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WESTMORELAND COAL v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WESTMORELAND COAL COMPANY,
CONTESTANT

v.

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

Contest of Order

Docket No. VA 81-4-R

Order No. 692905

Bullitt Mine

Appearances: Thomas L. Hopkins, Esq., Big Stone Gap, Virginia,
for Contestant;
Covette Rooney, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania,
for Respondent

DECISION GRANTING WITHDRAWAL OF CONTEST

Before: Judge Melick

At hearing in Abingdon, Virginia, on January 7, 1981, MSHA
agreed to amend the order of withdrawal at issue (FN.1) changing it
to a citation under

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section 104(a) (FN.2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." The Westmoreland Coal Company thereafter requested to withdraw its contest which I approved at hearing and now affirm. The background of events leading up to this action was discussed in a bench decision which is set forth below:

This proceeding is a contest by the Westmoreland Coal Company of Order No. 692905. It was the Government's position in this case that that order was issued orally on September 11, 1980, at 12:01 p.m., and the fact that it was not committed to writing until the 18th of September was irrelevant. It argued that since the order was issued on the 11th and the factors giving rise to that order occurred at that time, the order was therefore issued "forthwith" as required by section 104(d)(1) of the Act. It turns out, however, and there is no dispute over this, that at the time that order was orally issued on September 11, there was no precedential section 104(d)(1) citation in existence. Such a citation is clearly a prerequisite to the issuance of a 104(d)(1) order. The Government now concedes that another section 104(d)(1) order (No. 692904) issued on September 11, which was subsequently amended on September 18 to become a 104(d)(1) citation, could not have had retroactive effect to furnish the requisite underlying 104(d)(1) citation needed on September 11, to provide the necessary foundation for the 104(d)(1) order now before me.

I have also expressed my reservations with the effort by the Government to bootstrap a 104(d)(1) order using a 104(d)(1) citation based on the same event giving rise to the "unwarrantable failure" findings in each. In this case that same event, a downed line curtain, was used as the "unwarrantable failure" for both the underlying 104(d)(1) citation and the 104(d)(1) order. As a result of those reservations, the Government moved to amend the 104(d)(1) order at issue in this case, that is, Order No. 692095, to a 104(a) citation. Westmoreland thereafter requested to withdraw its contest of

the new section 104(a) citation. Under the circumstances, I see no reason not to accept that request. The contest is accordingly dismissed and the proceeding terminated.

Gary Melick
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 This order was issued under the provisions of section 104(d)(1) of the Act. That section reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by the unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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."

~FOOTNOTE_TWO

2 Section 104(a) reads in part as follows:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator."