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S.WESTERN PORTLAND CEMENT v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SOUTHWESTERN PORTLAND CEMENT COMPANY, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. CENT 85-71-RM
GARY PRITCHETT, UNION REPRESENTATIVE	Citation No. 2235007; 1/10/85
and	Docket No. CENT 85-81-RM
PETE BARRERAZ, UNION REPRESENTATIVE	Order No. 2238401; 4/10/85
v.	Docket No. CENT 85-82-RM
	Order No. 2238402; 4/10/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Odessa Cement Plant

ORDER

Southwestern Portland Cement Company (SPCC) has moved for a summary decision herein. The Secretary of Labor opposes the motion. Briefs have been filed by SPCC and the Secretary in support of their positions.

The facts are these:

CENT 85-71-RM

1. In this case Citation No. 2235007 was issued under Section 104(d)(1) of the Act. The citation in its format indicates that it was issued on January 10, 1985. The body of the citation itself recites that it was issued on March 21, 1985.

2. The citation alleges that three miners were exposed to an undetermined amount of heat and gas while working in the SPCC multiclone. It is further alleged that SPCC's actions constituted an unwarrantable failure to comply with 30 C.F.R. 56.15-6.

3. Subsequently, on May 1, 1985, the citation was modified by formally changing the issuance date from January 10, 1985 to March 21, 1985. It was further stated in the amendment that "the violation was believed to have occurred on January 10, 1985." (FOOTNOTE.1)

4. Between March 21 (the date Citation 2235007 was issued) and May 1 (the date the citation was modified) two contested withdrawal orders were issued. These contests are now docketed as CENT 85-81-RM and CENT 85-82-RM.

CENT 85-81-RM

5. In this case SPCC contests MSHA's order number 2238401 issued under Section 104(d)(1) of the Act.

The foregoing order alleges SPCC violated 30 C.F.R. 56.9-40. The order was issued April 10, 1985 after an MSHA inspector had completed an investigation.

The order claims that SPCC's operation of its #183 forklift constituted an unwarrantable failure by SPCC to comply with the regulation.

CENT 85-82-RM

6. In this case SPCC contests MSHA's order 2238402 issued under Section 104(d)(1) of the Act.

The foregoing order alleges SPCC violated 30 C.F.R. 56.14-27. The order was issued on April 10, 1985 after an MSHA inspector had completed an investigation.

The order claims that SPCC's operation of its #183 forklift (on an occasion other than as alleged in Citation 2238401) constituted an unwarrantable failure by SPCC to comply with the cited regulation.

Discussion

SPCC contends that under Section 104(d) of the Act any violations, in order to be cited and made the subject of citations and withdrawal orders, must be in existence at the time of an inspection in order to subject a mine operator to liability for violations under the Act. SPCC also contends that Section 104(d) differs from Section 104(a) and other provisions of the Act since Section 104(d) introduces a time factor into the enforcement action.

The Secretary counters claiming that Section 103(g)(1) plainly provides a right to obtain an immediate inspection after notice of an allegedly violative condition is received by the Secretary.

The judge for the purpose of this order has reviewed the citation and withdrawal orders as well as the affidavits on file. These indicate that the violative condition were not actually perceived, observed or otherwise directly detected by the MSHA inspectors. Further, such violative conditions did not exist at

the time the inspectors visited the worksite. This analysis rests on the fact that MSHA conducted an after the fact investigation before issuing the citation and orders. Specifically, Citation 2235007 was issued due to events that allegedly occurred on January 10, 1985. MSHA investigated these events when it received a written employee complaint on February 7, 1985. The two withdrawal orders were issued as the result of an after the fact MSHA investigation on April 3, 1985.

An overview of the Act is necessary to resolve the issues in the case.

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,. . . .

The contrast between the foregoing sections indicates that Congress saw an investigation as something different from an inspection.

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 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 would be to increase the 90-day period provided for in the second section of Section 104(d)(1) by the amount of time which passed between the occurrence of the violative condition described in the order and the issuance of the order.

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) indicates the Congress did so with some premeditation.

Further, an example of the fact that Congress intended the words to have different meanings is provided by Section 107(b)(1) - (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, 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.

A review of the various portions of the Act, commencing at the point where the subject words are first used on through to the end of such use, indicates that the terms were used with care and judiciously and with an understanding of the general connotations contained in their definitions.(FOOTNOTE.2)

Commission Judge Richard C. Steffey thoroughly considered the legislative history of the Act concerning these issues in Westmoreland Coal Company, WEVA 82-340-R, May 4, 1983. His views, slightly recast by the writer, are quoted at length herein because his order (on a motion for a summary decision) is otherwise unreported. He stated:

> WCC correctly argues that an order issued under Section 104(d) should be based on an inspection as opposed to an investigation. As herein before indicated, the Secretary argues that Congress has not defined either term to indicate that Congress recognizes 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 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 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. S.2917, when reported in the Senate, contained an unwarrantable-failure provision; 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.
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> Conference Report No. 91-761. 91st Congress, 1st Session, 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 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 ad

dition to the special inspection required under section 104(b) had 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 Congress, 1st Session, 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 in

spector's finding that there was a violation. Additionally, as both the Secretary and WCC have noted, Senate Report No. 95-181, 95th Congress, 1st Session, 39, 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, in part, that 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. 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 "the 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 any subsequent inspection, he finds another violation of any mandatory health or safety standard and finds such violation to be caused by an unwarrantable failure of such 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, the operator is liberated from the unwarrantable-failure chain. Conference Report No. 95-181, 34, states that "both 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 added.)

