

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 03 2016

SECRETARY OF LABOR,	:	Docket Nos.	LAKE 2013-231-RM
MINE SAFETY AND HEALTH	:		LAKE 2013-232-RM
ADMINISTRATION (MSHA)	:		LAKE 2013-233-RM
	:		LAKE 2013-234-RM
v.	:		LAKE 2013-348-M
	:		
HIBBING TACONITE COMPANY	:		

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), a Commission Administrative Law Judge sustained four orders which were issued to Hibbing Taconite Company pursuant to section 104(b) of the Mine Act.¹ The orders were issued by the

¹ Section 104 provides in relevant part:

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated . . . any mandatory health or safety standard, . . . he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation In addition, the citation shall fix a reasonable time for the abatement of the violation. . . .

(b) 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 . . . to

Department of Labor’s Mine Safety and Health Administration (“MSHA”) because of Hibbing Taconite’s failure to abate three housekeeping violations and one violation that alleged a failure to maintain a fan housing. 35 FMSHRC 2535, 2553 (Aug. 2013) (ALJ). Hibbing Taconite asserts that the inspector abused his discretion in issuing the orders. For the reasons discussed more fully below, we vacate the failure to abate orders on the basis that the inspector abused his discretion by setting arbitrary times for abatement of the underlying citations.

I.

Factual and Procedural Background

Hibbing Taconite operates a large plant in St. Louis County, Minnesota. The plant produces taconite pellets by filtering powder material, forming it into small balls, and hardening the balls through an indurating process.² The facility has multiple levels and sublevels, some of the floors between levels are grates, and the bottom floor is cement. There is regular spillage, and material from the upper levels falls to the lower levels, including while the upper levels are hosed down during the cleaning process. During the week, approximately 50 miners work at the plant, while during the evenings and weekends, an operating crew of approximately eight or nine miners works at the plant.

Beginning on December 12, 2012, an MSHA inspector, Thaddeus Sichmeller, inspected the plant and, over the course of a few days, issued various citations and the subject orders. As stated more particularly below, the inspector verbally issued citations each day based on conditions he observed. On each following day, upon arriving at the mine, the inspector issued the written version of the citations he had verbally issued the day before, and reexamined the cited areas.

At approximately 5:30 p.m. on December 12, Inspector Sichmeller issued a verbal citation for a significant and substantial (“S&S”)³ violation of 30 C.F.R. § 56.20003(a)⁴ for

immediately cause all persons . . . to be withdrawn from. . . such area until an authorized representative of the Secretary determines that such violation has been abated. . . .

30 U.S.C. § 814(a), (b).

² Induration is the “hardening of a rock or rock material by heat, pressure, or the introduction of cementing material.” American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 279 (2d ed. 1997).

³ The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C § 814(d)(1).

conditions he observed inside the 505 mandoor of the pellet plant. 35 FMSHRC at 2538; Tr. 99. Inspector Sichmeller believed that a housekeeping violation existed because there were pellets, entangled hoses, and slurry in the walkway near a conveyor, and that those conditions created slip and fall hazards. Tr. 28, 31-32.

The following morning, December 13, the inspector returned to the mine to continue the inspection. He was accompanied by the operator's safety representative of the pellet plant, Tiara Marcus. The inspector then issued the written versions of the verbal citations he had issued on December 12, including Citation No. 8665946 for the violation of section 56.20003(a). Citation No. 8665946 set forth an abatement time of 8:00 a.m. that morning. Upon re-inspecting the cited area, the inspector verbally issued an extension to abate the citation because he observed miners cleaning the area and progress had been made. Tr. 37.

At approximately 10:30 or 11:00 the following morning, Friday, December 14, the inspector arrived and met with safety representative Marcus, and Tim Angelo, the pellet plant's operations manager, among others. Tr. 116. At that meeting, the operator received the written extension for Citation No. 8665946, which had an abatement time of 8:00 a.m. In addition, they discussed the citation and Angelo's concerns about the abatement times set by the inspector. Tr. 116. Inspector Sichmeller explained that he was setting short abatement times in order to get immediate corrective action. Tr. 70.

