CCASE:
EMERY MINING v. SOL (MSHA)
SOL (MSHA) v. EMERY MINING
DDATE:
19851118
TTEXT:

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

| | |
|---|---|
| EMERY MINING CORPORATION,<br>CONTESTANT | CONTEST PROCEEDING |
| v. | Docket No. WEST 85-95-R<br>Order No. 2503086; 4/17/85 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>RESPONDENT | Deer Creek Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br>Docket No. WEST 85-137<br>A.C. No. 42-00121-03581 |
| v. | Deer Creek Mine |
| EMERY MINING CORPORATION,<br>RESPONDENT | |

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C.,
for Contestant/Respondent;
Heidi Weintraub, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent/Petitioner.

Before: Judge Lasher

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977. At the close of a hearing on the record and after consideration of evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during argument, a decision was entered. Such bench decision appears below as it appears in the transcript aside from minor corrections.

A preliminary hearing was held in Denver, Colorado, on September 26, 1985, to determine the issues raised by the Contestant-Respondent (herein Emery) in the above two dockets in its motion for summary decision filed June 12, 1985. Counsel for the parties, at the close of the hearing, indicated that there was no issue of any material fact sufficient to bar the resolution of the motion on the record developed. Counsel for both parties, prior to the preliminary hearing, submitted excellent briefs which fully set forth the positions advanced by them together with supporting points and authorities.

The dispute in this matter arose out of the issuance of a withdrawal order issued pursuant to the provisions of section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, which alleged that Emery had violated 30 C.F.R. section 75.1704 on April 12, 1985, to wit: "The designated escapeway in the "B" North working section was not maintained to ensure passage at all times of any person, including disabled persons, on April 12, 1985. At about 11:45 p.m. on the No. 21 crosscut in the intake escapeway, the roof was shot down 16 feet in width, 20 feet in length, and 2 feet in depth. The area was unsupported and men were inby at the time the roof was shot down. The section is advancing and only three entries are being driven intake belt and return."

The subject withdrawal order, No. 2503086, was issued on April 17, 1985, five days after the alleged violation occurred and during an AAA inspection which was being conducted by Inspector Robert L. Huggins, a duly authorized representative of the Secretary of Labor (herein Secretary). An AAA inspection is one of the four inspections required annually under the Act and Inspector Huggins indicated that this inspection commenced on April 1, 1985, and would have lasted a period of approximately 25 - 35 days. Inspector Huggins also indicated that he was the only MSHA inspector who was conducting the AAA inspection at Emery's Deer Creek Mine and that he was present at the mine and engaged in such endeavor on April 2, 3, 4, 8, 9, 10, 17, 18, and 22.(FOOTNOTE.1)

Emery contends that a withdrawal order may not properly be issued under section 104(d)(2) of the Act for a violation which has been terminated and is no longer in existence where the inspector's determination that such violation occurred is based solely on statements made to the inspector some five days after the alleged violation occurred by miners who were present and witnessed the occurrence thereof.(FOOTNOTE.2)

Emery contends that under section 104(d), as well as section 104(a), violations, in order to be cited and made the subject of citations and withdrawal orders issued by the enforcement agency,

must be in existence at the time of an inspection in order to subject a mine operator to liability for violations under the Act. Emery also contends, however, that section 104(d) differs from section 104(a) and other provisions of the Act since, unlike other provisions, section 104(d) introduces a time factor into the enforcement equation.(FOOTNOTE.3)

The Secretary takes the position that it is not necessary for an inspector conducting an inspection to actually view or otherwise otherwise perceive the existence or occurrence of a condition or practice in violation of a Mine Safety and Health standard; that the enforcement action taken by the inspector under section 104(d) was not restricted by Congress' placing limitations on the circumstances surrounding the issuance of such, other than that such enforcement action be found related to "any" inspection. The Secretary goes on to add that the withdrawal order in question was clearly related to the AAA inspection which was underway at the mine.

