

CCASE:  
GREENWICH COLLIERIES V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

GREENWICH COLLIERIES,  
DIVISION OF PENNSYLVANIA  
MINES CORPORATION,  
CONTESTANT

CONTEST PROCEEDINGS

Docket No. PENN 85-188-R  
Order No. 2256015; 3/29/85

v.

Docket No. PENN 85-189-R  
Order No. 2256016; 3/29/85

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

Docket No. PENN 85-190-R  
Order No. 2256017; 3/29/85

Docket No. PENN 85-191-R  
Order No. 2256018; 3/29/85

Docket No. PENN 85-192-R  
Order No. 2256019; 3/29/85

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 86-33  
A.C. No. 36-02405-03614

v.

Greenwich No. 1 Mine

GREENWICH COLLIERIES,  
RESPONDENT

PARTIAL SUMMARY DECISION

Before: Judge Maurer

Counsel for the Greenwich Collieries, Division of Pennsylvania Mines Corporation ("PMC") has moved for summary decision in these cases under Commission Rule 64, 29 C.F.R. 2700.64.

These cases involve five (5) orders issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act") on March 29, 1985, as the result of an investigation of a multiple fatality mine explosion which had occurred in the Greenwich No. 1 Mine on February 16, 1984, and their associated civil penalties.

PMC avers that the orders are invalid on the following three grounds:

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1. The Orders were not issued as a result of, and the alleged violations were not detected during, an inspection, as required by 104(d)(1); on the contrary, MSHA concluded that the alleged violations had occurred based on an investigation after the alleged violations no longer existed;
2. The Orders were not issued within 90 days of the issuance of the 104(d)(1) citation upon which they were based; and
3. The Orders were not issued forthwith as is required by the Act.

Furthermore, PMC contends that these orders cannot be modified to section 104(a) citations because they were not issued with "reasonable promptness."

On February 16, 1984, an explosion occurred at the Greenwich No. 1 Mine. Three miners were killed and several others were injured. Shortly after the explosion, MSHA organized an investigation team, and began the accident investigation. The underground inspection portion of the investigation was begun on February 25, 1984, and was completed on April 5, 1984, and numerous citations and orders were issued to PMC. Additionally, beginning on March 27, 1984, and until April 27, 1984, sworn statements were received from 66 persons who participated in the mine recovery operations or persons who could have had knowledge of the conditions in the affected areas prior to the explosion. On September 6, 1985, the Secretary issued his final report on this investigation.

On March 29, 1985, thirteen (13) months after the explosion, the Secretary issued the five (5) section 104(d)(1) orders which are contested herein. The orders each state that they are based on Citation No. 2016261, a section 104(d)(1) citation which was issued to PMC on February 24, 1984, approximately one year earlier.

I find that these orders were issued as a result of the accident investigation that followed the explosion as opposed to an inspection and for violations which no longer existed. The orders were in fact terminated at the same point in time that they were issued. I conclude, therefore, that the essential underlying facts surrounding the issuance of these orders are not in dispute and I find that PMC is entitled to a partial summary decision as a matter of law.

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The first issue raised by PMC herein concerning the validity of these section 104(d) orders, to wit, that they are invalid because they were not issued based on a finding by an MSHA inspector of an existing violation observed or detected during an inspection, but rather are based on an investigation of pre-existing, terminated violations is dispositive.

In the recent past, five Commission Administrative Law Judges have considered and consistently decided the issue presented in the instant case. See, Westmoreland Coal Company, Docket Nos. WEVA 82-34 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), review pending (Chief Judge Merlin); Emerald Mines Corporation, 8 FMSHRC 324 (1986), review pending (Judge Melick), and White County Coal Corporation, 8 FMSHRC 324 (1986) (Judge Melick).

I do not think it necessary to restate herein the rationale of those decisions. I agree with the extensive rationale set forth in Judge Steffey's Westmoreland decision and those that have followed it pertaining to this issue.

I find that Order Nos. 2256015-2256019 are invalid as section 104(d)(1) orders because an order issued under section 104(d) should be based on an inspection as opposed to an investigation and the above orders state on their face that the violations which had allegedly occurred are based on an investigation and no longer then existed.

Section 104(a), on the other hand, allows MSHA to issue citations on the basis of an inspection or an investigation and permits the issuance of a citation even though the alleged violative condition or practice is no longer in existence at the time of its issuance. The only condition being that it be issued "with reasonable promptness." I conclude that under the totality of the circumstances herein, the above orders, modified by this decision to 104(a) citations, were issued "with reasonable promptness."

In accordance with the foregoing, the motion of PMC for summary decision is granted in part and denied in part. The orders at bar are hereby modified to citations under section 104(a) of the Act. Therefore, further proceedings will be required to dispose of all the issues in the captioned cases.

Roy J. Maurer  
Administrative Law Judge