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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No: WEST 82-153 A.O. No: 48-00900-03028
v.	
MEDICINE BOW COAL COMPANY, RESPONDENT	Medicine Bow Mine

DECISION

This case has been presented on stipulated facts and cross motions for judgement. The issue as stated in petitioner's brief, is whether the assessment office can properly propose a penalty on the basis of an imminent danger order issued under 107 of the Act.

For reasons that are unexplained in the record, the MSHA inspector did not issue citations with the imminent danger order even though the description of the imminent danger also described violations of two of the safety standards After the imminent danger order was terminated on December 16, 1981, MSHA modified it as follows:

> "The 107(a) order No: 1017366 issued December 15, 1981 while investigating a formal 103(g)(1) miner's complaint is hereby modified to include the violations of Sections 77-1605(i) and 77-1600(b) of CFR.30. The 107(a) has been terminated."

The above quoted modification was issued on January 4, 1982.

The Secretary does not argue in its brief, that the inspector made a mistake in failing to check the citation block, and that the mistake should be excused. He does not argue that on January 4, 1982 the inspector intended to or should have issued 2 citations rather than attempting to modify an order that had been terminated, and he does not argue that the modification of the order had the effect of transforming the imminent danger order into one or more citations. In fact, the Secretary's two-page brief does not even mention the modification of the order. The Secretary simply takes the position that a 107 imminent danger order is a proper foundation for a penalty proceeding.

The Secretary relies on two Commission cases in support of its position. In fact the Secretary says that these two cases "are dispositive of the legal issue in this case." The first case relied on is Secretary of Labor vs. Tazco, Inc., 3 FMSHRC 1895 (August 1981) It stands for the proposition that if a judge finds a violation he can not suspend the payment of the penalty. The the second case, Secretary of Labor vs. Van Mulvehille Coal Co. Inc., 2 FMSHRC 283 (February 1980) stands for the proposition that if a combination citation and imminent danger order is issued, the allegation of a violation of a standard survives the vacation of the imminent danger order. Far from being "dispositive", I find these cases have little relevance to the curret issue. The Tazco case is similar to the RM Coal Company case decided by the Department of the Interior's Board of Mine Operations Appeals with reference to the 1969 coal Act 7 IBMA 64(1976). In that case Judge Kennedy had issued a default decision in which he found that one of the violations was both non-serious and non-negligent and therefore warranted a penalty of zero. The Board reversed and assessed a penalty of $1 because assessment of a penalty was considered mandatory. In the Tazco case Judge Kennedy accepted a settlement of $400 but because the mine operator had fired the foreman who had caused the violation, he suspended payment of the penalty. The Commission said that suspension of the payment was equivalent to assessing a zero penalty, and that that was improper because assessment of a penalty is mandatory. But the fact that both the IBMA and the Commission have held that assessment of a penalty is mandatory if a violation is found, does not mean that the procedures set forth in the Act for finding such a violation and assessing a penalty can be ignored.

Section 110(a) of the Act provides for the assessment of penalties for violations of a health or safety standard or any other provision of the Act, but Sections 104 and 105 provide the procedures for such assessment. Section 104 provides for the issuance of citations and orders (but not imminent danger orders) for violations of the health and safety standards. Section 105(a) provides for an assessment after "the Secretary issues a citation or order under Section 104 . . . ." There is no provision for assessment after the issuance of orders under Section 107 of the Act.

The conversion of an imminent danger order into a combined imminent danger order and citation is merely a matter of making a checkmark in an appropriate box and making reference to the appropriate section of the Act. If the Secretary was arguing that the omission of this simple step was inadvertent and that no prejudice resulted, and that insistence upon the proper steps being taken at the proper time would be elevating form over substance, I would tend to agree. If he argued that the amendment of the order to include reference to two safety standards had the effect of converting it to a citation, I might agree with that. The Secretary, however, advances neither of these arguments. He flatly contends that an order issued under Section 107 alone is an appropriate

foundation for the assessment of a civil penalty. I hold that it is not. The last sentence of Section 107(a) states "The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under Section 110." This distinguishes the Mine Safety Act from the Coal Mine Act. Under Section 104(b) of the Coal Mine Act a notice of violation (citation) could not be issued if an imminent danger existed. Under the old Act, an imminent danger order was an appropriate foundation for a penalty action. Under the present Act it is not.

The charges against the company are DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge