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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

These cases are before me on remand from the Commission (FOOTNOTE 1) with specific instructions from the majority to consider and rule on Greenwich's challenge to the validity of the five section 104(d)(1) orders at bar because they were not issued within 90 days of the underlying section 104(d)(1) citation upon which they were based and because they were not issued "forthwith."

Subsequent to the Commission's decision in these cases, counsel for Greenwich Collieries, Division of Pennsylvania Mines Corporation (PMC) has moved for summary decision pursuant to Commission Rule 64, 29 C.F.R. 2700.64, arguing that

the instant orders are invalid on the basis of the aforementioned two grounds. PMC had previously included these two bases for invalidity of the orders in their original motion for summary decision filed in April 1986, but I did not consider them at that time. Rather, I partially granted their first motion for summary decision, modifying the five orders to section 104(a) citations, because they were issued based upon an investigation as opposed to an inspection and because the violations had long since ceased to exist at the time the orders were issued. On September 30, 1987, the Commission reversed me on that decision and remanded the cases to me for further proceedings.

The essential facts of these cases are as set out by the Commission in its decision of September 30, 1987: (FOOTNTOE 2)

> On February 16, 1984, a methane ignition and explosion occurred at the Greenwich No. 1 mine, an underground coal mine operated by Greenwich Collieries, Division of Pennsylvania Mines Corporation ("Greenwich"), and located in southwestern Pennsylvania. Three miners were killed and eleven others were injured in the explosion. Representatives of the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived at the mine, engaged in rescue and recovery efforts, observed conditions at the site, and began an investigation of the cause of the explosion. As part of its investigation, MSHA examined the entire mine between February 25 and April 5, 1984, and between March 27 and April 27, 1984, took sworn statements from numerous individuals who participated in the recovery operations or who had information regarding the conditions in the mine prior to the explosion. The Secretary's investigators concluded that the operator's unwarrantable failure to comply with five mandatory safety standards contributed to the accident. Therefore, on March 29, 1985, MSHA Inspector Theodore W. Glusko issued to Greenwich the five section 104(d)(1) orders of withdrawal at issue in this case. The orders alleged that violations of various safety standards had occurred in December 1983 and January and February 1984. Each of the section 104(d)(1) orders indicated that they were based on a section 104(d)(1) citation issued to Greenwich on February 24, 1984. The orders also indicated that they were terminated at the time that they were issued. No miners were withdrawn from the mine as a result of the orders.

The Secretary, in his brief in opposition to the motion for summary decision goes into much more detail concerning the merits of the alleged violations and the special findings. However, the merits of these cases are not at issue at this point in the proceedings. PMC's motion for summary decision is based entirely on the invalidity of the Orders under the terms of 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"). (FOOTNOTE 3)

It is uncontroverted that the 104(d)(1) orders at issue here were not actually issued within 90 days of the underlying 104(d)(1) citation. Each was issued on March 29, 1985, approximately thirteen months after the February 24, 1984, 104(d)(1) citation on which they were based. However, that fact is not particularly relevant to my reading of the statute's requirements. Section 104(d)(1) requires that if the Secretary, during the same inspection or any subsequent inspection within 90 days after the issuance of the underlying (d)(1) citation, finds another violation caused by an unwarrantable failure, he shall forthwith issue an order. The 90Äday period starts running with the issuance of the (d)(1) citation. In this case February 24, 1984. Any subsequent violation the Secretary turns up within the following 90Äday period which he also finds to be caused by an unwarrantable failure shall be the subject of a (d)(1) order, issued forthwith. In this case, the Secretary alleges that physical evidence of each of the violations was observed during the course of the inspection of the mine immediately after the explosion and additional evidence relating to the nature and circumstances surrounding the violations was obtained during March and April of 1984 during the course of formal testimony taken from those having knowledge pertaining to the accident, and conditions in the mine prior to the explosion. An inference can be drawn that at least by April 27, 1984, when the formal testimony was concluded, the existence of the violations and the factual basis for an unwarrantability finding were known to the Secretary. The Secretary goes even further and avers that within a few days or even hours after the explosion most of the investigators had a "strong reason" to believe that these violations existed at the time of the explosion and that questions of management failures (i.e., unwarrantable failure special findings) were involved. The critical finding of fact which needs to be made on this point then is whether or not the Secretary had found the five alleged unwarrantable failure violations within the requisite 90Äday period.

For purposes of ruling on this motion for summary decision, I accept as true the Secretary's allegation that the violations alleged in these cases were found by the Secretary during the same inspection within 90 days of the February 24, 1984, (d)(1) citation on which they are based; that is, they were ultimately issued for violations which were found within 90 days of the underlying unwarrantable violation, as required by 104(d)(1). Therefore, I find PMC's challenge to the validity of these five orders for the reason that they were not issued within 90 days of the original (d)(1) citation to be without merit.

Turning now to the second ground for invalidity as alleged by PMC to be that the subject orders were not issued "forthwith" as required by 104(d)(1).

