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MSHA V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 24, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 85-19

MID-CONTINENT RESOURCES, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Backley, Lastowka and Nelson

The issue in this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act"), is whether the Secretary of Labor ("Secretary") proved the validity of a withdrawal order issued pursuant to section 104(b) of the Mine Act, 30 U.S.C. $ 814(b). 1/ The withdrawal order alleges that Mid-Continent

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1/ Section 104(b) states:

> If, upon any follow-up inspection of a ... mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to [section 104] ... 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to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary

Resources, Inc. ("Mid-Continent") failed to abate a violation of 30 C.F.R. $ 75.1704 within the prescribed period of time. 2/ Commission Administrative Law Judge Michael A. Lasher found that the Secretary did not prove that Mid-Continent failed to abate the violation, and he vacated the section 104(b) withdrawal order. 9 FMSHRC 1757 (October 1987)(ALJ). We granted the Secretary's petition for discretionary review challenging the judge's finding. For the reasons that follow, we affirm.

The events leading to the issuance of the contested withdrawal order occurred in the designated return air escapeway of the 102 Long Wall Panel at Mid-Continent's Dutch Creek No. 1 Mine, an underground coal mine, located at Carbondale, Pitkin County, Colorado. The mine lies under 2000 to 3000 feet of overburden. As a result of pressure from the overburden, the mine has an ongoing problem with floor heave and deterioration of the ribs of mine entries. Man-made pack walls, composed of cement and crushed rock or a crushed limestone mixture, provide support in the entries, including entries serving as escapeways. 3/ Pressure from the overburden causes the pack walls to deteriorate and to buckle. Also, water continually seeps into the mine. As a result, impoundments of water in the escapeways can occur.

On June 20, 1984, Mine Safety and Health Administration ("MSHA") Inspector Louis Villegos inspected the designated return air escapeway of the 102 Long Wall Panel. As Villegos walked the escapeway he saw that the floor had heaved and that a dam composed of rock and mud mixed

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determines that such violation has been abated.

30 U.S.C. $ 814(b).

2/ 30 C.F.R. $ 75.1704, the mandatory underground coal mine escapeways standard, provides in part:

> [A]t least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked....

Section 75.1704 essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. $ 877(f)(1).

3/ A "pack wall" is "a dry-stone wall built along the edge of a roadway of a coal ... mine. The wall helps to support the roof and also to retain the packing material and prevent it spreading onto the roadway." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 787 (1968).

with coal had built up to a height of 15 inches. The dam was impounding water at a point approximately 450 feet from the face. The water was up to 12 inches deep and covered the width of the entry. 9 FMSHRC 1760-61.

Because the inspector believed that the impoundment obstructed the escapeway to the extent that passage through the escapeway could not be insured at all times, he issued a citation pursuant to section 104(a) of the Act alleging a violation of section 75.1704, supra. The citation states:

> The designated return escapeway from the 102 longwall section was not maintained to insure passage at all times due to the following conditions being present. At a location 450 feet outby the 102 Longwall face, floor material had been pushed up to within 4 feet of the roof forming a bank and a[n] impoundment of water and rock up to 15 inches deep, 6 feet wide and 75 feet in length. No one was observed in the area to correct the condition. Men were at work at the Longwall face.

Exh. P-1. (emphasis added).

Inspector Villegos issued the citation at 5:15 p.m. on June 20. In the citation he fixed the time for abatement of the violation as 9:00 p.m. the same day. Villegos subsequently twice extended the time for abatement, to July 11, 1984, and to July 20, 1984.

Between June 20 and July 25 mining had advanced in the 102 Long Wall Panel. On July 25, 1984, MSHA Inspector Lee H. Smith inspected the same escapeway with MSHA Supervisory Inspector Clarence Daniels and Mine Superintendent Allyn Davis. Smith had discussed the section 104(a) citation with Villegos. Tr. 126-127. Smith was aware that the time had passed for abatement of the violation but had not previously seen the conditions for which the citation was issued.

