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September 24, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UNITED SALT CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2015-98 A.C. No. 41-02478-000364520 Mine: Hockley Mine

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND ORDER GRANTING SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). United Salt Corporation (hereinafter "United Salt" or the Respondent) has contested the two enforcement actions covered by the Secretary's penalty petition, a citation and order both issued pursuant to section 104(d)(1) of the Mine Act. On August 21, 2015, United Salt Corporation filed a Motion for Partial Summary Decision under Rule 67 of the Commission's Procedural Rules, 29 C.F.R. § 2700.67. The Respondent's motion includes as exhibits copies of the disputed citation and order, and excerpts from deposition testimony of the issuing inspectors. On September 2, 2015, the Secretary filed a Motion for Partial Summary Decision and an accompanying Brief in Support of Cross-Motion for Summary Decision and in Opposition to Respondent's Motion for Summary Decision. The Secretary's brief in support of his motion includes as exhibits copies of the inspectors' notes on the disputed citation and order (designated as "Documentation"), the complete transcripts of the deposition testimony of the issuing inspectors, and sworn declarations made by the inspectors and their supervisor. United Salt responded to the Secretary's cross motion on September 15, 2015. For the reasons set forth below, I **DENY** United Salt's motion and **GRANT** the Secretary's motion.

On August 20, 2014, the Secretary issued section 104(d)(1) Order No. 8769489 and section 104(d)(1) Citation No. 8776991 at United Salt's Hockley Mine. The violations charged in both the citation and order were designated as having been the result of United Salt's unwarrantable failure to comply with the cited standards.[1] Both motions made by the parties concern what is

[1] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

commonly referred to as the section 104(d) chain. Section 104(d) creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is significant and substantial (S&S)[2] and that it is also caused by an unwarrantable failure to comply with a mandatory standard, the inspector issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a section 104(d)(1) citation or a predicate citation. *See Greenwich Colleries, Div. of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990).

If, during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, the inspector issues a withdrawal order under section 104(d)(1). 30 U.S.C. § 814(d)(1); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector "finds upon any subsequent inspection" a violation caused by unwarrantable failure, he issues a withdrawal order for the violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation "until such time as an inspection of such mine discloses no similar violations." *Id.*; *see Naaco*, 9 FMSHRC at 1545.

In this case, MSHA issued both a predicate citation and a withdrawal order to United Salt. The issue for decision is whether the predicate citation must be reduced to writing and handed to the mine operator prior to the issuance of the (d)(1) order, the next step in the chain. I find that the predicate citation may be issued verbally, and before it is reduced to writing, the next order in the chain may be issued, also verbally.

The uncontroverted facts relating to the issuances of these enforcement actions are taken from the file, the citations and the documents filed by the parties. On August 20, 2014, MSHA Inspectors Brandon Olivier and David Smith were conducting a regular quarterly inspection of United Salt's Hockley Mine. At 10:15 A.M., Inspector Olivier found that United Salt had failed to cover an energized transformer in violation of 30 C.F.R. § 57.12032. He also found that the violation was S&S and the result of United Salt's unwarrantable failure to comply with the standard. In the presence of Inspector Smith, Olivier verbally notified the mine superintendent David Frost of the findings. Sec'y Ex. C. United Salt took immediate actions to abate the violative condition, and the citation was terminated by 11:00 A.M. The violation is described in Citation No. 8776991. Later that same day, Inspector Smith found that United Salt had failed to guard the motor on the drag chain to an elevator, in violation of 30 C.F.R. § 57.14107(a). He also found that the violation was S&S and the result of United Salt's unwarrantable failure to comply with the standard. Because he knew of Inspector Olivier's earlier section 104(d)(1) enforcement action, Smith issued a verbal section 104(d)(1) withdrawal order. Sec'y Ex. F. During the evening of August 20, 2014, Inspectors Olivier and Smith reduced their findings to writing after

[2] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1).

leaving the mine site. Sometime between 7:00 and 8:00 A.M. the following morning, August 21, 2014, Olivier and Smith delivered written Citation No. 8776991 and Order No. 8769489 to Frost. Sec'y Exs. C & F.[3] Thus, both the citation and order were issued verbally on one day, reduced to writing later, and handed to the mine at approximately the same time the next morning. Respondent argues that handing the citation and order, without proving that the citation was handed in writing first to the operator, violates the requirements of the Act. The Secretary argues that the citation and order were issued verbally in the correct order, and that reducing them to writing and handing them to the mine operator at nearly the same time, does not invalidate the requirement regarding the order in which they are issued.