One of the principal, if not the principal, points of contention between the parties is whether or not the Act differentiates between "inspections" and "investigations," with Emery contending on the one hand that a section 104(d)(2) order must be issued "upon an inspection of the mine," and the Secretary contending on the other hand that "Congress did not define the terms "inspection' or "investigation' as a literal part of the 1979 Act." (FOOTNOTE.4)

Although evidence was produced at the preliminary hearing in some detail with respect to issues which related to the merits of the fundamental issues raised by the issuance of the order in question, certain facts relating to the conduct of the inspection should be mentioned as a preliminary to discussion of the paramount legal issue which is involved here. It is concluded that the reliable and

probative evidence introduced on the record indicates that the conditions which existed in the "intake escapeway" area described in the order on April 17, 1985, differed from those in existence on April 12, 1985.(FOOTNOTE.5)

Although the inspector testified that he viewed the area described in the order on April 17, 1985, before issuing the citation, it is concluded from the entire record that his decision was made primarily on the basis of the oral reports received from miners who were present on the day of the blasting, April 12, 1985. In this connection, it should be noted that the inspector indicated that he received one written statement from one miner, Caroline Booker, on the day following the issuance of the order in question. Since that statement was received subsequent to the issuance of the citation, it is concluded that this written statement, in and of itself, was not part of the intellectual fund of information the inspector used to decide whether or not to issue the order in question. Caroline Booker, however, was one of the witnesses who the inspector interviewed orally in the mine on April 17, 1985, prior to the issuance of the order in question.

The record does indicate that the order in question was issued during the approximately 25-day period commencing April 1, 1985, during which the AAA inspection was conducted by Inspector Huggins. In a general sense, the violative condition or practice described in the subject order was also extant during this same time frame. It is also clear that the violative condition was not extant on any day that the inspection actually was being conducted by the inspector since he was not at the mine engaged in inspecting, or for that matter investigating, on April 12; the surrounding days he was engaged in inspecting were April 10 and April 17. There is no question but that the inspector failed to actually see, observe, or perceive the area of the mine involved during any period of time it was in a state of violation as alleged in the order.

The inspector testified that on April 17, 1985, the intake escapeway (passageway) was not in violation of the safety standard. Nevertheless, the order was not issued until after the inspector had

viewed the area involved and interviewed both miners and management personnel.(FOOTNOTE.6)

It is concluded, on the basis of the entire record, that Inspector Huggins, on April 17, 1985, did not see or otherwise discover from his visual inspection of the area of the mine involved in the order any evidence which--in and of itself--established that a violation had occurred five days earlier.

Turning now to the legal issue raised concerning the necessity of an inspection, as distinguished from an investigation, in the process of the lawful issuance of a Section 104(d)(2) order, a general bird's-eye view of the Act itself is enlightening.

The first mention of the words "inspection" and "investigation" is at the heading of Section 103 of the Act. That heading reads "Inspections, Investigations, and Recordkeeping."

Section 103(a) of the Act provides: "Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of ... (4) determining whether there is compliance with the mandatory health or safety standards ..."

Section 103(b) of the Act, speaking only of an "investigation," provides: "For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a ... mine, the Secretary may, after notice, hold public hearings, et cetera." (FOOTNOTE.7)

Section 103(g)(2) of the Act, relating only to "inspection," provides that prior to or during "any inspection of a ... mine, any representative of miners ... may notify the Secretary ... of any violation of this Act, et cetera." (FOOTNOTE.8)

Of considerable significance, the most used enforcement tool, section 104(a), mentions both inspections and investigations. It provides that "if, upon inspection or investigation, the Secretary ... believes that an operator of a ... mine ... has violated this Act, or any ... standard, ... he shall, with reasonable promptness, issue a citation to the operator.... The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Section 104(d)(1), in contrast to section 104(a), relates only to "inspections," providing that "if, upon any inspection of a ... mine, an authorized representative of the Secretary finds that there has been (FOOTNOTE.9) 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 can significantly and substantially contribute to the cause and effect of a ... hazard, and if he finds such violation to be caused by an unwarrantable failure ... he shall include such findings in any citation given to the operator under this Act."

The second sentence of section 104(d)(1) provides for the withdrawal order in the enforcement chain or scheme contemplated by Congress in this so-called "unwarrantable failure" formula. Significantly, it provides that "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 ... and finds such violation to be also caused by an unwarrantable failure ..., he shall forthwith issue an order requiring the operator to cause all persons ... to be withdrawn from ... such area...."