Section 104(d)(1) states that once a 104(d)(1) citation has been issued, if within 90 days the Secretary finds another violation of a mandatory health or safety standard caused by an unwarrantable failure to comply, "he shall forthwith issue an order" (Emphasis added).

PMC maintains that the inclusion of the word "forthwith," which according to its dictionary definition or common usage means "immediately" creates a jurisdictional timeliness requirement for the issuance of orders under 104(d)(1).

The orders at bar allege that violations of various safety standards occurred in December of 1983 and January and February of 1984. The explosion occurred on February 16, 1984. MSHA examined the entire mine between February 25 and April 5, 1984, and took sworn testimony between March 27 and April 27, 1984, concerning the accident and conditions extant in the mine prior to the explosion. As I have previously noted, all of the data necessary to issue the orders had been found on or before April 27, 1984. Therefore, MSHA could have issued the instant orders on or about April 27, 1984, should they have chosen to. They chose not to, however, finally issuing the orders on March 29, 1985, at least eleven months after it was feasible for them to have done so.

Given that an eleven month delay hardly demonstrates immediacy, the question remains is the "forthwith" requirement for issuance jurisdictional. The Secretary argues that it is not and that in any event the delay experienced herein in issuing these orders was "reasonable and fully justified." That delay according to the Secretary being because the five orders at bar involve violations that the Secretary determined directly contributed to the deaths of three miners in a major mine explosion; and it is traditional in these circumstances that citations and orders which are deemed to be related to the major causes of major accidents are not issued until such time as the investigation team has formulated a major draft of the final investigation report. It is noteworthy that the initial unwarrantable violation and over 100 section 104(d)(1) orders were issued in the aftermath of the explosion during the accident investigation. None of these violations were found to be, however, directly related to the explosion. On the other hand, the five orders at bar were purposefully not issued at that time because they did involve violations that had been identified as having contributed to the accident itself. These violations were purportedly subjected to greater scrutiny and research and ultimately issued as (d)(1) orders on March 29, 1985.

The Secretary's secondary or "fall-back" position on this point seems to be that even if the "forthwith" requirement is

jurisdictional, deviations therefrom are not jurisdictionally defective unless the operator can demonstrate substantial prejudice or a lack of substantive due process. The Secretary then concludes that in this particular case no harm has accrued to the operator by virtue of the delayed issuance and absent a finding that such harm exists, the statutory requirement that such orders issue "forthwith" cannot be an absolute procedural bar to the delayed issuance of the (d)(1) orders, as here.

Section 104(d) differs from 104(a) in that the statute expressly recites that delay in issuing a citation under 104(a) is not jurisdictional. There is no similar saving provision in 104(d), and I conclude that the Secretary's failure to issue the orders at bar "forthwith" is a jurisdictional defect which renders them invalid as (d)(1) orders. There clearly is Congressional interest in the timeliness of withdrawal orders, and I can find no indication in the Act or its legislative history that these timeliness requirements deliberately placed in the Act by Congress are not jurisdictional prerequisites to the issuance of valid withdrawal orders pursuant to 104(d). Furthermore, there is no evidence of Congressional intent to differentiate between the timeliness of withdrawal orders that relate to violations which cause mine accidents and those which do not. The Secretary's enforcement policy which caused the long delay in issuing the (d)(1) orders at bar, no matter how "reasonable" it may be, is clearly at odds with the express timeliness term of the statute itself.

With regard to the Secretary's argument that PMC has not been prejudiced by the delay in issuance of the orders, I find that in the case of 104(d)(1) orders, as opposed to 104(a) citations, a showing of prejudice is not required. However, even if some showing was required, I agree with PMC that an 11Ä13 month delay in notifying the operator of what specifically it is charged with doing or failing to do is inherently prejudicial in some degree to an operator's ability to defend itself against the allegations contained in the orders.

PMC also contends that MSHA's delays in issuing these orders violates even 104(a)'s more liberal standard of "reasonable promptness." Perhaps, but since the statutory mandate that 104(a) citations be issued with "reasonable promptness" is not a jurisdictional prerequisite to enforcement, I am unwilling to dispose of these extremely serious allegations on that kind of procedural basis. Therefore, I am modifying the five (d)(1) orders at bar to 104(a) citations and a hearing on the merits of the violations, as well as the S & S special findings and penalties to be imposed, if any, will be necessary to finally dispose of these proceedings.

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ORDER

In accordance with the foregoing, the motion of PMC for summary decision is granted in part and denied in part; and Order Nos. 2256015Ä2256019 are hereby modified to citations under section 104(a) of the Act.

Roy J. Maurer
Administrative Law Judge

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~FOOTNOTE_ONE

1 Greenwich Collieries, 9 FMSHRC 1601 (September 30, 1987).

~FOOTNOTE_TWO

2 Id. at 1602Ä1603.

~FOOTNOTE_THREE

3 Section 104(d)(1) provides:

> If, upon an 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 and 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]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
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> 30 U.S.C. 814(d)(1).