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WHITE COUNTY COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WHITE COUNTY COAL CORPORATION,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. LAKE 86-58-R
Order No. 2817373; 2/6/86

Docket No. LAKE 86-59-R
Order No. 2817375; 2/21/86

Pattiki Mine

DECISION

Before: Judge Melick

These cases are before me upon the contests filed by the White County Coal Corporation (White County) 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 two orders of withdrawal under section 104(d) of the Act.(FOOTNOTE 1)

White County subsequently filed a motion for partial summary decision pursuant to Commission Rule 64, 29 C.F.R. 2700.64 seeking modification of the orders to citations under section 104(a) of the Act. White County maintains that the section 104(d) orders at issue are invalid because they are not based on existing practices or conditions actually perceived during an inspection by an inspector as purportedly required by that section of the Act. The essential underlying facts indeed do not appear to be in dispute and I find that White County is entitled to partial summary decision as a matter of law. Commission Rule 64, supra.

On February 6, 1986, an inspector for the Federal Mine Safety and Health Administration (MSHA), Wolfgang Kaak, was conducting an inspection of the White County Pattiki Mine when he discovered that a chalk centerline had been drawn under the unsupported roof of room No. 6 from the last row of permanent supports inby to the face for a distance of 13 feet. It is clear that the inspector was not present when the chalk line was drawn and that he did not observe anyone under the unsupported roof.

The coal drill operator, Darrell Marshall, admitted to Inspector Kaak however that he had drawn the chalk line in question because the mining sequence was behind schedule and he was being pressed to keep his coal drilling process going. Marshall also admitted that he had walked under the unsupported area even though he had seen the red flag warning of the danger. Based upon these observations and admissions Kaak thereupon issued section 104(d)(1) Withdrawal Order No. 2817373 alleging an unwarrantable violation of the standard at 30 C.F.R. 75.200. That standard provides in pertinent part that "no person shall proceed beyond the last permanent support "

The order reads as follows:

A chalk centerline was observed on the roof of room No. 6 running from the last row of permanent supports, roof bolts, inby to the face. This area was and had not been supported when the coal drill operator, (D. Marshall), made the centerline on the roof. The distance from the last row of bolts to the face was 13 feet. Working section I.D. 003A0.

The order was terminated 25 minutes later following crew reinstruction on the roof control plan.

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During a subsequent inspection at the Pattiki Mine on February 12, 1986, Inspector Kaak observed foot prints beneath an area of unsupported roof. Again Kaak did not observe anyone under the unsupported roof. Moreover he was unable to obtain any further information about the incident upon questioning the foreman and miners in the area. Kaak nevertheless then issued section 104(d)(2) Order No. 2817375 alleging an unwarrantable violation of 30 C.F.R. 75.200. The order reads as follows:

Physical evidence, footprints, were observed going through an area of unsupported roof in the X-cut between Entry No. 6 and Entry No. 7 at curve Y spad No. 1773. The opening averaged about 10 feet long by 10 feet wide. The height average was 6 feet. The area was rock dusted and foot prints were clearly visible. Work section I.D. 002A0.

This order was terminated about 1 hour later after the crew was again reinstructed on the roof control plan and the area had been permanently supported.

Citing the decisions of 5 Commission Administrative Law Judges (Westmoreland Coal Company, Docket Nos. WEVA 82A34AR et al, May 4, 1983, Judge Steffey; Emery Mining Corporation, 7 FMSHRC 1908, 1919 (1985), Judge Lasher; Southwestern Portland Cement Company, 7 FMSHRC 2283, 2292 (1985), Judge Morris; Nacco Mining Company, 8 FMSHRC 59 (1986), Chief Judge Merlin, review pending; Emerald Mines Corporation, 8 FMSHRC 324 (1986), Judge Melick, review pending) White County maintains that the section 104(d) orders herein are invalid because they were not issued based upon a finding by an MSHA inspector of an existing violation of the Act or a mandatory standard.

It is not necessary to here restate the supportive rational of the cited decisions. It is sufficient to state that I am in agreement with the rational of those decisions and the principles stated therein that section 104(d) orders cannot be issued based upon a finding by the inspector of a violation that has occurred in the past but no longer then exists. It is undisputed in this case that the inspector did not observe any violations being committed but that he based his issuance of the 104(d) orders before me upon evidence of past violations. Accordingly White County's motion for partial summary decision is granted and the orders at bar are accordingly modified to citations under section 104(a) of the Act.

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In light of this decision the parties are directed to confer and advise the undersigned on or before June 20, 1986 regarding further proceedings in this matter.

Gary Melick
Administrative Law Judge
(703) 756-6261

1 Order No. 2817373 was issued under section 104(d)(1) of the Act. That section reads 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."

Order No. 2817375 was issued under section 104(d)(2) of the Act. That section provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."