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MSHA V. VAN MULVEHILL COAL  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, DC  
February 25, 1980

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

v. Docket No. SE 79-127

VAN MULVEHILL COAL CO.. INC.

Decision

On January 22, 1979, an inspector of the Mine Safety and Health Administration inspected Van Mulvehill Coal Company's Black Creek No. 1 mine. He observed several alleged violations of mandatory safety standards, and he believed that an imminent danger existed. He issued a combined citation and withdrawal order under sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a) and 817(a). The document stated:

An imminent danger existed in that the mine fan was not operating and employees were in the mine (75.300). A ventilation and dust control plan had not been submitted (75.316). A fan stoppage plan had not been submitted (75.321). An up-to-date map of the mine had not been submitted to MSHA (75.316-1a). The operator had not submitted arrangements for emergency medical assistance (75.1713-1(a)(b)).  
[Citation and Order No. 239804.]

The conditions cited by the inspector were abated by the operator and the withdrawal order was terminated on January 30, 1979.

On October 12, 1979, the Secretary filed with the Commission a

proposal for a penalty, seeking the assessment of penalties under section 110 of the Act for the five alleged violations cited on January 22, 1979. Penalties totaling \$164 were sought.

On November 28, 1979, the inspector issued a document that stated:

Citation number 239804 issued January 22, 1979 is vacated on grounds that coal was not being produced at the time. The financial condition as stated by accountants are such that the payment of the penalties could have an effect on the company continuing in operation. There has been full cooperation since the issuance of the citation to comply with the Act and regulations by company officials and employees.

On December 10, the Secretary moved to withdraw his proposal for a penalty "for the reason that the Order of Withdrawal No. 239804, heretofore issued, has been vacated." On December 12, the administrative law judge granted the motion. On January 11, 1980, we directed review on our own motion to determine whether the judge erred in granting the Secretary's motion to dismiss. We reverse.

We do not have before us in this civil penalty proceeding the propriety of the imminent danger withdrawal order issued under section 107(a). Thus, to the extent that the inspector's action on November 28, 1979, vacated that order (presumably on the basis that no imminent danger existed), as implied by the Secretary's December 10 motion to dismiss, we do not decide whether or not the vacation was correct. Even if it was, however, dismissal of the civil penalty proceeding was error. The Act mandates assessment of a penalty for any violation of a mandatory safety standard or any provision of the Act, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order.... Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Cf. *Island Creek Coal Company*, Docket No. KENT 79-129 (February, 1980). Thus, whether the January 22, 1979, withdrawal order was properly issued under section 107(a) is not relevant to the assessment of a penalty under section 110 for alleged violations cited in that order.

To the extent, however, that the inspector's November 28 action purported to vacate the section 104(a) citations, as appears was his intent, the dismissal was still error. As the Secretary now correctly states in his brief on review, the factors stated by the inspector do not support vacation of the citations. Rather, if the alleged violations occurred, those factors may be taken into account in

considering the criteria of gravity, effect on ability to continue in business, and good faith of abatement efforts in assessing appropriate penalties under section 110(i) of the Act.

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Accordingly, the judge's order of dismissal is reversed and the case is remanded for further proceedings.

Richard V. Backley, Commissioner

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