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DAVIDSON MINING V. SOL
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FMSHRC-FCV
JUNE 21, 1988

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-168
A. C. No. 46-06898-03530

No. 1 Mine

DAVIDSON MINING INC.,
Respondent

DAVIDSON MINING INC.
Contestant
v.

CONTEST PROCEEDING

Docket No. WEVA 88-82-R
Order No. 2953130; 12/2/87

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

Mine I.D. 46-06898

Davidson No. 1 Mine

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia for
the Secretary of Labor; William D. Stover, Esq.,
Beckley, West Virginia for Davidson Mining Inc.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge a citation and withdrawal order issued to Davidson Mining Inc. (Davidson) under sections 104(a) and 104(b) of the Act, respectively, and for review of the civil penalty proposed by the Secretary of Labor for the violation alleged therein. At hearing Davidson acknowledged the violation and allegations set forth in the citation and asserted that it was challenging only the validity of section 104(b) Order No. 2953130 and the amount of penalty proposed.

The underlying citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.301 and charges as follows:

Only 2420 cubic feet of air a minute could be measured in the last open crosscut between No. 8 and No. 9 entries in the 007-0 Moose Mains Section when measured with chemical smoke and only 1995 cubic feet of air a minute would be measured behind line brattice in No. 8 entry where roof bolting machine was preparing coal and only 1450 cubic feet of air a minute could be measured in face No. 6 entry where continuous mining machine was located.

30 C.F.R. § 75.301 provides in part as follows:

The minimum of quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9000 cubic feet a minute The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute.

The Section 104(b) order reads as follows:

Only 6042 cubic feet of air a minute could be measured in the last open crosscut when measured with chemical smoke, management was building permanent undercasts and ventilation stoppings which were -Lore [sic] out due to a roof fall which occurred on 11/28/87. 007-0 Moose Mains Section right side.

Section 104(b) of the Act reads 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.

It is not disputed that the violation charged in Citation No. 2953127 was not totally abated within the time set forth in that citation and that the period of time for abatement had not been extended. The issue before me then is whether MSHA

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Inspector Ernest Thompson, the authorized representative of the Secretary, acted reasonably in refusing to extend the time for abatement. In this case I find that he did in fact act reasonably.

Inspector Thompson was performing a general inspection at the Davidson No. 1 Mine on December 1, 1987, when he learned that a roof fall had occurred in the Moose Mains Section of the mine three days earlier. Thompson observed, and it is not disputed, that the mine ventilation had been interrupted as a result of the roof fall and the air was short circuited and not adequately ventilating the working faces. Only 2,420 cubic feet per minute (cfm) of ventilating air was found at the last open crosscut where 9,000 cfm was required. In addition only 1,995 cfm was found behind the line brattice at the No. 8 entry and only 1,450 cfm was found at the face of the No. 6 entry--locations where 3,000 cfm was required. Thompson accordingly issued the section 104(a) citation at bar.

Thompson told Section Foreman James Hancock at about 12:40 p.m. that he was then "under a citation" and that he was to "pull the power on his equipment and restore his ventilation." Although Thompson did not then inform Hancock of a specific abatement time Thompson anticipated that temporary check curtains would be hung within 20 or 30 minutes to correct the immediate problem of inadequate ventilation. Thompson later prepared the written citation on the surface around 1:30 or 2:00 p.m. setting forth a specific abatement time and presented it to Dale Patten, the company representative. No objection was then raised to the abatement time.

On December 2nd Thompson returned to the subject area with Patten. Arriving at 10:59 a.m. he again took air readings in the last open crosscut and found only 6,042 cfm where 9,000 cfm was required. Thompson observed that the belt conveyor had been advanced forward one or two crosscuts, and that there had been additional coal production as evidenced by several new connecting crosscuts. He estimated that since the citation had been issued there had been 6 to 8 hours of coal production with a regular crew (48 man hours) taking 8 or 9 cuts of coal. Stoppings had also been erected inby the fall area necessitated by the belt move and Thompson: estimated that this involved an additional 12 manhours.

Thompson thereupon told Patten that he was issuing a section 104(b) order, basing his decision on the evidence that they had "run coal", made a belt move, and added new stoppings--indicating to him that they had had time to correct the ventilation problem but chose rather to continue running coal. Thompson was also concerned that the continued inadequate

ventilation increased the danger from the accumulation of methane and other dangerous gases. This hazard was exacerbated by the extraction of virgin coal in a coal seam having a history of methane liberation (i.e. the Cedar Grove Coal Seam) and in a coal seam located below the water table.

Subsequent examination of the mine preshift reports confirmed to Thompson that mining had continued without adequate ventilation even after the citation had been issued. It is not disputed that the designation on the preshift report for the evening shift (p.13 Exhibit G-5) "LOB R-3,010 cfm" means that during the preshift examination between 2:00 a.m. and 3:30 a.m. on December 2, the ventilation was not legally sufficient. The report (p.14 Exhibit G-5) does not show that the ventilation was corrected before coal was mined.

In closing argument Davidson claimed that the "whole situation reeks of unreasonableness" and that Inspector Thompson should have extended the abatement time to permit completion of an undercast rather than have issued the subject order. Davidson argues that the initial abatement time set forth in the citation was not reasonable. It maintains that Inspector Thompson and Mine Superintendent Larry Presley had agreed to abate the violative condition by the construction of an undercast and implies that it must therefore have been understood by Thompson that the violative condition could not have been abated within the limited time given in the citation.

Inspector Thompson denies however that there was any such agreement and, to the contrary, testified that he anticipated that temporary controls would have been erected within 20 or 30 minutes to abate the immediate ventilation problem. Inasmuch as Thompson did in fact provide a relatively short abatement time in the citation, it is readily apparent that he did in fact anticipate the use of temporary measures to quickly abate what he perceived to be a hazardous condition. Whether or not there was an additional agreement to construct an undercast as a permanent solution to the ventilation deficiency is therefore not particularly relevant.

I also find Davidson's complaint that it was not given sufficient time to abate to be less than credible for the reason that it did not object to that abatement time when the citation was issued and complained only after Thompson had already issued the 104(b) order the next day. If company officials truly believed they had reached an agreement to defer abatement until they had time to complete construction of a permanent undercast it is reasonable to expect that they would have immediately protested the brief time allowed by Thompson in his citation and have requested an extension. Under the circumstances I find that

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the abatement time set forth on the citation was reasonable for the immediate construction of temporary corrective measures--and that Davidson knew that the abatement time was reasonable for that purpose. In light of this evidence I also reject Davidson's claims that temporary corrective measures were not feasible or could not have been achieved before the order was issued.

Davidson also argues that it did not mine coal without adequate ventilation after the citation had been issued. However in light of Davidson's own "Daily and On-Shift Reports" (Exhibit G-5 pps. 13-14) I find this claim to be without merit. Indeed even Mine Superintendent Presley conceded that the reports show that the inadequate ventilation reported on December 1st at the last break on the right side was not corrected before resumption of coal production in that area. Thus the credible evidence supports Inspector Thompson's belief at the time he issued the subject order that Davidson had produced coal without adequate ventilation after the issuance of the citation and contrary to his specific instructions to mine officials. In order to prevent further violations and exposure of miners to hazardous conditions and in light of Davidson's demonstrated bad faith in continuing to mine coal without proper ventilation it was particularly important and reasonable for Thompson to have issued a section 104(b) order of withdrawal requiring all miners not working on the abatement to be removed. Indeed I find that this basis for issuing the order was sufficient in itself regardless of whether the original abatement time was reasonable vel non. Under the circumstances I find that Order No. 2953130 was properly issued and is valid.

I also find that the violative condition was the result of operator negligence. The roof fall that initially caused the ventilation problems occurred three days before the citation was issued so the operator should have been on particular notice for ventilation problems. Moreover it is not disputed that there was so little air in the cited area when Thompson tested it that his anemometer would not even move. In spite of these conditions Davidson continued to mine coal until the citation was issued.

The evidence that Davidson continued coal production without adequate ventilation even after the issuance of the citation and its failure to have abated the violative condition within the time prescribed also show bad faith. Moreover, the continued mining of coal without adequate ventilation greatly increased the gravity of the violation. As Inspector Thompson observed, the continued mining of coal could have created excess methane and coal dust without adequate ventilation greatly increasing the potential for a fatal mine fire or explosion. In assessing a civil penalty in this case I have also considered Davidson's

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size and history of violations. Under the circumstances I find that a civil penalty of \$1,000 is appropriate.

ORDER

Citation No. 2953127 and Order No. 2953100 are affirmed and the Contest of the Order is denied. Davidson Mining Inc. is hereby directed to pay a civil penalty of \$1,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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