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SOL (MSHA) V. EASTERN ASSOCIATED COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-192 A. C. No. 46-01456-03825
v.	Docket No. WEVA 89-199 A. C. No. 46-01456-03824
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	Federal No. 2 Mine

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

On January 26, 1989, a Federal Mine Safety and Health Inspector issued Respondent two section 104(d)(2) orders in conjunction with two section 107(a) orders (issued under sections 104 and 107 of the Federal Mine Safety and Health Act of 1977 (The Act)). On August 18, 1989, Respondent filed a Motion for Summary Decision and Memorandum in Support thereof, and on September 5, 1989, Petitioner filed its Reply.

Respondent's Motion is predicated upon its assertion that as a matter of law, only a 104(a) Citation may be issued in conjunction with a 107(a) imminent danger order. Respondent argues that the plain language of section 107(a), supra, allows for only the issuance of a citation under section 104(a), supra, and that the issuance of a 104(d)(2) order is improper. Respondent by implication, refers to the following language from section 107(a), supra: "The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110." Respondent argues that, inasmuch as section 104 distinguishes between order and citation, had Congress intended orders to be included in section 107(a), supra, it would have so stated.

The legislative history of the Act does not contain any statement or discussion relevant as to whether the language in section 107(a), supra, was intended to preclude the issuance of a section 104(d) order.(FOOTNOTE 1) Thus, I have no basis to conclude, as

argued by Respondent, that by explicitly not precluding the issuance of a citation under section 104(a), supra, Congress intended thereby to preclude the issuance of a section 104(d) order. Such a construction is not supported by the legislative history of the Act, nor does a plain reading of the language of section 107(a), supra, unequivocally dictate such a construction.

I do not find any support for Respondent's argument that it is "obvious" that the language of section 104, supra, is intended to be mutually exclusive of section 107(a), supra. There is no language in section 104(d)(2), supra, which makes reference to section 107(a), supra. Nor is there support for Respondent's position in any legislative history of the Act. I do not find merit in Respondent's argument that inasmuch as section 104(d)(1), citations may be issued only where there is no imminent danger, it follows that similarly a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order. Section 104(d)(1), supra, as pertinent, provides if an inspector finds a violation of a mandatory health or safety standards 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 of 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." (Emphasis added). I find this language insufficient to base a conclusion that Congress intended that a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order.

A reading of the plain language of section 104(d)(1) and (2) indicates that, as as set forth in Petitioner's Memorandum:

> [I]f an inspector finds a violation constituting an unwarrantable failure on the part of the operator within ninety days after the issuance of a Section 104(d)(1) citation, the inspector "shall" issue an withdrawal order under Section 104(d)(1). Thereafter, the inspector "shall" issue a Section 104(d)(2) order for each violation found similar to the violation found in the Section 104(d)(1) order if the new violation also constitutes an unwarrantable failure on the part of the operator. This "chain" continues until a complete inspection of the mine reveals no further unwarrantable violations.

I find, accordingly, that, as argued by Petitioner, if Respondent's interpretation of the Act is adopted, it will result in the frustration of the statutory scheme embodied in section 104(d)(1) and (2), supra, as an inspector would be prevented from issuing orders required by section 104, supra. As correctly argued by Petitioner in its Memorandum, "If the Section 104(d)(1)

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or (2) order(s) constitutes an imminent danger, or a portion of an imminent danger, then the inspector is forced to choose which portion of the statute he will not enforce. He can issue the Section 107(a) order or the order(s) under Section 104(d), but not both. An interpretation forcing such a decision, which could result in the unjustified release of an operator from the Section 104(d) "chain" or the unjustified failure to issue an imminent danger order when such a danger exists, cannot be justified."

Thus, for all these reasons, I conclude that, as a matter of law, it is not true that only a 104(a) citation may be issued in conjunction with a 107(a) order. Hence, I find it has not been established, that, as a matter of law, the section 104(d)(2) order herein was improperly issued, and should be amended to a section 104(a) citation.

ORDER

It is ORDERED that Respondent's Motion for Summary Decision is DENIED.

Avram Weisberger
Administrative Law Judge
(703) 756-6210

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. The relevant legislative history cited by Respondent at pages 4 - 5 of its Memorandum merely reiterates the statutory language.