I agree with Judge Steffey and I conclude that the Act does not permit a section 104(d) order to be based on an investigation. But rather the order must be based on and it must have been a product of an inspection of the site. Section 104(d) 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) order may not be issued.

As previously noted, when it intended to permit MSHA enforcement actions to proceed on the basis of an inspection or an investigation, Congress so provided. The section 104(d) requirement of an inspection cannot be dismissed as mere semantic inadvertence on the part of Congress.

Section 104(d) sets forth the sanctions that may be imposed against an operator under the specific conditions discussed in that section. If follows that the inspector authorized on a miner's complaint by section 103(g)(1) cannot reduce the safeguards Congress intended to provide in section 104(d). The Secretary's reliance on section 103(g)(1) is, accordingly, rejected.

As previously noted the citation and orders in contest here all indicate on their face that they were issued as a result of MSHA investigations.

Accordingly, I find that Citation 2235007 and Withdrawal Orders 2238401 and 2238404 were improvidently issued pursuant to section 104(d) of the Act.

However, such a conclusion does not mandate that the citation and orders in contest here should be vacated. The Commission has thoroughly explored the procedural propriety of a judge modifying an invalid 104(d) order. Consolidation Coal Company, 4 FMSHRC 1791 (1982); United States Steel Corporation, 6 FMSHRC 1908 (1984). The rationale as expressed in Consolidation Coal Company follows:

> We first consider the question of modification from a general perspective. Sections 104(h) and 105(d) of the Mine Act expressly authorize the Commission to "modify" any "orders" issued under section 104. This power is conferred in broad terms and we conclude that it extends, under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations. In this case, and in future ones raising similar issues, we will define such "appropriate circumstances." Where, as here, the withdrawal order issued by the Secretary contains the special findings set forth in section 104(d)(1), but a valid underlying 104(d)(1) citation is found not to exist, an absolute vacation of the order, as urged by the operator, would allow the kind of serious violation encompassed by section 104(d) to fall outside of the statutory sanction expressly designed for it--the 104(d) sequence of citations and orders. The result would be that an operator who would otherwise be placed in the 104(d) chain would escape because of the sequencing of citations and orders. Such a result would frustrate section 104(d)'s graduated scheme of sanctions for more serious violations.

Consolidation Coal Company, specifically addresses the issue of whether 104(d) orders survive as alleged 104(a) violations. On this point the Commission stated 4 FMSHRC at 1794 (Footnote 9):

> Modification under such circumstances is also consistent with our settled precedent. We held in Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980), that allegations of a violation survived the Secretary's vacation of the 104(d)(1) withdrawal order in which they were contained and, if proven at a subsequent hearing, would have required assessment of a penalty. We reached a similar result in a companion case in which we held that allegations of violation also survived Secretarial

> vacation of an invalid 107(a) order (imminent danger). Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (February 1980). In both cases, we thus contemplated future trial of the allegations as possible 104(a) violations. (Neither of the vacated withdrawal orders had contained significant and substantial findings.) If less serious allegations of 104(a) violations survive, then, a fortiori, the more serious allegations in the present type of case should survive as potential 104(d)(1) violations. In short, the purport of our decisions is that such allegations survive, and modification is merely the appropriate means of assuring that they do.

For the foregoing reasons I conclude that SPCC's motion should only be granted in part. A total summary decision is denied because the pleadings herein indicate that a factual dispute remains as to the validity of the modified citation and orders. If, after a hearing, the evidence fails to show that the violations occurred then the citations will be vacated.

In summary, I conclude that the 104(d) citation and two 104(d) withdrawals orders are invalid because the alleged violative condition was not in existence during the period of the inspection. Further, the violations were not actually perceived, observed or otherwise directly detected by a duly authorized representative of the Secretary. I further conclude that Commission precedent requires that the 104(d) allegations should be modified to allegations of violations under Section 104(a) of the Act.

Accordingly, pursuant to Section 105(d) of the Act, I enter the following:

ORDER

1. Citation No. 2235007 alleging a violation of 30 C.F.R. 56.15-6, docketed as case No. CENT 85-71-RM and issued under section 104(d)(1) of the Act is modified to reflect its issuance under section 104(a) of the Act.

2. Withdrawal Order 2238401 alleging a violation of 30 C.F.R. 56.9-40, docketed as case No. CENT 85-81-RM and issued under section 104(d)(1) of the Act is modified to reflect its issuance under section 104(a) of the Act.

3. Withdrawal Order 2238402 alleging a violation of 30 C.F.R. 56.14-27, docketed as case No. CENT 85-82-RM, and issued under section 104(d)(1) of the Act is modified to reflect its issuance under section 104(a) of the Act.

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

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 The facts in this paragraph only appear in CENT 85-119-M, a penalty case pending before this judge for the alleged violation of Citation 2235007.

~Footnote_two

2 Webster's New Collegiate Dictionary, 1979 at 593 and 603 indicates that the primary definition of "inspect" is "to view closely in critical appraisal: look over." On the other hand, the primary definition of "investigate" is "to observe or study by close examination and systematic inquiry."