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EMERALD MINES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EMERALD MINES CORPORATION,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 85-298ÄR
Citation No. 2401863; 8/8/85

Emerald No. 1 Mine

UNITED MINE WORKERS OF
AMERICA (UMWA),
INTERVENOR

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Chapman,
Duff & Hasley, Pittsburgh, Pennsylvania, for
Contestant;
Heidi Weintraub, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent;
Tom Shumaker, United Mine Workers of America,
Masontown, Pennsylvania, for Intervenor.

Before: Judge Melick

This case is before me upon the Notice of Contest filed by Emerald Mines Corporation (Emerald) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act" to challenge the issuance by the Secretary of Labor of citation No. 2401863 under the provisions of section 104(d)(1) of the Act. The Secretary moved for dismissal of the case on the grounds that there was no justiciable issue in that Emerald had already paid the civil penalty corresponding to the citation and that 90 days

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had elapsed without any additional section 104(d) orders having been issued. According to the Secretary the case was therefore moot. The Secretary's motion was taken in part as a Motion For Summary Decision under Commission Rule 64, 29 C.F.R. 2700.64, and documents submitted in connection with the motion were supplemented at limited hearings under that rule. The Secretary's motion was thereafter granted in part and denied in part. The corresponding bench decision appears below with only non-substantive modification:

To the extent that Emerald does concede that it paid the penalty proposed by the Secretary for Citation Number 2401863 as a 104(a) citation, I find that the fact of the violation and the "significant and substantial" findings related to that citation have been the subject of a final disposition. Those issues, I find, have indeed been waived by payment of the penalty. [Old Ben Coal Co., 7 FMSHRC 205 (1985)].

Now whether the 104(d)(1) "unwarrantable failure" findings that were later added to the citation have also been the subject of a final disposition by the payment of that penalty, is still an issue that may be further probed in these limited proceedings. I will provide additional opportunity for the Secretary to present evidence on that subject, pursuant to Commission Rule 64(b).

So, to the extent that there does exist a genuine issue of fact based on the pleadings, documents, and affidavits submitted to me, regarding whether the 104(d)(1) citation was included in that penalty payment, and should likewise be considered waived, the Secretary's motion must be denied. [Commission Rule 64]

Now, the Secretary also asserts in paragraphs 2 and 3 of his motion that the 104(d)(1) "unwarrantable failure" issue is, in any event, a moot issue. Now, there may be other reasons why this is not moot, but I find that the "unwarrantable failure" issue is not a moot issue because the history of violations attributed to Emerald reflects the existence of the more serious 104(d)(1) citation as opposed to a less serious 104(a) citation. This history could be used in any future proceedings to increase penalties imposed against Emerald, both by the Secretary under his regulations, and by the Commission, under section 110(i) of the Act. In other words

as long as the 104(d)(1) characterization is associated with that citation, there indeed is a viable issue because of potential prejudice to Emerald in the future assessment of civil penalties. Now, there may be other reasons why this issue is not moot, but I don't find it necessary to consider any other reasons. So, with respect to the Secretary's paragraphs 2 and 3, in his motion to dismiss, those are also denied.

Following limited hearings on the Secretary's Motion under Commission Rule 64(b) a further bench decision was rendered. That decision appears as follows:

I am prepared to rule. I find that the testimony of Mr. Machesky [Emerald's Safety Director] is, indeed, fully credible. It is undisputed that when Mr. Machesky paid that section 104(a) citation, [on behalf of Emerald] he believed he was paying only a penalty for a 104(a) citation. I certainly accept his testimony that he did not then understand that his payment of that penalty would have had any impact on the 104(d)(1) modification to that citation.

Thus, when the penalty was paid on the citation, it was paid as a section 104(a) citation, and the only issues that were thereby waived were the fact of the violation cited and the amount of civil penalty. Those are the only issues that had become final by the payment of that penalty and the issue of "unwarrantable failure" survived that payment of penalty. The Secretary's motion to dismiss is, therefore, denied on that issue.

Emerald's Motion for Partial Summary Judgment under Commission Rule 64 was also considered at hearing. Emerald sought dismissal of the "unwarrantable failure" findings in the citation alleging inter alia that "an unwarrantable failure allegation must be based on an actual inspection of the mine and observance of the condition as opposed to an investigation performed after the fact."

