upon the Notice of Contest filed by the Amax Coal Company (Amax) challenging a "failure-to-abate" order issued by the Secretary of Labor under Section 104(b) of the Act.

At 11:30 on the morning of September 11, 1995, Inspector Robert Stamm of the Department of Labor's Mine Safety and Health Administration (MSHA) issued Citation No. 4264057 to Amax under Section 104(a) of the Act alleging a violation of the standard at 30 C.F.R. § 75.400 and charging as follows:

> An accumulation of coal and coal fines was present around the tail area of the #3 main West conveyor belt and extending 60 feet outby. The coal measured 4 to 24 inches in depth and was also present inby the tail and in the #34 crosscut with side. The belt was rubbing the coal and heat was present on the tail structure. Also float coal dust (black in color) was present on the mine floor from #2 to 36 crosscut, including the adjacent crosscuts.

The cited standard provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and

other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The citation also provided that these violative conditions were to be abated by 4:00 p.m. that same day. No representative of the Secretary appeared at the stated time, however, to determine whether the conditions had, in fact, been abated. Three days later, around 9:30 on the morning of September 14, 1995, the issuing inspector returned to the scene of the cited violation and found that an accumulation existed within the same area as originally cited in Citation No. 4264057. The Secretary acknowledges that he is unable to prove that the accumulated material found on September 14 was any part of the original accumulation cited on September 11.[1] In any event, Inspector Stamm issued an "extension of time" for abating the condition he found at 9:30 a.m. in a "subsequent action" form issued at 10:30 that morning. That form states as follows:

> A portion of the coal was removed from the tail area and for 40 feet outby of the #3 main West conveyor belt. An extension of time is being granted to remove the remaining coal from the tail area and 20 feet outby.

Inspector Stamm returned to this location at 12:25 p.m. on September 14 and, finding an accumulation, issued the section 104(b) order at bar. The order charges in relevant part that "[a]fter a reasonable termination due date and an extension of time, coal was still present under the tail area and extending 20 feet outby the #3 main West belt conveyor." This order was terminated 40 minutes later at 1:05 p.m.

Amax apparently does not dispute that the accumulations found by Inspector Stamm on September 11, 1995, constituted a violation of the cited standard but maintains that those accumulations had been removed, thereby abating the violation before the accumulation found on September 14 was created. Amax argues, therefore, that the September 14 Section 104(b) order was improperly issued.

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[1] The Secretary, as any litigating party, is bound by his admissions at trial and cannot retract those admissions by simply making contrary statements in a post-hearing brief. Any such contrary statements are accordingly rejected. If, indeed, it was subsequently discovered that the admissions were factually incorrect, the appropriate remedy is by motion for a new trial or similar motion stating appropriate grounds for relief.

When issuing a citation under Section 104(a) of the Act, the inspector must "describe with particularity the nature of the violation" as well as "fix a reasonable time for abatement of the violation". In addition, Section 104(b) of the Act 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 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 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.

When the validity of a section 104(b) order is challenged by an operator, the Secretary bears the burden of proving that the violation described in the underlying citation has not been abated within the time originally fixed or as subsequently extended. *Mid Continent Resources, Inc.,* 11 FMSHRC 505, 509 (April 1989) In that case the Commission specifically held that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may, however, rebut the prima facie case by showing that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred. See also*Mettiki Coal Corp.,* 13 FMSHRC 760, 765 (May 1991).

While the Secretary acknowledges that he cannot prove that any part of the coal accumulation found on September 11 continuously existed until September 14, under the*Mid Continent* decision he is apparently not required to prove that the original violative condition continuously existed until the section 104(b) order was issued. In any event, in this case the operator has produced sufficient credible evidence to show that the original accumulation cited in the section 104(a) citation had been cleaned prior to the issuance of the extension and order on September 14. In this regard it is undisputed that Foreman Thompson assigned miners to clean the cited area after the order

was issued on September 11 and that miners were continuing to clean at 3:00 p.m. when Thompson left the section. After the initial cleanup, the mine examiners made no entries in the examination book concerning an accumulation for the afternoon shift on September 11 or the following midnight shift on September 12 (R-25, pp. 70, 72).[2] While the examiner for the midnight shift noted in the "Remarks" column that the tail should be cleaned, this was not reported as a "violation or hazardous condition" and on the next shift, the day shift for September 12, no condition concerning accumulations or needing cleaning in the area of the citation (tail area plus 60 feet) was noted (R-25, p. 74). On the September 12 afternoon shift it is noted on the record books that the tail to 50 feet outby needed to be cleaned and this was addressed on the next shift (Tr. 57-8; R-25, pp. 76-7). On the September 13 midnight shift, the tail and 75 feet outby were noted as needing cleaning and it appears to have been cleaned on the next shift (R-25, pp. 78-9). This is confirmed by the absence of a notation that the tail area needed to be cleaned in the entry for the day shift on September 13 (R-25, p.80). On the September 13 afternoon shift, the mine examiner noted that the tail and 100 feet outby needed to be cleaned. This was addressed on the next shift, the September 14 midnight shift (Tr. 62, 64-5; R-24, pp. 2-3). In addition, the examiner at the end of the midnight shift observed that the tail area needed to be cleaned (not the 100 feet outby) (R-24, p.4), and cleaning apparently occurred at the end of the shift. (Tr. 63-4, 67-8).

Within the above framework I find that the operator has established that the condition cited on September 11 had been abated before the issuance of the order on September 14. Under the circumstances, the order was not issued within the legal parameters of Section 104(b) and must be dismissed[3].

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[2] Page references are to the copies of exhibits with numbered pages as submitted with Respondent's brief.

[3] The Secretary's conditional request in his post-hearing brief for permission to amend his pleadings to modify the order to a section 104(a) citation is rejected. A request to modify a charging document is properly made by motion. See *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992) (Citing *Cypress Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). It would also be inappropriate to modify the 104(b) order to a 104(a) citation *sua sponte*. The necessary findings and related criteria in issuing 104(a) citations are not set forth in the 104(b) order and the operator has not been provided adequate notice. *Consolidation*

ORDER

Order No. 4264060 is hereby vacated.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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Coal Co., 4 FMSHRC 1791, 1794-6 (October 1982).