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

NACCO MINING COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. LAKE 85-87-R
v.	Citation No. 2330657; 6/5/85 Modified to Citation No. 2330657-02; 6/24/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Powhatan No. 6 Mine
AND	
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-2 A.C. No. 33-01159-03668
v.	Powhatan No. 6 Mine
NACCO MINING COMPANY, RESPONDENT	
AND	
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	

DECISION

Appearances: Paul W. Reidl, Esq., Crowell & Moring, Washington, D.C. for Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio for Respondent/Petitioner;
Thomas M. Myers, Esq., United Mine Workers of America, Shadyside, Ohio for Intervenor.

Before: Judge Merlin

The above-captioned notice of contest is before me pursuant to order of the Commission dated November 13, 1985. See also the letter of the Commission's Acting General Counsel dated January 7, 1986. The related penalty case is before me pursuant to Order of Assignment dated November 14, 1985.

In a telephone conference call with the undersigned Administrative Law Judge counsel agreed that (1) the contest and penalty cases be consolidated for decision; (2) the cases be decided on the basis of the present record without any further hearing and (3) filing of post-hearing briefs be waived.(FOOTNOTE 1)

Accordingly, the contest and penalty cases are hereby consolidated and decided on the present record.

The subject citation dated June 5, 1985 and issued under section 104(a) for a violation of 30 C.F.R. 75.200, reads as follows:

> During an investigation of a 103(g)(1) complaint it has been determined that Bill Palmer, while operating the No. 14 continuous mining machine in the 6á94 crosscut No. 3 to 2 entry in the 9 left 2 east section on the first shift 5Ä30Ä85 traveled at least 6 feet 5 inches inby permanent roof supports (roof bolts) and temporary roof supports had not been installed. Information to substantiate this violation was obtained by inspecting the 6á94 crosscut and conferring with management and mine employees. The Section Foreman was Stanley Sikora.

The notice of termination dated June 11, 1985 provides:

> Safety meetings were held and the roof control plan and the hazards of going beyond roof supports were explained to all the working miners.

Subsequently on June 24, 1985, a modification was issued changing the 104(a) citation to a 104(d)(1) citation. This modification states as follows:

> No. 2330657 issued on 6Ä5Ä85 is being modified to show this action was a

> 104(d)(1) type citation instead of a 104(a). Bill Palmer, continuous miner operator under the supervision of Stanley Sikora, Section Foreman, was mining coal 6 feet 3 inches inby permanent roof supports in an area of unsupported roof. This violation occurred May 30, 1985, in the 9 left 2 east section. This is an unwarrantable failure. This citation was terminated 6Ä11Ä85.

The operator does not contest the fact of violation (Tr. 6Ä7). Nor has it argued that the violation was not serious. Its challenge is first, to the circumstances and procedures under which the (d) citation was issued and second, to the existence of unwarrantable failure (Tr. 7Ä8, 37).

The first issue is the validity of the citation in light of the requirements of section 104(d) that the inspector issue the citation on an "inspection" and make a "finding" of unwarrantable failure.

Three administrative law judges of this Commission now have considered the meaning and effect of section 104(d) in cases like this. In an Order Granting In Part For Summary Decision, Specifying Further Proceedings, And Granting Motion To Consolidate in Westmoreland Coal Co., (WEVA 82Ä340ÄR et al.) (May 4, 1983), Judge Steffey explained section 104(d) in light of the legislative history as follows:

> WCC correctly argues that an order issued under 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. 91Ä761, 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 91Ä761, pp. 67Ä68).

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. 95Ä461, 95th Cong., 1st Sess., 47Ä48, 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. 95Ä181, 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. 95Ä181, 37, and Conference Report No. 95Ä461, 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. 95Ä461, 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, "uponany 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 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. 95Ä181, 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.]

Most recently, in Emery Mining Corporation, 7 FMSHRC 1908 (1985) Judge Lasher agreed with and followed Judge Steffey stating in pertinent part:

> 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%y(4)27 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 9 [footnote omitted] 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%y(4)27"

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 90Äday 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.10 [footnote omitted]

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) 11 [footnote omitted] did so with some premeditation.

* * * * * * * * *

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)

* * * * * * * * *

> 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.

The foregoing decision was not appealed.

Again, most recently in Southwestern Portland Cement Company, 7 FMSHRC ÄÄÄÄ (November 25, 1985) Judge Morris also issued an Order employing the same rationale and reaching the same result as Judge Steffey. Judge Morris concluded his discussion on this issue as follows:

> * * * * * *
>
> 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. It 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.

There is little that can or needs to be added to Judge Steffey's decision which thoroughly addresses the question of what section 104(d) means and how it should be interpreted in a case such as this. This decision is persuasive and the instant matter falls squarely within it. The recent decisions of Judges Lasher and Morris also follow Judge Steffey's rationale and result. In this case there is no dispute that when the inspector went to the mine he was looking into the circumstances of a past event. The cited violative event of the continuous miner operator going beyond supported roof occurred and ended several days before the inspector visited the mine. The unsupported roof was bolted later on the same day the violation occurred which was long before the inspector arrived. Because the inspector here was engaged in the investigation of a past happening rather than an inspection of an existing situation he could not issue a (d) citation. Since the inspector could not issue a (d) citation, the sub-district manager could not do so either. The power to modify exercised by the sub-district manager pursuant to section 104(h) does not mean that he, a step further removed from the

actual situation, could do what the statute forbids the investigating inspector from doing in the first instance. And section 103(g) cannot change the conditions so clearly required by section 104(d) for issuance of an unwarrantable citation.

