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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

AND

LOCAL UNION 1889, DISTRICT 17
UNITED MINE WORKERS OF
AMERICA,

INTERVENOR

CONTEST PROCEEDING

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

Emerald No. 1 Mine

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corporation, Pittsburgh, Pennsylvania
for Emerald Mines Company;
Edward H. Fitch, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia for
the Secretary of Labor;
Mary Lu Jordan, Esq., United Mine Workers of
America, Washington, D.C. for the Intervenor

Before: Judge Gary Melick

This case is before me upon remand by a majority of the
Commission for further proceedings consistent with its decision
dated September 30, 1987. On October 27, 1987, the following
stipulations were filed with the undersigned:

1. On August 8, 1985, at 8:00 a.m., Inspector Koscho
issued Citation No. 2401863 ("Citation") purportedly
pursuant to Section 104(a) of the Federal Mine Safety
and Health Act of 1977 ("the Act"), 30 U.S.C. 814(a),
alleging a violation of 30 C.F.R. 75.308.

2. Under the heading and caption "Condition or
Practice," the Citation alleged as follows:

During a 103(G)(1) investigation it is determined that power from the continuous miner Serial No. JM 2567 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 No. 1 Haulage 002 section in a crosscut being driven from 3 Room to 2 Room on 7/29/85.

3. The Citation alleged that the alleged violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard.

4. On August 23, 1985, at 8:15 a.m., Inspector Koscho modified the Citation to a Section 104(d) citation, thereby alleging an unwarrantable failure to comply with the mandatory standard.

5. On September 6, 1985, Emerald filed a Notice of Contest challenging the Citation and the modification of the Citation to a Section 104(d) citation and the special finding of "unwarrantable failure."

6. A proposed penalty was issued for the 104(a) Citation in September, 1985, and was paid by Emerald on October 11, 1985.

7. On November 18, 1985, the Secretary filed a Motion to Dismiss Proceedings on the basis that the Notice of Contest was moot because Emerald paid the proposed penalty. Emerald filed a response to the Secretary's Motion to Dismiss.

8. On November 15, 1985, Emerald filed a Motion for Partial Summary Judgment as to the unwarrantable failure allegation. The principal ground for this Motion was that the Citation was based upon an after-the-fact investigation and, therefore, could not properly be based upon Section 104(d) of the Act. The Secretary filed a response to Emerald's Motion.

9. A hearing was held before the Administrative Law Judge on January 22, 1986. The hearing was limited to the issues raised by the parties' Motions.

10. On March 5, 1986, the Administrative Law Judge issued his decision. He granted the Secretary's Motion to Dismiss as to the fact of the violation and the significant and substantial finding but denied it as to the unwarrantable failure allegation and the allegation of a violation of

Section 104(d)(1) of the Act. He also granted Emerald's Motion for Partial Summary Judgment, modified the Citation to a Section 104(a) Citation and deleted the unwarrantable failure finding.

11. Intervenor, the United Mine Workers of America, petitioned the Federal Mine Safety and Health Review Commission for discretionary review of the Judge's decision granting Emerald's Motion for Partial Summary Judgment, and the Commission granted review on April 14, 1986.

12. After briefing and oral argument, the Commission issued a decision on September 30, 1987, reversing the Administrative Law Judge's decision as to Emerald's Motion for Partial Summary Judgment and vacating his modification of the Section 104(d) Citation to a Section 104(a). The Commission remanded the case to the Administrative Law Judge for further proceedings.

13. Emerald wishes in the near future to seek review by the United States Court of Appeals of the Commission's decision on the issue of whether a Section 104(d) violation and unwarrantable failure finding may be based on an after-the-fact investigation. It is unable to do so until a final order is issued in this matter, and, for that reason, it has entered into this Stipulation to facilitate and expedite such review.

14. Emerald withdraws all its allegations challenging the modification of the Citation to a Section 104(d) citation except insofar as it has challenged such modification as improperly based upon an after-the-fact investigation, rather than an inspection and actual observance of the conditions described in the Citation. Emerald now limits its challenge of the unwarrantable failure finding and the allegations of a violation of Section 104(d) to those issues which the Administrative Law Judge addressed in deciding its Motion for Partial Summary Judgment and which were involved in the Commission's review of such decision, i.e., whether a Section 104(d) violation can properly be based upon an after-the-fact investigation rather than an inspection and actual observance of the cited conditions.

15. With this limitation of the basis of Emerald's challenge to the modification of the Citation, the Commission's resolution of the issues raised by Emerald's Motion for Partial Summary Judgment as to whether a Section 104(d) violation may be based upon an after-the-fact investigation is dispositive of Emerald's Notice of Contest and, on that basis, it is stipulated that it would be

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appropriate that a finding be entered denying Emerald's Notice of Contest on the basis of the Commission's decision in this matter.

16. No further hearings are necessary in this matter.

17. An order may be entered denying Emerald's Notice of Contest on the basis of the Commission's decision in this matter since there are no other issues to be addressed in this matter.

The above stipulations are accepted for purposes of these proceedings. The Contest herein is accordingly denied and dismissed on the basis of the Commission's decision in this case rendered September 30, 1987.

Gary Melick
Administrative Law Judge
(703) 756-6261