The inspector continued his inspection, and traveled to the cited area. Upon re-inspecting the area, the inspector verbally issued another extension of time to abate the condition because, although progress had been made, more corrective action needed to be taken. Tr. 38.

In addition, the inspector issued other verbal citations. As relevant to this proceeding, on December 14, the inspector issued a verbal citation (later written as Citation No. 8665957) alleging a housekeeping violation of section 56.20003(b)⁵ because he observed an accumulation of wet slurry and taconite pellets on the north walkway of the scrubber pump area. The inspector considered the violation to be non-S&S because the scrubber pump was down for maintenance and the condition did not extend the entire width of the walkway.

That same day, Inspector Sichmeller issued another verbal citation for a housekeeping violation of section 56.20003(a) (later written as Citation No. 8665959) because he observed an accumulation of taconite pellets in an area that was about 8x8 feet and 3 to 4 inches deep in front of an electrical disconnect. He believed the condition was not S&S because miners were not in the area.

⁴ 30 C.F.R. § 56.20003(a) provides that, at all mining operations, “[w]orkplaces, passageways, store-rooms, and service rooms shall be kept clean and orderly.”

⁵ 30 C.F.R. § 56.20003(b) provides in part that, at all mining operations, “[t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition.”

The inspector also verbally issued a citation (later written as Citation No. 8665960) alleging a violation of 30 C.F.R. § 56.14100(b)⁶ because he observed that the metal housing of an exhaust fan was not being properly maintained. The inspector believed that the condition was not S&S because there was little access by miners to the area.

At approximately 3:00 p.m. later that day, all of the mine's crew except for the operating crew of eight to nine miners left for the weekend. At the end of the inspection day on December 14, there were 12 open enforcement actions.

On the following day, Saturday, December 15, at approximately 11:45 a.m., the inspector issued the written version of eight citations that had been verbally issued on December 14, including Citation Nos. 8665957, 8665959, 8665960, and some extensions, including the extension for Citation No. 8665946. The time listed for abatement on each of the enforcement actions was 8:00 a.m. Tr. 133.

The inspector then re-inspected the areas that were the subject of Citation Nos. 8665946, 8665957, 8665959, and 8665960. The inspector noted that there were no miners working on the cited conditions in the areas, the conditions had not been abated, there were no posted barricades or warnings, and he found no mitigating circumstances. Tr. 40-41, 51, 57, 65. The operator explained that the plant was being cleaned from top to bottom, which impacted some of the cited areas. Tr. 140, 150, 215.

Pursuant to section 104(b) of the Act, Inspector Sichmeller issued Orders Nos. 8665965, 8665970, 8665968, and 8665969 for the operator's failure to abate Citation Nos. 8665946, 8665957, 8665959, and 8665960, respectively. At the end of that inspection day, Sichmeller indicated in a close-out conference that, going forward, Hibbing Taconite should assume that abatement times would be set for 8:00 a.m. the following day. Tr. 152, 163, 215-16.

The operator challenged the failure to abate orders, and the matter proceeded to hearing before the Judge.

The Judge sustained the four section 104(b) orders. She found that the inspector did not abuse his discretion in issuing the orders and that, in refusing to grant the extensions, the inspector had a clear understanding of the law and that his primary concern was the safety of miners. 35 FMSHRC at 2542-43, 2546, 2548, 2551. In so holding, the Judge credited the inspector's testimony regarding the condition of the cited areas and lack of abatement efforts. *Id.*

Hibbing Taconite filed a petition for discretionary review challenging the Judge's decision. The operator argues in part that the inspector arbitrarily set abatement times and that the inspector's refusal to extend the abatement times was unreasonable given various

⁶ 30 C.F.R. § 56.14100(b) provides that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

circumstances relevant to the citations underlying the orders. We granted the petition and heard oral argument.

II.

Disposition

Under section 104(b) of the Mine Act, it is the operator's duty to abate the "violation described in [the] citation issued pursuant to [section 104(a)]." 30 U.S.C. § 814(b). 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). Section 104(b) provides that an inspector shall issue a failure to abate order when a cited violation has not been "totally abated" within the abatement time originally fixed or as subsequently extended, and if he determines "that the period of time . . . should not be further extended." *See* n.1, *supra*.

The Commission has held that it is the Secretary, as the proponent of a section 104(b) order, who bears the burden of proving that the violation has not been abated within the time period originally fixed or as subsequently extended. *Mid-Continent Res., Inc.*, 11 FMSHRC 505, 509 (Apr. 1989). 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 citation had been abated within the time period fixed in the citation, but had recurred. *Id.*

In contesting a section 104(b) order, an operator may challenge the reasonableness of the time set for abatement or the Secretary's failure to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (Nov. 1989). The Commission has applied an "abuse of discretion" standard in reviewing an inspector's issuance of a failure to abate order.⁷ *See Energy West*, 18 FMSHRC at 569 (applying an abuse of discretion standard in reviewing Secretary's failure to extend abatement time). An 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." *Id.* (citations omitted).

⁷ The Secretary must prove by a preponderance of the evidence that the inspector did not abuse his discretion in issuing the section 104(b) orders. *Mid-Continent*, 11 FMSHRC at 509; *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996). The Commission thereafter applies a substantial evidence standard in reviewing the Judge's factual determinations. *Cf. Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993). The Judge erroneously applied a substantial evidence standard in affirming the four failure to abate orders. 35 FMSHRC at 2542-43, 2546, 2548, 2551.

Here, Hibbing Taconite challenges both the reasonableness of the times set for abatement in the underlying section 104(a) citations and the Secretary's failure to extend those times. Because we conclude that the inspector set arbitrary abatement times, we need not reach Hibbing Taconite's remaining arguments.

When considering an operator's challenge to a section 104(b) order, the Commission has clarified that "in fixing a reasonable time for abatement, the inspector must necessarily specify the violative conditions found and determine the time reasonably required for the abatement of the specified conditions." *Mid-Continent*, 11 FMSHRC at 510. We conclude that the record reveals that the inspector failed to set abatement times that were based upon those times reasonably required for the abatement of the cited conditions.

Rather, Inspector Sichmeller testified that he universally set abatement times of 8:00 a.m. the morning after he verbally issued citations in order to prompt the operator to quickly abate the violations. Tr. 70. The inspector explained that, for instance, he did not want to give an abatement time of three days and have the operator not take any action on abating the condition until the third day.⁸ Tr. 89.

On December 14, the inspector verbally issued eight citations and set an abatement time of 8:00 a.m. on December 15 for each of the eight citations. Tr. 133. The inspector's field notes set forth the explanation that he gave Angelo for setting the abatement times:

Tim [Angelo] has brought up issues about termination times & extensions. Discussed that due to past experiences that when given extended termination time I've found conditions are not being tended to within allotted time frame so the basis of short termination times is to ensure that items are being addressed. [D]iscussed that I understood that sometimes that all conditions may not be taken care of in that time & if finding appropriate action is being done have no reason for not extending citation at that time.

Gov't Ex. P13 at pp. 30-31. Thus, the inspector conceded that the cited conditions may not be capable of being abated within the abatement times that he set.

With respect to the citations that led to three of the subject orders, the record reveals that the inspector was aware that setting an abatement time of 8:00 a.m. the next morning would not have provided the operator with sufficient time to correct conditions. For instance, Inspector Sichmeller verbally issued Citation No. 8665946 at approximately 5:30 p.m. on December 12, set an abatement time of 8:00 a.m. on December 13, and thereafter extended the abatement time until 8:00 a.m. on Dec. 14 and until 8:00 a.m. on December 15. Tr. 36-39, 99, 113, 117; Gov't

⁸ The Secretary referred to the inspector's practice of setting an 8:00 a.m. abatement time as the inspector's abatement "policy." S. Br. at 7 n.8; *see also* Oral Arg. Tr. at 38.