I have not overlooked Judge Koutras' decision holding that walk-around pay was due when a miner representative accompanied an inspector on a roof control technical "investigation". Monterey Coal Company, 5 FMSHRC 1223 (1983). As the decision makes clear, the term "investigation" in that case was the result of MSHA computer code labels rather than the statute itself and the Judge expressed difficulty in understanding any real distinction between a spot inspection and activity to determine whether an operator was complying with its roof control plan. That there was no real distinction in that case is apparent because the inspector there was looking into and observing on-going and present events unlike this case which involved only looking back into a specific past happening. Even more importantly, as Judge Koutras explained, the walk-around pay provision is governed by its unique legislative history and by judicial decisions which interpret it in light of that history. Section 104(d) which has its own terms and legislative history must be governed by them. Accordingly, Monterey is distinguishable from this case.

In light of the foregoing, I hold that the (d) citation cannot stand and must be modified to an (a) citation.

Mention must also be made of the manner in which the sub-district manager proceeded. He ordered a supervisory inspector to order the issuing inspector to change the (a) citation to a (d) citation (Tr. 351Ä352). And he testified that his decision to modify the citation was based upon prior safety meetings he had held with the operator and upon certain MSHA policy memoranda regarding the issuance of 104(d) citations and orders for roof control violations (GxÄ5, GxÄ6, GxÄ7, Tr. 358Ä368). Finally, he never spoke to the issuing inspector and he did not know or care what was done by the section foreman who was in charge when the violation occurred (Tr. 351Ä352, 399). The sub-district manager, is of course, a duly authorized representative of the Secretary with power under section 104(h) to modify citations. But he cannot exercise this power based solely upon blanket administrative fiat which indiscriminately decrees that all section foreman must have known or should have known of this type of violation regardless of what actually occurred in the particular case. I do not read the MSHA memoranda as requiring such an approach (GxÄ5, GXÄ6, GXÄ7). In any event, the sub-district manager followed such a policy here and his action must be disapproved of because the result reached by a duly authorized representative, whatever his administrative level, must be based upon the facts of the case involved. There is a dispute between the sub-district manager and the operator's mine manager over what was discussed at their meetings, but this makes no difference because unwarrantable failure can in no wise be based on these meetings and general policies without reference to the

circumstances of the violation itself (Tr. 358, 376Ä377, 920, 933, 1077). Nevertheless, because a full and complete de novo hearing was held before an administrative law judge of this Commission, the basis upon which the sub-district manager acted would not in and of itself provide grounds for modifying the (d) citation in this case unless the evidence on the merits showed no unwarrantable failure which it does not. See the discussion of negligence, infra. If an operator wishes to successfully challenge an intermediate administrative action such as the sub-district manager's, it would be better advised to make the attempt where it can prevail on the merits. I set forth my views on the propriety and effect of the sub-district manager's action so that if an appeal is taken and the Commission disagrees with my determination regarding the "inspection" requirement of section 104(d), further remands will be unnecessary.

There remains for consideration the penalty case. As set forth above, the operator admits the violation and has not contested that the violation was serious. I take official notice that roof falls remain a major source of serious accidents in the mines.

Next, negligence must be determined. In this connection an exposition of the facts is appropriate. Near the end of the hoot owl shift on the morning of May 30, 1985, the section foreman, Mr. Sikora, assigned the continuous miner operator, William Palmer, the task of cutting coal in the crosscut going from the No. 3 entry towards the No. 2 entry (Tr. 615Ä618). This was the second cut into the crosscut. The first cut previously had been taken by someone else (Tr. 437, 440). According to the engineer's map and the witnesses, the first cut was very much off sight and on an angle (Tr. 189, 197, 269, 297Ä298, 324, 878Ä879) (Op. Exhibit 4). But Sikora did not notice this and he said he did not check because it was the end of the shift and he was in a hurry to go home (Tr. 659Ä660, 718). Palmer also did not look to see if the first cut was straight or on an angle (Tr. 451). The crosscut could not have been holed through under supported roof with just one cut and this was especially true because of the angled first cut (Tr. 670, 719, 451). However, Palmer did hole through to the No. 2 entry on one cut, but to do so he went at least several feet beyond supported roof in violation of the roof control plan (Tr. 867, 858, 954). Not only did Palmer go beyond supported roof to cut through but he pushed the coal into a pile to the further side of the No. 2 entry (Tr. 447, 677). As shown by the engineer's map, pushing the coal required Palmer to go far beyond where he should have stopped (Tr. 858, 995) (Op. Exhibit 4). Sikora stated that at the time Palmer was improperly cutting through the crosscut, he (Sikora) was doing his pre-shift examination for the next shift (Tr. 617Ä618). He stated that when he returned, Palmer was cleaning up and he (Sikora) did not notice

the wide and deep cut because a danger sign had been hung (Tr. 623, 626, 655). Therefore, he did not go into the crosscut (Tr. 620Ä627). However, testimony of others demonstrates that the improperly deep and wide cut was visibly obvious as was the pile of coal (Tr. 177, 869). Sikora said it was "funny" he did not notice the improper cut but again gave the excuse he was in a hurry to go home (Tr. 687). The on-coming day shift was a maintenance shift and the roof was bolted on the afternoon shift of May 30 (Tr. 105Ä106).

