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NACCO MINING V. SOL (MSHA) & (UMWA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

DECISION

Appearances: Thomas C. Means, 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.

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Before: Judge Merlin

This case is before me pursuant to the Commission's decision and order of remand dated September 30, 1987. 9 FMSHRC 1541. A subsequent conference in chambers was held with counsel for all parties on October 22, 1987, at which time counsel advised they wished to submit stipulations covering the issues which had been remanded for further consideration. Permission to submit stipulations was granted.

The stipulations were received on November 16, 1987 and they read as follows:

> 1. Because NACCO Mining Company ("NACCO") wishes to obtain prompt review of the Commission's September 30, 1987 decision but is unable to do until a final order is issued in this matter, it has entered into this Stipulation to eliminate the less important issues which remain in order to facilitate and expedite such review.
>
> 2. NACCO hereby agrees to withdraw its Notice of Contest to the extent that NACCO no longer challenges the finding of unwarrantability.
>
> 3. NACCO no longer alleges that MSHA Subdistrict Manager William H. Reid improperly modified Citation No. 2330657 from a 104(a) citation to a 104(d)(1) citation based solely upon a general policy consideration.
>
> 4. Subdistrict Manager William H. Reid modified the citation in light of his view of applicable legal standards after he reviewed the facts as recited in the citation and the memorandum summarizing the events upon which the citation was based and considered prior meetings that he conducted with NACCO officials concerning prior alleged violative incidents such as the one contained in the citation.
>
> NACCO, despite the Commission's September 30, 1987 decision in this case, continues to contest the 104(d) citation on the grounds that it was based on an investigation of a past already abated violation instead of an inspection of an existing

violation as NACCO contends 104(d)(1) requires.

A voluminous record, including the transcript of a de novo hearing of substantial duration, has been compiled in the instant matter. Because of this and in light of the Commission's remand, I believe it incumbent upon me to review the stipulations in order to determine whether they are in accordance with the record. Cf. 30 U.S.C. 820(k) and 29 C.F.R. 2700.30(c). Such review is particularly called for with respect to the issue of the sub-district manager's actions because after vigorously challenging this conduct at the trial level, the operator now has done a complete volte face by not only seeking to drop its protest (Paragraph No. 3), but further by endorsing with great particularity the sub-district manager's behavior (Paragraph No. 4).

Accordingly, I have again reviewed the record to determine whether the sub-district manager acted correctly within the statutory framework. Upon such additional consideration, I now conclude that the sub-district manager's mode of action in modifying the citation was proper. I accept his testimony that after he scrutinized the citation he telephoned the supervisory inspector and went through with him the violation and its particulars (Tr. 350-351). This telephone conversation was confirmed by the supervisory inspector (Tr. 215, 224). The sub-district manager further stated that his finding of unwarrantable failure was based upon prior meetings with mine management and the violation itself (Tr. 359). From reading the citation he concluded the continuous miner operator had to have known he was under unsupported roof (Tr. 372). The sub-district manager stated he would have ordered the modification even if there were no policy considerations (Tr. 376). In his opinion, the facts in the citation met the criteria for unwarrantable failure (Tr. 390-391). In light of this evidence, I believe a substantial basis exists to support the conclusion that the sub-district manager's modification action was based upon the specific facts of this case, as the operator now admits. In addition, I believe it was appropriate for the sub-district manager to evaluate the facts of this citation in light of the prior meetings he had held with mine management regarding the problem of deep cuts (Tr. 353-354, 357-358, 367, 376). Finally, when the sub-district manager's statement that he did not know what the section foreman was doing at the time of the violation is viewed in context, it becomes clear that this statement does not mean the manager acted without reference to the facts of the case. This remark concerned the brief period the foreman was absent because he was performing the pre-shift examination (Tr. 399). The sub-district manager testified that the foreman could have been legitimately absent because of his pre-shift responsibilities, but that he nevertheless should have known what was going on in his section especially since he had only five entries

(Tr. 373, 398-399). In this respect also, therefore, the conclusions of the sub-district manager were premised upon the circumstances of the violation.

In view of the foregoing, the agreement of the parties that the sub-district manager acted correctly is accepted.

In Paragraph No. 1 the operator advises it no longer challenges the finding of unwarrantable failure. I conclude the record supports a finding of unwarrantability and that therefore, the operator's present stance regarding this issue is in accordance with the evidence and consistent with governing interpretations of the term "unwarrantable failure" in effect at this time. In Zeigler Coal Corporation, 7 IBMA 280, 295-296 (1977), unwarrantable failure was cast in terms of what the operator "knew or should have known" or a failure to abate because of "a lack of due diligence, or because of indifference or lack of reasonable care". More recently, it has appeared that the Commission is engaged in a process of refining the concept of unwarrantability and perhaps moving towards a higher level of fault. In U.S. Steel Corporation, 6 FMSHRC 1423, 1437 (1984) the Commission noted that the Zeigler interpretation had been specifically approved in the legislative history of the 1977 Mine Act. However, the Commission stated that an unwarrantable failure to comply could be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order because of "indifference, willful intent, or a serious lack of reasonable care" (emphasis supplied). Subsequently, in Westmoreland Coal Company, 7 FMSHRC 1338, 1342 (1985) the Commission again spoke of the degree of "aggravated conduct" intended to constitute unwarrantable failure as "indifference, willful intent, or serious lack of reasonable care" (emphasis supplied). Assuming that the Commission's recent decisions embody something more than the Zeigler standard which was akin to ordinary negligence, there can be no doubt that the operator's conduct here falls well within the concept of "aggravated conduct" as it has been articulated thus far by the Commission.

In my original decision, I reviewed the evidence of record and concluded as follows:

> It was to such an individual [Palmer, a fast and careless continuous miner operator] that Sikora [section foreman] 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). * * *

It is clear therefore, that the section foreman's conduct in this case not only constituted, but indeed far exceeded, "unwarrantable failure" under any of the descriptive terms used by the Commission to define that concept. His extraordinary and egregious departure from what reasonably could be required of one in his position clearly justified issuance of a 104(d)(1) citation with its attendant serious sanctions.

In light of the foregoing and pursuant to the Commission's decision that a 104(d)(1) citation could be issued under the circumstances presented here, the subject citation is AFFIRMED and the operator's notice of contest is DISMISSED.

Paul Merlin
Chief Administrative Law Judge