If the position of the Secretary in this case were adopted, that is, if withdrawal orders could be issued on the basis of an investigation of past occurrences, the effect could be to increase the 90-day period provided for in the second section of section 104(d)(1) and by the amount of time which passed between the occurrence of the violative condition described in the order and the issuance of the order.(FOOTNOTE.10)

Section 104(d)(2) of the Act permits the issuance of a withdrawal order by the Secretary if his authorized representative "finds upon any subsequent inspection" the existence of violations similar to those that resulted in the issuance of the section 104(d)(1) order.

Summing up, it is clear that nowhere in section 104(d) is the issuance of any enforcement documentation sanctioned on the basis of an investigation. Although Congress did not define the terms "inspection" or "investigation" specifically in the Act, there is no question but that Congress in using those terms in specific ways in prior sections of the Act, and by not using the term "investigation" in section 104(d)(1) and (2) (FOOTNOTE.11) did so with some premeditation.

Emery's reply brief, at page 6, makes a telling point in this regard: "A yet more graphic example of the fact that Congress intended the words to have different meanings is provided by section 107(b)(1) and (2) of the Act where Congress lays out an enforcement sequence whereby, based upon findings made during an "inspection,' further "investigation' may be made."

Finally, it is noted that section 107(a) of the Act permits the Secretary's representative to issue a withdrawal order where imminent danger is found to exist either upon an inspection or investigation.

Perusal of these various portions of the Mine Act, commencing at the point where the subject words are first used on through to the end of their use, indicates that such terms were used with care and judiciously and with an understanding of the general connotations contained in their definitions.(FOOTNOTE.12)

~1915

I agree with my colleague, Judge Richard C. Steffey, who observed in a proceeding involving Westmoreland Coal Company, which was unreported: (FOOTNOTE.13)

"WCC correctly argues that an order issued section 104(d) should be based on an inspection as opposed to an investigation. As hereinbefore indicated, the Secretary argues that Congress has not defined either term to indicate that Congress recognized that there is a difference between an "inspection' as opposed to an "investigation.' If one wants to examine the legislative history which preceded the enactment of the unwarrantable-failure provisions of the 1977 Act, one must examine the legislative history which preceded the enactment of section 104(c) of the 1969 Act. The reason for the aforesaid assertion is that Congress made no changes in the wording of section 104(c) of the 1969 Act when it carried those provisions over to the 1977 Act as section 104(d).

"The history of the 1969 Act shows that there was a difference in the language of the unwarrantable-failure provisions of S. 2917 as opposed to H.R. 13950. Whereas S. 2917, when reported in the Senate contained an unwarrantable-failure section 302(c) which read almost word for word as does the present section 104(d), H.R. 13950 contained an unwarrantable-failure section 104(c) which provided that if an unwarrantable-failure notice of violation had been issued under section 104(c)(1), a reinspection of the mine should be made within 90 days to determine whether another unwarrantable-failure violation existed. H.R. 13950 also contained a definition section 3(1) which defined an "inspection' to mean "* * * the period beginning when an authorized representative of the Secretary first enters a coal mine and ending when he leaves the coal mine during or after the coal-producing shift in which he entered.'

"Conference Report No. 91-761, 91st Cong., 1st Sess., stated with respect to the definition in section 3(1) of H.R. 13950 (page 63):

> * * * The definition of "inspection' as contained in the House amendment is no longer necessary, since the conference agreement adopts the language of the Senate bill in section 104(c) of the Act which provides for findings of an unwarrantable failure at any time during the same inspection or during any subsequent inspection without regard to when the particular inspection begins or ends. * * *

Section 104(c)(1) of H.R. 13950 provided for the findings of unwarrantable failure to be made in a notice of violation which would be issued under section 104(b). Section 104(c)(1)'s requirement of a reinspection within 90 days to determine if an unwarrantable-failure violation still existed explained that the reinspection required within 90 days by section 104(c)(1) was in addition to the

special inspection required under section 104(b) to determine whether a violation cited under section 104(b) had been abated. Section 104(c)(1), as finally enacted, eliminated the confusion about intermixing reinspections with special inspections by simply providing that an unwarrantable-failure order would be issued under section 104(c)(1) any time that an inspector, during a subsequent inspection, found another unwarrantable-failure violation (Conference Report 91-761, pp. 67-68).