During inspection of the escapeway Smith observed an impoundment backing up water. In addition, portions of the pack walls in the area of this impoundment had fallen into the escapeway and the mine floor had heaved to within four feet of the roof. Water and mud had accumulated in the impoundment, which was approximately 50 to 70 feet in length by six to 8 feet in width. Smith testified that the water was about 12 inches deep for a distance of at least 20 feet and the heaving problem existed from the water and mud

accumulation to within 100 to 150 feet of the face.. Tr. 119, 120-22, 154-55. Smith believed that the obstruction in the escapeway represented an ongoing condition in the area," and that after two extensions of the period of time fixed to abate the violation that the area was not being cleaned fast enough." Tr. 151.

Smith, after discussions with Daniels and Davis, believed that the obstructed area of the escapeway was the same area cited by Villegos on June 20. Tr. 126. However, at the hearing on the matter, Smith unequivocally testified that in fact the area was not the same.

Tr. 122-23, 140-141, 150-151, 154. 4/

Smith issued to Mid-Continent a section 104(b) withdrawal order stating in part:

> The designated return air escapeway from the 102 longwall active working section is still not being maintained to insure passage at all times of any person, including disabled persons. Citation No. 2212848 was issued on 06-20-84 because of this condition....

Exh. P-4. On July 30, 1984, Mid-Continent abated the condition leading to issuance of the withdrawal order by grading the entire escapeway to a height of at least 6 feet and a width of 8 feet.

At the hearing, Mid-Continent conceded that the conditions cited by Villegos violated section 75.1704. Mid-Continent argued, however, that because the obstruction cited by Smith in the withdrawal order was different from the obstruction cited in the citation, the section 104(b) order was improperly issued on the basis of its failure to abate the violation alleged in the citation. The Secretary argued that because the escapeway was obstructed on July 25, Mid-Continent had not abated the violation within the period of time as subsequently extended. Alternatively, the Secretary argued that the conditions observed by Smith constituted a separate violation of section 75.1704 and that the contested withdrawal order should be modified to a section 104(a) citation. 5/ 9 FMSHRC 1759-60 (Tr. 114, 274-75).

In his decision the judge followed the alternative course argued for by the Secretary. He found that the Secretary had proved two separate violations of section 75.1704 -- one on June 20, 1984, and one on July 25, 1984 .- but concluded that the Secretary had not proved that Mid-Continent failed to abate the first cited violation. Therefore, the judge held that the order of withdrawal was invalid, and he modified it to a section 104(a) citation. 9 FMSHRC at 1766-67.

In considering the validity of the withdrawal order the judge stated:

4/ The judge found that "[t]he area described in the withdrawal order was closer to the face than the area described by Inspector Villegos in the citation...." 9 FMSHRC at 1763. On review it is undisputed that the sites of the violation cited in the citation and the withdrawal order were different.

5/ Although Mid-Continent did not file a notice of contest pursuant to section 105(d) of the Act, 30 U.S.C. $ 815(d), challenging the issuance of the section 104(b) withdrawal order, the propriety of its first time challenge to the merits of the withdrawal order in this civil penalty proceeding was not argued to the judge or raised on review and therefore is not at issue.

> I ... find insufficient evidence of [the Secretary's] "failure to abate" allegation, not simply because the second (July 25) violation occurred in a different area, but because there (a) is no reliable evidence as to the condition of the original (June 20) violation situs after July 11, coupled with the fact (b) that there is insufficient evidentiary basis to draw the inference that the return escapeway, for one reason or another, at one location or another, was not cleaned up, or maintained adequately during the period July 11 - July 25 to constitute an abatement at some point in time of the original violation. Accordingly, it is concluded that the 104(b) Withdrawal Order was improperly issued.

9 FMSHRC at 1766-67.

On review, the Secretary argues that the judge erred in finding that the section 104(b) order was invalid because the Secretary had not proved that the violative condition existed continuously from the time the condition was originally cited until the time the order was issued. In the Secretary's view, if, during a follow-up inspection, an inspector finds that the operator is not in compliance with the standard cited in a prior section 104(a) citation, a section 104(b) order may validly issue. Because on July 24 Mid-Continent was not in compliance with section 75.1704, the Secretary contends that the section 104(b) withdrawal order was valid.

We conclude that to the extent the judge:s decision can be read as holding that to establish the validity of a section 104(b) withdrawal order the Secretary must prove the violative condition continuously existed from the time when the condition was cited until the order was issued, the judge erred. Requiring the Secretary to prove the violation's continuous existence would compel the Secretary to constantly monitor the operator's abatement activities, an unrealistic burden not contemplated by the Act. Moreover, it is the operator who is in the best position to know and prove precisely what has been done to abate the underlying violation.

Nonetheless, when the validity of a section 104(b) order is challenged by an operator, it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, 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 rebut the prima facie case by showing, for example, 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.

We now turn to the merits of the failure to abate order at issue.

Under section 104(b) of the Act it is the operator's duty to abate the "violation described in [the] citation issued pursuant to [section 104(a)]." When issuing a section 104(a) citation the inspector must "describe with particularity the nature of the violation" as well as "fix a reasonable time for the abatement of the violation." 30 U.S.C. $ 814(a). 6/ Section 104(a) thus mandates that the operator be given fair notice in the citation of the violation that it is required to correct. See Eastern Associated Coal Corp., 1 IBMA 233, 235 (December 1972). Furthermore, in fixing a reasonable time for abatement, the inspector necessarily must specify the violative conditions found and determine the time reasonably required for abatement of the specified conditions. Subsequent violative conditions, not described in the original citation, may be subject to separate enforcement actions by the Secretary, but are not properly grandfathered into the abatement duties imposed upon the operator as a result of the original citation.

Therefore, the initial question before us in considering the validity of the section 104(b) withdrawal order at issue is whether the Secretary proved that the violative conditions identified in the underlying section 104(a) citation were present at the time of issuance of the section 104(b) withdrawal order. Accordingly, we must look to the underlying section 104(a) citation issued by Inspector Villegos and relevant testimony to determine the conditions that Mid-Continent was required to correct in order to abate the cited violation of section 75.1704. The specific conditions in the escapeway for which Villegos cited Mid-Continent were conditions "450 feet outby the 102 longwall face" where "floor material had been pushed up to within 4 feet of the roof forming a bank and an impoundment of water and rock up to 15 inches deep and 75 feet in length." Exh. P-1. The fact that these were the violative conditions for which Mid-Continent was cited is underscored by the fact that Villegos initially fixed only 3 hours and 45 minutes for abatement of the conditions.

The Secretary did not prove that the same violative conditions cited by Inspector Villegos were present on July 25, 1984. Inspector Smith could not state that the specific conditions cited in the June 20 section 104(a) citation had not been remedied. Tr. 155; 9 FMSHRC at 1764. While on both June 20 and July 25 a dam and an impoundment of water were found to obstruct the escapeway, it was not proven to the judge that the obstructions were the same. In fact, as the judge noted, Smith's testimony established that the situs of the obstructive conditions on July 25 was different from the situs of the obstructive

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6/ Section 104(a) of the Mine Act states in part:

> Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for abatement of the violation.

30 U.S.C. $ 814(a).

conditions cited by Villegos on June 20. 9 FMSHRC at 1763, 1767. By July 25, Mid-Continent had graded the area of the escapeway where Villegos observed the obstruction. See Exh. R-1.

The floor heave, deterioration of the pack walls, and obstruction in the mine's escapeways is the result of a continuous, natural process at the Dutch Creek No. 1 mine. The record establishes that such problems can occur quickly when, as here, mining has proceeded and the face has advanced. Tr. 34-35, 170, 184-185. Given these natural geologic propensities, the conditions found by Smith on July 25 may have been "similar" to those found by Villegos on June 20. Sec. Br. 8. The mere subsequent existence of similar conditions, however, is an inadequate basis for concluding that the section 104(a) citation issued to Mid-Continent had not been abated. We therefore find that substantial evidence supports the judge's finding that the Secretary has not established that Mid-Continent failed to abate the violation originally cited.

Because the Secretary did not prove that the violative conditions identified by the inspector in the underlying section 104(a) citation were still extant when the subject section 104(b) withdrawal order was issued, we conclude that the Secretary failed to establish a prima facie case that the failure to abate withdrawal order was validly issued. Accordingly, we affirm the judge's decision finding, in accordance with the Secretary's alternative argument before the judge, that the conditions described in the section 104(b) order constituted an additional, discrete violation of 30 C.F.R. $ 75.1704. 7/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James. A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

7/ On review, Mid-Continent has moved to traverse what it views as a material mischaracterization of its position by the Secretary. In response, the Secretary states that she never intended her position to have the meaning that Mid-Continent suggests. In view of the Secretary's disclaimer and our conclusion that the Secretary did not prove the validity of the contested order, we find Mid-Continent's motion to be moot.

Commissioner Doyle, concurring in part and dissenting in part:

I concur with the majority's holding that in order to sustain a 104(b) withdrawal order, the Secretary need not prove that the violation continued uninterrupted from the time it was cited until the withdrawal order was issued. The law provides a presumption of continuance with respect to conditions proven to exist at a given time and I see no reason that it should not be applied to the existence of conditions that violate the Mine Act. 31A C.J.S. Evidence $124(1), 29 Am. Jur. 2d Evidence $237. To find otherwise would impose an impossible burden on the Secretary.

I dissent, however, from the majority's affirmance of the judge's finding of insufficient evidence to support the "failure to abate" violation, a finding that was based on the judge's incorrect assumption that it was necessary for the Secretary to prove that the violation continued uninterrupted from the time it was originally cited until the section 104(b) order was issued.

The majority affirms the judge but on the different basis that the Secretary failed to prove that the July 25 obstruction was the same as the June 20 obstruction. Slip op. at 6. In contrast, the judge found that "the essence of the standard is the having if two escapeways as contrasted to a focus on the presence of a particular condition, obstruction or impediment to passage at a given place in the escapeway." 9 FMSHRC at 1767. I agree with the judge and am of the opinion that the record supports his finding.

The regulation in issue, 30 C.F.R. $75.1704, (1984), requires that at least two separate and distinct travelable passageways be maintained to insure passage at all times. The passageway in issue was not so maintained on June 20. 1984, when it was originally cited. It was not so maintained when the inspector returned to the mine on July 5, 1984, and July 11, 1984. Nor was it so maintained when a second inspector visited the mine on July 25, 1984, and issued a section 104(b) withdrawal order.

The evidence indicates that, at the time of the original citation "floor material had been pushed up to within four feet of the roof forming a bank and an impoundment of water and rock..." at a location "450 feet outby the 102 longwall face." Exh. P-1. The testimony of Mid-Continent's mine superintendent, Allyn Davis, who is also a geological engineer, reveals that Mid-Continent recognized that, in order to abate the violation, it would have to grade the entire tailgate, not just the particular area in question,

"[b]ecause that area, you know -- that would just propogate itself.
If I cleaned that area up, then, we would find the same thing ahead."
Tr. 208. Even if the in-

spector did not immediately recognize the extent of the work that would be required for abatement, he soon became aware that abatement would require grading of the entire tailgate. The inspector who issued the original citation based his extensions of time for abatement upon the extent of grading that had been accomplished. Tr. 93, 94. Similarly the inspector who issued the order did so because the grading was not being done in a diligent manner. Tr. 123.

As Mid-Continent attempted to abate the violation by grading the escapeway, "this mess kept following [them] in or kept preceding [them] in." Tr. 191. The fact that "this mess" had been advanced by the grading and was now at a different location does not, to me, indicate a separate violation but rather that the same violation, a failure to maintain the escapeway to insure passage, was still in existence.

Accordingly, I would reverse the judge and reinstate the section 104(b) withdrawal order.

Joyce A. Doyle, Commissioner

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