The undisputed evidence on the motion is as follows. On August 8, 1985, at 8:00 a.m. Joseph Koscho, an inspector for the Federal Mine Safety and Health Administration (MSHA), issued Citation No. 2401863 under section 104(a) of the Act charging a "significant and substantial" violation of the standard at 30 C.F.R. 75.308. The citation alleged as follows:

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"During a 103(g)(1) investigation it is determined that power from the continuous miner serial number JM2567 was not immediately de-energized when 2.5% to 2.6% methane was detected, also changes were made in the ventilation in the working places before the continuous miner in the working place was de-energized. The incidence [sic] took place in number 1 haulage 002 section in a crosscut being driven from 3 room to 2 room on 7/29/85."

On August 23, 1985, Inspector Koscho modified the citation changing item 9 "Type of Action" from "104(a)" to "104(d)(1)" and noting that "the subject citation is hereby modified to show item 9 type of action to be changed from 104Aa to 104AdA1 as per instruction of upper MSHA supervision."

The events leading to the issuance of the citation are as follows. On July 30, 1985, Inspector Koscho had received a section 103(g)(1) complaint concerning an alleged accumulation of methane at the Emerald No. 1 Mine on July 29, 1985.2 Koscho began his investigation on July 31, 1985, by visiting the mine and talking to Lampman Don Kelly on the surface. At this point he was investigating allegations that the hand-held methane detectors had not been working properly and were poorly maintained. Koscho reviewed the records concerning the methane detectors and found no violations. He then

proceeded into the East Mains section of the mine to interview miners who had been present at the time of the alleged methane violation reported in the "103(g)" complaint.

The next day, August 1, 1985, Inspector Koscho returned to the mine and for the first time visited the underground area in which the cited violation had occurred i.e., in the crosscut between the No. 2 and No. 3 entry in the 002 section. According to Koscho, conditions on August 1 differed from conditions that reportedly had existed on the date of the violation. In this regard Koscho found "very little methane" on August 1st and observed that since the violation 2 full cuts of coal had been removed from the No. 3 entry and 1 cut from the No. 2 entry. Koscho tested the methane monitor on the continuous miner which had been used on the date of the violation and found it to be working. He also obtained records concerning the retraining of mine employees. This was a "long drawn out affair" since some records were not readily obtainable.

Upon obtaining all of the requested documentation Koscho finally wrote the section 104(a) citation on August 8, 1985. He did not observe the violation that occurred on July 29, and acknowledged that conditions were different when he was physically on-site on August 1, 1985. The citation was based upon the unsworn statements of the miners who purportedly observed the violation. On August 23, 1985, Koscho modified the section 104(a) citation to a citation under section 104(d)(1) of the Act based on the same information he used to issue the section 104(a) citation.

Within this framework of evidence it is clear that the citation at bar was not based on an inspection of the mine but upon an investigation through subsequent interviews and the examination of records conducted by the inspector several days after the incidents giving rise to the violation. A finding of "unwarrantable failure" under section 104(d)(1) must however be based upon an "inspection" of the mine. See Emery Mining Corporation, 7 FMSHRC 1908 (1985) (Judge Lasher) citing therein the order of Judge Steffey in Westmoreland Coal Company, WEVA 82Ä340ÄR et. al); Southwestern Portland Cement Company, 7 FMSHRC 2283 (1985) (Judge Morris) and NACCO Mining Company, 8 FMSHRC ÄÄÄÄ (Jan 14, 1986) (Chief Judge Merlin). Under the circumstances the "unwarrantable failure" allegation herein cannot be supported and the citation as a citation under section 104(d)(1) of the Act must fail.

Accordingly the Motion for Partial Summary Decision filed by Emerald is granted and the citation at bar is modified from a citation under section 104(d)(1) of the Act to a citation under section 104(a) of the Act. Inasmuch as Emerald has already paid the civil penalty proposed by the

Secretary of Labor for Citation No. 2401863 as a section 104(a) citation, further proceedings in this matter are unnecessary.

Gary Melick
Administrative Law Judge

footnotes start here-

1 Section 104(d)(1) provides in relevant part as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

2 Section 103(g)(1) provides as follows:

"Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator, or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provision of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.