"The legislative history discussed above shows that Congress thought of an inspection as being the period of time an inspector would spend to inspect a mine on a single day because the inspection was to begin when the inspector entered the mine and end when he left. It would be contrary to common sense to argue that the inspector might take a large supply of food with him so as to spend more than a single day in a coal mine at one time. On the other hand, Congress is very experienced in making investigations to determine whether certain types of legislation should be enacted. Congress is well aware that an investigation, as opposed to an inspection, is likely to take weeks or months to complete. Therefore, I cannot accept the Secretary's argument that Congress did not intend to distinguish between an "inspection" and an "investigation" when it used those two terms in section 104(a) and section 107(a) of the 1977 Act.

"It should be noted, for example, that the counterpart of section 104(a) in the 1977 Act was section 104(b) in the 1969 Act. Section 104(b) in the 1969 Act provided for notices of violation to be issued "upon any inspection,' but section 104(a) in the 1977 Act provides for citations to be issued "upon inspection or investigation.' Likewise, the counterpart of imminent-danger section 107(a) in the 1977 Act was section 104(a) in the 1969 Act. In the 1969 Act an imminent-danger order was to be written "upon any inspection,' but when Congress placed the imminent-danger provision of the 1977 Act in section 107(a), it provided for imminent-danger orders to be issued "upon any inspection or investigation.' On the other hand, when the unwarrantable-failure provision of section 104(c) of the 1969 Act was placed in the 1977 Act as section 104(d), Congress did not change the requirement that unwarrantable-failure orders were to be issued "upon any inspection.'

"The legislative history explains why Congress changed section 104(a) in the 1977 Act to allow a citation to be issued "upon inspection or investigation.' Conference Report No. 95-461, 95th Cong., 1st Sess., 47-48, states that the Senate bill permitted a citation or order to be issued based upon the inspector's belief that a violation had occurred, whereas the House amendment required that the notice or order be based on the inspector's finding that there was a violation. Additionally, as both the Secretary and WCC have noted, Senate Report No. 95-181, 95th Cong., 1st Sess., 30, explains that an inspector may issue a citation when he believes a violation has occurred and the report states that there may be times when

> * * * a citation will be delayed because of the

complexity of issues raised by the violations, because of a protracted

> accident investigation, or for other legitimate reasons. For this reason, [section 104(a) ] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. * * *

"The legislative history and the plain language of section 107(a) in the 1977 Act explain why that section was changed so as to insert the provision that an imminent-danger order could be issued upon an "investigation' as well as upon an "inspection.' Section 107(a) states that "* * * [t]he 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.' Both Senate Report No. 95-181, 37, and Conference Report No. 95-461, 55, refer to the preceding quoted sentence to show that a citation of a violation may be issued as part of an imminent-danger order. Since section 104(a) had been modified to provide for a citation to be issued upon an inspector's "belief' that a violation had occurred, it was necessary to modify section 107(a) to provide that an imminent-danger order could be issued upon an inspection or an investigation so as to make the issuance of a citation as part of an imminent-danger order conform with the inspector's authority to issue such citations under section 104(a).

"Despite the language changes between the 1969 and 1977 Acts with respect to the issuance of citations and imminent-danger orders, Congress did not change a single word when it transferred the unwarrantable-failure provisions of section 104(c) of the 1969 Act to the 1977 Act as section 104(d). Conference Report No. 95-461, 48, specifically states "[t]he conference substitute conforms to the House amendment, thus retaining the identical language of existing law.'

"My review of the legislative history convinces me that Congress did not intend for the unwarrantable-failure provisions of section 104(d) to be based upon lengthy investigations. Congress did not provide that an inspector may issue an unwarrantable-failure citation or order upon a "belief' that a violation occurred. Without exception, every provision of section 104(d) specifically requires that findings be made by the inspector to support the issuance of the first citation and all subsequent orders. The inspector must first, "upon any inspection' find that a violation has occurred. Then he must find that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. He must then find that such violation is caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. He thereafter must place those findings in the citation to be given to the operator. If during that same inspection or any subsequent inspection, he 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 to be withdrawn

and be prohibited from entering such area until the inspector determines that such violation has been abated.

"After a withdrawal order has been issued under subsection 104(d)(1), a further withdrawal order is required to be issued promptly under subsection 104(d)(2) if an inspector finds upon any subsequent inspection that an additional unwarrantable-failure violation exists until such time as an inspection of such mine which discloses no unwarrantable-failure violations. Following an inspection of such mine which discloses no unwarrantable-failure violations, the operator is liberated from the unwarrantable-failure chain. Conference Report No. 95-181, 34, states that "[b]oth sections [104(d)(1) ] and [104(e)] require an inspection of the mine in its entirety in order to break the sequence of the issuance of orders.' [Emphasis supplied.]"

I conclude that the Act does not permit a section 104(d)(2) order to be based on an investigation, as here, but rather the order must be based on and it must have been a product of an inspection of the site. Section 104(d)(2) provides that an order may be issued only if, upon an inspection of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d)(2) order may not be issued.

As I have previously noted, when it intended to permit MSHA enforcement actions to proceed on the basis of an inspection, or an investigation, Congress so provided. As Emery points out in its motion, the section 104(d)(2) requirement of an inspection cannot be dismissed as mere semantic inadvertence on the part of Congress.

Insofar as the instant proceeding is concerned, I find it clear that on April 17, 1985, Inspector Huggins was engaged in both an inspection and an investigation. His inspection of the mine apparently did produce the existence or occurrence of a (separate) violation which allegedly was in existence on April 17, 1985. (FOOTNOTE.14)

However, Inspector Huggins, in questioning the miners and in questioning management personnel on April 17, 1985 (about the subject violation which allegedly occurred on April 12) was engaged in an investigation, as Congress has used that term in the Act. The special and severe sanctions provided in section 104(d) of the Act cannot be based upon an investigation but must be derived from an inspection.

Accordingly, I find that Order No. 2503086 was improperly issued pursuant to section 104(d)(2) of the Act. In so finding, no death knell is sounded with respect to the alleged violation described in the body of the order, however; thus, I do not accept Emery's contention that even under section 104(a) of the Act, an inspector is required to actually visually observe or otherwise perceive in person a violation in existence as a prerequisite to his citation of the infraction.

~1919

Section 103(a), as noted previously, authorizes inspections--and investigations--by the Secretary for the purpose of determining whether there is compliance with the mandatory health or safety standards. That provision should be read in conjunction with section 104(a), which authorizes the Secretary, upon either inspection or investigation, to issue a citation if he believes an operator has violated the Act or a standard.

I conclude that section 104(a) permits the issuance of a citation even though the violative condition or practice is not in existence at the time of the inspector's observation or actual detection since section 104(a) refers to investigations as well as inspections.

In conclusion, while I have found the issuance of a section 104(d) order invalid in this proceeding since it was based on a condition or practice not in existence during the time period of an inspection but on one which had already occurred and been abated and was not actually perceived, observed, or otherwise directly detected by a duly authorized representative of the Secretary as part of an inspection, I also conclude that such condition (or practice) is properly cited under section 104(a). Based on the inspector's testimony in this case in connection with the circumstances surrounding the issuance of the order, I find such issuance comports with section 104(a) requirements.(FOOTNOTE.15)

Based on the foregoing analysis, it is concluded that the motion for summary decision should be granted in part.

ORDER

Withdrawal Order No. 2503086 dated April 17, 1985, is modified pursuant to section 105(d) of the Act to reflect its issuance as a citation under section 104(a) of the Act rather than as a withdrawal order under section 104(d)(2) of the Act. United States Steel Corporation, 6 FMSHRC 1908, at 1915 (Fn. 3) (1984).

All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr.
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE:-

~Footnote_one

1 Inspector Huggins was not present at the mine on the day the alleged violation occurred, April 12, 1985.

~Footnote_two

2 One of the purposes of the preliminary hearing was to determine the factual setting in which the inspection was conducted and the alleged violation occurred. The parties presented the testimony of three witnesses, Inspector Huggins for the Secretary, and for Emery, two members of Emery's management: Kenneth E. Callahan (shift foreman on April 12, 1985) and James Atwood (mine manager during the period in question).