Exs. P1-3, P1-4, P1-5 at p. 5. In his notes for December 12, the inspector acknowledged “[t]his is a vast area affected due to the multiple conditions present.” Gov’t Ex. P1-5. The inspector also testified that it took the operator from December 15, the date the order was issued, until December 18 to abate the order due to the “extensiveness” of the cleanup required. Tr. 68. He stated that he was “surprised they got it done in three days as extensive as it was.” Tr. 68. Safety Representative Marcus also described the condition as “obviously a pretty massive project.” Tr. 113.

Similarly, the inspector verbally issued Citation No. 8665957 for pellets and slurry in the walkway of the scrubber pump area on December 14 at approximately 1:30 p.m., and set an abatement time of December 15 at 8:00 a.m. Gov’t Ex. P3-1. The inspector testified that after the order was issued on December 15, it “took them to the 17th to get this done because of the extensiveness of the conditions.” Tr. 53.

Inspector Sichmeller verbally issued Citation No. 8665960 for the deteriorated condition of the fan housing at approximately 2:15 p.m. on December 14, and set the abatement time for 8:00 a.m. on December 15. Gov’t Ex. P7-1. The inspector explained that the operator “had to get some manlifts and stuff in there” and grind down the rough edges of the fan housing, and that the order was terminated on December 17. Tr. 66-67; Gov’t Ex. P8-3.

Inspector Sichmeller also failed to set an abatement time that reflected the time reasonably required for the abatement of the conditions cited in Citation No. 8665959 involving the 8x8 feet accumulation of pellets in the walkway by the electrical disconnect. The inspector verbally issued the citation at approximately 2:00 p.m. on December 14, and set an abatement time of 8:00 a.m. on December 15. Gov’t Exs. P5-1, P5-2 at p. 104. Sichmeller acknowledged, however, that the cited conditions would only take about five minutes to clean up. Tr. 57, 60. The inspector conceded that “sometimes [the] eight o’clock termination time is way too long based on the conditions and the hazard that’s presented.” Tr. 71.

We conclude that the inspector did not fix the abatement times based upon “the time reasonably required for abatement of the specified conditions,” as he is required to do by the Mine Act and Commission precedent. *Mid-Continent*, 11 FMSHRC at 510. The record indicates that the inspector did not base the abatement times on such factors as the extent of the violative conditions, the availability of miners to undertake cleaning work, and competing safety concerns. Rather, the inspector set an arbitrary abatement time of 8:00 a.m. the next morning, regardless of the amount of time that the conditions required for abatement.⁹ The inspector’s issuance of the failure to abate orders was based upon a misunderstanding of the law, and amounted to an abuse of discretion.

⁹ The arbitrary nature of the 8:00 a.m. termination time is apparent from Inspector Sichmeller’s statement during the close-out conference on December 15, which the operator has not disputed, that the inspector would set an 8:00 a.m. abatement time on all citations going forward. Tr. 152, 215-16. The inspector could not have known what conditions would be cited, let alone that 8:00 a.m. the following morning would be a reasonable time for abatement.

While the inspector's concern with exacting immediate corrective action from the operator in order to keep miners safe is a laudable and important concern, the Mine Act sets forth a scheme in sections 104(a) and (b) by which to achieve that end. The inspector must take enforcement action consistent with those provisions. For instance, the inspector must set an abatement time based upon the amount of time necessary to fully abate a violation. Thereafter, if the operator does not fully abate within that time, the inspector must determine whether an extension in abatement time is warranted or whether he should issue a section 104(b) order. In making that determination, the inspector may consider information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated condition. Thus – responsive to Inspector Sichmeller's concern about delaying commencement of abatement – if, for example, the conditions reasonably require three days to complete abatement, and the operator unjustifiably fails to begin the process until the third day, an inspector may determine that further extension of the abatement time is not warranted, and instead issue a section 104(b) order.

Accordingly, for the reasons discussed above, we hold that the inspector abused his discretion in issuing Orders Nos. 8665965, 8665970, 8665968, and 8665969.

III.

Conclusion

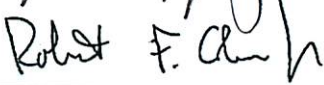
For the foregoing reasons, we hereby reverse the Judge's decision and vacate Orders Nos. 8665965, 8665970, 8665968, and 8665969.




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