In its motion, United Salt asserts that section 104(d)(1) requires that a predicate citation must "be issued in writing before the withdrawal order," and that in this instance, it is entitled to summary decision because the Secretary "has no evidence" that the predicate section 104(d)(1) citation, No. 8776991, was issued before the section 104(d)(1) withdrawal order, No. 8769489. Mot. at 4, 6. The company characterizes its assertion as to the "lack of evidence" regarding the sequence in which Citation No. 8776991 and Order No. 8769489 were issued, as an undisputed material fact. Mot. at 1-2. United Salt relies on deposition testimony taken from Inspectors Olivier and Smith. Olivier, who issued Citation No. 8776991, testified during his deposition that he issued the written citation on August 21, 2014, in the "[e]arly morning, approximately 7:30ish." Smith, who issued Order No. 8769489, testified that he issued the written order also on August 21, 2014, "between 7:00 and 8:00 in the morning."

In support of his cross motion, the Secretary argues that an MSHA inspector has the discretion to issue a section 104(d)(1) withdrawal order verbally before the predicate citation on which the order is based is reduced to writing and given to the operator. The Secretary maintains that the section 104(d)(1) order Inspector Smith issued verbally on August 20, 2014, (Order No. 8769489) is therefore valid, and that as such, the Secretary is entitled to summary decision as a matter of law.

The Commission's Procedural Rule 67(b) sets forth the grounds for determining whether a party is entitled to a summary decision:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that[] '[s]ummary decision is an extraordinary procedure,'" and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West*

Mining Co., 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

Here, I find that the basic facts pertaining to the issuance of Citation No. 8776991 and Order No. 8769489 are not in dispute, and thus that there is "no issue as to any material fact," satisfying Rule 67(b)(1). The parties both agree that the citation was issued verbally on August 20, 2014, that the subsequent order was issued verbally later that same day, and that both the citation and order were reduced to writing and handed to mine management the following morning. In view of the analysis that follows, I find that the sequence in which the written citation and order were physically handed to the Respondent does not invalidate either enforcement action.

The argument of both parties is that they are entitled to summary decision "as a matter of law," 29 C.F.R. § 2700.67(b)(2), based upon the statutory language at the center of the dispute. Section 104(d)(1) states as:

> If, upon any 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 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. 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) 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.

30 U.S.C. § 814(d)(1) (emphasis added).

The essential inquiry here is to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is *silent* or ambiguous with

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (emphasis added, footnotes and citations omitted).

Here, the "precise question at issue" is whether a *written* predicate section 104(d)(1) citation must precede the issuance of a section 104(d)(1) withdrawal order. The statute requires that the inspector make "findings," but nowhere does it specify that these must be in writing. The closest the statute comes to referring to a writing is the requirement that the inspector include his findings in a citation "given" to the operator. But while this might refer to a physical document, the statute is by no means unambiguous on the point. Indeed, notwithstanding United Salt's arguments to the contrary, any explicit reference to a writing is conspicuously absent from section 104(d)(1), including any explicit requirement to reduce a finding to writing prior to issuing a withdrawal order. Most of the references to an inspector's actions are to making findings, and without any requirement that any such findings be in writing. There is also a reference to the forthwith issuance of a withdrawal order, which, again, does not include any requirement that the issuance be in writing. The silence of the statute on the "precise question at issue" is obvious: Congress simply did not address it.

I find that as to the manner in which the Secretary exercises his discretion to issue unwarrantable failure citations and orders, section 104(d)(1) is ambiguous to whether and to what extent such issuances must be in writing. I find further that the Secretary's reading of section 104(d)(1) as allowing him to verbally issue section 104(d)(1) withdrawal orders based on the verbal issuance of a predicate citation is reasonable and, as such, entitled to deference.

The primary purpose of the Mine Act is to ensure the health and safety of miners. It would defy reason and the very purpose of the Mine Act to require MSHA to delay issuing a withdrawal order so that a predicate citation could be committed to writing. The purpose of a withdrawal order is to protect miners from hazards, and the hazards that led the inspector to issue a withdrawal order should not be placed on hold while the inspector takes the time to prepare a written predicate citation. Though the Commission has never ruled that section 104(d)(1) withdrawal orders may be issued based upon a verbal predicate citation,[4] such an interpretation reasonably follows from the text of the Mine Act, which requires that withdrawal orders be issued "forthwith" and permits them to be issued "during the same inspection" as the citation. 30 U.S.C. § 814(d)(1). Verbally issued citations and orders are consistent with the scheme outlined in section 104(d) for protecting miners from the repeated unwarrantable failure of an operator to comply with mandatory standards – i.e., violations attributable to the operator's aggravated negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (unwarrantable failure is aggravated conduct constituting more than ordinary negligence).

United Salt argues that its interpretation of section 104(d)(1) is compelled by the language

[4] In roughly analogous circumstances, in the face of hazardous conditions, the Commission recently affirmed as a matter of course a verbal order that was only subsequently given in writing to the mine operator. *See Mill Branch Coal Corp.*, 37 FMSHRC ___, slip op. at 4 (July 23, 2015) (affirming verbally issued section 107(a) imminent danger order).

of the statute. But as I have already noted, the text of section 104(d)(1) does not explicitly, or even implicitly, require that MSHA serve a *written* citation upon a mine operator before it issues "forthwith" a subsequent withdrawal order. Furthermore, United Salt's interpretation would lead to the absurd result of exposing miners to hazards while an inspector rushes out of the mine to his car and prepares a written citation before returning to hand it to the mine operator and only then continue his inspection.

United Salt also argues that the requirement set forth in section 104(a) of the Mine Act that "[e]ach citation shall be in writing," 30 U.S.C. § 814(a), "unambiguously indicates that there can be no such thing as an oral citation." United Salt Resp. at 1. I find no such clarity in the statutory language, and do not discern any prohibition against MSHA acting in the first instance through verbal directives so long as such actions are reduced to writing as soon as is practicable. In this regard, the Commission has recognized that the purpose of the requirements of section 104(a) is to "allow [] the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter." *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993). In this instance, it appears that the verbal issuance of Citation No. 8776991 and its subsequent written transmission to United Salt both put the company on notice of the conditions it needed to abate (the cited condition was terminated before the written citation was given to United Salt) and allowed it to prepare for a hearing. Furthermore, MSHA mine inspectors must act to protect miners from harm, and often must act quickly and without the impediment of reducing their findings to writing *before* ordering a mine operator to correct a hazard. If the discretion of inspectors to take such immediate action was constrained as United Salt argues, the Mine Act would be eviscerated.[5]

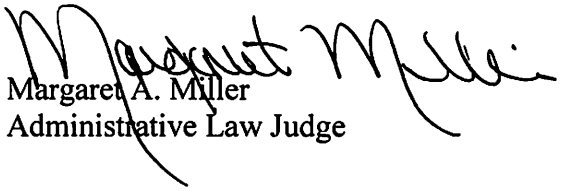
Even if I determined that the Secretary was not entitled to summary decision, I could not grant United Salt's motion. United Salt's argument depends on finding that the written Citation No. 8776991 was given to the operator before it received the written Order No. 8769489. But United Salt relies on indefinite deposition testimony as proof of this fact; it is by no means an undisputed material fact as to which both parties can agree. It is clear, after examining the deposition testimony upon which United Salt relies, that it is not certain exactly when either the written citation or written order was given to United Salt on August 21, 2014. What is clear from the deposition testimony is that these two pieces of paper were issued to the Respondent very close to – if not exactly – at the same time. Even if the sequence in which *written* section 104(d)(1) citations and orders are given to a mine operator is relevant to the validity of such paper, that sequence is obviously unsettled and would be in need of further factual development, rendering

[5] I reject out of hand United Salt's novel assertion that section 104(d)(1) must be strictly construed under the rule of lenity because "a section 104(d)(1) withdrawal order is punitive." United Salt Resp. at 2. Withdrawal orders are not issued to punish mine operators. They are issued to protect miners from potential harm. As to the penalty petition that is before me in this proceeding, the legislative history of the Mine Act sets forth the purpose of the Act's civil penalty provision, section 110(I), 30 U.S.C. § 820(I), as follows: "[T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." S. Rep. No. 95-181, at 40-41 (1977). The legislative history of section 110(I) makes clear that civil penalties are remedial in nature, not punitive, and are assessed to induce effective and meaningful compliance with safety and health standards.

summary decision inappropriate.

Moreover, even if, as a matter of law, the issuance of a written predicate citation *must* precede the issuance of a subsequent section 104(d)(1) order for that order to stand, I note that it is within my power to modify either the predicate citation or the subsequent order to satisfy a "sequence rule" of the sort United Salt argues for. *See Lodestar Energy, Inc.*, 25 FMSHRC 343, 345-46 (July 2003). Section 105(d) of the Mine Act states that "the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." 30 U.S.C. § 815(d). The Commission has explained that this provision "permits a judge to modify a citation or order so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order." *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880 (June 1996). Under *Mechanicsville*, I do not have the authority to "add new findings to create a 104(d)(1) citation." *Id.* But I do have the authority to modify withdrawal Order No. 8769489 here to a predicate citation, and modify predicate Citation No. 8776991 to a withdrawal order, that is if the circumstances surrounding the issuance of these two enforcement actions so warrants, either on my own motion or if moved to do so by the Secretary. I note particularly that withdrawal Order No. 8769489 meets all the prerequisites for a predicate citation: findings by the inspector that the violation was S&S and caused by an unwarrantable failure to comply with the cited standard. *See Lodestar*, 25 FMSHRC at 345.

Having considered all of the documents, briefs, and exhibits, I find that the Secretary is entitled to summary decision as a matter of law, and that section 104(d)(1) Order No. 8769489 was validly issued based upon the verbal issuance of predicate section 104(d)(1) Citation No. 8776991. I do not reach the merits of the citation and order and therefore leave that matter for hearing and grant a partial decision in favor of the Secretary. Accordingly, the Motion for Partial Summary Decision of United Salt Corporation is **DENIED**, and the Motion for Partial Summary Decision of the Secretary of Labor is **GRANTED**.



Margaret A. Miller
Administrative Law Judge

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