The foregoing facts demonstrate an egregious lack of reasonable and due care by the section foreman. When Sikora told Palmer to cut coal in this crosscut, the cut previously taken was way off sight. Yet Sikora gave Palmer no instructions about how to proceed and did not supervise him (Tr. 617Ä618). Indeed, by his own admission Sikora did not even recognize the existing cut was wide because it was the end of the shift and he was in a hurry to go home (Tr. 659Ä660, 718). Yet it was Sikora himself who set the sight lines for the crosscut and as he admitted, it was his responsibility to see Palmer did not make wide cuts (Tr. 638Ä639, 661). Moreover, Sikora acknowledged he had heard Palmer cut a little wide (Tr. 632). In addition, the union safety committeeman testified Palmer was a fast worker who did not bother to clean up and who had a tendency to go to the limit to get as much coal as he could (Tr. 306, 334Ä335, 341). Palmer's own testimony demonstrates his unreliability both as a continuous miner operator and as a witness. Thus, Palmer admitted he did not pay much attention to excessively wide or deep cuts (Tr. 427Ä428). His attempt to excuse his wide cuts because of a missing lug was contradicted by every other witness who addressed the issue (Tr. 422Ä424, 455, 632Ä633, 740, 950). So too, his general justification of his conduct on the grounds the company encouraged such actions is undercut by his acknowledgment that management did not tell him to take wide or deep cuts (Tr. 461, 484, 486Ä487). Finally, Palmer described himself as one of the fastest workers there is (Tr. 428). The picture is, therefore, clear. Palmer was a fast and careless worker who gave little, if any, thought to safety and whose excuses are unsupported by anyone else and are lost in a maze of self-contradictions.

It was to such an individual that Sikora assigned the task of cutting coal in the crosscut near the end of the shift. But Sikora turned his back on the time element and on the off sight nature of the pre-existing first cut, both of which increased the pressure on the continuous miner operator to complete the crosscut on that shift in one cut. When the circumstances under which this task was assigned are combined with the nature of the individual to whom the job was given, what happened was all but inevitable, i.e. the taking of all coal on one cut and the continuous mine operator in violation by going far beyond supported roof. The union safety committeeman testified the circumstances made it "tempting" to take all the coal on one cut (Tr. 329). To an individual like Palmer it would be virtually irresistible to get the extra 10 tons in the one cut (Tr. 720). Sikora must have realized this. He knew Palmer and he knew the conditions under

which he was assigning him this task. Sikora's conduct is far worse than mere lack of supervision. It was he who created the circumstances under which the violation was all but bound to happen. And it was he whose first priority was not safety but getting home as fast as he could at the end of the shift. The operator put Sikora in his position of supervisory and managerial responsibility. His careless, reckless and wilful behavior is attributable to the operator which must bear the consequences. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982). I conclude the operator is guilty of gross negligence.(FOOTNOTE 2)

Clearly too, Palmer was extremely negligent and since his work habits were well known, his conduct was foreseeable and therefore also attributable to the operator, A.H. Smith, 5 FMSHRC 13 (1983). However, for purposes of determining assessment of the amount of the penalty in light of negligence, consideration of Sikora's behavior is sufficient.

The operator's size is large (Tr. 972, 980). In absence of evidence to the contrary I find imposition of a penalty will not affect its ability to continue in business. The parties agreed that since October 1982 there were two violations at this mine, for going under unsupported roof (Tr. 380). Overall, the operator had a worse than average history of violations but it was improving by the time of the hearing, and the operator was now showing a positive attitude toward safety (Tr. 384Ä387). I accept the evidence regarding prior history, but as appears herein evidence of improvement is after-the-fact insofar as this case is concerned. Finally, in absence of any evidence to the contrary I find there was good faith abatement.

In light of the foregoing considerations and in accordance with the statutory criteria in section 110(i) a penalty of $5,000 is assessed.

ORDER

It is Ordered that the subject 104(d) citation is Modified to a 104(a) citation.

It is further Ordered that a penalty of $5,000 is assessed which the operator is ORDERED TO PAY within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

FOOTNOTES START HERE

1 Operator's counsel filed a Notification of Subsequent Authority which the Solicitor has moved to strike. The operator has opposed the Solicitor's motion. The matter is moot because I read the decisions in question before the operator's notification was received. Since the positions of the parties have been fully presented, further briefing is unnecessary.

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.

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.

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.

2 I have not overlooked testimony regarding the operator's generally cooperative and positive attitude. But that evidence cannot overcome what occurred in this case.