~Footnote_three

3 This contention will be taken up in more detail subsequently.

~Footnote_four

4 The parties also have differing views as to the significance and meaning of two other terms used in the Act, "finds" (or "findings") and "believes" (or "belief"). After careful consideration of the thorough research of the parties in this respect, I am of the opinion that attempting to divine congressional intention in the use of these terms will prove to be a futile act. Divining congressional intent in the major ways called for in this proceeding does not require a specific determination of the terms "find" or "believe." The distinction between "inspections" and "investigations" as those terms are used by Congress in formulating a range of enforcement mechanisms, is of considerable, if not critical, importance, however, in determining the merit of the motion for summary dismissal.

~Footnote_five

5 This is reflected in the testimony of Emery's witness Callahan and also reflected indirectly by the fact that the inspector, on cross-examination, indicated that various answers to interrogatories propounded to him were, in fact, answered by him with the indication that he was not present in the "B" North section of the mine on April 12, 1985, the date the alleged violation occurred. There is no question but that some changes had occurred in the area of the mine involved, and described in the order, and exactly to what extent cannot, in this proceeding, be determined. Based on the testimony of the witnesses in this proceeding, it is unlikely that precisely what those differences are will ever be determined.

~Footnote_six

6 On the morning of April 17, 1985, Inspector Huggins' supervisor told him of a rumor concerning the blasting which occurred on April 12, 1985, and Inspector Huggins indicated that at approximately 9 o'clock, when he arrived at the mine, that he advised management representative Callahan of his "purpose," which the inspector explained meant that he was conducting an AAA inspection and also of the "25 shots" (utilized in the commission of the alleged violation).

~Footnote_seven

7 I note here that this is one of the more significant provisions of the Act in determining the validity of the order in question since it authorizes the Secretary to make an "investigation" of an accident or "other occurrence relating to health or safety." It is clear here, as well as in other provisions of the Act, that Congress saw an investigation as something different from an inspection. One can readily see the difference between the investigation of some past happening or occurrence or accident and the inspection of some physical plant or property.

~Footnote_eight

8 Section 103(g)(1) provides a procedure for the representative of miners to obtain "an immediate inspection" by giving notice to the Secretary of the occurrence of a violation or imminent danger.

~Footnote_nine

9 The Secretary attributes importance to the use of the past tense here in the sense that Section 104(d)(1) can cover an event or violative occurrence which occurred prior to the issuance of an enforcement order or citation. This contention is rejected on the basis of the subsequent provisions of section 104(d)(1) which are phrased in the present tense and the fact that the two paragraphs constituting section 104(d), when read in their entirety, indicate that use of the phrase "has been" was not an intentional extension of the coverage of the paragraph to prior events but simply a matter of practical phraseology.

~Footnote_ten

10 This could, if the principle is accepted, be a period well in excess of the five days involved in the instant proceeding.

~Footnote_eleven

11 As it did, for example, in section 104(a) of the Act.

~Footnote_twelve

12 Reference is made to Webster's Third New International Dictionary, G. & C. Merriam Company, 1976, which defines "inspect" in the following manner: "1: to view closely and critically (as in order to ascertain quality or state, detect errors, or otherwise appraise): examine with care: scrutinize (let us inspect your motives) (inspected the herd for ticks) 2: to view and examine officially (as troops or arms)." The word "inspection," in the same dictionary, contains various definitions, which include references to "physical" examinations of various things, including persons, premises, or installations. The word "investigate" is defined as follows: "to observe or study closely: inquire into systematically: examine, scrutinize

(the whole brilliance of this novel lies in the fullness with which it investigates a past) (a commission to investigate costs of industrial production ...)."

One concludes from reading these definitions that an investigation is more applicable to the study or scrutiny of some past event or intellectual subject, whereas an inspection relates more generally to looking at some physical thing. This common distinction between these phrases is consistent with the congressional usage of the term "investigate," for example, in section 103(b) of the Act and for the use of both terms in section 104(a) of the Act.

~Footnote_thirteen

13 Westmoreland Coal Company, "Order Granting In Part Motion for Summary Decision," et cetera, Docket Numbers WEVA 82-340-R, et al, (May 4, 1983).

~Footnote_fourteen

14 The record is somewhat confused on this point, however, I find that a citation was issued on April 17, 1985.

~Footnote_fifteen

15 This decision does conflict with holdings of at least two other Administrative Law Judges who have dealt, in some degree, with the issue; however, in reading their decisions, I was unable to determine whether the precise issue was presented to them squarely. (Their decisions are referred to in the Secretary's memorandum, and in Emery's motion.)