

SEPTEMBER 1987

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*It was discovered that the decision, Garry Goff v. Youghioghenny and Ohio, LAKE 84-86-D was not published in its entirety in the December, 1986 volume. We are reprinting it at this time, but cites should refer to the December publication.

SEPTEMBER 1987

Review was granted in the following cases during the month of September:

Western Fuels-Utah v. Secretary of Labor, MSHA, Docket No. WEST 86-113-R, etc. (Judge Maurer, August 4, 1987)

Harley Smith v. Bow Valley Coal Resources, Inc., Docket Nos. KENT 86-23-D, KENT 86-84-D. (Judge Weisberger, August 19, 1987)

Secretary of Labor on behalf of Bryan Pack v. Maynard Branch Dredging Company and Roger Kirk, Docket No. KENT 86-9-D. (Judge Fauver, August 20, 1987)

Secretary of Labor on behalf of Joseph Gabossi v. Western Fuels-Utah, Inc., Docket No. WEST 86-24-D. (Judge Morris, August 21, 1987)

No cases were filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 30, 1987

NACCO MINING COMPANY :
 :
 v. : Docket No. LAKE 85-87-R
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 :
 and :
 :
 UNITED MINE WORKERS OF :
 AMERICA (UMWA) :
 :
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 :
 v. : Docket No. LAKE 86-2
 :
 NACCO MINING COMPANY :
 :
 and :
 :
 UNITED MINE WORKERS OF :
 AMERICA (UMWA) :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves the issuance of a citation pursuant to section 104(d)(1) of the Mine Act by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") as a result of an inspection conducted pursuant to section 103(g)(1) of the Act. 1/ Commission Chief Administrative Law

1/ Section 104(d)(1) states:

If, upon any inspection of a coal or other mine,

Judge Paul Merlin held that although a violation was established, the section 104(d)(1) citation was not properly issued because the cited violative event had occurred several days before the inspector visited

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) 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.

30 U.S.C. § 814(d)(1).

Section 103(g)(1) states in part:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists ... such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.... Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this [Title]. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. § 813(g)(1).

the mine. The judge concluded that since the inspector had been engaged in the investigation of a past event rather than in an inspection of an existing condition, only a section 104(a) citation could be issued. 8 FMSHRC 59 (January 1986)(ALJ). The Commission granted the petition for discretionary review filed by the United Mine Workers of America ("UMWA") and heard oral argument. We conclude that the Mine Act permits the issuance of a section 104(d)(1) citation under the circumstances presented in this case. Therefore, we reverse and remand.

Nacco's Powhatan No. 6 mine is an underground coal mine located in eastern Ohio. On Friday, May 31, 1985, the miners' representative at the mine requested, by telephone and confirmatory letter, that MSHA conduct an examination of "long cuts" being made at the mine. 2/ The request referenced a specific long cut alleged to have occurred on the previous day. The letter stated that "[t]his re-occurring [sic] violation has been discussed with mine management several times since January 1985 by the UMWA and MSHA without getting this practice stopped." The letter further suggested that criminal action might be appropriate.

MSHA inspectors arrived at the mine on the following Monday, June 3, 1985. The inspectors went underground to the location where the long cut allegedly had occurred. Through observations and measurements, the inspectors determined to their satisfaction that a long cut had been made on May 30, and that in making the cut the continuous miner operator was under unsupported roof, at least six feet beyond the last permanent roof supports. On June 4, 1985, the inspectors returned to the mine and further questioned the crew, union representatives, and mine management about the long cut. On June 5, 1985, the inspectors issued to Nacco a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), charging that the continuous miner operator's proceeding under unsupported roof constituted a violation of 30 C.F.R. § 75.200. 3/ The citation indicated that the violation was of a "significant and substantial" nature.

On June 24, 1985, the MSHA sub-district manager reviewed the citation. He concluded that the citation should have been issued pursuant to section 104(d)(1) of the Mine Act because, in his opinion, the violation was the result of Nacco's unwarrantable failure to prevent miners from proceeding under unsupported roof. He ordered the citation modified accordingly. At the subsequent evidentiary hearing, Nacco did not contest the allegation of a violation or that the violation was

2/ A "long cut" occurs when a continuous mining machine ("continuous miner") cuts coal from the coal face in such depth that the continuous miner operator is placed beyond the last permanent roof support and under unsupported roof.

3/ In relevant part, section 75.200 prohibits persons from proceeding beyond the last permanent roof support, unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners.

significant and substantial. Rather, Nacco argued that the citation was issued improperly under section 104(d) and that the violation was not caused by its unwarrantable failure to comply with section 75.200.

In his decision, Judge Merlin held the section 104(d) citation to be invalid because it was based on an investigation of a past happening, rather than on an inspection of an existing condition. The judge relied upon the unreviewed decisions of three Commission administrative law judges: Westmoreland Coal Co., Nos. WEVA 82-304-R, etc. (May 4, 1983) (ALJ Steffey)(unpublished order); Emery Mining Corp., 7 FMSHRC 1908 (November 1985)(ALJ Lasher); Southwestern Portland Cement Co., 7 FMSHRC 2283(December 1985)(ALJ Morris). 4/ The judge quoted with approval Judge Steffey's observations in Westmoreland, supra, that section 104(d) restricts the issuance of unwarrantable failure sanctions to existing violations found during the course of an inspection and that Congress intended to distinguish between the terms "inspection" and "investigation" in the Mine Act. 8 FMSHRC at 61-66. The judge also noted Judge Lasher's statement in Emery, supra, that Congress viewed an investigation of a past occurrence as different from an inspection of a mine site, and that the Act does not permit a section 104(d) sanction to be issued based upon past occurrences. Judge Merlin noted that Judges Steffey, Lasher, and Morris agreed that when an inspector is engaged in the investigation of a past happening rather than an inspection of an existing situation, section 104(d) sanctions cannot be issued. 8 FMSHRC at 71.

The judge found the reasoning of his colleagues persuasive and applied it to the facts at hand. The judge stated that when the inspectors went to the mine on June 3 and 4, 1985, they were looking into the circumstances of an event alleged to have occurred in the past -- the continuous miner operator having proceeded beyond the last permanent roof support on May 30, 1985. Because the inspectors were investigating a past happening rather than inspecting an existing condition, the judge held that they could not issue a citation under section 104(d). 8 FMSHRC at 71-72. Accordingly, the judge modified the citation to one issued under section 104(a).

Turning to the penalty aspect of the case, the judge concluded that the violation was serious and that Nacco was grossly negligent in allowing the violation to exist. He assessed a civil penalty of \$5,000. 8 FMSHRC at 73-75.

The United Mine Workers of America sought Commission review on the grounds that the judge erroneously interpreted the prerequisites for the issuance of a citation under section 104(d). We granted the UMWA's petition for discretionary review and heard oral argument in this and

4/ Commission Administrative Law Judge William Fauver subsequently reached an opposite conclusion in Florence Mining Co., 9 FMSHRC 1180 (June 1987)(ALJ), review directed, August 7, 1987. See also Rushton Mining Co., 9 FMSHRC 800 (April 1987)(ALJ Broderick)(distinguishing above decisions).

three other cases that raise similar issues. 5/

The specific issue before us requires a determination of whether a section 104(d) citation may be issued for a violative condition that no longer exists when cited by the MSHA inspector. Such a determination must take into account the overall enforcement scheme of the Mine Act and its primary purpose of providing miners with more effective protection from hazardous conditions and practices. 30 U.S.C. § 801. See also Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 82-86 (1978)(statement of Senator Williams)("Mine Act Legis. Hist."). In line with this purpose, section 2(e) of the Act places primary responsibility upon "the operators of such mines with the assistance of the miners ... to prevent the existence of such [hazardous] conditions and practices in such mines." 30 U.S.C. § 801(e).

As an incentive for operator compliance, the Act's enforcement scheme provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (April 1981). Sections 104(a) and 110(a) provide that the violation of any mandatory standard requires the issuance of a citation and assessment of a monetary civil penalty. Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed. 30 U.S.C. §§ 814(b) and 820(b). Under section 104(d), if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and has resulted from the operator's unwarrantable failure to comply with the standard, a citation noting those findings is issued. This "section 104(d) citation" carries enforcement consequences potentially more severe than section 104(b) sanctions. 6/ If further unwarrantable failure violations occur within 90 days of the citation issued under section 104(d), unwarrantable failure withdrawal orders are triggered. Issuance of the withdrawal orders does not cease until an inspection of the mine discloses no unwarrantable failure violation. Kitt Energy Corp., 6 FMSHRC 1596 (July 1984), aff'd sub nom. UMW v. FMSHRC, 768 F.2d 1477 (D.C. Cir. 1985).

5/ Emerald Mines Corporation, 9 FMSHRC ____ (September 30, 1987); White County Coal Corp., 9 FMSHRC ____ (September 30, 1987); Greenwich Collieries, 9 FMSHRC ____ (September 30, 1987).

6/ The Secretary argues that only section 104(a) authorizes the issuance of a citation and that it is, therefore, improper to refer to a citation issued with section 104(d) findings, as here, as a "section 104(d) citation." For convenience and clarity, we have found it useful to refer to a citation issued with section 104(d) findings as a section 104(d) citation. Consolidation Coal Co., 6 FMSHRC 189, 191-192 (February 1984). This shorthand form of expression is commonly employed and understood. It was used by the parties at the hearing and by the judge in his decision. Indeed, the citation here at issue was modified by the sub-district MSHA manager to a "104(d) type citation."

The threat of this "chain" of citations and orders under section 104(d) provides a powerful incentive for the operator to exercise special vigilance in health and safety matters because it is the conduct of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. See S. Rep. No. 181, 95th Cong., 2d Sess. 30-32 ("S. Rep.") reprinted in Mine Act Legis. Hist. 618-620. See also UMWA v. FMSHRC, supra, 768 F.2d at 1479. To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.

The judge's invalidation of the use of section 104(d) for a prior violation and his conclusion that section 104(d) may be used for existing violations only, is not supported by the relevant statutory language. Section 104(d)(1) does not state that enforcement action may be taken only if the inspector finds a violation in progress. Rather, section 104(d)(1) is triggered if an inspector finds that there "has been a violation" of a mandatory health or safety standard. Use of the present perfect tense of the verb "to be" in this key context denotes a wide, not narrow, temporal range covering both past and present violations. Thus, by its own terms, section 104(d)(1) sanctions are applicable to prior as well as existing violations, and nothing in the text of section 104(d)(1) restricts their use solely to ongoing violations.

Nor can the insistence on the inspector's personal observation of an existing violation be reconciled with the obvious purpose of section 104(d). Throughout section 104(d), enforcement action is consistently linked to the inspector's determination that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation. Under the construction urged by Nacco, unwarrantable failure findings would frequently be unavailable despite unwarrantable conduct on the part of an operator.

We have resisted previous invitations to give the Mine Act a technical interpretation at odds with its obvious purpose. In Westmoreland Coal Co., 8 FMSHRC 1317, 1323-27 (September 1986), a case involving the right of miners to compensation under section 111 of the Mine Act, 30 U.S.C. § 821, we concluded that the chronological sequence in which orders of withdrawal are issued is not determinative of the right to compensation. We looked to the purpose of section 111 -- added incentive for operator compliance through a graduated scheme of compensation tying enlarged compensatory entitlement to increasingly serious operator conduct. We noted the focus of section 111 as a whole on operator conduct, and we declined to adopt a technical interpretation of section 111 that thwarted its purpose.

We follow a similar approach here and interpret section 104(d) in a manner consistent with its purpose. Congress deemed that miners should be protected from the hazards of recurring violations caused by an operator's unwarrantable failure through the deterrent effect of the progressively severe sanctions of section 104(d). Legis. Hist. at 619. Yet, application of the judge's holding produces results at odds with this intent. Under the judge's opinion, an operator who commits an unwarrantable failure violation that is not detected by the inspector until it has ceased to exist is free of the very sanction intended to prevent similar failures in the future. The fact that such a violation could be cited under section 104(a) and that a penalty would be assessed for the violation, does not compensate for the loss of the heightened awareness of unwarrantable violations that attends section 104(d) sanctions and that is aimed at preventing such violations from occurring in the first instance.

Further, detection of a violation after it has ceased to exist is not uncommon. Many violations by their very nature cannot be, or are unlikely to be, observed or detected until after they occur. For example, the failure to perform a required pre-shift examination, 30 C.F.R. § 75.303, is usually detected after the shift has commenced, and most health violations are determined after the fact of violation through the analysis of samples and other data. See, e.g., 30 C.F.R. § 70.100. In fact, the violation at issue here, proceeding beyond the last permanent roof support when no temporary support is provided, is the type of violation that is unlikely to occur in the presence of the inspector. Were we to agree with the approach adopted by the judge, the statutory disincentive for operator misconduct would be lost. 7/

Nacco asserts that because section 104(d) refers only to violations found "upon any inspection," whereas section 104(a) refers to violations found "upon inspection or investigation," Congress intended to distinguish between enforcement actions based upon an inspection and those based upon an investigation. Nacco argues that an "inspection" denotes the time in which an inspector is physically present at the mine (and actually observes a violation in progress), whereas an "investigation" denotes an inspector's inquiry into a past violation. Therefore, according to Nacco, section 104(d) applies only to ongoing violations observed by the inspector.

Although we are not required in this proceeding to decide the meaning of "inspection" and "investigation" for all purposes under the Mine Act, we are satisfied that, as used in section 104(d), Congress did not intend the distinction urged by Nacco and approved by the judge. In interpreting the conditions under which a section 104(d) sanction may issue, we do not find significant the inclusion of the terms "inspection or investigation" in section 104(a) and the term "inspection" alone in section 104(d). The words are not defined in the Mine Act, and common

7/ Although Nacco argues that untoward problems in terms of the "time sequence" of section 104(d) will arise if section 104(d) is used to cite violations that no longer exist, no issue with respect to the commencement and termination of the ninety-day period is before us on review.

usage does not limit the meaning of "inspection" to an observation of presently existing circumstances nor restrict the meaning of "investigation" to an inquiry into past events. Webster's Third New International Dictionary (Unabridged) 1170, 1189 (1971) ("Webster's"). Both words can encompass an examination of present and past events and of existing and expired conditions and circumstances. 8/

The first major reference to both terms appears in section 103 of the Act, 30 U.S.C. § 813, which pertains to inspections, investigations and record keeping. While it is true that section 103 indicates that inspection and investigation are, to some extent, distinct, it is also clear that, as in common usage, the concepts are not intended to be mutually exclusive. In particular, it is clear that an inspection is not meant to preclude an inquiry into past events. Section 103(g) (n. 1 supra) provides to the representative of miners the right to obtain an immediate "inspection" whenever the representative has reasonable grounds to believe that a violation of a mandatory health or safety standard exists. There is nothing in the language of section 103(g) that requires the violation to be ongoing when the inspector arrives at the mine site. As a practical matter, the violation may have been corrected shortly after the request of the miners' representative and before the inspector reaches the mine. Yet the inspector is nonetheless on an "inspection" and, if he finds that a violation has occurred, he may cite it using the full panoply of sanctions available under the Act. Indeed, this case was instituted on the basis of a section 103(g) inspection, requested by the representative of miners, after the violation had occurred.

Further, we find in the legislative history of section 104(d) indications that section 104(d) sanctions are not restricted to occasions when an inspector observes an existing violation. Section 104(d) of the Mine Act was carried over without substantive change from section 104(c) of the 1969 Coal Act. 30 U.S.C. § 801 et seq. (1976)

8/ See also, e.g., Atlantic Cleaners & Dyers, Inc. v. U.S., 286 U.S. 427 (1932):

Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.

* * * * *

It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it to have in each instance.

286 U.S. at 433-34.

(amended 1977) ("Coal Act"). When Congress was contemplating the provision that became section 104(c)(1) of the Coal Act, the House Bill defined the term "inspection" as "the period beginning when an authorized representative of the Secretary first enters a coal mine and ending when he leaves the coal mine during or after the coal-producing shift in which he entered." Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 917-918 (1975)("Coal Act Legis. Hist."). Judge Steffey in Westmoreland, supra, quoted by Judge Merlin with approval (8 FMSHRC at 63), viewed this definition as support for a conclusion that Congress intended to distinguish between an "inspection" and an "investigation" because it regarded an inspection as an examination limited to a single day. However, the House Bill definition of inspection was dropped at conference in favor of the Senate version of section 104(c)(1), which provided for findings of unwarrantable failure at any time during the same inspection or during any subsequent inspection within 90 days of the issuance of the initial 104(c)(1) notice of violation "without regard to when the particular inspection begins or ends." Coal Act Legis. Hist. at 1507. The Senate version was enacted as section 104(c)(1) of the Coal Act, and reflects a clear congressional understanding that an inspection may take longer than one day (particularly at large mines), that an inspector's inquiry into unwarrantable failure may take more time than any one-day period that he is in a mine, and that a finding of unwarrantable failure may require examination into events and actions "without regard to when the particular inspection begins or ends." Coal Act Legis. Hist. at 1507.

Nacco makes much of the fact that although Congress did not substantively change the language of section 104(c) of the Coal Act when it was carried over as section 104(d) of the Mine Act, Congress did change section 104(a) of the Mine Act by authorizing the Secretary to issue citations upon an inspector's "belief" that an operator violated the Act and upon either an "inspection or an investigation." For Nacco, the inspector's belief can be premised upon a retrospective inquiry into past events and circumstances, or upon an analysis of present events and circumstances. Nacco finds the change in section 104(a) compelling evidence that Congress distinguished between enforcement actions that can be based upon past or present conditions and those that must be based solely upon present conditions.

We are not persuaded. The fact remains that there is no indication in the Mine Act legislative history that Congress intended the change in section 104(a) to affect the application of section 104(d)'s unwarrantable failure sanctions in any way. In fact, it has been asserted, by way of explanation, that the change in section 104(a) merely reflects the drafters' technical reliance on the language of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1970), in amending the Coal Act rather than an intent to change the circumstances under which a section 104(d) citation can be issued. 1 T. Biddle, Coal Law & Regulations § 9.03[2][b] (1968). We are reluctant to draw substantive inferences from the change where evidence of express legislative intent is lacking.

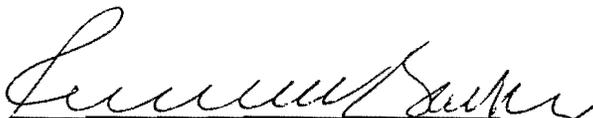
Nor are we persuaded by Nacco's argument that use of the term "finds" in section 104(d) perforce demonstrates that the inspector must personally observe an ongoing violative condition or practice. In ordinary usage, the term's use is not confined to the mere accidental discovery of things but extends as well to detection by effort, analysis, and study. Webster's at 851-852 (1971). In the context of section 104(d), we hold that "find" is used in an adjudicative sense, meaning that the inspector must conclude that an unwarrantable violation has occurred based upon whatever process of discovery or examination may be appropriate.

In sum, the result reached by the judge frustrates the deterrent power of section 104(d). After searching the language and purpose of the Act, as well as the legislative histories, we find no evidence that Congress intended to place such a severe limitation on so important an enforcement mechanism. ^{9/} Consequently, and for the foregoing reasons, we conclude that a section 104(d) sanction may be based upon a prior violation and that the judge erred in holding that the citation was improperly issued under section 104(d) of the Mine Act. We reverse the judge in this regard.

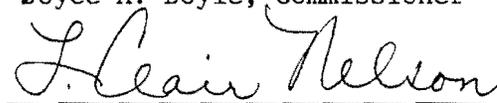
At the hearing Nacco challenged the validity of the section 104(d)(1) citation on the grounds that the sub-district manager ordered the modification as a matter of policy, and that all such roof control violations were automatically deemed to be unwarrantable without regard to the particular facts involved. The judge made mention of the sub-district manager's decision to modify the citation and appears to have inferred that the modification improperly rested upon general policies without consideration of the particular circumstances of the violation. 8 FMSHRC 72-73. However, the judge made no conclusions on this issue given his disposition of the case. Since questions may remain regarding the sub-district manager's decision to have the citation modified from a section 104(a) citation to section 104(d)(1) citation, the judge should, as part of his disposition, clarify his finding as to whether the modification was proper within the statutory framework. If he determines that the sub-district manager's modification was proper, he shall then determine whether the violation resulted from an unwarrantable failure to comply with the standard.

^{9/} Moreover, this case involves a factual situation that begins with an exercise of miners' rights under section 103(g)(1). As noted, that section provides that the miners' representative may obtain an "immediate inspection" of the mine by MSHA whenever the representative "has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists...." 30 U.S.C. § 813(g)(1). Congress intended that through the exercise of this "important right" miners are to "play an integral part in the enforcement of the mine safety and health standards." Mine Act Legis. Hist. at 617-618. Yet, as the facts of this case illustrate, were we to hold that an operator must be caught in the act of violation before the appropriate section 104(d) enforcement actions could be taken, the miners' self-help remedy embodied in section 103(g)(1) could be eroded seriously.

Accordingly, and for the foregoing reasons, we reverse the judge's conclusion that a section 104(d) citation may not be issued under the kind of circumstances presented by this case. We vacate the judge's subsequent modification of the section 104(d) citation to a section 104(a) citation, and remand for further proceedings consistent with this decision.


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

I am in total agreement with the majority's conclusion that the administrative law judge erred in determining that a citation could not be issued properly pursuant to section 104(d)(1) of the Mine Act in the circumstances of this case. I believe, however, that certain aspects of the rationale compelling this conclusion deserve emphasis and that some of the arguments of the operator and the dissent need to be addressed more directly.

The question of law before us can be stated in general terms as follows: Can a finding by MSHA, that a violation of the Mine Act was caused by an "unwarrantable failure" on the part of a mine operator, be included in a citation issued for a violative condition that occurred but is no longer in existence so as to be observable at the time of an MSHA inspection? The more specific question posed is whether the administrative law judge erred in concluding that in the circumstances of the present case it was procedurally improper for MSHA to find that the violation resulted from Nacco's unwarrantable failure. As explained below, both of these questions must be answered in the affirmative.

The relevant facts are undisputed. A miners' representative reported to MSHA a violation alleged to have occurred at Nacco's mine. The reported violation involved an operator of a continuous mining machine extracting coal to an excessive depth such that he impermissibly placed himself under an unsupported portion of the mine's roof. The report to MSHA further stated that this type of violation was recurring at the mine despite past discussions with mine management by both MSHA and the United Mine Workers of America. The miners' representative requested "an immediate investigation" by MSHA of the incident and suggested that criminal prosecution under the Mine Act might be warranted. (Exh. GX-4).

Pursuant to this request, two MSHA inspectors went to Nacco's mine. They reviewed the mine's daily report books and saw no reference to the incident. They proceeded underground. They observed the location of the reported incident and took measurements of the width and depth of the mined area and the spacing of the roof support bolts that had been installed. The following day the inspectors questioned miners, management personnel and representatives of the miners concerning the incident. The inspectors determined that, as had been reported to MSHA, the operator of the continuous mining machine had proceeded under unsupported roof in violation of 30 C.F.R. § 75.200. They issued a citation alleging a violation and indicated on the citation that it was issued pursuant to section 104(a) of the Mine Act. They also indicated on the citation that they found the violation to be a "significant and substantial" violation.

Fifteen days after the citation was issued, it was modified at the direction of the inspectors' supervisor to include a further finding that the violation resulted from Nacco's "unwarrantable failure to comply" with the applicable mandatory standard. 30 U.S.C. § 814(d)(1).

Nacco does not contest that the incident occurred, that the mandatory standard was violated or that the violation was significant and substantial. Rather, the sole focus of this litigation is the propriety of the additional, subsequent finding that the violation resulted from Nacco's "unwarrantable failure."

Nacco's concern over the making of the unwarrantable failure finding has its roots in the more severe enforcement consequences triggered by the presence of such a finding in a citation. For present purposes, those consequences can be succinctly highlighted by quoting a summary of the statutory provision by the U.S. Court of Appeals for the District of Columbia Circuit:

An "unwarrantable failure" citation commences a probationary period: If a second violation resulting from an "unwarrantable failure" is found within 90 days, the Secretary must issue a "withdrawal order" requiring the mine operator to remove all persons from the area ... until the violation has been abated. Such withdrawal orders are among the Secretary's most powerful instruments for enforcing mine safety.

Once a withdrawal order has been issued, any subsequent unwarrantable failure results in another such order. This "chain" of withdrawal order liability remains in effect until broken by an intervening "clean" inspection. That is, "an inspection of such mine [which] discloses no similar violations." 30 U.S.C. § 814(d)(2).

UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984) (emphasis added).

There is no dispute in the present case that the enforcement effect of an unwarrantable failure finding made pursuant to section 104(d) is as described above. What is disputed, however, is the extent of the availability of this statutory mechanism to certain violative situations, viz., whether an unwarrantable failure finding can be made in conjunction with a citation issued for a violative condition that occurred but is no longer in existence so as to be observable by an MSHA inspector.

The answer to this question must first be sought in the language of section 104(d)(1). Quotation of the first sentence of the section and identification of its discrete components serves to focus the inquiry:

[1] If, upon any inspection of a coal or other mine, an authorized representative of the Secretary [2] finds that there has been a violation of any mandatory health or safety standard, and [3] 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 [4] if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, [5] he shall include such finding in any citation given to the operator under this Act.

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

The arguments in support of the procedural validity of the Secretary's action in issuing the citation in this case, reduced to their essence, are straightforward: Each element of section 104(d)(1) being met, the citation properly was issued pursuant to section 104(d)(1). In my opinion, based on the undisputed facts, the procedural history recited above, and the plain text of section 104(d)(1), there is no apparent procedural error associated with the Secretary's action in issuing the contested citation pursuant to section 104(d)(1). There was: (1) an inspection; (2) a finding of a violation; (3) a significant and substantial finding; (4) an unwarrantable failure finding; and (5) all of the above findings were included in a citation issued to the operator. The opposite conclusion is advanced by the operator and the dissent with such vigor, however, that a closer examination of their contentions should be undertaken to determine whether there is a less apparent, but nevertheless fatal flaw in the Secretary's actions.

Clause [1] of the first sentence of section 104(d)(1) provides that the actions identified in clauses [2] through [5] be taken "upon any inspection of a coal ... mine". (Emphasis added). Much is made by the operator and the dissent of the fact that the word "inspection" and the word "investigation" are both used in the Mine Act in referring to and describing the various enforcement activities of the Secretary authorized by the Act. In some instances both words appear in the same provision (e.g., § 104(a), § 107(a)), but in other provisions only one of the words appears (e.g., § 103(b)(investigation), § 104(d)(inspection), § 104(e)(inspection) and § 105(c)(2)(investigation)).

The basic point of the arguments highlighting the Mine Act's varying usage of the words "inspection" and "investigation" is that the words are different, their meanings are different and a distinctive impact on the Secretary's enforcement activities and the consequences flowing therefrom was intended depending on the particular word used in a particular statutory provision. As specifically related to the principal issue presented in this case, the argument advanced is that because clause [1] of section 104(d)(1) refers only to "inspections", the special findings provided for in clause [3] ("significant and substantial") and clause [4] ("unwarrantable failure") cannot appropriately be included in citations issued as a result of "investigations" by the Secretary.

Despite the force with which this argument is advanced, extensive consideration of its merits is unnecessary and inappropriate in the present case. The fact is that the citation at issue was issued "upon an inspection" of the mine. It is undisputed that the inspectors were at Nacco's mine pursuant to a request by a representative of the miners that MSHA look into the circumstances surrounding a reported violation

of the Act. See, e.g., Oral Arg. Tr. at 47-48. The statutory basis for the miners request and MSHA's prompt response thereto is section 103(g)(1). This section provides:

Whenever a representative of miners or a miner ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists....

30 U.S.C. § 813(g)(1)(emphasis added). 1/ Therefore, because the citation disputed in this case was issued "upon an inspection" conducted pursuant to section 103(g)(1), it is unnecessary here to address the contention that citations cannot be issued pursuant to section 104(d) where through the course of an MSHA "investigation" it is determined that violations have occurred even though they are no longer in existence. That question appropriately is addressed in a case that actually poses the issue.

The next basis for the argument that the provisions of section 104(d)(1) were not intended to be applied to violations that occurred but are no longer in existence at the time of an MSHA inspection centers on that section's use of the word "finds" as the predicate for actions taken thereunder. (Clause [2] If an inspector "finds that there has been a violation"; clause [3] "if he also finds that" the violation is significant and substantial; and clause [4] "if he finds such violation to be caused by an unwarrantable failure")(emphasis added)). Nacco argues that the plain meaning of "find" is "to happen on; come upon; meet with; discover by chance". Nacco's brief at 12, citing Webster's New World Dictionary 523 (2d Coll. ed. 1976). It asserts that a violative condition that no longer exists cannot be happened upon or discovered by chance and therefore cannot be "found" during an inspection within the meaning of section 104(d)(1). The Secretary and the UMWA argue in opposition that in section 104(d)(1) the word "finds" is used in its adjudicative sense to describe the reaching of a conclusion by an inspector.

In my opinion, the operator's argument that the use of the word "finds" in section 104(d)(1) requires the inspector to discover a presently existing violative condition is defeated by a plain reading of the section. Clause [2] states: if an inspector "finds that there has been a violaton...." The use of the phrase "finds that" clearly refers to a conclusive finding rather than a finding in the nature of a chance

1/ Although a suggestion that section 103(g)(1) itself was intended by Congress to be applicable only to presently existing violations has been proffered, it has been advanced with little vigor in a footnote to the operator's brief. See Nacco's brief at 15 n. 17. In fact, even this limited espousal of a narrow reading of the text of section 103(g)(1) was disavowed at oral argument before the Commission. See Oral Arg. Tr. at 52-53.

discovery. Further, the precise conclusion described ("that there has been a violation") by its own terms includes, rather than precludes, violations that occurred but are no longer present when an inspector arrives at a mine. To equate the phrase "that there has been a violation" with the phrase "that there is a presently existing violation" is to give a tortured rather than a plain reading to clause [2]. The text of clauses [3] and [4] also is directly contrary to the argument advanced by Nacco. In describing further actions to be taken by the inspector, clauses [3] and [4] respectively provide that "if he also finds that ... such violation" is significant and substantial and "if he finds such violation to be caused by an unwarrantable failure...." Again, both of these uses of the word "finds" plainly are in the sense of conclusive findings; the inspector must make determinations as to whether the level of danger posed by a violation and the nature of the operator's conduct associated with the violation meet the thresholds of governing legal tests. These types of determinations are not "chance discoveries" or conditions "happened upon." Rather, they are determinative findings or conclusions arrived at through the faculty of mental reasoning. That this is the plain meaning of the word "finds" as used in section 104(d)(1) is further underscored by clause [5]'s provision that the inspector "shall include such finding[s] in any citation given to the operator under this Act." (Emphasis added). 2/

Furthermore, clause [5] 's provision that such findings shall be included "in any citation" issued to the operator (emphasis added), by its plain terms authorizes, rather than prohibits, the making of unwarrantable failure findings in any citation, including a citation issued for a violation that occurred out of the sight of an MSHA inspector.

Therefore, I conclude that a plain reading of section 104(d)(1) requires a conclusion that the Secretary properly can issue a citation thereunder containing findings that a violation occurred but no longer exists, that the violation is a significant and substantial violation and that the violation resulted from an unwarrantable failure by the operator to comply with a mandatory standard. 3/

2/ Nacco's reliance on Holland v. United States, 464 F. Supp. 117 (W.D. Ky. 1978), to support its interpretation of section 104(d) is unpersuasive. The Holland court's discussion of section 104(d) arose in the context of a tort claim based on negligent inspection, a context clearly distinguishable from the enforcement case before us. Even assuming its applicability, and further assuming that Holland supports the proposition that a violation must be observed by an inspector to be cited under section 104(d), I would respectfully disagree.

3/ The parties cite, and the majority and dissenting opinions discuss in some detail, the legislative history pertaining to the origins of section 104(d). Even when the meaning of statutory text appears clear on its face, it is not inappropriate to examine legislative history for any further enlightenment as may be available concerning congressional intent. Train v. Colorado Public Interest Research Group, 420 U.S. 1, 9 (1975). See 2A Sutherland Statutory Construction, § 48.01, p. 278 (4th ed. 1984). Accordingly, I have reviewed the proffered passages and the arguments based thereon. I find in the legislative history absolutely no indication that Congress specifically focused upon or had any reason to be aware of the nuance to the enforcement of section 104(d) that has been suggested and scrutinized in this case. Although the advocates on both sides of the issue can extract isolated words and phrases from the legislative history and interpret them to support their positions, I

(Footnote continued)

Even if the Secretary is not precluded on the face of section 104(d)(1) from issuing citations thereunder for violations no longer in existence when an MSHA inspector is present at the mine, Nacco and the dissent argue that such action is nonetheless improper because it runs directly counter to the fundamental purpose and logic underlying section 104(d). The operator repeatedly describes section 104(d) as a "time critical" provision and argues that once a violative condition has ceased to exist the appropriate time for proceeding under section 104(d) also has ceased. Nacco submits that the purpose of section 104(d) "is to encourage compliance, not to punish an operator" and that to allow citations under section 104(d) of violations that are no longer in existence at the time of an MSHA inspector's arrival at the mine leads to the "Kafkaesque" and "bizarre" result that a withdrawal order would be issued for a hazardous condition that is no longer present. Nacco's brief at 20-21. The dissent echoes these themes in asserting that "the Secretary ... is motivated more by retribution than by the protection of miners when he issues a section 104(d) citation or withdrawal order for a hazard that no longer exists" and that in such circumstances "bald harassment becomes inevitable." Dissent at 32, 36.

Contrary to these characterizations of the cataclysmic effect of our upholding the Secretary's right to proceed as he did in this case, the result we reach not only is consistent with the plain language of section 104(d) as discussed above, but also is entirely consistent with the enforcement logic underlying the section as discussed below. Furthermore, in light of the operator's and the dissent's predictions of the dire consequences that will result from our upholding the Secretary's actions, it is important to underscore the fact that our decision is simply an affirmation of the Secretary's right to continue to enforce this provision as it has always been enforced under both the 1977 Mine Act and its predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977)

The feature that distinguishes section 104(d) from other enforcement provisions in the Mine Act is its authorization of the Secretary to find a violation to have been caused by an unwarrantable failure of the operator to comply with a standard. No other provision in the Mine Act concerns itself with whether the conduct of an operator in conjunction with a violation was "unwarrantable." The importance of an unwarrantable failure finding in a citation stems from the probationary effect triggered by its presence as was described at the outset of this opinion (supra at 2) by quoting the court of appeals decision in Kitt Energy Corp. As described therein, once a citation containing an unwarrantable failure finding and a significant and substantial finding has been issued, any further violation also caused by an unwarrantable failure within 90 days requires issuance of a withdrawal order, as do still further violations until a complete, clean inspection of the mine has taken place.

Fn. 3/ continued

find none of the referenced passages so illuminating on the question at issue as to justify any interpretation in conflict with a plain reading of section 104(d). UMWA v. FMSHRC, 671 F.2d 615, 621 (D.C. Cir. 1982), cert. denied, 459 U.S. 927 (1982); United States v. U.S. Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973), cert. denied, 414 U.S. 909 (1973). See also 2A Sutherland, supra.

The plain focus of section 104(d)'s unique enforcement scheme is on the conduct of an operator in relation to an occurrence of a violation. Where a violation results from an operator's unwarrantable failure, the statute requires that a higher toll be exacted from the operator than is exacted in situations where, although a violation occurred, the operator has not acted unwarrantably. In arguing that the special provisions of section 104(d) are not logically applied to violations that occurred but no longer exist, the operator and the dissent ignore the section's focus on the conduct of the operator, which would be the same regardless of whether an inspector observed the violation. They further overlook the fact that the Secretary's inquiry into whether an operator's conduct in relation to a violation was unwarrantable, will be precisely the same type of inquiry undertaken in precisely the same manner regardless of whether the violation actually was observed by an inspector. Simply put, determination of whether an operator's conduct in relation to a violation was unwarrantable is not at all contingent on or affected by whether a violative condition remains in existence at the time of inspection.

Concomitant with their failure to recognize that the operator's conduct, rather than the timing of the inspector's arrival, is the focal point of section 104(d), the operator and the dissent erroneously assert that proceeding under section 104(d) where a violative condition is not presently in existence serves no safety purpose and constitutes meaningless punishment. If this is true a remarkable transformation has been worked. The use of one of "the Secretary's most powerful instruments for enforcing mine safety" (Kitt Energy, supra, 768 F.2d at 1479) has been reduced to nothing more than purposeless punishment unrelated to the safety goals of the Mine Act.

The essence of the argument that no safety purpose is served by proceeding under section 104(d) for violations not discovered during their existence can be cast in terms of the following syllogism: (1) Hazardous conditions threaten miners' safety; (2) no hazardous condition exists if a violative condition is not presently in existence; (3) therefore miners' safety is not threatened in these circumstances. The fallacy in this syllogism lies in its second premise. Contrary to the arguments of Nacco and the dissent, a very significant safety concern is presented in situations where an inspector determines that a violation occurred even though the violative condition no longer exists. Furthermore, such situations, like those where violative conditions are observed by an inspector, appropriately can be addressed pursuant to the procedures set forth in section 104(d) with no damage to that section's underlying enforcement logic.

To be sure, the most clear cut example of a hazard jeopardizing miner safety is an observable physical condition that is in violation of an applicable mandatory standard. Where such a violative condition is observed by an inspector and is determined to have resulted from unwarrantable conduct by the operator, the section 104(d) probationary scheme indisputably is appropriately invoked. A significant threat to miner's safety also is presented, however, by situations such as that in the present case where a violative condition has occurred but has ceased to exist prior to the inspector's arrival at the mine. In fact, the level of danger posed in such circumstances may far surpass that posed by violations observed by an inspector.

At the moment that a mandatory standard is violated, the immediate threat to miner safety is identical regardless of whether an inspector is present to observe the violative act. In both instances a hazard has occurred and miner safety has been jeopardized. Beyond this initial exposure, however, the level of harm that is posed by an unobserved violation begins to transcend that posed by an observed violation for two reasons. First, if an inspector observes a violation being committed, he will immediately order its cessation and the associated threat of harm to the miner will end. Where an inspector is not present to intervene, however, the violative act and the associated hazard will likely continue to exist until the work task being performed in a violative manner is completed. Second, where a violation has not been observed by an inspector the violative conduct is more likely to be repeated in the future due to the lack of any immediate intervening sanction directed at the violative act dissuading its repetition. This latter consideration is forcefully illustrated in the present case by the recurring instances of miners working under unsupported roof at Nacco's mine that prompted the miners' representative's complaint to MSHA and request for intervention. Therefore, despite Nacco's and the dissent's suggestions to the contrary, the hazard or threat to miner safety posed by violations that are not observed by MSHA inspectors often will exceed, in duration as well as instances of exposure, the hazard posed by violations that happen to be caught by inspectors during the period of their existence.

Since violations that occurred but were not observed by MSHA inspectors during the period of their existence pose at least as great, if not greater, danger to miner safety as violations that are observed, the necessity and logic of applying the enforcement procedures in section 104(d) to unobserved as well as observed violations is evident. In both instances MSHA inspectors will have determined that violations of mandatory standards occurred. In both instances citations specifying the nature of the violations and addressing abatement measures will be issued. ^{4/} In both instances the inspectors will determine whether the violation resulted from the operator's unwarrantable conduct and, if so, the operator will be put on notice that further unwarrantable violations will result in the cessation of mining operations through the issuance of withdrawal orders. In short, in both instances the important sanctions Congress provided in section 104(d) can be logically invoked and effectively directed at the precise type of aggravated operator conduct to which section 104(d) was intended to be applied.

For the foregoing reasons, as to the question of law before us, I agree with the majority's conclusion that the Secretary is not barred from issuing a citation pursuant to section 104(d)(1) of the Mine Act for a violation that occurred but is no longer in existence so as to be observable during an MSHA inspection.

^{4/} Abatement of an observed instance of a miner working under unsupported roof normally would involve removal of the miner from the unsafe area and instruction of the miner, and others if appropriate, concerning the need for future compliance with roof control standards. Abatement of a similar, but unobserved, violation necessarily would emphasize the latter.

Of course, the Secretary's action in proceeding under section 104(d) is subject to challenge and review, like any other secretarial enforcement action, to determine whether, in a given set of circumstances, the Secretary has acted arbitrarily, capriciously or otherwise not in accordance with law. Considered in the abstract, it may be possible that the Secretary's invoking of section 104(d) sanctions for a violation that occurred far in the past could, depending on the particular factual context, constitute impermissible enforcement action. See generally dissent at 22, 33-36. This vague specter of possible abuse, however, is a plainly insufficient basis for foreclosing in all circumstances the Secretary's ability to cite past violations under section 104(d). More relevant is how the Secretary actually proceeds in non-theoretical enforcement situations.

In the case before us, the Secretary conducted an inspection in response to a miners' representative's report of a violation. The violation occurred on a Thursday, the request for an inspection was made on a Friday, the Secretary's inspection took place on the following Monday and Tuesday, and a section 104(a) citation was issued on Wednesday. The finding that the violation resulted from the operator's unwarrantable failure, resulting in the modification of the citation to a section 104(d)(1) citation, was made only 19 days later. As of this date the operator was put on notice that it was subject to a section 104(d) probationary chain and that to avoid the issuance of withdrawal orders avoidance of further unwarrantable violations during the next 90 days was necessary. Thus, section 104(d) was invoked and implemented in a manner consistent with its intent.

Based on these circumstances, and the record in this case, I perceive no basis for any conclusion that an injustice to the operator or a perversion of section 104(d)'s enforcement scheme has been caused by the Secretary's actions.

Accordingly, I join the majority in reversing the judge's decision and remanding for further proceedings. 5/


James A. Lastowka
Commissioner

5/ I agree with the majority that further findings concerning whether the violation at issue resulted from the operator's unwarrantable failure are necessary. Although the judge indicated that he desired to avoid just such a remand in the event he was reversed on the controlling question of law (8 FMSHRC at 73), the intended meaning of his findings as to the validity of the modification of the citation and whether the operator's conduct, in fact, was unwarrantable, is not totally clear. See 8 FMSHRC at 72-73. See also, Oral Arg. Tr. at 38-39. Clarification of these points through further findings is necessary. Regarding the procedural propriety of the modification of the citation, two points should be noted. First, an inspector's supervisor certainly has the power to review the inspector's enforcement actions and, based on that review, direct appropriate modifications of the inspector's action. Second, the record in this case contains evidence, not referenced by the judge, concerning the sub-district manager's consideration of the particular circumstances of the violation at issue influencing his direction that the citation be modified to include an unwarrantable failure finding. Tr. 350-368, 376-77.

Chairman Ford, dissenting: */

The decision of Chief Administrative Law Judge Merlin, that the majority would reverse, holds that an MSHA inspector is not authorized to issue an unwarrantable failure citation or order of withdrawal for a pre-existing violation that no longer exists at the time of his on site inspection. According to the judge's reasoning, the sole post hoc sanction available to the inspector in such circumstances is a citation authorized under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, 814(a). 1/ All Commission judges who considered this issue prior to this appeal had agreed with Judge Merlin. 2/

On appeal, the Secretary and the United Mine Workers of America (UMWA) argue -- and the majority agrees -- that the scope of section 104(d), 30 U.S.C. § 814(d), is so broad as to authorize unwarrantable failure sanctions (including mine closure orders) for violations that, while they may have existed in the past, no longer exist and therefore are not personally observed by the inspector. The section 104(d) sanctions imposed in such circumstances have no prophylactic purpose. Thus, the majority is constrained to justify the imposition of section 104(d) for a past completed violation because of its "deterrent effect" (Majority Slip Opinion at p. 7). That expansive view conflicts with the plain meaning of the 1977 Act, the intentions of its authors, and its underlying policies. Accordingly, I must respectfully but vigorously dissent.

*/ This opinion constitutes my general position on the applicability of unwarrantable failure sanctions to past completed violations not observed by MSHA inspectors. My legal conclusions herein therefore apply to three related cases also decided today: Greenwich Collieries, Docket Nos. PENN 86-33 and PENN 85-188-R et al., 9 FMSHRC _____ (Sept. 30 1987); White County Coal Corp., Docket Nos. LAKE 86-58-R and LAKE 86-59-R, 9 FMSHRC _____ (Sept. 30, 1987); and Emerald Mines, Docket No. PENN 85-298-R, 9 FMSHRC _____ (Sept. 30, 1987).

1/ For purposes of this opinion, sanctions based on unwarrantable failure allegations will be referred to as section 104(d) citations and orders while sanctions not alleging unwarrantable failure will be referred to as section 104(a) citations. I agree with my colleagues' view that despite the Secretary's theoretical arguments on this issue, such a distinction serves to clarify the discussion.

2/ Greenwich Collieries, 8 FMSHRC 1105 (1986)(ALJ Maurer); White County Coal Corp., 8 FMSHRC 921 (1986)(ALJ Melick); Emerald Mines Corp., 8 FMSHRC 324 (1986)(ALJ Melick); Southwestern Portland Cement Co., 7 FMSHRC 2283 (ALJ Morris); Emery Mining Corp., 7 FMSHRC 1908 (1985)(ALJ Lasher); and Westmoreland Coal Corp., (WEVA 82-340-R et al.) (May 4, 1983)(ALJ Steffey). As the majority notes, one judge has recently reached a contrary result. Florence Mining, 9 FMSHRC 1180 (1987)(ALJ Fauver). The Secretary correctly indicates that this is a matter of first impression for the Commission. Secretary's brief at p. 9. The Secretary cites only Rushton Mining Co., 6 IBMA 329 (1976) both as precedent under the 1969 Coal Mine Health and Safety Act, 30 U.S.C. 801 et seq. (1970) and as an indication of traditional post hoc enforcement policy under section 104(d). Secretary's brief at pp. 14-15. Rushton, however, is clearly distinguishable from these cases on appeal insofar as it involved a violation that continued up to the time the inspector observed it. 6 IBMA 334-336.

The category of past completed violations that the majority would subject to section 104(d) sanctions presumably includes a violation that may have occurred weeks or months before an inspector is made aware of it, let alone conducted his after the fact investigation as to whether and under what circumstances it may have existed. Additionally, the violation may no longer exist for any number of reasons: the area where it occurred may long since have been abandoned; intervening incidents or conditions may have corrected or obliterated it; or a conscientious operator may have taken steps unilaterally to abate it. Under any of these scenarios, no unwarrantable, significant and substantial violation exists that poses an ongoing hazard to miners or that demonstrates continuing operator indifference to miner health and safety. As will be demonstrated below, post hoc imposition of section 104(d) sanctions in such circumstances was simply not contemplated by Congress.

I. The Plain Meaning of Section 104

A. Present vs. Past Conditions

As stated in Higgins v. Marshall, one "must look first to the language of the [Mine] Act itself and give [its] words ... their ordinary meaning." 584 F.2d 1035, 1037 (D.C. Cir. 1978), cert denied 441 U.S. 931 (1979).

A parsing of the text of section 104(d) reveals the conscious intent of Congress to distinguish between citations based on present conditions and those based on past conditions that are no longer extant when the inspector is physically present in the mine. This legislative purpose is directly reflected by the use of the present tense throughout section 104(d). 3/

Since the grammatical context of section 104(d) is the present tense, it follows that its enforcement sanctions are directed toward extant violations. The statutory language itself does not encompass the expansion of the section 104(d) sanction to include violations that no longer exist (or that have been abated) and, therefore, do not reflect current operator indifference to mine safety or a continuing risk to miners. 4/

3/ Under section 104(d)(1) a citation can only be issued where "the conditions created by such violation do not cause [not "did not" cause] imminent danger"; where "such violation is [not "was"] of such a nature as could [not "could have"] significantly and substantially contribute [not "contributed"] to the cause and effect of a ... hazard"; and only "if [the inspector] finds such violation to be caused [not "to have been caused"] by an unwarrantable failure of such operator to comply [not "to have complied"]. Similarly, a section 104(d)(1) withdrawal order can only be issued if the Secretary "finds another violation ... to be also caused [not "was caused"] by an unwarrantable failure." [Emphasis added].

4/ Contrary to the argument of the majority the phrase "has been a violation" in section 104(d) does not lead to a contrary conclusion. "Has been" is the present perfect tense of "to be" denoting an action begun in the past and continuing into the present. Thus, "has been" is the necessary predicate establishing that a violation has to have occurred and then continued up to the point where an inspector can "find" it and impose appropriate sanctions.

Textual analysis is buttressed by legislative history that ties section 104(d) sanctions to extant violations. Section 104(d) was adopted virtually without change in the 1977 Act from section 104(c) of the 1969 Coal Mine Health and Safety Act. 80 U.S.C. § 801, 814(c)(1970). 5/ Therefore, what Congress said in 1969 about the timeliness of unwarrantable failure citations and orders is dispositive of the issue under the 1977 Amendments.

The 1969 House Report described the unwarrantable failure enforcement sanction as applicable when an inspector finds that a mandatory health or safety standard "is being violated." 6/ The Senate's unwarrantable failure sanction was likewise applicable where the inspector "finds [that a standard] is being violated." 7/ The Conference Report restated the Senate characterization: "if an inspection of a coal mine shows that a mandatory [standard] is being violated." 8/ Thus, when the 1969 Act passed Congress, the legislators agreed that unwarrantable failure sanctions applied to existing violations, that is, practices or conditions that continue to violate mandatory health and safety standards up to the time the inspector witnesses them.

As noted above, the 95th Congress re-enacted the existing language of the 1969 Act (section 104(c)) as section 104(d) of the 1977 Act. In so doing Congress found the language to be "effective and viable" in its existing form. 9/ Lastly, the Senate Labor Committee clearly spoke to the timeliness factor for unwarrantable failure closure orders by relating them to failure to abate orders authorized under section 104(b) of the 1977 Act:

Like the failure to abate closure order ... the unwarranted (sic) failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards.... 10/

The legislative history thus explains and justifies the adoption of the present tense in the statutory language of section 104(d): Congress deliberately restricted unwarrantable failure sanctions to extant conditions or practices discovered by the inspector because they

5/ Sen. Rep. No. 95-461, 95th Cong., 1st Sess. 48 (1977). Reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1326. (Leg. Hist., 1977 Act).

6/ Legislative History of the Federal Coal Mine Health and Safety Act of 1969, 94th Cong. 1st Sess. (Comm. Print 1975) (Leg. Hist., 1969 Act) at p. 1061.

7/ Id. at 872-73.

8/ Id. at 1511-1512.

9/ Leg. Hist., 1977 Act, 620.

10/ Leg. Hist., 1977 Act, 619.

have been allowed to continue through operator indifference, willful intent or a serious lack of reasonable care. Review Commission decisions addressing the proper definition of "unwarrantable failure" are entirely consistent with this Congressional view. Westmoreland Coal Co., 7 FMSHRC 1338 (1985); United States Steel Corp., 6 FMSHRC 1423 (1984). "[A]n unwarrantable failure to comply may 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." 6 FMSHRC 1437. [Emphasis added].

B. Investigation vs. Inspection

A principal basis upon which the judges' decisions below have rested is the distinction between "investigation" and "inspection" as those terms are used in the 1977 Act. Section 104(a) citations can be issued on the basis of an inspection or investigation while section 104(d) sanctions are limited to violations cited in the course of an inspection only.

The words "inspection" and "investigation" are not separately defined in the Act. Therefore, these words must be interpreted and understood as having their contemporary, ordinary meanings. Furthermore, it is a commonly accepted generalization that when people say one thing they do not mean something else. Thus, when Congress said "inspection", it did not mean "investigation" and vice versa. In this regard and contrary to the UMWA's contention (UMWA brief at p. 10), the legislative history of the 1977 Act clearly demonstrates that Congress made "fine distinctions" between "inspection" and "investigation" for purposes of the Act.

Senate Report No. 95-181 discusses the Secretary's subpoena powers under what ultimately became section 103(b), 30 U.S.C. § 813(b), and states, "This authority is limited to investigations and not inspections." 11/ Later, in the Senate floor debate, Sen. McClure sought to amend section 103(b) so that it would more clearly apply to investigations only, and not inspections. The ensuing colloquy between Sen. McClure and the principal authors of S. 717, Sens. Williams and Javitz, clearly indicates that by adopting the McClure amendment, all three obviously distinguished between "inspections" and "investigations" within the context of the 1977 Act. 12/

The foregoing legislative history is fully explained by the ordinary meanings of the two terms. Against the background of federal oversight and regulation of mine safety and health, "inspection" is defined as "strict or close examination or survey to determine compliance," while "investigation" is defined as a "searching inquiry as to causes." 13/ Ordinarily, the use of different terms, as here, creates an inference that Congress intended a difference in meaning. This inference is

11/ Leg. Hist., 1977 Act, 615.

12/ Id. at p. 1091-92.

13/ Webster's Third New International Dictionary (G&C Merriam Co., 1971).

confirmed by the statutory language itself. Thus, when Congress used the words together in sections 103(a), 104(a), (b), and (g)(1), 105(a), and 107(a), 30 U.S.C. §§ 813(a), 814(a), (b) and (g)(1), 815(a) and 817(a), it separated them with the disjunctive "or" rather than the conjunctive "and". The use of "or" clearly indicates that Congress did not intend these words to be considered interchangeable. Likewise, when Congress limited the prohibition against advance notice to "inspections" in section 103(a), it did so in recognition of the different meaning of "inspections" and "investigations". ^{14/} Since an investigation, as defined, is an inquiry into causes, it follows upon an antecedent event which is known before the "investigation" can begin. Therefore, it would be futile to bar advance notice of the Congressionally mandated follow-up to a mine accident. An "inspection", in contrast, is the beginning of enforcement to determine if violative mine conditions exist, and Congress wanted to bar advance notice to avoid operator efforts to disguise safety hazards.

Section 104(a) and (b) broadly confer citation and withdrawal order authority for violations believed to have been committed upon "investigation" or "inspection". The withdrawal sanction is limited to the operator's failure to abate after having been cited. Section 104(d)(1), however, is confined to violations found "upon any inspection". This provision read together with section 104(d)(2) provides for immediate withdrawal authority without regard to abatement efforts for violations deemed to result from the operator's unwarrantable failure to comply. This is a significant extension of regulatory authority and by using the term "inspection" alone, Congress reserved and confined this authority to current existing violations which, because of their gravity or the operator's underlying failure to correct them require prophylactic mine closure. Congress did not intend this authority to be used as a post hoc sanction for violations no longer extant or previously abated but later "found" during after-the-fact "investigations" as to their causes. ^{15/} Moreover, Congress used the terms together six times in the Act. 30 U.S.C. §§ 813(a), 814(a), (b) and (g)(1), 815(a) and 817(a). Congress' failure to do so in section 104(d)(1), therefore must be attributed to conscious

^{14/} See also section 110(e) 30 U.S.C. § 820(e), authorizing criminal penalties for advance notice of "inspections" only.

^{15/} The majority attaches some significance to the fact that Congress dropped a House-proposed definition of "inspection" from the 1969 Act, and then goes on to assume that the deletion somehow authorizes the issuance of unwarrantable failure sanctions at any time for past violations. (Majority slip opinion at pp. 8-9). I believe the reason for the deletion is much simpler than that. The definition was irrational. As judge Steffey wryly observed, the definition, if read literally, would have required an inspector to set up an underground larder to sustain him until his quarterly inspection of the entire mine was completed. Westmoreland Coal Co., Docket Nos. WEVA 82-304-R (May 4, 1983), quoted below at 8 FMSHRC 63.

choice rather than inadvertance. 16/ The Act, its legislative history, and an inquiry into the plain meaning of the terms at issue indicate clear Congressional intent that investigations and inspections were to be considered as distinctly different enforcement activities with equally distinct consequences.

Finally, the majority emphasizes that section 103(g) grants a complaining miner the right to an "inspection" and that the enforcement actions here were taken as a consequence of a section 103(g) complaint. While that is true as far as it goes, the activities engaged in by MSHA were investigative rather than inspectorial in nature. Furthermore, the specific enforcement action complained of -- citing the operator under section 104(d) -- was undertaken by the sub-district manager when he modified the initial citation 19 days after it was issued by the inspectors who responded to the miner's complaint.

One is left to conclude, therefore, that "inspection" now encompasses all enforcement activity the Secretary chooses to engage in: an inquiry into past events, an examination of existing conditions, and all subsequent internal review conducted by MSHA once the inspector leaves the mine premises. 17/ Under that rubric, I disagree with my colleagues that they are "not required ... to decide the meaning of inspection ... for all purposes under the Mine Act" (Majority Slip Opinion at P. 7). They have.

16/ The Court of Appeals for the District of Columbia recently applied this principle of statutory construction in another case involving the Mine Act. Citing Rusello v. United States, 464 U.S. 16, (1983) the D.C. Circuit endorsed the proposition that where Congress includes language in one section of a statute but omits it in another section of the same Act it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. United Mine Workers of America v. Mine Safety and Health Administration, Docket Nos. 86-1239 and 86-1327 (D.C. Cir. July 10, 1987)(slip opinion at p. 19).

17/ The 19-day hiatus between the initial issuance of the section 104(a) citation and its ultimate modification to a 104(d) citation would appear to confound the Secretary's own review procedures in 30 C.F.R. Part 100. Section 100.6 provides for pre-Commission review of citations and orders "issued during an inspection" and requires all parties desiring a safety and health conference to request one within 10 days after receipt of the citation or order. The regulations are silent with respect to modifications to citations and orders. It is therefore conceivable that an operator could waive his right to a conference on a 104(a) citation only to be notified after the 10-day period has elapsed that the citation has been modified to a section 104(d) citation or order. In such a circumstance the operator is lulled into forfeiting the opportunity to present exculpatory evidence that might militate against the modification of a section 104(a) citation to a section 104(d) citation or order. The inevitable result of today's decision will be that operators may defensively request conferences on all citations so as to avoid the unforeseeable consequences of extended "inspections" by the Secretary.

C. Believes vs. Finds

Intertwined with the distinction between investigations and inspections under the Act is that between "believes" and "finds" within the constituent elements of section 104. Section 104(a) allows for the issuance of a citation whenever an inspector "believes" an operator has violated the Act or mandatory standards, whereas section 104(d) requires that the inspector "find" a violation.

Both the Secretary and the UMWA argue that "finds" as used in section 104(d) carries an adjudicative sense 18/ while NACCO argues that the term requires that the inspector "discover" the violation first-hand before a section 104(d) citation or order may be issued. 19/

A search of the language and purpose of the Act, as well as the legislative history however, does indicate explicit intent on the part of Congress to limit the application of section 104(d) to instances where the violation in question is actually observed by the inspector. Indeed, contrary to the Secretary's and the UMWA's arguments, the legislative history of the 1977 Act specifically equates "finds" with "observes" or "discovers" for purposes of section 104(d).

Senate Report No. 95-181 addresses the rationale for injunctions under section 108 of the 1977 Act, 30 U.S.C. § 818. The remedial injunction was a new enforcement tool granted the Secretary by Congress in the 1977 Act to be used against "habitual or chronic" violators that don't respond to the citation, mandatory abatement and withdrawal order sanctions of section 104. 20/ The Senate Report is quoted at length because it has direct and dispositive bearing on the issues in this case:

18/ "It is patently clear from the language of section 104(d) itself that the word finds is used in that section in the adjudicative sense, meaning that the inspector must conclude that an unwarrantable violation has occurred, not that he must literally discover an active, in-progress violation." Secretary's brief at p. 20 (emphasis added).

"Furthermore, under Judge Merlin's analysis, use of the word finds can only mean that an inspector must discover or "come upon" a violation.... Only by interpreting find to mean conclude or determine can the provision of 104(d) make any sense, as an effective enforcement tool." UMWA's brief at pp. 4-5 (emphasis added).

19/ Brief of NACCO at p. 16. The majority endorses the position of the Secretary and the UMWA on this issue. (Majority slip opinion at p. 9). The "finding" of unwarrantable failure was made three weeks after the issuance of the original 104(a) citation by a sub-district manager who did not visit the mine, interview witnesses, examine the operator's records or consult with the issuing inspector. 8 FMSHRC 72. The two inspectors who did perform those activities, however, declined to "find" unwarrantability even in the sense that that term is propounded by the majority.

20/ Leg. Hist., 1977 Act, 1334.

The current scheme for enforcing the mine safety laws enables MESA to eliminate the dangerous conditions which are observed in the course of inspections either by requiring the abatement of the violation or, where warranted, by withdrawing miners from the dangerous situations. Having taken these steps, however, there are no current enforcement sanctions to insure continued compliance with the Act's requirements by the operator after abatement of the actual violations observed The new provision of section 109 of the bill is designed to deal with that gap in enforcement.

It is in essence, a means by which the Secretary can (sic) obtain the correction of violations which habitually occur when the inspector is not present in the mine. The provision enables the court to infer from the repeated discovery of violations at a mine that the operator probably regularly permits such violations to occur at times when the inspector is not present at the mine. 21/ [Emphasis added.]

It should be noted that the "current scheme" and "current enforcement sanctions" of the 1969 Act to which the Senate Report refers are identical to the current scheme and sanctions of the 1977 Act insofar as section 104(d) is concerned. As noted above, section 104(d) was drawn almost verbatim from section 104(c) of the 1969 Act. (As will be discussed below, the same holds generally true for section 103(g), 30 U.S.C. 813(g), (miners' complaints) and its predecessor in the 1969 Act).

Had Congress sought to grant the Secretary the authority to impose 104(d) sanctions for violations that no longer exist when the inspector is present to observe them, it would have amended section 104(d) for that purpose. Instead, Congress devised injunctive relief to fill an acknowledged "gap in enforcement" with respect to violations not actually observed by the inspector because he is not present at the mine. Section 108 constitutes extraordinary relief that is to be invoked only when other statutory measures have failed. Nevertheless, its genesis, quoted above, was the recognition by Congress that section 104(d) had limited application to violations still in progress during the Secretary's physical inspection of the mine.

A conscious decision on the part of Congress to withhold the Secretary's authority to invoke section 104(d) sanctions for violations not observed by his inspectors is binding on this Commission as well.

Furthermore, the legislative history for section 104(e), 30 U.S.C. § 814(e), indicates clearly that Congress intended "finds" to mean

21/ Leg. Hist., 1977 Act, 627.

"discover". 22/ Sen. Schweiker authored what is now section 104(e). In a Senate floor colloquy with Sen. McClure, Sen. Schweiker explained what "finds" means in terms of section 104(e):

The way the amendment works is if a pattern of substantial violations is found the mine is put on notice.... Then after the next violation occurs they are shut down.... He [the operator] can clean the slate up in 90 days by good behavior, or he can clean it up on the next inspection and show that there are no violations that exist. 23/ [Emphasis added].

Sen. Schweiker's explanation is even more clearly stated later in the Senate Record:

...Once a withdrawal order has been issued ... and a subsequent inspection of the mine discloses another violation... a withdrawal order will be issued until the violation has been abated.... Subsequent to this, the operator is subject to further withdrawal orders ... each time a violation of a substantial and significant nature is discovered, until an inspection of the mine in its entirety discloses no violations ... which could significantly and substantially," etc. 24/ [Emphasis added].

The legislative history fully supports Judge Merlin's view that the inspector's first-hand observation of violations is a prerequisite to the imposition of section 104(d) sanctions. In short, an inspector cannot cite under section 104(d) what he cannot "find", that is, observe or discover in the course of his inspection. 25/ Clear judicial support for equating

22/ While section 104(e) is not before this Commission, our ultimate decision will carry implications for future "pattern of violations" enforcement. Sections 104(d) and (e) are completely analogous insofar as the inspection/investigation and believes/finds dichotomies are concerned. The majority's determination that section 104(d) sanctions can be imposed post hoc for violations no longer extant clearly implies that section 104(e) sanctions can be similarly imposed.

23/ Leg. History, 1977 Act at p. 1077.

24/ Id. at p. 1105.

25/ The majority cites two violations that might escape section 104(d) sanctions -- failure to perform pre-shift examinations (30 C.F.R. 75.303) and health violations, such as excursions above the respirable coal dust standard, that are determined by after the fact analysis of samples.

(Footnote continued)

"find" with "observe" is also found in Holland v. U.S., 464 F.Supp 117, 123 (W.D. Ky. 1978). Thus, the inspector is limited to the 104(a) sanctions with respect to past violations no longer extant at the time of his inspection and observation of current conditions.

II. The Interaction Between Section 104(d) Sanctions and Miners' Complaints

Concerns have been raised in this case that if inspectors cannot impose section 104(d) sanctions for past, but unobserved violations, the rights of miners under section 103(g) will be "emasculated". Oral argument at p. 57. Indeed, as the majority notes, this case arose from a citation issued in response to a section 103(g) complaint. The Conference Report on the 1977 Act, however, could not be more clear as to the interaction between section 103(g) and the ensuing sanctions allowed under the Act:

Fn. 25/ continued

Regarding the first example, section 75.303 requires not only that a pre-shift inspection be conducted but also that it be recorded in an examination book "open for inspection by interested persons." Failure to examine and then record would therefore be a violation continuing to the time the inspector arrives at the mine to inspect the books. He would be observing the continuing violation and would have available to him the unwarrantable failure sanction. Of course, failure to preshift but nevertheless misrepresenting that failure by "recording" it is an offense subject to the criminal sanctions of Section 110(f), 30 U.S.C. 820(f).

As for the second example, except for respirable coal dust sampling, the vast majority of sampling conducted for the purpose of determining compliance with health standards is conducted by MSHA inspectors themselves. See generally, Mine Inspection and Investigation Manual, U.S. Department of Labor, Chapters III and IV (1978). Accordingly, when an inspector conducts the sampling to determine compliance with various health standards and then analyzes those samples or forwards them for laboratory analysis, he is at all times engaged in the "discovery" of a potential violation and, if the ultimate analysis proves noncompliance, he is authorized to cite under section 104(d) if the other elements of that section are met. It should also be noted that emerging technology increasingly provides instrumentation for instantaneous analysis and quantification of workplace toxics just as sound level meters provide instant quantification of workplace noise. Furthermore, with respect to the health standard specifically raised by the majority, the respirable coal dust standard, Congress has specifically fashioned a sanction for continuing noncompliance with the standard that verges on an unwarrantable failure to comply. Section 104(f) provides withdrawal order authority when an inspector finds that an operator has failed to reduce dust levels below the standard as evidenced by sample results, and when he further determines that additional time for abatement is not warranted. 30 U.S.C. 814(f).

The conference substitute contains a further amendment requiring the Secretary to notify the operator ... forthwith if the [103(g)] complaint indicates that an imminent danger exists. Otherwise, miners might continue to work in an imminently dangerous situation until the Secretary is able to inspect Accordingly, an operator who receives such a notice would do what is necessary to evaluate the situation and protect the miners who may be exposed from the dangerous situations. While this provision, in fact, gives the operators the opportunity to abate such dangerous conditions-its sole purpose [is?] to protect the health and safety of miners. 26/

The clear implication of the underlined sentence is that operators in such circumstances may "get away with" abating violations without being cited when the inspector arrives but that the substance of protecting miners takes precedence over the form of enforcement. In fact, what does the above passage mean other than that the Secretary is precluded from citing past, abated violations that give rise to section 103(g) complaints? Such a reading also reinforces the proposition that Congress intended "finds" to mean "observes in the course of inspection" since section 107, 30 U.S.C. 817, requires the inspector to "find" imminent danger just as he is required to "find" a violation under section 104(d).

Furthermore, the Conference Report goes on to state:

The failure of the Secretary to notify the operator ... under this provision will not nullify any citation or order which may be issued as a result of the inspection in response to the [miner's] request ... even if such inspection discloses the existence of an imminent danger situation in the mine. 27/

The only logical explanation for this "hold harmless" language is that if the operator has been notified and he abates prior to inspection he cannot be cited; whereas if he is not notified and therefore does not abate prior to inspection, he can be cited and cannot affirmatively defend against the citation or order by arguing that the Secretary failed to notify him of the violation.

Moreover, section 103(g) had an analogous antecedent in the 1969 Act, 30 U.S.C. § 813(g)(1970). That inspection in response to a miner's complaint was also part of the "current scheme" referred to in the Senate Report quoted above. As such, section 104(d) sanctions were limited under the 1969 Act to violations "observed in the course of [section 103(g)] inspections." Leg. Hist., 1977 Act, 627. Congress did not

26/ Leg. Hist., 1977 Act, 1324 [emphasis added].

27/ Id. at 1324 [emphasis added].

amend section 103(g) to authorize section 104(d) sanctions for past completed violations not observed by the inspector upon his arrival at the mine in response to a miner's complaint. Therefore, the "current scheme" of the 1977 Act must operate under the same restrictions as Congress ascribed to the "scheme" of the 1969 Act.

The appropriate interrelation between sections 103(g) and 104(d) can also be established by reference to section 2 of the Act which sets forth its Congressionally determined purposes. In section 2(e) Congress declares that mine operators "with the assistance of miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in ... mines." Section 2(g) goes on to state that the purpose of the Act is "to require that each operator of a coal or other mine and every miner in such mine comply with [mandatory safety and health] standards." 30 U.S.C. §§ 802(e) and (g).

Thus, the operators' and the miners' responsibilities to prevent the continued existence of unsafe and unhealthful conditions and practices derive directly from section 2 of the Act itself - not because of, and perhaps in spite of, the Secretary's various enforcement incentives and disincentives used to encourage compliance. Given the Secretary's finite enforcement resources, section 2 explicitly acknowledges that the correction of hazardous conditions and practices will for the largest part depend upon the vigilant self-policing of mine safety and health by operators and miners. As the UMWA states convincingly in its brief:

The likely interaction of all parties involved in carrying out the enforcement of mine safety and health laws should be the highest priority of the Commission in fashioning its interpretation of section 104(d) in this case. Only by construing the statute with an eye toward that priority, will the proper determination be made. UMWA brief at p. 12.

The "likely interaction" of all parties is obviously aimed at the prevention of hazards to miners and the prompt abatement of violations once they arise irrespective of the threat of sanctions. When two of the parties, the operator and the miner, for whatever reason cannot or will not "interact" to carry out their responsibilities under section 2(g), Congress has provided for Secretarial intervention under section 103(g). However, given the Conference Committee's view, above, as to how this level of interaction is to be circumscribed, 104(d) sanctions are impermissible responses to 103(g) complaints aimed at past completed violations.

Under the principles enunciated in section 2 of the Act, such a limitation on the Secretary's enforcement powers is appropriate. There is no incentive for fostering the "interaction of all parties involved" when one of the parties, the Secretary, is motivated more by retribution than by the protection of miners when he issues a section 104(d) citation or withdrawal order for a hazard that no longer exists. Section 2 is even more severely compromised when the operator's unilateral action to abate violations prior to the inspector's arrival is "rewarded" by imposition of the more severe enforcement sanctions of section 104(d).

Yet, the majority would extend the Secretary's authority to issue 104(d) sanctions to violations "corrected" before the inspector's arrival. (Majority slip opinion at p. 13.)

In short, the majority's decision will encourage its own "cat and mouse game" 28/ with respect to violations that no longer pose any colorable threat to miner health and safety.

III. Practical Enforcement Problems Arising from Post Hoc Section 104(d) Sanctions

By reversing Judge Merlin and allowing the Secretary to issue retroactively the enforcement sanctions of section 104(d), the majority raises a number of enforcement policy issues. Practical issues include the potential for constant recomputation of the 90 day probationary period built into section 104(d). The majority dismisses this "time sequence" problem by arguing that it doesn't arise on review and thus need not be considered here. (Majority Slip Opinion at p. 7, fn. 6.) They err on two counts.

First, the "time sequence" issue raised by NACCO is not mere calendar speculation; it is a substantive argument in favor of limiting section 104(d) citations and orders to existing violations actually observed by an inspector in the course of his inspection. NACCO correctly argues that by applying section 104(d) to past, completed violations the 90 day probationary period is "written out of the Act." NACCO brief at p. 22. This is because the majority's opinion allows the Secretary, through the post hoc imposition of section 104(d) sanctions, to reach back continuously into expired 90 day "clean" probationary periods previously considered to be unwarrantable failure free. This argument is inextricably linked to the "present tense", "finds" vs "believes", and "inspection" vs "investigation" arguments, discussed above. They all center on the proposition that the section 104(d) chain is a prospective sanction that starts with a presently observed unwarrantable failure violation and becomes progressively more severe as subsequent unwarrantable failure violations are observed during the ensuing 90 day period.

Second, the "time sequence" issue is before the Commission on the basis of the facts of this case. The violation was alleged to have occurred on May 30, 1985. It was cited by the inspectors under section 104(a) on June 5, 1985. The section 104(a) citation was modified to a section 104(d)(1) citation by the subdistrict manager on June 24, 1985. From which of the three dates does the 90 day probationary period run? If the Secretary can retroactively "find" an unwarrantable failure violation 25 days into the past, doesn't it follow that the operator should be credited with those same 25 days toward the 90 day probationary period? If not, doesn't the majority's decision actually establish a 115 day probationary period under section 104(d)? These are legitimate questions that can not be deferred to another day since NACCO has explicitly raised them in this appeal. Furthermore, as the majority is obviously breaking new ground with this decision, clear guidelines as to future enforcement procedures must be articulated in this case. Obviously, if

28/ UMWA brief at p. 12.

as argued in this dissent, the Secretary has no authority to issue a section 104(d) citation in the first place, the "time sequence" issue is moot. 29/

Although an unwarrantable failure closure order is not at issue here, the majority's decision authorizes the issuance of such orders for non-extant violations alleged by the Secretary to have occurred some time before the arrival of an inspector. Indeed, the majority's decisions today in White County Coal Corp., Docket Nos. LAKE 86-58-R and LAKE 86-59-R, 9 FMSHRC _____ (Sept. 30, 1987) and Greenwich Collieries, Docket Nos. PENN 86-33 and PENN 85-188 et al., 9 FMSHRC _____ (Sept. 30, 1987), allow just such enforcement actions. As argued above, since the violation no longer exists, the withdrawal order is not issued for the purpose of protecting miners; no hazard is present at the time of issuance. This, despite Congressional statements to the effect that such orders are necessary so as to prevent "miners continuing to work in the face of hazards." 30/

If, as the Secretary suggests, the withdrawal order is issued "to send a message" 31/ or, in the terminology of the majority, for its "deterrent effect", then section 104(d) curiously takes on the trappings of a civil penalty closure order.

Both the Senate and House bills that gave rise to the 1977 Act included such an order. Leg. History, 1977 Act at pp. 159 and 237. Its purpose was not the protection of miners but was purely punitive. The order, however, could only be imposed by the Commission after a full hearing. After due deliberation, Congress rejected the civil penalty closure order. What Congress was unwilling to delegate legislatively to the Secretary cannot be delegated judicially by this Commission.

If as the UMWA argues 32/, the withdrawal order can be terminated simultaneously with its issuance, the enforcement mechanism of section 104(d) becomes a dead letter, a "nonclosure" closure order. No one is

29/ Aside from the uncertainty now introduced into the computation of the 90 day probationary period, there is now also a general lack of temporal restraint on the Secretary in applying section 104(d) sanctions, particularly section 104(d) orders. In two cases decided today, the violations are alleged to have occurred as short as one hour (White County Coal Corp., infra) and as long as 13 months (Greenwich Collieries, infra) before issuance of the orders.

30/ Leg. Hist., 1977 Act, 619.

31/ "We close that section of the mine; we cut off production, send a message to everyone involved - from the miners to the operators - that we are not going to tolerate this kind of activity.... I would probably close it until the next clean inspection, yes ... The Commission has often paid due deference to the Secretary's interpretation of his enforcement mandates." Statement of Solicitor of Labor Salem, oral argument, December 16, 1986 at pp. 18-20.

32/ Statement of Mr. Meyers for UMWA, oral argument, December 16, 1986 at pp. 31-32.

actually withdrawn, although the statute requires that they be withdrawn, and the credibility of the entire enforcement mechanism becomes subservient to an obviously formalistic exercise.

Finally, if as the Secretary alternatively suggests, 33/ the withdrawal order is issued for the purpose of training miners in such areas as roof control and ventilation as a means of abatement, two problems arise. First, the Secretary did not allege a violation of the training regulations that would warrant such a means of abatement. Second, the miners that are withdrawn as a result of the order may not be the miners that were present in the area when the violation is alleged to have occurred. In either event the remedial basis for the order is inapposite with respect to the violation charged. 34/

IV. The Underlying Policy of Section 104(d).

What is most disconcerting about the enforcement policy now blessed by the majority is its adverse effect on the Act's fundamental philosophy of voluntary compliance. What compliance incentives exist when a mine operator and his workforce who currently maintain a commendable safety performance can be brought under the heavy hand of section 104(d) enforcement for errors alleged to have been committed weeks or months in the past? 35/ Indeed, given the unlimited retroactivity inherent in the majority's holding, section 104(d) sanctions are now authorized against a current management and workforce that may not even have been involved in the past completed violation. Particularly galling will be the retroactive issuance of withdrawal orders for violations that posed no conceivable threat to miner health and safety even when they first occurred (e.g., recordkeeping violations). Only the first violation in a section 104(d) chain need be both significant and substantial and caused by unwarrantable failure to comply; subsequent withdrawal orders in the chain need only allege unwarrantability.

33/ Statement of Solicitor Salem, oral argument, December 16, 1986 at p. 21.

34/ These arguments are particularly true with regard to the Majority's decision today in White County Coal Corp., supra, wherein the means of abatement was the retraining of miners as to the requirements of the operator's roof control plan. Indeed, if in this case and in White County Coal Corp., the Secretary had alleged inadequate training as the basis of the violations (as, apparently, it was) and had cited under section 104(a), the deterrent effect of enforcement espoused by the majority would still have been achieved. Production would have been stopped for the period of time needed to abate the violation, i.e., until the miners in question had been retrained in the hazards of going under unsupported roof. In such a scenario the true purposes of the Act would have been served within the limitations placed on the Secretary by Congress with respect to past completed violations not observed by inspectors in the course of their inspections.

35/ In a companion case decided today, Greenwich Collieries, supra, 104(d) orders were issued for violations alleged to have occurred as far back as 13 months.

Furthermore, the carefully formulated enforcement scheme of section 104(d) is seriously undermined by today's decision, for despite their protests to the contrary, the majority has effectively jettisoned the 90 day probationary period central to the operation of section 104 of the Act. Logic dictates that the 90 day probationary period of section 104(d) can only be imposed prospectively in response to an extant violation that poses a discrete hazard to miner health or safety and that evidences an operator's "continuing indifference, willful intent or serious lack of reasonable care." U.S. Steel, supra. In this enforcement regimen, both management and miners are unequivocally put on notice that any future violation, regardless of its seriousness, that results from an unwarrantable failure to comply will result in a summary withdrawal order. By law the triggering citation is posted for both managers and miners to see. The threat of a withdrawal order hangs like a Sword of Damocles over every shift and every section for the ensuing 90 days. Safety and health awareness is heightened as the attention of everyone is focused on avoiding the adverse economic and productivity consequences of unwarrantable failure violations. These practical yet motivational incentives cannot but have a salutary effect on maintaining a safer and more healthful workplace as the probationary period progresses. In sum, the prospectively applied probationary period has definition, limits, immediacy and practical consequences for those who must work under it and establish a habit of compliance.

Though I hesitate to characterize the Mine Act's enforcement scheme in criminal law terms, the obvious and primary purpose of section 104(d) is rehabilitative. The majority's holding however would play hob with the rehabilitative function of the probationary period by allowing the Secretary to reach back continuously into the past to restart the 90 day clock. In such circumstances the Sword of Damocles may never be sheathed. Once that point is reached, the credibility of the enforcement program is severely compromised, the incentive to voluntary compliance is dulled, and bald harrassment becomes inevitable.

In summary, I do not hold with the majority's view that the Secretary can impose section 104(d) sanctions for prior completed violations not observed by his inspectors. Congress explicitly declined to delegate such authority. Indeed, the legislative history on point clearly indicates that section 104(d) was reserved by Congress for violations observed by the inspector in the course of his inspection.

The inspector may, nevertheless, cite the operator under section 104(a) of the Act if upon "investigation" he "believes" a past violation, not witnessed by him, has occurred. There is more than sufficient "deterrent effect" in the civil penalty sanctions associated with section 104(a) as witnessed by the \$5000.00 civil penalty assessed by Judge Merlin in this case. Therefore, I would affirm his decision.


Ford B. Ford
Chairman

Distribution

Ann Rosenthal, Esq.
Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Thomas W. Meyers, Esq.
United Mine Workers of America
56000 Dilles Bottom
Shadyside, Ohio 43947

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Paul W. Reidl, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor, 6700 Grant Street
Pittsburgh, PA 15219

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1987

WHITE COUNTY COAL CORPORATION	:	
	:	
v.	:	Docket Nos. LAKE 86-58-R
	:	LAKE 86-59-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and presents us with an issue, similar to that decided by us this date in Nacco Mining Co., 9 FMSHRC ____, Docket Nos. LAKE 85-87-R and 86-2 (September 30, 1987): May the Secretary of Labor, in the course of an inspection, issue orders pursuant to section 104(d) of the Mine Act, 30 U.S.C. § 814(d), based upon a violation that is detected after the violation has ceased to exist? 1/ Commission Administrative Law Judge Gary Melick held that

1/ Section 104(d) states:

(1) 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 autho-

such orders could not be issued. 8 FMSHRC 921 (June 1986)(ALJ). For the reasons set forth in Nacco, supra, we reverse and remand.

The facts are not in dispute. On February 6, 1986, Inspector Wolfgang Kaak of the Department of Labor's Mine Safety and Health Administration ("MSHA") was conducting a "spot" inspection, pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i), of the Pattiki Mine of White County Coal Corporation ("White County"), an underground coal mine located in southern Illinois. During the inspection, he observed a chalk line drawn for centering purposes on the unsupported roof of Room No. 6. The chalk line extended from the last row of permanent supports to the face for a distance of thirteen feet. Inspector Kaak was not present when the chalk line was drawn and he observed no one under the unsupported roof. However, the coal drill operator admitted to the inspector that he had drawn the chalk line and had walked under unsupported roof to do so, even though he had seen a red flag warning of the danger. 8 FMSHRC at 922.

Inspector Kaak issued a section 104(d)(1) order of withdrawal to White County, alleging an unwarrantable failure violation of mandatory safety standard 30 C.F.R. § 75.200. 2/ This violation was alleged in a

rized 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(1) & (2).

2/ 30 C.F.R. § 75.200 provides in part:

No person shall proceed beyond the last permanent support unless adequate temporary support is

section 104(d)(1) order because, as the record reflects, a preceding section 104(d)(1) citation had been issued approximately one month earlier. 30 U.S.C. § 814(d)(1). According to the inspector's affidavit, the chalk line had been drawn one hour before he detected the violation. The inspector terminated the order twenty-five minutes later, after the miners were reinstructed on the roof control plan.

During a subsequent regular quarterly inspection of the mine, on February 12, 1986, Inspector Kaak observed footprints under unsupported roof in the crosscut between the No. 6 and 7 entries. Again, the inspector did not observe anyone under the unsupported roof nor was he able to obtain further information about the incident. The inspector issued a section 104(d)(2) order of withdrawal to White County alleging another unwarrantable failure violation of section 75.200 (n. 2 supra). This violation was alleged in a section 104(d)(2) order because of the preceding issuance of the section 104(d)(1) order. 30 U.S.C. §§ 814(d)(1) & (2). This order was terminated approximately one hour after it was issued.

White County contested both orders and challenged the unwarrantable failure findings. White County moved for summary decision, arguing that the orders were invalid because they were not issued based upon findings of existing violations. Relying on certain unreviewed Commission administrative law judges' decisions, including two judges' decisions that we reverse today, ^{3/} Judge Melick held that section 104(d) orders cannot be issued based upon findings of violations that occurred in the past but no longer exist when detected by the inspector. 8 FMSHRC at 923. The judge found that the inspector did not observe any violations being committed and based the section 104(d) orders upon evidence of past violations. Id. Therefore, the judge granted White County partial summary decision, modified the section 104(d) orders to section 104(a) citations, 30 U.S.C. § 814(a), and ordered the parties to confer regarding the desirability of further proceedings. 8 FMSHRC at 923-24. Thereafter, White County advised the judge that it did not wish to contest the citations further, and the judge dismissed the case. 8 FMSHRC 994 (June 1986)(ALJ). We granted the Secretary of Labor's petition for discretionary review and heard oral argument.

In Nacco, supra, we addressed the closely related question of whether an inspector may issue a citation under section 104(d)(1) for a violation not in existence at the time of its detection by an inspector. We held that the enforcement sanctions of section 104(d) are not restricted to existing violations observed by the inspector. Rather, these sanctions are to be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards -- regardless of whether they are in existence at the time of detection. Nacco, slip

provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. ...

^{3/} Nacco, supra; Emerald Mines Corporation, 9 FMSHRC ____, Docket No. PENN 85-298-R (September 30, 1987).

op. at 5-10. Accord: Emerald Mines, infra, slip op. at 4-6. We based this conclusion on the text of section 104(d), its legislative history, the section's purpose of deterrence, and the overall scheme of the Mine Act. Id. We emphasized the importance of unwarrantable failure findings within the context of the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for increasingly serious violations or operator behavior." Nacco, slip op. at 5, quoting Cement Division, National Gypsum Co., 3 FMSHRC 822, 828 (April 1981). We held:

The threat of th[e] "chain" of citations and orders under section 104(d) provides a powerful incentive for the operator to exercise special vigilance in health and safety matters because it is the conduct of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. ... To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.

* * * *

Throughout section 104(d), enforcement action is consistently linked to the inspector's determination that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation.

Slip op. at 6 (citations omitted; emphasis in original).

Although the present case involves section 104(d)(1) and (2) orders, whereas Nacco involved a section 104(d)(1) citation, the reasons that led us to conclude that 104(d) citations could be issued for prior violations not detected by the inspector at the time of occurrence apply to orders issued under sections 104(d)(1) and (2) as well. Those reasons apply whether a citation or order is involved because the focus of section 104(d) is upon unwarrantable failure by the operator not upon whether its detection occurs concurrently with its commission. Further, section 104(d) orders are the procedural vehicles both specified and required by the Mine Act for alleging violations involving unwarrantable failure once a section 104(d)(1) citation has been issued. Therefore, we hold that section 104(d) orders may be based upon violations detected by the inspector during an inspection occurring after the violation has

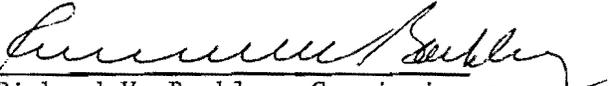
ceased to exist. See Nacco, slip op. at 5-10; Emerald, slip op. at 4-6. 4/

With respect to the chalk line violation in this proceeding, the inspector issued the contested section 104(d)(1) order within one hour after learning that the coal drill operator had proceeded under unsupported roof. The dangers of unsupported roof are well documented, and the violation in this case, proceeding under unsupported roof, is the type of violation that is unlikely to occur in the presence of an inspector. See Nacco, slip op. at 7. The same considerations apply with respect to the subsequent footprint violation. Such violations will ordinarily be detected by an inspector only after they have occurred. Under the rationale adopted by the judge, however, such unwarrantable conduct would not be subject to the unwarrantable failure sanctions mandated by the Mine Act.

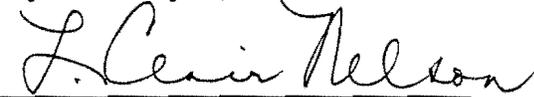
To the extent that the judge's decision rests upon a conclusion that only the term "inspection" appears in section 104(d) (as opposed to the use of both "inspection" and "investigation" in section 104(a)) and that the term inspection is limited to detection of presently existing events only, we reject that rationale. First, the orders issued in this case arose from a section 103(i) "spot" inspection and from a regular quarterly inspection and, more importantly, as we held in Nacco, the term inspection is broad and includes inquiry into past as well as present events. Nacco, slip op. at 7-8.

4/ See Greenwich Collieries, Div. of Pennsylvania Mines Corp., 9 FMSHRC ___, slip op. at 6, Nos. PENN 85-188-R, etc. (September 30, 1987), as to the Secretary's policy regarding withdrawal of miners from a mine in those instances where section 104(d) orders are issued for violations no longer in existence.

We therefore reverse the judge and vacate his modification of the section 104(d) orders to section 104(a) citations. Because the judge held that these orders were not properly issued under section 104(d), he did not reach the question of whether the alleged violations occurred as a result of the unwarrantable failure of the operator to comply with 30 C.F.R. § 75.200. Therefore, we remand the matter to the judge for further proceedings consistent with this decision.


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

In this case the administrative law judge granted a motion by White County Coal Corporation for partial summary decision. The judge's ruling involved a question of law raised by White County concerning whether an MSHA inspector properly could issue orders pursuant to section 104(d) of the Mine Act alleging violations that had occurred but were no longer in existence at the time of the MSHA inspection. The judge concluded that because "the inspector did not observe any violations being committed but ... based his issuance of the [section] 104(d) orders ... upon evidence of past violations", the orders were not properly issued pursuant to section 104(d). 8 FMSHRC at 923. Accordingly, the judge modified the orders to section 104(a) citations. Id.

I agree with the majority that the judge's conclusion on the question of law at issue was erroneous and that a remand for further proceedings is necessary. I write separately in order to set forth the basis for my conclusion in the context of the particular circumstances of this case.

In ruling on motions for summary decision the facts must be viewed in the light most favorable to the opposing party. United States v. Diebold, Inc., 369 U.S. 654 (1962). See 6 Moore's Federal Practice, § 56.15[8] (1985). Cast in this light, the factual background underlying the question of law before us can be summarized as follows. On February 6, 1986, an MSHA inspector was conducting an inspection at White County's mine pursuant to section 103(i) of the Mine Act. 1/ While conducting this inspection the inspector observed a chalk line drawn on the roof of the mine in Room No. 6. The chalk line extended from the last row of roof support bolts to the coal face, a distance of about 13 feet. The miner who operated the coal drill admitted that he had drawn the chalk line and that in doing so he had placed himself under unsupported roof. 2/ The

1/ Section 103(i) provides:

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals....

30 U.S.C. § 813(i).

2/ The chalk line served as a guide to ensure that the coal face would be advanced in its intended direction. See e.g., Deposition of Darrell Gene Marshall at 4.

miner's action in proceeding under unsupported roof violated mandatory standard 30 C.F.R. § 75.200.

The MSHA inspector issued an order pursuant to section 104(d)(1) of the Mine Act charging the operator with a violation of section 75.200 and finding that the violation resulted from an unwarrantable failure on the part of the operator to comply with the standard. 3/

Six days later, on February 12, 1986, the same MSHA inspector was conducting a regular quarterly inspection of the same mine. During this inspection the inspector observed footprints on the mine floor in an area of a crosscut that lacked roof support. The inspector was unable to obtain information enabling him to attribute the footprints to a particular miner. He concluded, however, that the footprints established that a miner had been under unsupported roof in violation of 30 C.F.R. § 75.200. Because the inspector further found that the violation was caused by White County's unwarrantable failure, and because he had issued a section 104(d)(1) order six days previously, this second violation of section 75.200 was alleged in an order issued pursuant to section 104(d)(2), 30 U.S.C. § 814(d)(2). (The text of section 104(d)(1) and (2) is set forth in footnote 1 to the majority opinion).

The legal challenge raised by the operator against the issuance of both orders is that because the inspector did not observe the violations being committed, i.e., he did not actually witness miners proceeding under unsupported roof but saw only physical evidence that they had done so, the violations could not be charged in orders issued pursuant to section 104(d). In another decision issued this date, the Commission has considered and rejected a challenge to the Secretary of Labor's authority to issue citations pursuant to section 104(d)(1) for violations that occurred but are not in existence so as to be observable at the time of an MSHA inspection. Nacco Mining Co., FMSHRC Docket Nos. LAKE 85-57-R, etc., September 30, 1987 (majority and concurring opinions). As explained below, White County's challenge to the issuance of orders pursuant to section 104(d) must be rejected for similar reasons.

First, as in Nacco, part of the argument advanced by the operator and accepted by the administrative law judge concerns the presence of the word "inspection" and the absence of the word "investigation" in section 104(d) and the resulting impact, if any, on the Secretary's authority to charge violations under section 104(d) based on the results of an "investigation." As was the case in Nacco, it is unnecessary to address this question in the present case. Section 104(d) provides that an MSHA inspector can undertake the enforcement action specified therein "upon any inspection of a ... mine." 30 U.S.C. § 814(d)(1) (emphasis added). The two section 104(d) orders at issue in the present case were issued by the MSHA inspector upon a section 103(i) spot inspection and a section 103(a)

3/ An order was issued pursuant to section 104(d)(1) because a citation had been issued to the operator, within the preceding 90 days, for a violation that MSHA found to be a significant and substantial violation caused by the operator's unwarrantable failure. 30 U.S.C. § 814(d)(1).

regular quarterly inspection, respectively. Therefore, the question of whether MSHA can proceed under section 104(d) based upon the fruits of an "investigation" is not presented by this case and properly is left to a case in which that issue actually is presented. Nacco, slip op. at 14-15 (concurring opinion).

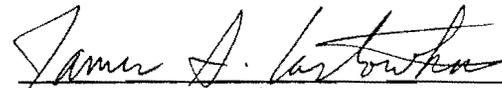
Second, because White County's arguments concerning the grammatical structure of section 104(d) parallel those of the operator in Nacco, I reject them for the reasons stated in my concurring opinion in Nacco. In particular, I conclude that a plain reading of section 104(d) permits the Secretary to cite the operator thereunder for violations that occurred prior to an MSHA inspector's arrival at the mine as well as for violations actually observed by the inspector. Nacco, slip op. at 15-16 (concurring opinion).

Third, as in Nacco, no damage is done to the enforcement logic underlying section 104(d) by upholding the Secretary's right to proceed under section 104(d) in citing the violations at issue. The distinguishing characteristic of section 104(d) is its focus on the operator's conduct in connection with a violation, *i.e.*, did the operator act "unwarrantably". The nature of this inquiry and the manner in which it is determined are the same regardless of whether an MSHA inspector is present to observe the violative conduct. Nacco, slip op. at 17-18 (concurring opinion). Furthermore, an important safety purpose is served by upholding the Secretary's right to direct one of his "most powerful instruments for enforcing mine safety" against violative conduct occurring out of the sight of an MSHA inspector. *Id.* at 18-19, quoting UMWA v. FMSHRC & Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir., 1984). As is the case with an observed violation, applying section 104(d)'s enforcement scheme against unobserved violations will serve to forcefully dissuade repetition of the violative conduct. *Id.*

Fourth, no practical problem is presented by upholding the Secretary's right to proceed under section 104(d) in the circumstances of the present case. Even before the issuance of the section 104(d) orders challenged here, the operator already was under a section 104(d) probationary chain. *See* n. 3, *supra* (concurring opinion). The inspector's issuance of the first section 104(d) order for a violation that the drill operator admitted he had just committed, and the issuance of the second section 104(d) order six days later for a violation that apparently had occurred only shortly before the inspector's arrival (*see* Deposition of MSHA inspector at 7), present none of the dire consequences claimed to be caused by permitting the citation under section 104(d) of violations not actually observed at the time of their commission. *See, e.g.*, White County's brief at 13-17. Prior to the issuance of the orders contested in this case, the operator knew that it was on a section 104(d) chain and was aware of the consequences that would flow from repetition of further unwarrantable violations. The violations alleged to have been caused by the operator's unwarrantable failure were cited by the inspector almost immediately after their occurrence. As was the case in Nacco, when measured against the record before us, the specter of abuse that the operator raises against the Secretary's right to proceed under section 104(d) for violations not observed by an inspector proves far more theoretical than factual.

Finally, the one facet of the enforcement of section 104(d) that distinguishes the present case from Nacco requires no difference in result. In Nacco the enforcement action taken by the Secretary was the issuance of a section 104(d)(1) citation. Here, the MSHA inspector issued section 104(d)(1) and section 104(d)(2) orders. The course of the inspector's enforcement actions, however, was dictated by the statutory scheme, not by an exercise of discretion on his part. Once the inspector made the findings set forth in section 104(d) concerning the existence of the violations and the nature of the operator's conduct in connection with the violations, his issuance of orders pursuant to section 104(d) was mandated by the Mine Act. Thus, whether a citation or an order is to be issued under section 104(d) is determined solely by whether and where the operator is on a section 104(d) probationary chain, and the facts surrounding the violation. Insofar as the appropriate extent of the withdrawal of miners caused by the issuance of an order is concerned (See slip op. at 5 n.6 (majority opinion)), section 104(d)(1) provides that the withdrawal order shall cover "all persons in the area affected by such violation." 30 U.S.C. § 814(d)(1). The record in the present case provides absolutely no indication that the inspector's exercise of his authority to order withdrawal based on the violations at issue exceeded proper bounds. See, e.g., Oral Arg. Tr. at 5-6.

Accordingly, I concur in the majority's reversal of the administrative law judge's grant of partial summary judgment and the remand for further appropriate proceedings.


James A. Lastowka
Commissioner

Chairman Ford, dissenting:

For the reasons stated in my dissent today in Nacco Mining Co., 9 FMSHRC _____ (Sept. 30, 1987), I would affirm the decision of Administrative Law Judge Melick in this case. That dissent is, therefore, incorporated by reference herein. In my view, the Mine Act does not authorize the issuance of any unwarrantable failure sanctions, be they citations in Nacco or withdrawal orders here, when the violations in question are past, completed and not observed by the issuing inspector.

Furthermore, as noted at p. 35 of my dissent in Nacco, supra, all necessary safety and health purposes would have been served, within the statutory framework, if the violations in this case had been cited under section 104(a). 30 U.S.C. 814(a). Production would have been interrupted until the offending miners had been reinstructed in proper procedures regarding unsupported roof. Here, the imposition of one of the Secretary's more formidable enforcement tools served no additional purpose other than the hollow castigation of the mine operator.

Accordingly, I dissent.


Ford B. Ford
Chairman

Distribution

Ann Rosenthal, Esq.
Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Thomas W. Meyers, Esq.
United Mine Workers of America
56000 Dilles Botton
Shadyside, Ohio 43947

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Paul W. Reidle, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor, 6700 Grant St.
Pittsburgh, Pennsylvania 15219

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1987

EMERALD MINES CORPORATION	:	
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 85-298-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves the issuance of a citation pursuant to section 104(d)(1) of the Mine Act by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") as a result of an inspection conducted pursuant to section 103(g)(1) of the Act. 1/ Commission Administrative Law Judge

1/ Section 104(d)(1) states:

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 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

Gary Melick held that the section 104(d) citation was not properly issued because the cited violative event had occurred several days before the inspector visited the mine. The judge concluded that, because the inspector had been engaged in an investigation of a past event rather than in an inspection of an existing condition, only a section 104(a) citation could be issued. 8 FMSHRC 324 (March 1986)(ALJ). The Commission granted the petition for discretionary review filed by the United Mine Workers of America ("UMWA") and heard oral argument. In another case decided this date, Nacco Mining Co., 9 FMSHRC __, Docket Nos. LAKE 85-87-R and 86-2 (September 30, 1987), we concluded that the Mine Act permits the issuance of a section 104(d)(1) citation under circumstances similar to those presented in this proceeding. For the reasons set forth in Nacco, we reverse and remand.

The essential facts are not in dispute. On July 30, 1985, MSHA Inspector Joseph Koscho received a complaint pursuant to section 103(g)(1) of the Mine Act (n. 1 infra). The complaint alleged that a

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.

30 U.S.C. § 814(d)(1).

Section 103(g)(1) provides in part:

Whenever a representative of the miners or a miner in the case of a ... mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists, ... such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation.... Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this [Title]. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. § 813(g)(1).

violative accumulation of methane had occurred at the No. 1 Mine of Emerald Mines Corporation ("Emerald"), an underground coal mine located in Pennsylvania.

On July 31, 1985, Inspector Koscho went to the mine and reviewed records with respect to the methane detectors and interviewed miners who were present when the alleged methane accumulation occurred. On August 1, 1985, the inspector visited the site of the alleged accumulation, tested for methane, and found only a small amount. He also tested the methane monitor on the continuous mining machine used on July 29 and found it to be working. However, on the basis of statements of miners whom he interviewed, the inspector determined that on July 29 there had been a violation of mandatory safety standard 30 C.F.R. § 75.308 when, following the detection of methane accumulations of 2.5% to 2.6% in the 002 section, the continuous mining machine was not immediately de-energized while changes were being made in the ventilation of the working places. 2/

On August 8, 1985, the inspector issued to Emerald a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 75.308. The inspector also designated the violation as being of a "significant and substantial" nature. On August 24, 1985, at the direction of his supervisor, Inspector Koscho modified the citation to a citation issued pursuant to section 104(d)(1) of the Act to reflect MSHA's assertion that the violation was caused by Emerald's unwarrantable failure to comply with section 75.308.

Emerald contested the propriety of the section 104(d)(1) citation essentially on the basis that it was issued for a violation that no longer existed when detected by the MSHA inspector. Emerald then paid the civil penalty proposed by the Secretary for the alleged violation. In his decision, the judge found that Emerald's payment of the proposed penalty waived any contest of the violation itself and of the significant and substantial finding. 8 FMSHRC at 325. However, the judge also found that Emerald had tendered its payment under the mistaken impression that the citation was issued pursuant to section 104(a) of the Act rather than section 104(d)(1). The judge ruled that, in fairness, and to avoid any future detriment to the operator stemming from an inaccurate record of its history of violations, Emerald's challenge to

2/ 30 C.F.R. § 75.308 states in part:

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off....

the unwarrantable failure finding survived. 3/

With respect to the allegation of unwarrantable failure, the judge held that such a finding under section 104(d) must be based upon an inspection of the mine, and that the citation in this matter was not founded upon an inspection but rather upon an investigation conducted through subsequent interviews and the examination of records several days later. 8 FMSHRC at 328. This conclusion resulted from the judge's view that inspections pertain only to examinations of existing conditions and investigations pertain only to past events. Id. The judge then modified the section 104(d) citation to a citation issued pursuant to section 104(a) of the Act and dismissed the case. 8 FMSHRC at 328-29. We conclude that the judge erred.

We have held today in Nacco that the enforcement sanction of a section 104(d) citation is not restricted to existing violations observed by the inspector. Rather, a citation issued pursuant to section 104(d)(1) may be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards -- regardless of whether the violations are in existence at the time that they are detected by an inspector. Nacco, slip op. at 5-10. We based this conclusion upon an examination of the text of section 104(d), its legislative history, the section's purpose of deterrence, and the overall enforcement scheme of the Mine Act. Id. We pointed specifically to the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for increasingly serious violations or operator behavior." Slip op. at 5, quoting Cement Division, National Gypsum Co., 3 FMSHRC 822, 828 (April 1981). We held:

The threat of th[e] "chain" of citations and orders under section 104(d) provides a powerful incentive for the operator to exercise special vigilance in health and safety matters because it is the conduct of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. ... To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.

* * * *

Throughout section 104(d), enforcement action is

3/ No issue concerning this aspect of the judge's decision has been raised on review and we intimate no view as to the propriety of that ruling.

consistently linked to the inspector's determination that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation.

Slip op. at 6 (citations omitted; emphasis in original).

As noted in Nacco, many violations, by their very nature, are unlikely to be observed until after they occur. Slip op. at 7. The violation at issue in this case presents precisely such a situation. The condition precedent to a violation of section 75.308 is the presence of 1% or more of methane in a working place. The transitory nature of methane accumulations and the vital necessity of immediately reducing the level below 1% makes it unlikely that an inspector would discover a violation of section 75.308 while it was occurring. Under the judge's decision, such a past violation, even though caused by an operator's unwarrantable failure, would escape the sanction and deterrent effect of section 104(d), which is designed to address unwarrantable failure. As we concluded in Nacco: "Were we to agree with the approach adopted by the judge, the statutory disincentive for [such] operator misconduct would be lost." Slip op. at 7.

As we indicated in Nacco, the term "inspection" in section 104(d) of the Mine Act is not limited, for purposes of that section, to observation of presently existing circumstances but includes inquiry into past events as well. Slip op. at 7-8. The present case was initiated by a complaint of a possible violation made to MSHA pursuant to section 103(g)(1) of the Act. That section provides to representatives of miners the right to obtain an immediate "inspection" whenever the representative has reasonable grounds to believe that a violation exists. We stated in Nacco:

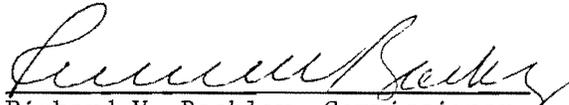
There is nothing in the language of section 103(g) that requires the violation to be ongoing when the inspector arrives at the mine site. As a practical matter, the violation may have been corrected shortly after the request of the miners' representative and before the inspector reaches the mine. Yet the inspector is nonetheless on an "inspection" and, if he finds that a violation has occurred, he may cite it using the full panoply of sanctions available under the Act.

Slip op. at 8.

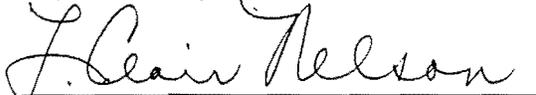
Arguments similar to those advanced by the operator in Nacco concerning the meaning of "investigation" and "inspection," the meaning of the term "finds" in section 104(d), and the asserted "present time" focus of section 104(d), have been raised herein by Emerald and are rejected for the reasons set forth in Nacco.

In sum, we conclude that a section 104(d) citation resulting from a section 103(g)(1) inspection may be based upon a violation detected during an inspection occurring after the violation has ceased to exist. Thus, we hold that the judge erred in concluding that the citation was issued improperly under section 104(d) of the Mine Act.

Accordingly, we reverse the judge and vacate his modification of the section 104(d) citation to a section 104(a) citation. Because the judge held that the section 104(d) citation was not issued properly, he did not consider the merits of the unwarrantable failure allegation included in the citation. Therefore, we remand this matter to the judge for further proceedings consistent with this decision.


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

In this case the administrative law judge granted a motion by Emerald Mines Corporation for partial summary decision. Although Emerald raised several alternative grounds upon which it believed summary decision was appropriate, the sole basis articulated by the judge for his grant of the motion was that because "the citation at bar was not based on an inspection of the mine but upon an investigation through subsequent interviews and the examination of records conducted by the inspector several days after the incidents giving rise to the violation", the violation could not be properly cited under section 104(d). 8 FMSHRC at 328. See also Tr. at 114-16. Accordingly, the judge modified the citation to one issued pursuant to section 104(a) of the Mine Act. Id.

I agree with the majority that the judge's grant of partial summary decision was erroneous. I write separately to set forth the basis for my conclusion in the context of the particular circumstances of this case.

Although the judge concluded that the citation was not properly issued pursuant to section 104(d) because it was not based "on an inspection" of Emerald's mine, the record flatly contradicts his premise. It is undisputed that the MSHA inspector was at Emerald's mine pursuant to a miner's report of an alleged violation of the Mine Act and his request for an inspection pursuant to section 103(g) of the Act. The miner's handwritten report to MSHA stated:

July 30, 1985

I am requesting a 103G [sic] at the Emerald Mine, Waynesburg Pa. of an incident that occurred [sic] on July 29, 1985 in the 002 section on the 8am to 4pm shift.

Amount of 2.6% [methane] was detected and the mine foreman did not take the appropriate action according to the law, but proceeded to make adjustments in air by pulling tubing out.

Exh. R-1.

Section 103(g) of the Mine Act, referenced in the miner's report to MSHA, provides:

Whenever a representative of the miners or a miner... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be

reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

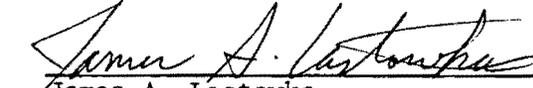
30 U.S.C. § 813(g)(1) (emphasis added). Pursuant to this grant of statutory authority, the MSHA inspector conducted the requested inspection and, as a result, issued the contested citation. Therefore, the challenged enforcement action taken by the Secretary under section 104(d) was indeed taken "upon an inspection" and the judge erred in finding otherwise.

Although the judge did not discuss any further rationale for his grant of partial summary decision, he did cite several administrative law judge decisions, including that in Nacco Mining Co., 8 FMSHRC 59 (January 1986) (ALJ), in support of his disposition. Today, the Commission has issued its decision in Nacco reversing the judge's decision relied upon by the judge in the present case. In Nacco, the majority and concurring opinions extensively discuss the reasons why, as a matter of law, it is not improper for MSHA to proceed under section 104(d) for violations that occurred but no longer exist at the time of an MSHA inspection. Because the arguments raised by the operator in the present case parallel, in all essentials, those raised and addressed in Nacco, I reject them for the reasons stated in my concurring opinion in Nacco, slip op. at 12-20.

I also note that in the present case, as in Nacco and White County Coal Corp., FMSHRC Docket No. LAKE 86-58-R, etc., also issued this date, the record discloses no impediment to a logical application of the enforcement scheme provided for in section 104(d). The violation at issue was alleged to have occurred on Monday, July 29, 1985. It was reported to MSHA on Tuesday, July 30th. On July 31st and August 1st the MSHA inspector conducted a section 103(g) inspection at the mine concerning the reported violation. On August 8th he issued a citation pursuant to section 104(a) of the Mine Act, which citation also found the violation to be "significant and substantial". On August 24th, a further finding that the violation resulted from an unwarrantable failure on the part of the operator was made. All the necessary predicates for a section 104(d)(1) citation being met, the citation accordingly was modified to a section 104(d)(1) citation. With the issuance of this modification, Emerald was given timely notice that it was subject to a section 104(d) probationary chain and that further unwarrantable violations during the next 90 days would result in the issuance of withdrawal orders.

Thus, in the circumstances of this case, the Secretary's action in proceeding under section 104(d) in citing the violation at issue was procedurally proper and consistent with the intended purpose underlying section 104(d). As in Nacco, "no injustice to the operator or ... perversion of section 104(d)'s enforcement scheme has been caused by the Secretary's actions." Nacco, slip op. at 20 (concurring opinion).

Accordingly, I join the majority in reversing the judge's decision and in remanding for further proceedings.


James A. Lastowka
Commissioner

Chairman Ford, dissenting:

For the reasons stated in my dissent today in Nacco Mining Co., 9 FMSHRC (Sept. 30, 1987) I would affirm the decision of Administrative Law Judge Melick. That dissent, therefore, is incorporated herein by reference. In my view, sanctions issued pursuant to section 104(d), 30 U.S.C. 814(d) are limited to ongoing violations actually observed by inspectors in the course of their inspections. Here, the citation, originally issued pursuant to section 104(a), 30 U.S.C. § 814(a), specified that it was based upon an investigation conducted in the course of several days after the violation was alleged to have occurred. Section 104(d) clearly limits unwarrantable failure sanctions to those violations discovered in the course of inspections, not investigations into past occurrences.

Furthermore, the facts of this case raise the same issues with respect to the 90 day probationary period of section 104(d) as were raised in Nacco, supra. Here, the violation was alleged to have occurred on July 29, 1985. It was charged in a section 104(a) citation issued August 8, 1985. Twenty-five days after the violation was alleged to have occurred, the citation was modified August 23, 1985, on orders from the issuing inspector's superiors, to allege unwarrantable failure under section 104(d).

As in Nacco, the majority gives no guidance as to how the 90 day period is now to be computed when the triggering citation can be issued post hoc, even though Emerald specifically raises the issue. Brief at pp. 17-18.

Does the probationary period begin on July 29, August 8, or August 23? If, as the Secretary argues, the latter date is correct, the operator in effect is subject to a 115 day probationary period and the statutory period of 90 days is jettisoned. See generally, Nacco dissent, supra at pp. 33-34.

Lastly, on the facts of this case, it is apparent that the term "inspection" has now been thoroughly elasticized to encompass all Secretarial enforcement activity. The so-called finding of unwarrantability was in fact made by the issuing inspector's superiors who conducted no investigation let alone inspection with respect to the alleged violation. Such transparent bootstrapping so as to impose the unwarrantable failure chain for a past abated violation seriously compromises the voluntary compliance philosophy of the Act. See Nacco dissent, supra, p. 26.

Accordingly, I dissent.


Ford B. Ford
Chairman

Distribution

Ann Rosenthal, Esq.
Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Thomas W. Meyers, Esq.
United Mine Workers of America
56000 Dilles Botton
Shadyside, Ohio 43947

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Paul W. Reidle, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor, 6700 Grant St.
Pittsburgh, Pennsylvania 15219

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1987

GREENWICH COLLIERIES, DIVISION :
OF PENNSYLVANIA MINES :
CORPORATION :
v. : Docket Nos. PENN 85-188-R :
 : PENN 85-189-R :
SECRETARY OF LABOR, : PENN 85-190-R :
MINE SAFETY AND HEALTH : PENN 85-191-R :
ADMINISTRATION (MSHA) : PENN 85-192-R :
and :
UNITED MINE WORKERS :
OF AMERICA (UMWA), :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
and :
UNITED MINE WORKERS OF :
AMERICA (UMWA) :
v. : Docket No. PENN 86-33 :
GREENWICH COLLIERIES :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This consolidated contest and civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents us with a question of law, similar to that decided this date in Nacco Mining Co., 9 FMSHRC ____, Docket Nos. LAKE 85-87-R and 86-2 (September 30, 1987): May the Secretary of Labor, in the course of investigations, issue orders pursuant to section 104(d) of the Mine Act based upon violations that are detected after the violations have ceased

to exist? 1/ Commission Administrative Law Judge Roy L. Maurer held that such orders could not be issued. 8 FMSHRC 1105 (July 1986)(ALJ). For the reasons stated in our decision in Nacco, supra, we reverse and remand.

The essential facts are as follows: 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

1/ 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.

30 U.S.C. § 814(d)(1).

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.

Greenwich contested the orders and subsequently filed a motion for summary decision, arguing that the orders were not issued properly under section 104(d) because the inspector had not observed the violations during an inspection but had concluded that the violations occurred based on MSHA's investigation after the violations had ceased to exist. In granting Greenwich's motion, the judge relied upon certain unreviewed decisions of Commission administrative law judges, including two decisions that we reverse today. ^{2/} He held that the orders were invalid "because an order issued under section 104(d) should be based on an inspection as opposed to an investigation and the above orders state on their face that the violations which had allegedly occurred are based on an investigation and no longer then existed." 8 FMSHRC at 1107. Consequently, the judge vacated the unwarrantable failure allegations included in the section 104(d) orders, modified the orders to citations issued pursuant to section 104(a), 30 U.S.C. § 814(a), and stated that further proceedings would be held to resolve the remaining issues. 8 FMSHRC at 1107. Greenwich's motion for summary decision also contended that the orders did not meet certain procedural prerequisites of section 104(d)(1) in that they were not issued within 90 days of the underlying section 104(d) citation and were not issued "forthwith." Given his disposition of the motion, the judge did not reach the merits of these contentions.

The Secretary of Labor, joined by the United Mine Workers of America, which intervened in the proceeding, filed with the Commission a Petition for Interlocutory Review and a Motion to Stay Proceedings. We granted both the petition and the motion and heard oral argument. We conclude that the judge erred. In Nacco, supra, we set forth the proper interpretation and application of section 104(d). We held that the enforcement sanctions of section 104(d) are not restricted to existing violations observed personally by the inspector. Rather, these sanctions may also be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards -- regardless of whether the violations are in existence at the time of their detection. Nacco, slip op. at 5-10. Accord: Emerald Mines, infra, slip op. at 4-6. We based this conclusion on the text of section 104(d), its legislative history, the section's purpose of deterrence and the overall enforcement scheme of the Mine Act. We emphasized the importance of unwarrantable failure findings within the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for

^{2/} Nacco, supra; Emerald Mines Corporation, 9 FMSHRC ____, Docket No. PENN-85-298-R (September 30, 1987).

increasingly serious violations or operator behavior." Nacco, slip op. at 5, quoting Cement Division, National Gypsum Co., 3 FMSHRC 822, 828 (April 1981). We held:

The threat of th[e] "chain" of citations and orders under section 104(d) provides a powerful incentive for the operator to exercise special vigilance in health and safety matters because it is the conduct of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. ... To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.

* * * *

Throughout section 104(d), enforcement action is consistently linked to the inspector's determination that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation.

Slip op. at 6 (citations omitted; emphasis in original).

In addition, we rejected the suggestion that Congress intended to distinguish between enforcement actions based upon an inspection and those based upon an investigation, and held that inclusion of the terms "inspection or investigation" in section 104(a) as compared to use of the term "inspection" alone in section 104(d) was without legal significance regarding enforcement pursuant to section 104(d). Slip op. at 7-8. We based this conclusion upon the fact that the terms are not defined in the Mine Act, and that "common usage does not limit the meaning of 'inspection' to an observation of presently existing circumstances nor restrict the meaning of 'investigation' to an inquiry into past events." Slip op. at 8. The varied use of these terms within the Act and its legislative history also support this conclusion. Slip op. at 8-9.

Although the present case involves orders issued pursuant to section 104(d)(1), whereas Nacco involved a citation issued pursuant to that section, for the reasons stated in Nacco, we hold that orders issued under section 104(d)(1) can also be based upon prior violations not observed by the inspector at the time of occurrence. In another case decided today, we have reached an identical conclusion. White

County Coal Corp., 9 FMSHRC ____, Docket Nos. LAKE 86-58-R and LAKE 86-59-R (September 30, 1987). Further, as we held in White County, supra, in general and assuming the other prerequisites for their issuance have been met, "orders are the procedural vehicles both specified and required by the Mine Act for alleging violations involving unwarrantable failure once a section 104(d)(1) citation has been issued." Slip op. at 4.

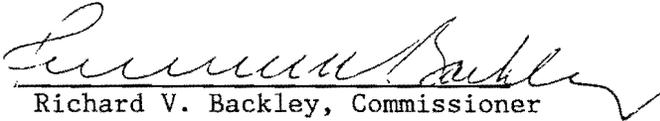
We noted in Nacco that many violations, by their very nature, are not likely to be observed or detected until after they occur. Slip op. at 7. This is particularly so where the violation is a failure to act as required or where the violation causes or contributes to the event being investigated. Both types of violation are present here. Two of the section 104(d) orders allege a failure to conduct required mine examinations, one being the pre-shift examination of the active workings and the other being the weekly examination of the mine's ventilation system. These examinations are designed to monitor potentially hazardous conditions, including the accumulation of excessive levels of methane. As such, they warn the operator of impending danger and are necessary to assure overall mine safety. Under the judge's decision, such critical violations, even though caused by an operator's unwarrantable failure, would escape the unwarrantable failure sanction established by Congress.

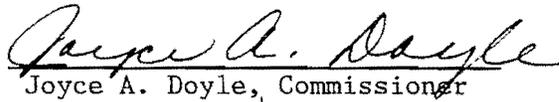
The remaining contested orders allege an insufficient volume and velocity of air ventilating the mine, violations of the mine's approved ventilation system and methane and dust control plan, and a failure to take required precautions when making changes in mine ventilation. These allegations arose out of the inspection and investigation that the Secretary was required to conduct in order to determine, among other things, the cause of the accident and whether there was compliance with mandatory health and safety standards. 30 U.S.C. § 813. One purpose of such inspections and investigations is to avoid future accidents. If the Secretary determines that violations contributing to an accident were caused by the operator's unwarrantable failure to comply with mandatory health and safety standards, citation of the violations pursuant to section 104(d) may deter future unwarrantable failure by an operator to assure compliance with mandatory health or safety standards. Congress did not intend to limit the inspectors' power to sanction unwarrantable operator conduct by removing from the purview of section 104(d) violations that occurred prior to a disaster but which were discovered only after the disaster. As we noted in Nacco, "[t]he focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation." Slip op. at 6. For purposes of section 104(d), Congress did not intend to make distinctions between the citation of past and presently existing violations when it used the words "inspection" and "investigation" in the Act. Slip op. at 7-8. Consequently, section 104(d) enforcement actions may result from "inspections" as well as "investigations."

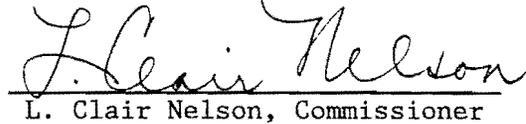
Finally, although Greenwich argues that requiring the withdrawal of miners for a violation that no longer exists violates due process

considerations, no miners were withdrawn from the mine when the orders in this matter were issued. The Secretary asserts that under such circumstances the issuance of an order that does not require withdrawal is consistent with his enforcement policy. Tr. Oral Arg. 20-21. This policy is appropriate in such circumstances and in no small way has persuaded us to conclude that the operator's due process argument on this issue is not well founded.

For the foregoing reasons, we reverse the judge's legal conclusion that the orders here are invalid because they were issued based upon an investigation and after the violations ceased to exist. As noted above, Greenwich also challenged the validity of the orders because they were not issued within 90 days of the section 104(d)(1) citation upon which they were based and were not issued "forthwith." Slip op. at 3. The judge did not reach these issues and on remand shall rule specifically on them. Further, there are other issues in this case regarding the merits of the alleged violations and the Secretary's unwarrantable failure allegations that should be resolved by the judge on remand.


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

In this case the administrative law judge granted in part a motion by Greenwich Collieries for summary decision. In its motion Greenwich challenged the validity of five orders issued by MSHA pursuant to section 104(d)(1) of the Mine Act. Greenwich specified three grounds upon which it believed summary decision was appropriate:

(1) The orders were not issued as a result of, and the alleged violations were not detected during, an inspection, as required by section 104(d)(1); on the contrary, MSHA concluded that the alleged violations had occurred based on an investigation after the alleged violations no longer existed;

(2) the orders were not issued within 90 days of the issuance of the section 104(d)(1) citation upon which they were based; and

(3) the orders were not issued "forthwith" as required by the Mine Act.

Greenwich's Motion for Summary Decision at 2.

The administrative law judge granted Greenwich's motion on the first ground, finding it "dispositive." 8 FMSHRC at 1107. Therefore, he did not reach Greenwich's other arguments in support of its request for summary decision.

I agree with the majority that the judge's decision granting summary decision must be reversed and the case remanded for further proceedings. I write separately to explain the basis for my conclusion in the context of the particular circumstances of this case.

In ruling on motions for summary decision the facts must be viewed in the light most favorable to the opposing party, here, the Secretary. United States v. Diebold, Inc., 369 U.S. 654 (1962). See 6 Moore's Federal Practice, §56.15[8](1985). In any event, the essential facts are undisputed and can be summarized as follows. On February 16, 1984, three miners were killed and several others were injured as a result of an explosion at the Greenwich No. 1 Mine. This incident triggered MSHA's exercise of most of the various statutory responsibilities assigned to it under the Mine Act. MSHA participated in rescue and recovery efforts, conducted inspections of the mine, investigated the cause of the explosion, issued numerous citations and orders alleging violations of the Mine Act and issued a final report setting forth its findings and conclusions concerning the explosion.

The particular action taken by MSHA that is challenged by the operator in the present case is the issuance of five orders pursuant to section 104(d)(1) of the Mine Act. Each of these orders allege a violation of a mandatory standard, which MSHA determined contributed to the cause of the explosion. The orders were issued on March 29, 1985, thirteen and one-half months after the explosion. The orders state that the violative conditions were observed "during the investigation" of the explosion.

The challenge to the procedural validity of these orders that was found by the judge to be dispositive in part concerns whether, as a matter of law, the Secretary properly can cite under section 104(d) of the Mine Act violations of the Act that occurred, but which were no longer in existence at the time of an MSHA inspection so as to be observable by an inspector. As to this aspect of the question of law before us, I agree with the majority that simply because a violation occurs out of the sight of an MSHA inspector and the violative condition no longer exists at the time the inspector arrives at the mine, the Secretary is not precluded from charging the violation in a citation or order issued pursuant to section 104(d). For the reasons stated in my concurring opinions in Nacco Mining Co., White County Coal Corp., and Emerald Mines Corp., all issued this date, the Secretary's authority to proceed under section 104(d) in such circumstances is consistent with the plain language of section 104(d). Furthermore, as I emphasized in Nacco, White County and Emerald, depending on the particular circumstances involved, the citation of unobserved violations pursuant to section 104(d) can serve to accomplish that section's intended purpose without damaging its underlying enforcement logic and without creating impractical implementation problems.

Greenwich's challenge to the orders at issue includes the further assertion that the Secretary properly cannot proceed under section 104(d) if his determination that a violation of the Mine Act occurred resulted from an MSHA "investigation", rather than an MSHA "inspection." This argument also was raised by the operators in Nacco, White County and Emerald. As explained in my concurring opinions in those cases, however, consideration of their argument was unnecessary because each of those cases involved MSHA enforcement activity under section 104(d) that was, in fact, undertaken "upon an inspection." 30 U.S.C. § 814(d)(1). The factual circumstances surrounding MSHA's enforcement action in the present case are fundamentally different from those in the other three cases and serve to better focus consideration of the "inspection/investigation" issue. 1/

Section 104(d)(1) of the Mine Act provides that the enforcement action specified therein can be undertaken by the Secretary "upon any inspection of a coal or other mine." 30 U.S.C. § 814(d)(1) (emphasis added). The operator argues, and the judge agreed, that because the word "inspection" and the word "investigation" are both used in the Mine Act in referring to various statutory responsibilities of the Secretary, a distinctive impact on the nature of the Secretary's activities was intended depending on the particular word used in

1/ Even in this case the Secretary suggests that consideration of the issue may be inappropriate because, he asserts, the violative conditions actually were observed by MSHA inspectors conducting post-accident inspections. Oral Arg. Tr. at 3-4; Sec. Br. at 11-12. It is clear, however, that the Secretary's issuance of the orders some thirteen and one-half months after the explosion was, in large part, based on information derived from MSHA's extensive investigation into the causes of the explosion. Therefore, the question of law reserved in the other cases is fairly presented in the present case.

a particular statutory provision. See, e.g., sections 103(a), 104(a) and 107(a)(inspections and investigations); sections 103(b) and 105(c)(2)(investigations); and sections 104(d) and (e)(inspections). As related to the particular circumstances of the present case, the argument advanced is that the challenged orders were all issued upon an "investigation", rather than an "inspection", and therefore were not properly issued under section 104(d).

The varying uses in the Mine Act of the words "inspection" and "investigation" are too numerous to attribute simply to editorial oversight or imprecise draftmanship. The Mine Act does not define the words, however, requiring that common usage be the first resort to determine their meaning. 2A Sutherland Statutory Construction, §§ 47.01, 47.28 (4th ed. 1984). In Webster's Third New International Dictionary (1971) common definitions of the words are provided which suggest that there are shades of distinctions in their meanings, but which also suggest that the meanings of the two words overlap to a certain extent and are not mutually exclusive. 2/ As is stated in the majority opinion in Nacco, in common usage "[b]oth words can encompass an examination of present and past events and of existing and expired conditions and circumstances." Nacco, supra, slip op. at 8.

The question therefore becomes whether the distinctions or the similarities in the meanings of the words are to be given emphasis in the context of section 104(d). If the distinctions in meanings are emphasized, then the operator is correct and the Secretary is not authorized to issue citations or orders pursuant to section 104(d) if his determination that a violation occurred is based on information derived from an investigation. Conversely, if the similarities in the meanings of the words are given emphasis, then violations determined to exist as a result of MSHA investigations properly may be cited under section 104(d).

For the reasons stated below, I agree with the majority's discussion and conclusion in Nacco (slip op. at 7-9) that, in the particular context of section 104(d), the presence of the word "inspection" and the absence of the word "investigation" in referring to the Secretary's enforcement activities authorized therein was not intended to have the substantive effect on the Secretary's authority argued for by the operator.

The distinguishing feature of section 104(d) is its authorization of the Secretary to make a special finding that a violation was caused by an

2/ E.g., "inspection: a strict or close examination; ... an examination or survey of a community, or premises, or an installation by an authorized person (as to determine compliance with regulations or susceptibility to fire or other hazards."

"investigation: detailed examination: study, research; a searching inquiry, an official probe."

Webster's, supra, at 1170, 1189.

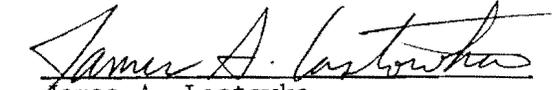
"unwarrantable failure" of the operator to comply with the Act or a mandatory standard. The particular importance of an unwarrantable failure finding stems from the probationary effect triggered by its presence in a citation or order. Once a citation containing an unwarrantable failure finding and a significant and substantial finding has been issued, any further violation also caused by an unwarrantable failure within 90 days requires issuance of a withdrawal order, as do still further violations until a complete, clean inspection of the mine has taken place. UMWA v. FMSHRC & Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984). Thus, the plain focus of section 104(d)'s enforcement scheme is on the conduct of a mine operator in relation to the occurrence of a violation. If a violation results from an operator's unwarrantable failure, "the statute requires that a higher toll be exacted from the operator than is exacted in situations where, although a violation has occurred, the operator has not acted unwarrantably." Nacco, slip op. at 18 (concurring opinion).

Section 104(d) is one of "the Secretary's most powerful instruments for enforcing mine safety" (Kitt Energy, *supra*, 768 F.2d at 1479), and the construction of unnecessary impediments hindering the Secretary's ability to fully exercise this special authority should not be undertaken lightly. As described above the focus of section 104(d) is on the conduct of an operator in connection with a violation. In this regard it must be emphasized that the nature of an operator's conduct in relation to a particular violation will not change depending on whether MSHA discovered the fact of violation through an inspection or through an investigation. Acceptance of the operator's argument in the context of section 104(d) would mean that the enforcement procedure established by Congress to specifically address and deter unwarrantable conduct on the part of mine operators could not be invoked in a large number of instances simply because the operator's unwarrantable violation was discovered during an MSHA "investigation" rather than during an MSHA "inspection."

Given the remedial purpose of the Mine Act, the deterrent purpose of section 104(d) in particular, the lack of special definitions of "inspection" and "investigation" in the Mine Act, the substantial overlap in the commonly understand meanings of the words and the lack of any overriding contrary indication in the legislative history as discussed by the majority and dissenting opinions in this decision and the other decisions issued this date, I conclude that the Secretary properly can proceed under section 104(d) of the Mine Act in issuing citations and orders for violations that MSHA determines, during the course of an investigation, to have occurred at a mine. Therefore, I concur in the majority's reversal of the judge's contrary conclusion and in the remand for further appropriate proceedings.

I note that the further proceedings in this case necessarily will encompass consideration of the operator's remaining challenges to the validity of the section 104(d) orders at issue which were not reached by the judge in his first decision. These arguments concern the effect, if any, on the validity of the section 104(d) orders caused by the lapse of time between the occurrence of the violations, MSHA's determination that the violations occurred and the date that the orders ultimately were issued. In rejecting those arguments of the operator discussed in this opinion, I intimate no view as to the merits of the remaining arguments. They too raise

important questions that will have to be resolved in light of the language and purpose of section 104(d), the particular circumstances surrounding the violations and the manner in which the Secretary proceeded in issuing the contested orders. 3/


James A. Lastowka
Commissioner

3/ I believe that the majority's expression of opinion concerning the Secretary's policy of issuing withdrawal orders that have no idling effect is premature. Slip op. at 5-6. In my view, that aspect of this case requires full consideration in conjunction with the disposition of the important issues remaining in this case.

Chairman Ford, dissenting:

For the reasons stated in my dissent today in Nacco Mining Co., 9 FMSHRC _____ (Sept. 30, 1987), I would affirm the decision of Administrative Law Judge Maurer in this case. That dissent is, therefore, incorporated herein by reference. In my view the statutory restrictions on the use of unwarrantable failure sanctions for past completed violations unobserved by the inspector apply equally to citations and orders issued under section 104(d). 30 U.S.C. 814(d).

Furthermore, as noted in my Nacco dissent, supra, at pp. 33-36, the majority's decision places no temporal restrictions on the imposition of section 104(d) sanctions. The majority suggests that a procedural challenge may lie where section 104(d) orders are issued 13 months after the issuance of an underlying 104(d)(1) citation. However, the surer remedy against such gross distortions of the unwarrantable failure "chain" would be to restrict the application of section 104(d) to extant violations observed by inspectors in the course of their inspections. I firmly contend that the statute so provides.

Unlike my colleagues, I am not persuaded that a closure order that closes no mine or part thereof - or that withdraws no miners - serves the Secretary's enforcement policy. As noted in my Nacco dissent at p. 15, such an enforcement action is a dead letter, or as Greenwich contends, a "sham." Brief at p. 13.

Accordingly, I dissent.



Ford. B. Ford
Chairman

Distribution

Ann Rosenthal, Esq.
Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Thomas W. Meyers, Esq.
United Mine Workers of America
56000 Dilles Botton
Shadyside, Ohio 43947

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Paul W. Reidl, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

R. Henry Moore, Esq.
Rose, Schmidt, Chapman, Duff & Hasley
900 Oliver Bldg.
Pittsburgh, Pennsylvania 15222

Administrative Law Judge Roy J. Maurer
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1987

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 85-169
 :
QUINLAND COALS, INC. :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and presents three issues: (1) whether substantial evidence supports Commission Administrative Law Judge William Fauver's findings of violations of 30 C.F.R. § 75.200 and 30 C.F.R. § 75.303, and his finding of negligence with respect to the violation of section 75.200 ; (2) whether an allegation by the Secretary of Labor ("Secretary") that a violation was caused by an operator's unwarrantable failure to comply with a cited standard can be contested in a civil penalty proceeding, where the order itself was not contested pursuant to section 105(d); and (3) whether the judge erred in considering certain exhibits. For the reasons that follow, we affirm the judge's findings of violation and negligence, hold that the judge erred in failing to rule on the merits of the unwarrantable failure allegation, and conclude that the judge's consideration of the exhibits was not improper.

I.

The No. 1 Mine operated by Quinland Coals, Inc. ("Quinland") is an underground coal mine located in southern West Virginia. On October 11, 1984, Ernest Thompson, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine in order to inspect seals located in the mine's East Mains area. 1/ The alleged violations concern the roof conditions in the

1/ The seals are concrete block bulkheads notched at least six inches into the ribs and flush with the floor and the roof. They were constructed following a methane explosion. Their purpose is to seal off the area where the explosion occurred from the rest of the mine.

entry in which the No. 7 seal is located.

The entry was accessible from a crosscut. In the entry and near its intersection with that crosscut, the inspector observed a large roof fall and as he walked toward the seal, he observed approximately ten broken posts lying on the ground in the entry. The inspector also observed that one side of the seal was being crushed by the weight of the roof. He noted that the roof was cracked and that the cracks ran from the roof fall to and beyond the seal. The inspector testified that he heard hissing through the cracks and that his methane detector registered an atmosphere of more than 5% methane in the immediate vicinity of the seal.

The inspector found that these conditions constituted a violation of 30 C.F.R. § 75.200 in that the roof was not adequately supported to protect persons from falls. ^{2/} The inspector also found that this violation was the result of Quinland's unwarrantable failure to comply with section 75.200 and that the violation significantly and substantially contributed to a mine safety hazard. 30 U.S.C. § 814(d)(1). Because a citation had been issued to Quinland pursuant to section 104(d)(1) of the Mine Act, within 90 days prior to the October 11, 1984 inspection, the inspector cited the violation of section 75.200 in an order issued pursuant to section 104(d)(1). Id. ^{3/} Quinland abated the

Tr. 21. See also Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 975 (1968).

^{2/} Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), provides in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

(Emphasis added.)

^{3/} Section 104(d)(1) of the Mine Act states:

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

section 75.200 violation by installing approximately 20 posts in the entry in order to support the roof.

Following the underground portion of the inspection, the inspector returned to the surface and went to the mine office where he reviewed that portion of the preshift examination record book relating to the No. 7 seal area. The inspector observed the word "clear" written in the book to describe the condition of the No. 7 seal area as found by the preshift examiner on October 11, 1984. The inspector found that the failure to record the condition of the roof and the presence of the methane indicated that the preshift examination on October 11 was inadequate and that it constituted a violation of 30 C.F.R. §75.303. 4/

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) 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.

4/ Section 75.303, which restates section 303(d)(1) of the Mine Act, 30 U.S.C. §863(d)(1), provides in part:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall ... examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section... and examine for such other hazards and violations of the mandatory health

The inspector also found that the inadequate examination was the result of Quinland's unwarrantable failure to comply with section 75.303 and significantly and substantially contributed to a mine safety hazard. Accordingly, the inspector issued a second section 104(d)(1) order of withdrawal.

Quinland did not contest the section 104(d)(1) orders within 30 days of their receipt. 30 U.S.C. §815(d). In March 1985, however, when the Secretary proposed civil penalties for the violations, Quinland requested a hearing. 30 U.S.C. §815(a). In answer to the Secretary's civil penalty assessment petition, Quinland denied that it violated the cited mandatory safety standards. In addition, Quinland asserted that "should a violation [of section 75.200] be found to exist ... the unwarrantable feature of the violation is improper."

Following an evidentiary hearing, the administrative law judge concluded that Quinland violated both sections 75.200 and 75.303. 8 FMSHRC 1175 (August 1986)(ALJ). The judge credited the testimony of the inspector and found that the condition of the roof was inadequate to protect persons from roof falls. 8 FMSHRC at 1178. Regarding the preshift examination, the judge found that the hazardous condition of the roof should have been reported by the preshift examiner on October 11, 1984, and that the failure to do so was a violation of section 75.303. 8 FMSHRC 1178-79. The judge held, however, that the failure of the preshift examiner to note the presence of methane did not violate the standard because the Secretary did not prove that methane was present at the time of the preshift examination. 8 FMSHRC at 1179.

The judge found that both violations were of a significant and substantial nature, but made no finding as to whether the violation of section 75.200 was due to Quinland's unwarrantable failure to comply with the standard. The judge assessed civil penalties of \$850 for the violation of section 75.200 and \$450 for the violation of section 75.303. We granted Quinland's petition for discretionary review.

II.

Section 75.200 requires that roof and ribs "be supported or otherwise controlled adequately." Liability for an alleged violation of this standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the

or safety standards, as an authorized representative of the Secretary may from time to time require.... Upon completing his examination, such miner examiner shall report the results of his examination to a person, designated by the operator to receive such reports... before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary....

adequacy of particular roof support must be measured against what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard. Canon Coal Co., 9 FMSHRC 667, 668 (April 1987). Cf. Ozark-Mahoney Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983), U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Measured against this test, we conclude that substantial evidence supports the judge's conclusion that the roof support in the area of the No. 7 seal was inadequate. 5/

In holding that Quinland violated section 75.200, the judge credited the testimony of the inspector that the roof support in the No. 7 seal entry was inadequate to protect persons from roof falls. 8 FMSHRC at 1178. The inspector's testimony regarding the conditions of the roof was detailed and essentially uncontradicted. The inspector described the roof fall, the broken posts, the damage to the No. 7 seal caused by the weight of the roof, and the cracks in the roof. The inspector stated that the roof had "dropped down approximately an inch ... [and] ... was leaning on what supports they had in there and the seal." Tr. 26. The inspector believed that the weight on the roof caused the posts to break. Dust on some of the broken posts indicated to the inspector that the posts had been broken for perhaps a month or two and that the deterioration of the roof was progressive.

We have recognized that a "judge's credibility findings ... should not be overturned lightly." Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). Accord, Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984). Quinland's witnesses did not dispute the condition of the roof as described by the inspector. Indeed, they confirmed generally what the inspector had seen. The mine foreman stated that the area in which the seals were located had "bad top" in places. Tr. 124. Quinland's preshift examiner acknowledged that some broken posts had not been replaced. Tr. 200. Both agreed that some posts had been broken for a month or more.

Thus, in view of the inspector's detailed testimony describing the conditions in the area of the No. 7 seal, the mine foreman's acknowledgement that the roof was bad generally and the pre-shift examiner's acknowledgement that some broken posts had not been replaced, we conclude that substantial evidence supports the judge's finding of a violation of section 75.200. Further, given this evidence establishing that the violation of section 75.200 was visually obvious and had existed for a protracted time, we find that substantial evidence also supports the judge's conclusion that Quinland was negligent in allowing the violation of section 75.200 to exist.

5/ Quinland's assertion that the Secretary is estopped from alleging a violation of section 75.200 because MSHA inspectors had found previously that the roof in the area of the No. 7 seal was adequately supported is rejected. King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421-22 (June 1981); See also Burgess Mining and Construction Co., 3 FMSHRC 296, 297 (February 1981).

We also affirm the judge's finding that Quinland violated section 75.303. The preshift examiner was aware of the conditions but did not report them. As held above, a reasonably prudent person would have concluded that the roof was not adequately supported. Section 75.303 requires the preshift examiner to report hazardous conditions and violations of mandatory safety standards such as inadequately supported roof. In failing to report that condition, the preshift examiner violated the standard.

III.

The inspector found that the violation of section 75.200, as cited in the section 104(d)(1) order, was the result of Quinland's unwarrantable failure to comply with the mandatory standard. As noted, Quinland did not contest the validity of the order pursuant to section 105(d) of the Mine Act. 6/ Instead, in contesting the Secretary's penalty proposal pursuant to section 105(a) of the Act, Quinland contended specifically that the unwarrantable failure finding was improper. 7/

6/ Section 105(d) states in part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this [Act], or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this [Act], or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this [Act], the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), 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).

7/ Section 105(a) states in part:

If, after an inspection or investigation, the Secretary issues a citation or order under section

The judge did not address this argument. On review Quinland argues that the judge erred in failing to rule on the merits of its challenge to the unwarrantable failure finding. The Secretary responds that under these circumstances the issue of whether a violation is caused by an unwarrantable failure may be considered only in a section 105(d) proceeding to review a citation or order, and not in a section 105(a) penalty proceeding. 8/ We hold that the validity of such findings is a proper subject for review in a penalty proceeding.

The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. See, e.g., Energy Fuels Corp., 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator immediately contest a citation or order within 30 days of receipt thereof, 30 U.S.C. §815(d), but he also may initiate a contest following the Secretary's subsequent proposed assessment of a civil penalty within 30 days of the Secretary's notification of the penalty proposal. 30 U.S.C. §

[104] of this [Act], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section [110(a)] of this [Act] for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency....

30 U.S.C. § 815(a).

8/ Several unreviewed decisions of various Commission administrative law judges reflect disagreement on this issue. Two decisions hold that the merits of an unwarrantable failure finding may be reviewed in a civil penalty proceeding. C. F. & I. Steel Corp., 4 FMSHRC 1776, 1786, (September 1982) (ALJ Carlson); Price River Coal Co., 3 FMSHRC 1766, 1771-73 (October 1983) (ALJ Vail). Three decisions reach the opposite conclusion. Turner Brothers, Inc., 6 FMSHRC 2125, 2130 (September 1980) (ALJ Koutras); Clinchfield Coal Co., 2 FMSHRC 290, 292 (February 1980) (ALJ Moore); Windsor Power House Coal Co., 6 FMSHRC 1739, 1740-41 (July 1980) (ALJ Melick).

The interrelationship between a contest proceeding and a civil penalty proceeding has, in the past, been a source of confusion and dispute over the issues that may be raised properly in each proceeding and over their preclusive effect once raised. In resolving these arguments we have afforded a wide latitude for review and eschewed preclusion. For example, in Energy Fuels, supra, we rejected the Secretary's argument that review of a violation and special findings contained in an abated citation is available only in a civil penalty proceeding. We found that the language of the Act did not so limit review and that the purposes of the Act and the interests of those subject to it are best served by permitting an immediate contest. 1 FMSHRC at 309. 10/ Here, the Secretary argues that failure to seek an immediate contest of the order containing the alleged violation bars the operator from challenging the validity of special findings in a subsequent civil penalty proceeding. We reject once again a restrictive interpretation of section 105. Because under the Mine Act a special finding is a critical consideration in evaluating the nature of the violation alleged and bears upon the appropriate penalty to be assessed, we conclude that the Act does not preclude the review of special findings in a civil penalty proceeding and that the purpose of the Act and the interests of those subject to it are best served by permitting review.

There is no dispute that the fact of violation may be placed in issue by the operator in a civil penalty proceeding regardless of whether the operator has availed itself of the opportunity to contest the citation or order in which the allegation of violation is contained. The Commission also has held that the procedural propriety of the issuance of a withdrawal order does not affect the allegation of a violation contained in the order. Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980); Van Mulvehill Coal Co., 2 FMSHRC 283, 284 (February

9/ The procedures followed by the Secretary in proposing penalties for violations usually result in an operator's receipt of the Secretary's notice of proposed penalty at a time substantially after the expiration of the 30-day period within which the operator may contest a citation or order.

10/ The special findings of "unwarrantable failure" and "significant and substantial" are found in sections 104(d) and 104(e) of the Act. 30 U.S.C. §§814(d), 814(e). Under section 104(d), an inspector's finding that a violation is the result of "unwarrantable failure" to comply with a mandatory standard and is "significant and substantial" leads to the issuance of a section 104(d) citation, and subsequent findings of unwarrantable failure may lead to a "chain" of withdrawal orders until an inspection of the mine discloses no further violations based on unwarrantable failure. 30 U.S.C. §§814(d)(1) & (2). Under section 104(e) where an operator has been given written notice by the Secretary that a pattern of "significant and substantial" violations exists, further significant and substantial violations may lead to a similar "chain" of withdrawal orders. 30 U.S.C. §814(e).

1980). The allegation of violation survives and if proven must be subject to the assessment of a civil penalty. 30 U.S.C. §820(a); Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981); See also Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (December 1980). Similarly, since the alleged violation survives, findings incidental to the violation survive as well.

It is apparent from the language of section 104(d) that special findings are made incident to the finding of violation. In addition to the finding of violation, the inspector must find that "such violation" is of a significant and substantial nature and that "such violation" is caused by the operator's unwarrantable failure to comply with the cited standard. 30 U.S.C. §814(d)(1) (emphasis added). As the Commission has held, these findings fully describe the nature and the characteristics of the violation. Consolidation Coal Co., 6 FMSHRC 189, 192 (February 1984).

The allegation of a violation contained in a citation or order is an initial step in the enforcement of the Mine Act and of its mandatory health and safety standards. The civil penalty assessed for the violation must reflect the surrounding facts and correlate with the nature of the violation through application of the statutory penalty criteria. 30 U.S.C. §820(i). Accordingly, in assessing a penalty, consideration of all incidents of a violation, including the special findings, is appropriate. The Commission has stated:

The validity of the allegation of violation and of any special findings made in connection with the alleged violation, all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found....

Old Ben Coal Co., 7 FMSHRC 205, 207-08 (February 1985)(emphasis added).

In previous cases where the Secretary has charged an operator with a violation in a citation issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. §814(a), and has made special findings in the citation, the validity of the special finding at issue has been addressed in the penalty proceedings albeit without specific discussion of the issue addressed here. Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). See also Consolidation Coal Co., supra, 6 FMSHRC at 191-192. The Commission also has recognized that the statutory penalty criterion of negligence and the special finding of unwarrantable failure, although not identical, are based frequently upon the same or similar factual circumstances. Black Diamond Coal Co., 7 FMSHRC 1117, 1122 (August 1985). ^{11/} In addition, the Secretary's regulatory procedures governing his proposed assessment of civil penalties reflect

^{11/} In like manner, the "gravity" penalty criteria and a special finding of "significant and substantial," although not identical, are based frequently upon the same or similar factual circumstances. 30 U.S.C. §§820(i), 814(d).

the interrelationship between special findings and the appropriate penalty to be assessed. 30 C.F.R. §100.5(b) provides in part that "MSHA may elect to waive the regular assessment formula (§ 100.3) or the single assessment provision (§100.4) if the agency determines that conditions surrounding the violation warrant special assessment." The regulation further provides that "[a]ccordingly, the following categories [of violations] will be reviewed individually to determine whether a special assessment is appropriate:... (b) Unwarrantable failure to comply with mandatory health and safety standards...." 30 C.F.R. §100.5(b). Because of the interdependent nature of special findings and the penalty assessment provisions of the Mine Act, it is appropriate to allow contest of such findings in a civil penalty proceeding and not to preclude this challenge because the operator failed to contest the validity of the order in which the findings are contained within 30 days of its issuance.

Most mine operators who immediately challenge a citation or order containing a special finding are concerned with the withdrawal consequences of an order or its "chain" implications. Conversely, those that elect to forego the immediate contest of an order that includes special findings will not be concerned primarily with such consequences. We expect that by delaying contest of an order and the special findings contained therein until the civil penalty proceeding is instituted, an operator's concern will be the deletion of the special findings and a reduction of the civil penalty. Indeed, this is the relief requested in the present case. We recognize that if a special finding is vacated by a judge, in some instances it may be appropriate for the judge to order modification or vacation of the order in which the special finding is contained. Such a circumstance most likely would arise when such modification or vacation would bear upon pending litigation involving a "chain" of which the order was a part. See generally Consolidation Coal Co., 4 FMSHRC 1791, 1793-95 (October 1982). This case does not require discussion of all conceivable collateral effects that might arise from the vacation or modification of an order containing special findings. Resolution of such questions can await cases in which they are specifically presented. ^{12/} Whatever the collateral effects may be, they arise from the right to review provided to operators by section 105 of the Act.

We therefore conclude that the judge erred in failing to consider Quinland's challenge to the unwarrantable failure finding associated with the violation of section 75.200.

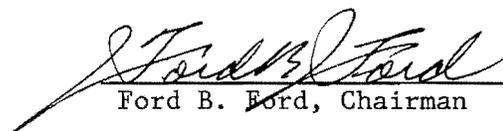
^{12/} We note that the Secretary has the power to propose more quickly a penalty for citations and orders and thus lessen the chances for ripple effects that may result from vacation of the underlying order.

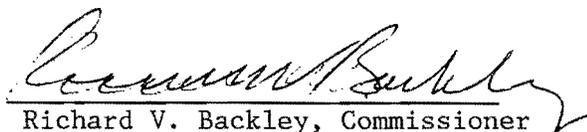
IV.

The final issue raised by the operator is whether the judge erred in considering copies of Quinland's preshift examination reports submitted to the judge by counsel for the Secretary following briefing of the case. The judge requested summaries of the reports in order to evaluate the veracity of Quinland's preshift examiner with respect to the frequency of his reports of hazardous conditions. The information was relevant and material to the issue of credibility. In submitting copies of the reports themselves, the Secretary's counsel failed to follow literally the procedure ordered by the judge. However, acceptance of the copies did not prejudice Quinland because they confirmed the examiner's statement that he frequently noted hazardous conditions during his preshift examinations. Tr. 205-06. Furthermore, the judge did not rely on the reports in concluding that Quinland violated section 75.303. Consequently, even if acceptance of the reports was erroneous, the error was harmless.

V.

For the foregoing reasons, we hold that substantial evidence supports the findings of the judge that Quinland violated section 75.200 and section 75.303 and that the violation of section 75.200 was the result of Quinland's negligence. We further hold that the judge erred in failing to address whether the violation of section 75.200 was the result of Quinland's unwarrantable failure. Finally, we hold that the operator was not prejudiced by the judge's acceptance of copies of preshift examination reports. Accordingly, the contested findings of violation and negligence are affirmed, as is the civil penalty assessment for the violation of section 75.303. The matter is remanded to the judge to determine whether the violation of section 75.200 was the result of Quinland's unwarrantable failure to comply with that mandatory safety standard and for such further proceedings as are then appropriate.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Robert D. Cline, Jr., Esq.
Shaffer & Shaffer
330 State Street
Madison, West Virginia 25130

William Stover, Esq.
41 Eagles Road
Beckley, West Virginia 25801

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1987

ODELL MAGGARD :
 :
 v. : Docket No. KENT 86-1-D
 :
 CHANEY CREEK COAL CORPORATION :
 :
 and :
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA), :
 on behalf of ODELL MAGGARD :
 :
 v. : Docket No. KENT 86-51-D
 :
 DOLLAR BRANCH COAL CORPORATION :
 and CHANEY CREEK COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

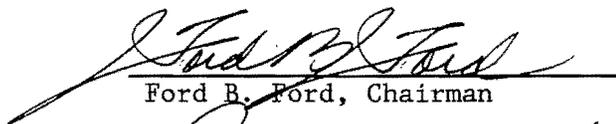
ORDER

BY THE COMMISSION:

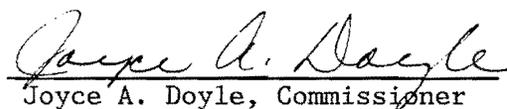
On August 25, 1987, the Commission issued its decision in this matter. On September 15, 1987, the Commission received from counsel for respondents a Motion for Reconsideration and a Motion to Amend Petition for Discretionary Review. Oppositions to both motions have been received from complainant Odell Maggard and from the Secretary of Labor. The operators request the Commission to reconsider its denial of their prior motion seeking dismissal of Dollar Branch Coal Corporation ("Dollar Branch") as a party on the asserted grounds that Dollar Branch had no direct employment relationship with Maggard. Upon consideration of the motions and the oppositions, the motions are denied.

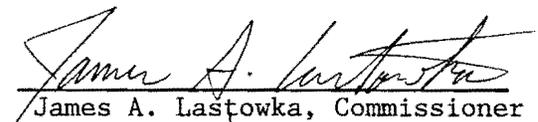
We previously ruled that we were barred as a matter of law by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), from considering this issue because it was not included in the operators' petition for discretionary review. Odell Maggard v. Chaney Creek Coal Corporation, etc., 9 FMSHRC ___, Nos. KENT 86-1, etc., slip op. at 2 n. 2 (August 25, 1987). We adhere to that ruling. We note that the operators also failed to raise this issue before the Commission's administrative law judge, and we conclude that counsel for the

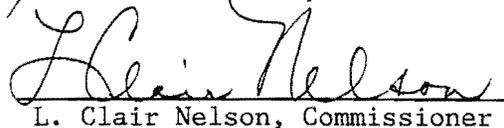
operators has failed to show why the facts asserted by Dollar Branch relating to its involvement in this case could not have been ascertained and acted upon in a timely manner.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Thomas C. Marks, Esq.
Miller, Griffin & Marks
Suite 700, Security Trust Bldg.
Lexington, Kentucky 40507

Tony Opegard, Esq.
Appalachian Research & Defense
Fund of Kentucky, Inc.
P.O. Box 360
Hazard, Kentucky 41701

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 19, 1986

GARRY GOFF :
 :
 v. : Docket No. LAKE 84-86-D
 :
 YOUGHIOGHENY & OHIO COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This proceeding concerns a discrimination complaint filed by Garry Goff pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Act"). Following a previous determination by the Commission that Goff's complaint stated a cause of action under section 105(c)(1) of the Act, the matter was remanded to Commission Administrative Law Judge Melick. The purpose of the remand was to determine whether Goff was discriminatorily discharged by the Youghiogheny and Ohio Coal Company ("Y&O") because he was "the subject of medical evaluation and potential transfer" under the standards set forth in 30 C.F.R. Part 90. 1/ 7 FMSHRC 1776 (November 1985). On remand, the judge examined that issue and found that Goff was not discharged in violation of section 105(c)(1). 2/ 8 FMSHRC 741 (May 1986) (ALJ). The Commission granted Goff's petition for discretionary review. For the reasons that follow, we affirm.

1/ Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m³").

2/ Section 105(c)(1) of the Act provides in part as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine ... because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act]....

30 U.S.C. § 815(c)(1).

This proceeding began when Goff filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Following investigation of the complaint, MSHA determined that a violation of section 105(c)(1) of the Act had not occurred. Goff then filed a complaint in his own behalf with this independent Commission alleging that his discharge violated the Act. Y&O moved to dismiss the complaint for failure to state a cause of action. The administrative law judge concluded that Goff's complaint was based on an allegation that Goff was discriminated against because he suffers from Black Lung (pneumoconiosis) and that such a complaint could be resolved only under section 428 of the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1982) ("BLBA"). Therefore, the judge granted the motion to dismiss. 6 FMSHRC 2055 (August 1984). On review, we reversed the judge's decision, holding that a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based upon the miner being "the subject of medical evaluations and potential transfer" under Part 90 and remanded the proceeding to the judge to determine whether Goff had been discharged unlawfully.

Our task on review is to determine whether the judge properly concluded that Goff was not discriminatorily discharged in violation of section 105(c)(1) of the Act. A number of collateral issues were raised by the complainant which lie outside the scope of our review and which we do not address; for example, whether Goff in fact had pneumoconiosis, which of the various doctors seen by Goff correctly diagnosed his medical condition, and whether Y&O's leave policies were reasonable. Further, our review in no way addresses any separate remedy Goff may be seeking under section 428 of the BLBA. 30 U.S.C. § 938. 3/

I.

Goff worked as a supervisory foreman for Y&O from September 1976 until January 20, 1984. In August 1982, while employed at Y&O's Allison Mine, Goff's doctor diagnosed him as having pneumoconiosis and Goff thereafter was assigned to work primarily outside the mine. In October 1983, Goff again was diagnosed by his doctor as having pneumoconiosis.

3/ The BLBA is administered by the Employment Standards Administration ("ESA") of the Department of Labor. The Department of Labor is charged with the duty under both the Mine Act and the BLBA to investigate pneumoconiosis-related discrimination complaints. Accordingly, the Department's MSHA and its ESA have entered into a Memorandum of Understanding ("MOU") to coordinate their investigations and to clarify their jurisdiction and procedures. 44 Fed. Reg. 75952 (Dec. 21, 1979).

Under the MOU, ESA makes the determination as to whether a violation of section 428 of the BLBA has occurred and MSHA makes a determination whether a violation of section 105(c) of the Mine Act has occurred. If the aggrieved person proceeds with complaints under both sections, MSHA proceeds first with the section 105(c) complaint and ESA may then proceed with the section 428 complaint. The MOU reflects that the two sections may provide different remedies.

In January 1984 Y&O closed the Allison Mine and Goff was transferred to an underground job as a labor foreman at Y&O's Nelms Mine, effective January 9, 1984. As a labor foreman Goff would work primarily in the less dusty outby areas but would work near or at the face when necessary. Upon reporting to work on January 9, 1984, Goff gave Charles Wurschum, the Nelms mine manager, copies of slips from his doctor stating that he had pneumoconiosis and should not work underground. On January 12, 1984, Goff called in sick to John Ronevich, his immediate supervisor. Goff went to his doctor and was diagnosed as having bronchitis and advised not to return to work for two weeks or until he recovered. After Goff relayed this advice to Ronevich, he was requested by Y&O to undergo a medical examination at the Wheeling Park Hospital. The next day Goff reported for that examination. He was given a battery of medical tests, had chest x-rays taken, and was examined by a certified "B" reader of chest x-rays. 4/ The results of his examination were not immediately available. 5/

On January 14, 1984, the day after his medical examination at the Wheeling Park Hospital, Goff mailed a Part 90 application and chest x-rays to MSHA. These x-rays had been taken at a local clinic in October 1983. Goff's application requested a determination by MSHA of his eligibility for participation in the Part 90 transfer program.

On January 16, 1984, Goff wrote a letter to Donald Weber, Y&O's director of personnel, calling attention to his chest x-rays of August 1982 and October 1983 and stating that he was unable to perform his duties as a labor foreman due to pneumoconiosis and that he should not be working underground in the dust. Goff further stated that until he had a job out of the dust, he would be off work under doctor's advice, but was willing to return to work with his doctor's release. The letter made no reference to Part 90 status. On January 19, 1984, Goff met with Weber and Wurschum and was advised that review of the medical report from Wheeling Park Hospital indicated that there was nothing preventing Goff from working underground as a supervisor, and that if he did not

4/ A "B" reader is a person possessing the highest qualifications to read chest x-rays for evidence of pneumoconiosis by the National Institute of Occupational Safety and Health.

5/ Goff states that while awaiting his examination, he was asked by a nurse whether he wanted to complete a Part 90 application and have the application and his x-rays sent to MSHA for a Part 90 status determination. Goff states that he completed the application but that the application and the Wheeling Park Hospital x-rays were not sent to MSHA. Tr. 196-97, 200. On review, Goff alleges that Y&O prevented the mailing of the application and the x-rays. There is, however, no evidence in the record which supports even an inference to support this allegation.

return to work the next day, he would be discharged. ^{6/} Goff testified that he told Weber and Wurschum that he would be unable to work until his doctor authorized his return. Goff did not report to work on January 20, 1984. On January 21, he received a letter from Y&O dated the previous day informing him that he was discharged for failing to report to work. The letter stated that Goff's "allegation of not being able to work has not been documented by medical certification" and noted that the results of Goff's medical examination on January 13 did not indicate any reason that would prevent Goff from working underground. On January 30, 1984, Goff took a medical release dated January 24, 1984, to Weber, who indicated that Y&O was not hiring.

On July 2, 1984, Goff received a letter from MSHA stating that based on the chest x-ray reports he had sent to MSHA on January 14, pneumoconiosis was indicated and he was eligible under Part 90 to work in an area of the mine with an average concentration of respirable dust at or below 1.0 mg/m³ of air. On August 8, 1984, however, Goff was further advised by MSHA that because he no longer was employed at an underground coal mine, Part 90 status was not applicable to him.

II.

In concluding that Y&O did not discharge Goff unlawfully, the judge noted that for Goff to establish a violation of section 105(c)(1), Goff had to prove that he engaged in protected activity and that his discharge was motivated in any part by the protected activity. 8 FMSHRC at 743. (Citing to Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981).) With respect to the motivational issue, the judge indicated that there was no evidence that any Y&O personnel knew, prior to Goff's discharge, that he had filed a Part 90 application. 8 FMSHRC at 743-44. In addition, the judge concluded that Y&O officials could reasonably have given greater weight to the medical evidence they obtained from the Wheeling Park Hospital medical evaluation of Goff, which indicated that Goff did not have pneumoconiosis and was capable of working. 8 FMSHRC at 744.

^{6/} Dr. Elliott stated in his medical report:

Chest x-ray was within normal limits. No evidence of pneumoconiosis was seen.

There was no evidence of any significant respiratory or pulmonary disease physiologically.

I find no medical reason at this time that would prevent Mr. Goff from being able to work underground as a supervisor.

8 FMSHRC at 742-43.

Finally, the judge found that even if Y&O had known that Goff applied for Part 90 status, Y&O would not have been motivated to discharge him on that basis because Part 90 status would not have affected Goff's work assignment as a labor foreman. 8 FMSHRC at 744. Under Part 90, a qualifying miner is entitled only to transfer to a dust reduced area where concentrations of respirable dust are at or below 1.0 mg/m³ of air, and the judge noted that Wurschum believed the dust concentrations in the entire Nelms Mine were less than 1.0 mg/m³ of air. The judge further noted that in 1984 the average respirable dust concentration in the outby areas of the mine, where Goff ordinarily would have worked, was 0.55 mg/m³ of air and that even near the face the average concentration was less than 1.0 mg/m³ of air. 8 FMSHRC at 244. The judge concluded that Goff had "failed in his burden of proving that Y&O was motivated in any part in discharging him because he was 'the subject of medical evaluation and potential transfer' under Part 90." 8 FMSHRC at 745.

III.

For the reasons that follow, we affirm the judge's conclusion that Goff's discharge did not violate the Act. A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

The medical examinations and procedures to which Goff was subjected in this case were intended to determine whether he suffered from pneumoconiosis, an initial step in obtaining Part 90 status, and as such, were protected activities. Further, Goff engaged in protected activity in applying to MSHA for a determination of his eligibility for Part 90 status. Like the medical evaluations, the application process is a necessary preliminary step and comes within the statutory protection afforded miners who are the "subject of medical evaluations and potential transfer" under Part 90.

We conclude, however, that although these events constituted protected activities, Goff did not establish that Y&O was motivated in any part by knowledge of such protected activities.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709

F.2d 51 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The present record contains no direct evidence that Y&O was illegally motivated, nor does it support a reasonable inference of discriminatory intent.

In examining the record for instances in which discriminatory intent could be inferred, we note that, with respect to Goff's medical evaluations of August 1982 and October 1983, Y&O did not discharge Goff because of these evaluations. To the contrary, the record indicates that Y&O accommodated Goff by assigning him work primarily on the surface. Not until the Allison Mine closed in early January 1984, approximately a year and a half after Goff's first diagnosis of pneumoconiosis, was he transferred to underground work. 7/

Similarly, no inference of discriminatory intent can be inferred from Y&O's response to Goff's medical evaluation of January 1984. Substantial evidence supports the judge's conclusion that Y&O reasonably relied upon Wheeling Park Hospital's January 1984 evaluation of Goff which, based upon specific medical tests and x-rays, indicated that Goff was fit to return to work.

With respect to Goff's Part 90 application, we affirm the judge's finding that Y&O did not know prior to his discharge that Goff had filed a Part 90 application. There is no evidence that Goff told supervisory personnel at Y&O that he had applied or was going to apply for Part 90 status. Goff states that he told mine manager Wurschum on January 1984, that he wanted to take one or two days off to "get x-rays taken" to settle the situation concerning his pneumoconiosis. Goff Dep. 58, Tr. 188. According to Wurschum, Goff asked only whether he was going to be allowed to take some days off and Goff said nothing about having x-rays taken or applying for Part 90 status. Tr. 401. We note that Goff actually filed his application on January 14, 1984. After that date Goff easily could have notified Y&O personnel that he had filed for Part 90 status (for example: in his January 16, 1984, letter to Weber or at the January 19, 1984, meeting). Goff did not do so. We hold that the record therefore supports the judge's finding that there is no "evidence that any Y&O personnel knew, prior to his discharge, that [Goff] had filed a Part 90 application." 8 FMSHRC at 744.

7/ Goff also argues that Y&O interfered with his section 105(c)(1) rights by failing to report his illness as required by 30 C.F.R. Part 50 when Y&O first became aware that he had been diagnosed with pneumoconiosis. We do not agree. Under Part 50, an operator is required to report illness, including pneumoconiosis, to the appropriate MSHA District Office and to the MSHA analysis center in Denver. 30 C.F.R. §§ 50.20 and 50.20-6. Failure to report as required may be a violation of Part 50, but it does not constitute discrimination. The purpose of reporting a miner's illness under Part 50 is to gather occupational illness statistics, not to effectuate the rights of medical evaluation and transfer inherent in Part 90 and protected by section 105(c)(1).

Moreover, substantial evidence supports the judge's conclusion that even if Y&O had known that Goff applied for Part 90 status, it is not reasonable to believe it would have been motivated to discharge him on that basis because Part 90 status would not have affected Goff's work assignment. The Nelms Mine manager testified that during 1984 the average concentration of respirable dust in areas outby the faces was 0.55 mg/m³ of air, and the average concentration in inby areas was less than 1.0 mg/m³ of air. That testimony was not disputed. 8/ Nevertheless, Goff stated in his letter to Weber that on the advice of his doctor, he would be off work until he had a dust free job. Neither the Act nor Part 90 gives a miner with evidence of the development of pneumoconiosis the right to work in a mining environment that is totally free of respirable dust. Rather, section 203(b)(2) of the Act, 30 U.S.C. § 843(b)(2), and 30 C.F.R. § 90.3(a) give a miner with evidence of the development of pneumoconiosis the right to exercise an option to transfer to an area of the mine with an average respirable dust concentration at or below 1.0 mg/m³ of air, not to cease work altogether.

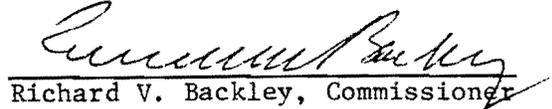
There is no proof in this record that Goff would have encountered excessive and impermissible respirable dust concentrations in his underground assignment. As previously indicated, there is persuasive evidence that during 1984 the average concentration of respirable dust in areas outby the faces was 0.55 mg/m³ of air and the average concentration in inby areas was less than 1.0 mg/m³ of air.

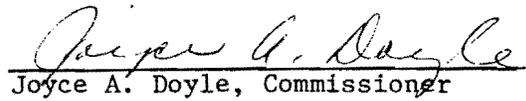
By refusing to report to work until he was assigned a dust-free job, Goff acted beyond the purview of section 203 of the Act and 30 C.F.R. Part 90. As such, his work refusal was not protected by the statute.

8/ Although the mine manager's testimony was based on the results of respirable dust samples taken pursuant to 30 C.F.R. Part 70, the results are indicative of the respirable dust concentrations that Goff could expect to encounter. They reflect average concentrations of respirable dust in areas where Goff ordinarily would be expected to work. Tr. 355-56.

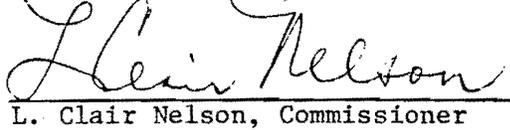
We find that Goff did not establish that the protected activity, being "the subject of medical evaluation and potential transfer", in any way motivated Y&O to discharge him. Rather, Y&O discharged Goff because he refused to report for work as ordered. We therefore affirm the judge's dismissal of Goff's complaint.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Garry Goff
57920 Rocky Fork Road
Jacobsburg, Ohio 43933

Gerald P. Duff, Esq.
Hanlon, Duff & Paleudis Co., LPA
46770 National Road West
P.O. Box 77
St. Clairsville, Ohio 43950

Administrative Law Judge Gary Melick
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 8 1987

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 85-131-DM
ON BEHALF OF : MD 85-11
GEORGE A. JONES, :
Complainant : Dee Gold Mine
v. :
DEE GOLD MINING COMPANY, :
Respondent :

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Complainant;
Jay W. Luther, Esq., Chickering & Gregory, San
Francisco, California,
for Respondent.

Before: Judge Lasher

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of George A. Jones (herein "Complainant"). The Secretary's complaint, as amended, alleges that Complainant was discharged (laid off) for engaging in protected safety activities in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1982).^{1/}

The Secretary contends that Complainant Jones, a maintenance employee in Respondent's ball mill at the time of his discharge, was terminated because of protected safety activities occurring primarily in the last month of his employment. Respondent contends that as a result of a "Feasibility Capital Cost Study" (herein referred to as the Kilburn Report) a reduction-in-force (herein RIF and layoff) was called for and planned, and Complainant, because of inferior work performance ("slow workmanship", "productivity" and other problems) was one of two

^{1/} The hearing was held during a period of four days, October 21, 22, 23, and 24, 1986. For each day of hearing there is a separate transcript beginning with page one. Accordingly, transcript citations will be prefaced with "I", "II", "III", and "IV", respectively, in this manner "I-T ___", "II-T. ___", etc.

employees who were properly laid off in the RIF to bring the mill maintenance crew down from a complement of 6 employees to 4 as called for by the Kilburn Report (III-T. 25-32).

Untimely Filing of the Secretary's Complaint. In raising this threshold issue, Respondent contends that there was "a delay of 5 months beyond the statutory maximum."

A chronology of most pertinent events was the subject of a stipulation between the parties (Court Ex. 1; I-T. 42-45). Based thereon and other evidence the following sequence is found to have occurred.

- October 11, 1984 Complainant was terminated (I-T. 45)
- October 12, 1984 Complainant filed "an informal complaint" with MSHA. Although not critical to this issue, I find that this filing complies with the 60 day filing requirement for individual miners contained in section 105(c) of the Act, even though such complaint is not filed on a particular standard form provided by the Secretary of Labor.
- November 13, 1984 Complainant filed a "formal complaint" with MSHA on an MSHA form.
- December 5, 1984 The Secretary (MSHA) commenced its investigation of the complaint.
- April 24, 1985 The Secretary's written determination that a violation occurred was issued.
- July 1, 1985 The Secretary's Complaint was filed- according to the date stamp thereof in the official Commission file folder. The parties' stipulation that such was filed on or about June 25, 1985, is rejected in view of the more precise information reflected in the file.

It is clear that Complainant Jones was prompt with the filing of his complaint with the Secretary. Respondent's bone of contention is the Secretary's delay. In Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986), the Commission delineated the various obligations of the Secretary in processing discrimination complaints:

"The Mine Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. The Secretary is required to act within the following time frames: (1) The investigation of a miner's complaint "shall commence within 15 days" of receipt of the miner's complaint (30 U.S.C. § 815(c)(2)); (2) the

Secretary "shall notify" the miner, in writing, of his determination as to whether a violation of section 105(c)(1) of the Mine Act has occurred "[w]ithin 90 days" of receipt of the miner's complaint (30 U.S.C. § 815(c)(3)); and (3) if the Secretary determines that there has been a violation of the Act, "he shall immediately file a complaint with the Commission." 30 U.S.C. § 815(c)(2). (Emphasis added throughout.) Finally, section 105(c)(3) of the Act specifically states, "Proceedings under this section shall be expedited by the Secretary and the Commission." 30 U.S.C. § 815(c)(3).

While the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these time frames are not jurisdictional ..."

XXX

XXX

XXX

XXX

Related passages of legislative history make equally clear, however, that Congress was well aware of the due process problems that may be caused by the prosecution of stale claims. See Legis. Hist. at 624 (discussion of 60-day time limit for the filing of miner's discrimination complaint with the Secretary). The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim.

Accordingly, we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter -- i.e., within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay.

"Applying these principles to the present record, there is no question that the Secretary seriously delayed in filing the complaint. Nevertheless, the record before the judge did not establish that the Secretary's delay prejudiced 4-A. In the absence of this requisite foundation, the judge erred in granting 4-A's motion to dismiss."

Respondent's basis for dismissal of the complaint is set forth at pages 38 and 39 of its post-hearing brief:

"In a great many cases, a delay of 5 months beyond the statutory maximum would not cause prejudice. This case, however, is different because of the critical nature of precise times. Thus, among the facts that have been helpful to Dee Gold's defense have been the time of the decision to layoff Mr. Jones;

the times at which certain incidents, particularly the hydro-stroke feeder and AR incidents were committed by Mr. Jones in relation to the time that Mr. Nameth was placed in charge of mill maintenance; the time at which it was decided that layoffs would occur at all; the time at which the ball mill was in the process of being repaired; (to a minor extent) the time at which Mr. Nameth announced at the meeting of October 9 that layoffs were to occur; and the dates upon which the events in the Jensen memorandum took place. These are likely to be contested in one fashion or another in the Government's brief, due to the occasionally ambiguous and uncertain testimony of various witnesses on the subject of precise dates, or timing. Where all the pertinent dates in a case occur in a relatively short period, it is much easier for prejudice to occur, and Respondent would submit that it has occurred in this case. Had this Complaint been brought 4 to 6 months earlier, recollections could have been more quickly canvassed, and a better record prepared."

It is concluded that Respondent has not established that the Secretary's delay prejudicially deprived it of a meaningful opportunity to defend itself in this matter. There is no allegation of any specific prejudice it sustained in pretrial preparation or in the trial of this matter. The general allegation that the memory of witnesses may have been impaired by the delay is insufficient to meet the burden of establishing a material legal prejudice; there is no articulation of the process by which Respondent was prejudiced. It is also noted that the delay of approximately 5 1/2 months here is significantly less than that - 2 years - involved in 4-A Coal Company, Inc., supra. There being no basis in argument or in the record to conclude that Respondent was materially prejudiced, its contention that the complaint should be dismissed for untimely filing is rejected. It should finally be mentioned that (1) a considerable portion of the time which elapsed between the allegedly discriminatory act and trial was accounted for by the extensive pre-trial procedures and settlement negotiations engaged in by the parties, and (2) Respondent, as will be shown within, on the day it laid off Complainant was put on notice of possible litigation and began taking steps to prepare therefor (See Exs. J-2 and J-3).

General Matters

Respondent, Dee Gold Mining Company, was at all material times a Nevada partnership engaged in gold and silver mining (III-T. 61).

Complainant, age 34 at the time of hearing, commenced employment with Respondent on March 26, 1984 (Ex. R-2), as a mill maintenance mechanic (I-T. 69, 73, 75). His immediate supervisor was Allen "Al" Jensen, mill maintenance foreman (I-T.70). Some of Complainant's basic duties were repair, fabrication, welding, pipefitting, crusher repair and pump repair (I-T. 77, 82). Various of these duties were performed on or about mills near the mine which separated the gold ore from waste material.

Complainant was laid off at the end of his day shift on the afternoon of Friday October 11, 1984, the last day of his work week (I-T. 105, 106; III-T. 114-116, 156). Thus, the total term of Complainant's employment with Respondent was less than seven months.

Sometime in May or June of 1984 Complainant received a written evaluation from Al Jensen rating him as excellent in every category (I-T. 80-81).^{2/} He received no other ratings prior to his layoff.

While Complainant's work performance was commendable in the beginning, it thereafter deteriorated. A decline in his speed and attitude was noted by his immediate supervisor, Jensen, following management's refusal to grant the mill maintenance crew's request for a raise (III-T. 132-134).

With respect to Complainant's attitude, Jensen testified that: "he would throw things, get a little bit angry about not having something to work with." Jensen also noted that Complainant complained about changes in the work schedule about this time, since he was building a house and that his hours began to drop. The records on overtime show that the high point on Complainant's overtime occurred in July, with 40 hours of overtime, and dropped to half that in both August and September. (See Exhibit R-2.) By contrast, during the same period Ingle worked 66 hours of overtime in July, 56 hours of overtime in August and 71 hours of overtime in September.

Mr. Jensen, following Complainant's termination, and in accordance with usual procedures, filled out a Dee Gold standard Payroll Change Notice Form, Joint Exhibit 1, which reflected his views on Complainant's ability as of the date that he filled it out, October 16, 1984. Complainant's "conduct" and "production" were listed as "poor," while his "initiative" was listed as only "fair." There were no "excellents" in the rating.

In the summer of 1984, the mill maintenance crew ^{3/} consisted of Complainant, Wayne Overholser, Joseph P. Timko, Dick Eisenbarth, Mike Ingle and Mitch Geyer. All but Geyer were "mill maintenance mechanics". The sixth mill maintenance employee, mechanic Wayne Overholser, worked for only part of the summer of 1984, before he transferred to the truck shop around September 1, 1984 (II-T. 21, 88, 122-124, 136-138; III-T. 15, 42-43, 66). Another employee, Kenneth Kohles, was promoted to and began working in mill maintenance, on or about September 1, 1984 (Ex.

^{2/} Respondent contends that Complainant's work performance deteriorated after this time.

^{3/} The record with respect to the number and composition of the crew was confused, possibly because of different employees coming in and out of the crew.

J-8) before the layoffs (II-T. 110, 152; III-T. 44, 65, 163-167). 4/

Dick Eisenbarth and Joseph Timko were hired subsequent to Complainant- Timko in June and Eisenbarth in July 1984 (I-T. 82). Ingles was hired before Complainant - on October 26, 1983 (II-T. 79); Geyer was hired before Complainant also - on February 6, 1984, but as a "helper" or laborer (II-T. 122); Geyer became a mill maintenance employee in August 1984 (II-T. 125). Timko commenced his employment with Respondent on June 11, 1984. Mr. Timko was elected mill maintenance safety representative (spokesman) sometime during the period July-September 1984 (I-T. 124-126; II-T. 141). Certain of Respondent's management was aware he held this position (I-T. 125-126). Mr. Timko was laid off on October 9, 1984 (III-T. 109) shortly after a meeting on the same date- which was called to discuss complaints (including safety complaints) - was conducted with the mill maintenance crew by mill superintendent Steve Nameth. 5/ Mr. Timko, like Complainant, testified that he understood when he was hired that it was to be a permanent position (I-T. 122). Crew member Mike Ingle who was favored over Complainant and Timko in the RIF, however, was told when he was hired that there might be a layoff "after things were going" (II-T. 99) and that Jensen told him he was "afraid to hire too many people because of the layoffs" (II-T. 99).

Protected Activities

At some indeterminate time prior to the start-up of the mill in September 1984, Complainant registered a verbal complaint to his immediate foreman, Al Jensen, concerning not having a grinding shield. Jensen replied that he would "put some on order" (I-T. 78).

Complainant also complained (1) to Larry Turner, Safety Director, and Al Jensen, that he needed a respirator since he was working with cyanide acid and gasses (I-T. 79, 86-87) on or about September 25, 1984 (I-T. 87), and (2) about an acid plate (I-T. 88-89).

Complainant engaged in various activities which Respondent was aware of in connection with his dissatisfaction with

4/ It thus appears that during the summer of 1984 and up to the layoffs in October 1984, the mill maintenance crew by and large did number six employees. This supports Respondent's position that a layoff of 2 employees was called for to effect compliance with the Kilburn Report.

5/ The October 9 meeting was a significant event in the context of this proceeding and is discussed more fully within.

Respondent's so-called "lockout" procedure at the ball mill. Complainant initially appraised this problem as follows:

"A The first time that I was informed that they had an emergency and Al Jensen said you've got to go into the mill and fix a liner. I said fine, where do you want me to put my lock on the motor? Al said well, we can't lock the motor out and I said why is that. He said they don't want to lock out the motor and you can lock out the air clutch but I didn't like the way to find the ball mill to lock out the air clutch as opposed to the locking out the motors. If the chair for a person who is working in the mill and air motor is still running there is a possibility the clutch could engage by itself, by outside means and the mill would turn.

Q. And what would happen if anyone was in the mill?

A. The person would be dead.

Q. What would kill him?

A. Fifty or sixty tons of steel balls that would crush him to death.

Q. What did Al Jensen say when you told him you thought the mill should be locked out?

A. He said he had to do what he was told.

Q. Who did he say told him that?

A. Nameth."

(I-T. 89-90).

Thereafter, on or about September 25, 1984, Complainant engaged in a conversation with Wayne Dillon, a safety representative of the State of Nevada who had been conducting a safety class at the mine, and Larry Turner, Respondent's Safety Director, in which Complainant asked Dillon if Respondent's mechanical lockout procedure was in compliance with State or MSHA regulations. Complainant's account of this conversation follows:

"Q. And what did Mr. Dillon say?

A. He said absolutely not.

Q. What did Mr. Turner say?

A. Turner didn't say anything.

Q. Did you make any complaints to Mr. Turner about the lock out procedure?

A. I told Mr. Turner Mr. Dillon is right here standing beside you and he said the mechanical lock out or air clutch lock out is not acceptable.

Q. What did Mr. Turner say in response to that?

A. He was dumbfounded; didn't say anything."
(I-T. 91; II-T. 24-29).

Prior to October 1, 1984, Mr. Turner told Complainant that Bob Morley, an MSHA investigator said it was "okay for Dee Gold to have a mechanical lock out on the ball mill's air clutch." (I-T. 92). After this, on October 1, Complainant went to MSHA's Reno, Nevada office and discussed the matter with Joe Frazier, supervisor of mine inspectors, who Complainant understood was Morley's "boss." Frazier, according to Complainant, stated:

"He said it was unacceptable to MSHA to have a mechanical lock out only the air clutch. He said it was a violation of standards. He read me the quotation in the regulation that all energized equipment will be de-energized before any worker will work on that equipment."

(I-T. 93; See also II-T. 30)

On Wednesday morning, October 3, 1984, Complainant advised Mr. Turner that "... a mechanical lock out was not acceptable to the Reno office." Mr. Turner indicated that he would look into it when he got the time (I-T. 94, II-T. 32). Both on October 4 and October 5 Complainant asked Turner if he had called Reno and Turner hadn't (II-T. 33). Complainant advised Joe Timko, the miners' elected mill maintenance safety representative, that he would not go into the ball mill under existing conditions (I-T. 95-96). He also confirmed to Al Jensen that he would not enter the ball mill (I-T. 97). This constitutes a refusal to work because of an asserted unsafe condition.

Complainant gave this account of a final safety complaint which occurred on the morning of October 11, 1984, the afternoon of which he was laid off:

"Q. Between the time of the Timko lay off and your lay off did you make any safety complaints?

A. Yes, I did.

Q. When did you make any complaints?

A. I think I believe it was Thursday morning, the day I was fired.

Q. When were you fired?

A. I was fired that afternoon.

Q. What was the nature of your complaint?

A. First thing in the morning Al Jensen told me to move my welding table approximately ten feet to one side. I objected immediately.

Q. What was the basis for your objection?

A. Well it was a collection area. The floor had one foot rise of concrete and would collect water and slurry. I would have to be on the sump pump side of slurry side which was a danger of electrocution was always very dangerous.

Q. Who did you say you made a complaint too?

A. Al Jensen. He said this was what Steve Nameth wanted and this is what he is going to get.

Q. Who informed you of your lay off on the eleventh?

A. No one actually informed me of my lay off.

Q. How did you learn about it?

A. Al Jensen had me do an emergency pipefitting job. He set a pipefitting job where I had to put a water line into the feed chute of the rod mill. When I was all done with this job I went back to put time on my time card and my time card was not in the slot. I went to Al Jensen and said, well, where is my time card. I asked and he said I could tell you in an hour and I asked him if I was laid off.

Q. What did you then?

A. I went into Steve Nameth's office.

Q. What did you say to him?

A. Said I am the least productive employee? He said I am.

Q. What did you say?

A. I said I am going to fight it even with my record and evaluations I have in my record I am still not the least productive employee.

Q. Did you say on what basis?

A. No. I just said I am going to fight it." 6/
(I-T. 106-107)

It is thus clear in the record and found here that Complainant engaged in various safety activities which in the abstract were of a nature sufficient to invoke the protection of the Act. Respondent for the most part concedes, and the record

6/ It is of some significance in this conversation Complainant did not specifically protest that he felt he was being laid-off due to his safety activities.

in any event establishes, that Respondent's management were aware of these various activities prior to Complainant's layoff on October 11, 1984.

The record, however, also shows that none of Complainant's safety complaints were received by his foreman or other of management's personnel with overt resentment, hostility or other discernible angry or anti-safety reaction. Also, during the summer of 1984, all the mill maintenance crew members were making complaints (I-T. 157; II-T. 56, 88, 128, 149). No one seemed to be making more complaints than any other (II-T. 88, 128, 140, 149). Furthermore, all of the mill maintenance crew refused to enter the ball mill with the motor running (II-T. 141, 157, 161).

The October 9 Meeting.

After a rumor circulated that Mill Superintendent Steven J. Nameth was to issue a company policy that the air clutch lock out would be sufficient and all employees would abide by such policy (I-T. 97, 98), Complainant told Timko that "we should have a meeting" with Arthur J. Schwandt, General Manager for the project and Nameth's supervisor (I-T. 98). Other maintenance employees asked Al Jensen for such a meeting (II-T. 89).

The meeting was held sometime between 9 a.m. and 11:30 a.m. in Steve Nameth's office (I-T. 99, 141; III-T. 101). The mill maintenance crew at that time consisted of Complainant, Joseph P. Timko, Dick Eisenbarth, Mike Ingle, Mitch Geyer and as previously noted, Kenneth Kohles (I-T. 99, 103, 141-142; II-T. 88, 162; III-T. 65, 166-167).

Joseph Timko, the safety representative, considered calling a meeting with Al Schwandt but did not do so after he learned of the "very close" friendship between Schwandt and Nameth (I-T. 136-137). The meeting in any event was called by Nameth after he was told by foreman Al Jensen that the men wanted a meeting with Schwandt to discuss "complaints" (II-T. 98-100; III-T. 99, 102). Nameth reported the request to Schwandt who told Nameth "he was busy" and told Nameth to conduct the meeting (III-T. 100).

The meeting was held in Nameth's office (III-T. 101) and was attended by Nameth, Al Jensen, Complainant, Timko, Ingle and Eisenbarth. Mitch Geyer and Kohles did not attend the meeting (II-T. 129; III-T. 100).

At the beginning of the meeting, Complainant said something to the effect that the men would like Art Schwandt present at the meeting (II-T. 91; III-T. 135) and Steve Nameth indicated that Schwandt would not be present but that he (Nameth) would give Schwandt all the pertinent information from the meeting. Nameth then opened up the discussion and Timko raised the subject of pay raises (II-T. 36-37). Thereafter, work procedures and non-safety subject matters were brought up and discussed (I-T. 100; II-T. 37-42, 90; III-T. 77).

Thereafter, either Complainant or Timko, probably Complainant, raised the question of the lockout procedure (II-T. 90; III-T. 135).

Those in attendance at this meeting gave differing accounts of it at the hearing. With the exception of Complainant, most of their remembrances of it were sketchy, sometimes remarkably contradictory, and for the most part lacking in detail. Other than Complainant's version the most inclusive account-with one inaccuracy as to when the "lockout" discussion occurred - was that of Nameth:

"The way I remember it, Jones started to speak. I interrupted and said I have an announcement to make. I said we were going to have a lay off that week. Somebody spoke up and said, who is going to be laid off. I said the least productive employee. They wanted names or somebody said who and I don't think I mentioned the name. Then Jones started complaining about various things in the mill. I'll see if I can remember some of them. He complained about wage rates, he complained about work schedules, he complained about a job he had done in the rock mill making some kind of complaint. If I had done it his way we could have made it in four days but my way took 16 days. He complained about the use of the thickness of hard plates we were using for wear plates and of course he complained about the ball mill and rock mill lockout procedure. Before he got to that, Jones-- not Jones, I'm sorry-- Mr. Timko spoke up rebuking Jones and saying what's all this about. I thought we were going to talk about lockout procedures and well then, Jones started talking about lockout procedure. He said it was not safe. It was inadequate. We checked with Bob Morley and Bob Morley said it was safe and we were legal. Jones then pulled out a card, I've been to see Bob Morley's boss. He mentioned the man's name, I think some district director and I think his name was Frazier and Frazier said it is not acceptable. I said I don't know anything about that. It was Bob Morley who said it was acceptable. Jones said here's his card, call him right now and I said I would look into it. He said-- kept repeating, call him right now, call him right now. He kept repeating and I said if you have nothing further we better go back to work and the meeting broke up about that time.

Q. Do you recall anything else about that meeting? Let me withdraw that question. Was there a specific number of people as being identified as people who would be laid off at the meeting?

A. No.

Q. I couldn't quite hear when you were speaking and did you say it was going to be the least productive employee or least productive employees going to be laid off?

A. It was plural.

Q. Did the lay off in fact take place that day?

A. Yes.

Q. Who was laid off that day?

A. Joe Timko.

Q. Was anybody laid off later that week?

A. Yes, George Jones was laid off two days later.

Q. Why was it Timko was laid off first and then Jones?

A. Well, the work Jones was-- Timko was on was not critical to the operation of the plant. Jones was working on a pipeline that was critical." (III-T. 77-79).

Nameth's version of the October 9 meeting is at variance with the accounts of all others as to the time when he made the announcement that there would be layoffs. According to Nameth, he interrupted Complainant at the beginning of the meeting to say he had an announcement to make, i.e., that there would be a lay-off. Nameth's rendition appears faulty in this one respect and I find that the layoff announcement did occur after the "lockout" discussion (I-T. 103; III-T. 155). Nevertheless, in all other respects, Nameth's recollection of the October 9 meeting appears more lucid and detailed than the others and not being in great variance from Complainant's version it is accepted.

Before the "lockout" discussion, two other safety matters were discussed, "face shields" and "hooks welded on a handrail" (I-T. 100-101; III-T. 136). It is clear, however, that subjects other than safety matters were also brought up, such as pay raises, wage rates, work schedules, and work matters such as plate welds, etc. (II-T. 36, 38-42; III-T. 103, 136).

As noted above it appears that Complainant brought up the lockout procedure issue, saying it was not safe. Nameth replied that MSHA Inspector Bob Morley had said Respondent's lockout method was safe at which point Complainant produced a business card from his pocket and said he had gone to Morley's boss-Frazier- who said it was not safe. Nameth said he was not aware of that (III-T. 103-104). Complainant said "here's his card, call him right now." Nameth said he would look into it and Complainant kept repeating "Here's his card, call him right now." According to Nameth, Respondent's safety director thereafter contacted Frazier and after some procedural processing MSHA determined Respondent's method was unsafe and that Respondent had to lock out the motor (III-T. 104-105).

Following the meeting, Nameth reported to Schwandt. Nameth testified:

"A. Immediately after the meeting I went to Mr. Schwandt's office and I stated that we could not terminate these people now as we had previously planned and he said why not and I said because they have gone to MSHA.

Q. What was said then?

A. He said we had planned to lay these people off before they went to MSHA so let's go ahead with the reduction in force." (III-T.89).

Schwandt confirmed Nameth's account of this conversation (III-T. 36).

On October 9 after discussing the matter with Schwandt, Nameth checked with Al Jensen to "find out what jobs Jones and Timko were on". Nameth determined that Timko's job was not critical to the operation to be completed that day and that the job Complainant Jones was on was critical. He decided to let Timko go that day and to let Complainant go at the end of his work week on October 11 (III-T. 110, 116).

Later in the afternoon of October 9, 1984, Nameth told Jensen that Timko was to be terminated that day. Nameth was not present when Timko was told by Jensen he was to be laid off (III-T. 109-114).

Following the layoffs (III-T. 139-140), Nameth asked Jensen to prepare a memorandum (Ex. J-2) with respect to Jones and Timko which Nameth testified "was intended to be seen by myself and Mr. Schwandt in case we had problems as we are having right now" (III-T. 80) and in anticipation of future litigation (III-T. 95). Schwandt also asked Nameth to prepare such a memo to describe the incidents that led Nameth to believe Complainant Jones and Timko should be discharged (Ex. J-3; III-T. 80-81).

Respondent's Position.

Prior to the opening of the mine an engineering firm (Kilburn) prepared an authentication of Respondent's preliminary capital and operating budgets entitled the Kilburn Feasibility Capital Cost Study and, as previously noted, referred to herein as the Kilburn Report (III-T. 23).

Excerpts from this Report were introduced into evidence as Ex. R-1. Such reflect that a total crew of four, 2 mill maintenance mechanics and two helpers, were contemplated as the "proper number" for the mill when its construction was completed and it came under "operating conditions." (III-T. 23-25, 135) More mill maintenance employees were needed and hired during the period prior to the time the mill began operating (III-T. 26, 31) in approximately September 1984 (I-T. 76).

Sometime around the end of August 1984, shortly after the time Steve Nameth took over the supervision of the mill

maintenance function, the Mine General Manager, Arthur J. Schwandt, discussed with him the size of the mill maintenance crew with the conclusion that the crew size should be four with the possibility that they might get by with less and that two should be laid off (III-T. 26-29, 30, 31-34, 42, 90). In a meeting in mid-September between Schwandt and Nameth it was decided that Timko and Complainant would be the ones who would be laid off in the reduction-in-force (III-T. 29, 31-33, 34, 47), the time of which would be contingent on the mill's "operation" and was anticipated to be "around" the first week of October 1984 (III-T. 48, 50-51). ^{7/} Al Jensen was in agreement that Timko and Complainant were the two who should be laid off (III-T. 80).

In this connection, Jensen, who himself had been laid off and was not employed by Respondent at the time of the hearing, testified:

"Q. In your view who were the least productive workers of the group at the time of his determination?

A. I had three, George Jones, Joe Timko and Mike Ingle.

Q. In ranking among those three who would you have laid off?

A. If I had to do it because George and Joe because Mike Ingle was senior of the two.

Q. Now, in-- why was it you regarded Mr. Jones as one of the least productive in the unit?

A. I think it had to do a lot-- seemed like he slowed down, you couldn't prove this but it seemed like he had slowed down an awful lot in his work; his temperament had been very, very bad-- cussing, throwing things around.

Q. What was the reason that you gave him a poor conduct in the general payroll change notice form?

A. Temper.

Q. Jones?

A. Oh, Jones. It was temper, getting mad at any little thing." (emphasis added) (III-T. 138)

After he took charge of the mill maintenance crew in August 1984, Mill Superintendent Nameth told the foreman, Al Jensen, to tell the crew that "we were overstaffed and we were going to have to cut two or three people off." He also told Jensen to "keep a

^{7/} According to General Manager Schwandt, employees who were to be laid off (RIF'd) in all cases were not given advance notice (III-T.37).

close eye" so that they would get "rid of the least productive people". (III-T. 67). ^{8/} Around the time Overholser transferred out of the mill maintenance crew (September 1, 1984), Jensen was asked by the crew about the transfer and they told him they had "a lot of work". Jensen told them that he "had been told we already still have too many people now." (III-T. 134, 148). Complainant Jones was present at this time (III-T. 134-135).

The decision to terminate Complainant as one of the two to be laid off in the reduction-in-force was made by Mill Superintendent Nameth with the approval of General Manager Arthur J. Schwandt, in late August 1984 (III-T. 90, 96, 117-119, 122-124, 156). The actual date it was determined that Complainant would be laid off on October 11, 1984, was October 9, 1984 (III-T. 122). At the time of the layoffs of Complainant and Timko on October 9 and 11, 1984, respectively, Mr. Nameth was the person in management's hierarchy who effectively decided to hire, discharge and layoff employees in the mill maintenance unit (III-T. 60, 96).

In his testimony, Nameth described at length the reasons for laying off Complainant Jones (and Timko) and the process by which this decision was reached as follows:

"A. The AR plate where Jones put in more than was necessary?

A. Yes.

Q. That would have been about the twenty-seventh or twenty-eighth of August.

Q. How important was that particular incident to you in reaching a conclusion?

A. The importance was that it was becoming apparent that Jones wouldn't follow instructions. Also important in the fact he wasted a lot of expensive AR plate.

Q. When did the incident with the two by four pieces occur?

A. Sometime in July, early August.

Q. And how did you hear about that?

^{8/} Although Complainant alleges, and various of the crew who testified said, that the crew had no "advance notice" of the layoffs, Nameth's testimony that he told Jensen that two or three of the crew were to be "cut" is supported by the testimony of one crew member (Geyer) that there was "hearsay going around" that there was to be a reduction (II-T. 132). Also, as noted above, Ingle conceded he was told when he was hired that there might be layoffs after things got "going" (II-T. 99). These two evidentiary items lend support to Respondent's position.

A. The carpenter involved told me about it. The carpenter was working for me. I believe at the time Jones was probably reporting to Bernie Carter through Jensen.

Q. Were you in a position at that point to take any disciplinary action?

A. I didn't. I found out about it a day or so after it happened." (III-T. 85-86).

XXX XXX XXX XXX XXX

"A. He was apparently deliberately slowing down. He was slow getting to the job. He always complained about stuff he had to work with." (III-T. 87).

XXX XXX XXX XXX XXX

"Did you have authority to reduce the force on your own authority?

A. Probably, I am sure I would have discussed it with Mr. Schwandt.

Q. Did you discuss it with Mr. Schwandt?

A. Yes, I did.

Q. When was that?

A. The function was turned over to me on the twenty-fifth. The following Monday would have been the twenty-seventh and I would-- I'm sure I would have met with him on the twenty-seventh.

Q. What was said during that meeting?

A. I mentioned the fact that we had too many people in that department and told him of the other operations that I had been on. He mentioned that there was some kind of study by Kilburn that indicated we were supposed to have four mechanics after the operation started up.

Q. Were any people discussed as candidates for a reduction in force?

A. Yes.

Q. Who was discussed?

A. Joe Timko and George Jones.

Q. What was said about them by each of you?

A. I mentioned the fact they looked like they were dragging their feet. They weren't giving us an honest days work.

There were several incidents which showed this. I think the-- I had an incident with George Jones on the cone crusher discharge chute where I told Al Jensen to put the discharge chute with no instructions (sic) because we were going to encounter a lot of clay and the chute should be without obstructions. George put the plate in there with protective obstructions and to protect the bolt heads. Somebody had to go back in there and cut them out. That added a lot of time to that job.

Q. Did you mention this to Mr. Schwandt?

A. I don't remember whether I did or not.

Q. I am just trying to find out what you mentioned to him during this meeting?

A. One of the things I mentioned to him, I could see crackers put in the plant, put in the chutes. They didn't put in wear plates and we had an incident with George Jones where what he was instructed to do was braze resistant plates. It's expensive. He had instructions to put in the hard plate to a certain length and he exceeded that and wanted it his own way-- I don't understand that level and when I questioned-- George doesn't know to follow instructions. He likes to do things his own way.

Q. Did you tell that to Mr. Schwandt?

A. Yes, I did.

Q. Did you tell anything else to Mr. Schwandt concerning these two employees or either of them in this meeting you've just described?

A. You are talking about the meeting of the twenty-seventh?

Q. I am talking about the meeting of the week of August twenty-seventh.

A. Actual incidents, no, with the exception of the fact that both Jones and Timko were very slow getting away from the tool room. Where most of the other mechanics would be off in 10 or 15 minutes to their jobs, Jones and Timko very often would be there 30-35 minutes after we started the shift.

Q. Now, did Mr. Schwandt have anything to say with respect to either of those employees?

A. I think Mr. Schwandt made some comments about Joe Timko's work. I don't think he said anything about Mr. Jones.

Q. Do you recall whether he mentioned any particular incidents with Timko?

A. He mentioned it everytime he noticed Mr. Timko that he was-- I don't remember his exact words, but he was-- but that he was moving in slow motion.

Q. Do you recall whether he said anything else on some particular incident?

A. No, it was a long time back.

Q. Was there any decision made at that time to have a reduction in force? How did the meeting conclude?

A. There was no question at that time we were going to have a reduction in force. We had made a tentative decision that it would be Jones and Timko but I decided I would watch both of them and see if there was any change in attitude and behavior.

Q. There were no incidents that occurred that week with Mr. Jones?

A. Yes, there was an incident of the hydrostroke cylinder. Mr. Jones and Mr. Timko were both assigned to remove the hydrostroke cylinder because it had malfunctioned. We had to take it apart to where it had malfunctioned. It took Jones and Timko about eight hours to remove that and replace it. I felt that was much too long a time.

Q. Was that reported to Mr. Schwandt at anytime during the week?

A. Sometime during the week, yes. I think it was-- may have been Mr. Schwandt had walked by that job that particular day and observed some of it.

Q. And who was involved in-- with that particular job?

A. Mr. Jones and Mr. Timko. Somebody said that Mike Ingle was there part of the time, but I don't recall seeing him.
(III-T. 68-72)

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Q. Did you have any subsequent meetings with Mr. Schwandt on the subject of the reduction in force?

A. Yes.

Q. When?

A. Sometime during the week of September 16th or 17. I believe 16th-- early in the week.

Q. What was said during that meeting?

A. I walked in his office and told him I wanted to reduce these guys, let these guys go now.

Q. What did Mr. Schwandt say?

A. Mr. Schwandt said we still have a lot of work to do; don't cut your nose off to spite your face. Let's wait a few more weeks.

Q. Had there been any event that took place other than the hydrostroke cylinder that had brought you to that conclusion or what was it?

A. In the case of Mr. Jones-- I'm sorry, Mr. Timko, had done a job on me number four conveyor belt skirting. He had fabricated the skirting, it was all wrong, had to be redone. That was sometime during that period.

Q. What about Mr. Jones, did anything happen to him other than the hydrostroke cylinder incident?

A. No specific things I can remember except for the fact I observed them apparently working at a slow pace, getting away from the tool room late, having coffee breaks."
(III-T. 68-73; See also III-T. 117-118).

On cross-examination, Mr. Nameth reiterated his reasons for selecting Complainant and Timko as the two mill maintenance employees who should be laid off, and pointed out that his decision was made before the "lockout" matter arose:

Q. "... as of the twenty-seventh, what in Mr. Jones conduct led you to conclude that he would be a candidate for favor to be reduced in force?

A. His general conduct about dragging his feet, taking a long time to leave the tool room to go to his job, the cone crusher charge chute incident that I described-- that was some of it.

Q. Now, how did you observe his general conduct the fact that it took him a long time to leave the tool shed? Were you standing there watching?

A. Their starting time was 6:30. I would come up to the mill area about that time. I noticed other mechanics were off on their jobs and Timko and Jones were still in that area gathering up tools, getting ready to be-- to go to a job.

Q. You didn't say anything to him?

A. I would deal with him through Mr. Jensen. I would complain to Mr. Jensen about it.

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Q. Now you as of the twenty-seventh felt Mr. Jones' performance was unacceptable; is that correct?

A. Yes.

Q. You didn't feel it incumbent upon yourself to give him a chance to improve himself?

A. Before I took over from Bernie Carter, since I was going to have responsibility of that plant, I was out in the field quite often where Jones and Timko were working. I observed their work habits at that time but I wasn't directly responsible for them at that time. I formed conclusions. Even at that time I had suspicions, yes. I talked to Al about their performance and their performance did not improve from the day I took over. It seemed to get worse but it wasn't all that good up until that time.

XXX XXX XXX XXX XXX

Q. When did you learn that Mr. Jones had refused to enter the ball mill under the lockout procedure that you had instituted?

A. You look for an exact date?

Q. Approximately?

A. It would have been about the twentieth or twenty-first of September.

Q. And this was after you had already formed the conclusion that he would definitely be terminated?

A. I would think so, yes. (III-T. 90-94).

XXX XXX XXX XXX XXX

Q. I believe you mentioned something about a two by four that Mr. Jones had thrown on the floor?

A. No, it wasn't one two by four-- a carpenter was working at a table. He had cut a number of two by fours for a job that he was doing and Mr. Jones came along and asked him if he could have one or some of the two by fours and the carpenter said no, I need all that I've got. Mr. Jones in a fit of temper swept everything off the table.

Q. And did this help you to reach a conclusion that he should be terminated?

A. It didn't help Jones case any. (III-T. 97)

XXX XXX XXX XXX XXX

Q. There was other evidence of Mr. Jones sweeping two by fours on the floor?

A. No. There were other reports of Mr. Jones not being able to get along with some of the other people around there.

Q. Second hand reports?

A. Yes.

Q. But you never checked those out did you?

A. No, I didn't. (III-T. 98).

CONCLUSIONS AND DISCUSSION

The Discrimination Formula.

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir., 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmatively defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Const. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghiogeny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

In terms of the required prima facie case in discrimination, Complainant clearly established the first elements thereof, i.e. that he had engaged in protected safety activities and that Respondent's management was aware thereof prior to the time he was laid off.

Discriminatory Motivation

The first of the two salient issues posed here are whether the adverse action (layoff) taken by Respondent against Complainant was "in any part" motivated by Complainant's pro-

tected activities. Respondent contends that it was not so motivated in either laying off two of the mill maintenance crew or in selecting Complainant as one of the two to be laid off.

Respondent's second line of defense, the affirmative defense provided under the Commission's discrimination formula, then frames the second issue: Assuming arguendo that Respondent was in part motivated by Complainant's protected activities, was it also motivated by his unprotected activities and would it in any event have laid him off for his unprotected activities alone.

Under the 1977 Mine Safety Act, discriminatory motivation is not to be presumed but must be proved. Simpson v. Kenta Energy, Inc. and Jackson, 8 FMSHRC 1034, 1040 (1986). Complainant, in order to carry the burden of establishing discriminatory motivation, seeks to have an inference thereof drawn from various circumstantial factors. From gleaning and organizing these points from this difficult record and briefs, several are set out and discussed below. It is noted that three of these factors - which are found to lack significant merit - are listed in the amended complaint and constitute part of the foundation for Complainant's theory of discrimination.

(a) The Secretary argues that Complainant and Timko were shown in the record and characterized by Jensen (III-T. 150) as the two biggest "complainers" and that these were the same two Respondent selected to lay off.

I construe this characterization by Jensen to at least include safety complaints as well as other work-related non-safety complaints. Nevertheless, various other factors take the edge off this particular argument. The other members of the mill maintenance crew also complained of safety and other matters, also refused to enter the ball mill to do repair work unless the motor was locked out, specifically complained about the lock out procedure, and had arguments ("discussions") with Nameth.

As far as Timko was concerned, Nameth denied (III-T. 127), and it was not otherwise established, that he had knowledge that Timko had been elected the crew's "safety representative." I thus draw no carry-over inference that had it been established that Timko was discriminated against, such discriminatory intent should be attributed to Respondent's purposes in also laying off Complainant. It is noted (1) that the Secretary's discrimination case on behalf of Timko was settled and not litigated and (2) that the record in this matter does not independently contain sufficient evidence from which a determination can be made whether or not Timko was discriminated against, or more specifically, whether or not Respondent was discriminatorily motivated in laying off Timko.

Respondent credibly established good and sufficient reasons related to the work performance of Complainant for picking him to be one of the two to be laid off in accordance with the Kilburn

Report's staffing plan after the construction phase was completed and the mill was operating.

(b) In the Amended Complaint, Complainant alleges that Nameth became irritable at the October 9 meeting after the "lock out" problem was raised and after it became apparent that Complainant had gone to the MSHA office in Reno and complained about Respondent's lock out procedure.

Nameth's demeanor at this meeting was the subject of numerous descriptions, conflicting even among Complainant's own witnesses, one of whom said that Nameth was irritable even when he came into the meeting (II-T. 90). After careful scrutiny of the record, I find no credible, probative evidence that Nameth's demeanor at the October 9 meeting was any different than his customary demeanor which the crew members described in such terms as "belligerent", "hostile," "irritable", "angry," etc. (I-T. 81, 90, 93, 134, 151). I find no reliable evidence and I am unable to conclude that any irritability shown by Nameth during the October 9 meeting was traceable to or a reaction to the lock out discussion or the expression of safety complaints. The record demonstrates there is both consistency and reliability in (1) Respondent's position and the testimony of its various witnesses that the layoff decision was made between Schwandt and Nameth some two to three weeks prior to this meeting, and (2) the bases established by Respondent (heretofore discussed) for the layoff of two crew members and Complainant and Timko in particular.

(c) Another factor urged by Complainant for inferring discriminatory motivation is that there was no "advance notice" announcement, communication or other specific notification to the employees at any time that their employment was to be temporary or that there would be a layoff at a future time (Complainant's brief, p. 22).

Based on prior findings, I conclude that this contention has no merit and should not be considered part of any basis for inferring discriminatory motivation. Although Complainant testified that he was not advised at the time of hiring that the position was temporary, Ingle was so advised. Geyer testified that there was a layoff rumor going around which is consistent with Nameth's testimony that he told Jensen to tell the crew that a cut of two or three mill maintenance employees would have to be made. It is also consistent with Jensen's testimony that he told the crew that he "had been told that we already still have too many people." I do infer from this evidence that the crew was aware that a layoff was coming prior to the October 9 meeting in view of the small size of the crew and their poignant sensitivity to employment concerns shown in the record.

(d) Complainant alleges: "As justifications for the alleged early decision to terminate Jones and Timko, Nameth complained that Jones had wasted a lot of expensive AR plate and that Jones and Timko were slow in getting away from the tool room. In fact,

Nameth complained that Jones and Timko would often remain from 30 to 35 minutes after the start of the shift (III-T. 70). Both of these complaints involved the wasting of company assets (either money or time). It must be remembered that Jones and Timko, although marked for termination as of the end of August, were to remain on the job until sometime in October. It is inconceivable that a manager could observe employees wasting half an hour at the start of the shift, consider it important enough to be a factor in a decision to terminate the employees, and never complain or take any steps to see that it did not continue for the next six weeks of their employment." (Complainant's Brief p. 18).

As with many of Complainant's assertions, I find little merit in this contention. Nameth's failure to take direct disciplinary or corrective action himself is consistent with Respondent's intention of laying off employees in the near term. Also Nameth testified that he was "sure" that he expressed a complaint through Jensen about Complainant's and Timko's tardiness (III-T. 30, 91, 93). It is also apparent that shortly thereafter in mid-September, Nameth asked Schwandt to trigger the layoff immediately (III-T. 73). According to Nameth, whose testimony I find generally persuasive and reliable, Schwandt replied: "... we still have a lot of work to do; don't cut your nose to spite your face. Let's wait a few more weeks." (III-T. 73).

Had Complainant- and Timko- been punitively discharged for "wasting" company "time and money", this argument would have more strength. However, with a layoff planned in the foreseeable future, Nameth's actions are not inconsistent with Respondent's general position, nor are they seen as demonstrating a discriminatory frame-of-mind. By contrast, Complainant's work performance here is seen as providing a business justification for respondent's decision to select him for the layoff.

(e) Complainant argues that various work and staffing decisions by Respondent were not "consistent with a business need to reduce the number of maintenance employees." Various of these points which are frequently general and not particularly probative to begin with, are that:

- (i) Kenny Kohles, an inexperienced 19-year old who had been hired as a janitor in May 1984, was promoted to the mill maintenance crew around September 1;
- (ii) After the layoffs, the crew members who remained were required to work considerable overtime;
- (iii) An outside contractor (Western General Contractors) was brought in to do maintenance work which could have been performed by employees of Dee Gold;
- (iv) Complainant and Timko were the only two workers laid off in 1984.

The record reflects that Respondent did get by with two less mill maintenance employees after the layoffs and after the mill

began operating; that the complement of 6 crew members prior to the mill start-up was reduced in accordance with Respondent's Kilburn Report staffing plan (III-T. 25, 27, 32) which was conceived before Complainant (and Timko) were hired; that Kohles was brought in to replace Overholser who requested a transfer out of the crew because of "friction" and that such replacement kept the size of the crew constant until such time as the layoff was called for. Kohles, according to Schwandt, was a "very hard working young fellow" (III-T. 43) and was "proficient in heavy equipment operation" (III-T. 65).

Respondent also credibly explained that the reduction in its mill maintenance force was called for even though there was no reduction in other sections of the mine, and that such was due to the fact that "we had more people than we had budgeted for" (III-T. 62). Respondent then established that it was "cheaper to pay a premium for" overtime than to have extra workers due to the cost of fringe benefits, such as health benefits (III-T. 40, 41), and that the work performed by Western General Contractors was within the framework of its contract and not a diversion of work from the mill maintenance crew (II-T. 153; III-T. 37-39).

(f) Complainant contends the after-the-fact written statements of Jensen (Ex. J-2) and Nameth (Ex. J-3) were prepared as part of a pretextual business justification for the layoff of Complainant and Timko. Here Complainant contends (Complainant's Brief, p. 24):

It is only after the (October 9) meeting, after the terminations and after Jones informs Nameth that he is going to fight his termination, that Jensen is instructed to write anything negative he can think of relating to the employment history of Jones and Timko. Likewise, the self-serving memorandum from Nameth to Schwandt only occurs after Jones informs Nameth that he is going to fight. This is almost a classic scenario of an ex post facto attempt to fabricate a factual justification for a prohibited action already taken."

There is no contention -- in this argument-- that any of the deficiencies of Complainant and Timko contained in the written statements of Jensen and Nameth did not occur. The point sought to be made is that such were fabricated and after-the-fact of the layoffs and thus should be the basis for an inference of discriminatory intent or animus. The response to this contention appearing at page 14 of Respondent's brief is found to have merit.

"J-2 was not a routine document, rather one prepared for the purposes of the litigation. Specifically, it was prepared by Mr. Jensen pursuant to Mr. Nameth's request to list all of the problems that he, Jensen, had experienced with Messrs. Jones and Timko.

Mr. Schwandt asked Mr. Nameth to prepare, and to have Mr. Jensen prepare, memoranda justifying Mr. Jones' termination. ... This memorandum was intended entirely for the internal purposes of Dee Gold, and was not intended for distribution to third parties. ... The only reason the Government obtained it was because it asked for it in its discovery and it was dutifully produced. There is no suggestion in the record that the memorandum was relied upon by any parties in terminating Mr. Jones (although some of the incidents recounted in it are pertinent); indeed, it is perfectly plain that it was made following his termination."

I find nothing irregular, suspicious, or nefarious in the fact that Respondent attempted to make a record for its own purposes after the layoffs in anticipation of future litigation (III-T. 54-57). Respondent effected no pretense that such statements were prepared prior to the layoffs. This contention is rejected.

At page 16 of its brief, Complainant expresses a related concern:

"There is no dispute that management was aware of Jones' safety complaints during the month of September. If, in fact, they had decided in September to terminate Jones and were, in fact, fearful of "repercussions" would it have not been logical to prepare these memoranda at the time the decision was made and while Jones was still employed? The timing of these memoranda is additional evidence that the allegations contained therein were pretextual justifications for decisions made in October which had nothing to do with ability or productivity."

The record firmly establishes that all members of the mill maintenance crew had expressed safety and other complaints during the summer of 1984 and were apparently not reluctant in doing so. It appears- and the probative evidence establishes-that Respondent had acquired real reason to anticipate litigation following both the October 9 meeting and the "I'll fight it" conversation between Nameth and Complainant after Complainant was laid off on October 11, 1984. The fact that Respondent did not "document" Complainant's deficiencies earlier is not illogical but it is consistent with the position Respondent has taken in this matter that Complainant was laid off in a long - anticipated reduction-in-force, and was not punitively discharged for unsatisfactory work performance or other reasons. An inference that the timing of the obtaining of the Jensen and Nameth statements is indicative of "pretextual justifications" will not be drawn.

(g) As part of the mosaic from which Complainant urges the inference of discriminatory motivation be drawn, Complainant points out that approximately three months after he was hired, Complainant Jones received a written evaluation rating him

"excellent" in all categories and he received no subsequent ratings or reprimands until his discharge.

Respondent credibly established and I have hereinabove found that Complainant's performance deteriorated thereafter in various respects. Respondent's evidence in this respect is reliable and persuasive and its determination to select Complainant for layoff is found to be reasonably attributable-by virtue of the preponderant probative evidence-to the justifications asserted and not to Complainant's protected activities.

(h) The most questionable circumstances raised by Complainant arose out of the October 9 meeting and from which Complainant maintains that the timing of the layoff announcements reflects anti-safety or retaliatory animus. Thus:

- a. the meeting was called for the purpose of discussing complaints, including safety complaints;
- b. safety complaints were indeed expressed at the meeting, including the "lock out" problem, and;
- c. after such, and Complainant's revelation that he had reported the lock out problem to MSHA, Nameth announced the layoffs;
- (d) Nameth incorrectly testified that he announced the layoffs before the lock out issue and Complainant's revelation were brought up.

Respondent, however, credibly established that it had previously planned the layoffs to take place around the time the October 9 meeting was held. Also, as previously shown, Complainant's belief and contention that Respondent had not previously planned, had no justification for, and had made no prior indication to the crew as to, the reduction in crew size was shown to be in error. Further, the quality of this record does not provide any reliable or persuasive basis to conclude (a) Nameth showed irritability at the meeting, or (b) even assuming that he did, that it was a reaction traceable to the voicing of any safety complaint or complaints.

Respondent, on the other hand, persuasively established that the layoffs were planned long before Complainant was hired and that there existed good and sufficient reason for the selection of Complainant for the reduction.^{9/} In addition, as previously shown, various of the bases for Complainant's assertion of discriminatory motivation, tenuous to begin with, did not stand up well under scrutiny.

^{9/} In Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982) the Commission pointed out: "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

In reaching the conclusion that the Secretary failed to establish that Complainant's layoff was discriminatorily motivated, consideration has been given to the fact that the record is barren with respect to ancillary or background factors which would reflect a disposition on the part of Respondent's management personnel, singularly or collectively, to engage in such conduct. A prior history of, or contemporary action indicating, antagonism or hostile reaction to the expression of safety complaints was not demonstrated. There was no evidence of retaliation against other employees who had expressed safety complaints either in the mill maintenance crew or other departments.

The record in this proceeding contains no admissions or other statements, oral or written, from the management personnel involved indicating an anti-safety reporting animus. Indeed, the record reflects that none of the employees were threatened or subjected to retaliation for expressing safety concerns or, in connection with the lock out issue, for not working inside the ball mill.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The present record contains no direct evidence that Respondent was illegally motivated, nor does it support a reasonable inference of discriminatory intent.

Ultimate Conclusions.

It is concluded that Respondent's motivation in selecting Complainant for layoff was for his several unprotected activities and the business justifications asserted by its management personnel, Schwandt, Nameth and Jensen, and that such decision was justified. It is further found that the adverse action complained of (layoff) was not in part discriminatorily motivated. Thus, the Secretary failed to establish a prima facie case of discrimination under Section 105(c) of the Act.

Even assuming arguendo that it were established by a preponderance of the evidence that Complainant's discharge was motivated in part by his protected activities, Respondent showed by a clear preponderance of the reliable, probative evidence that it was motivated by Complainant's unprotected activities and that it would have taken the adverse action in any event for such. See Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (1984).

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is dismissed.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, 10th Floor, San Francisco, CA 94119-3495 (Certified Mail)

Jay W. Luther, Esq., Chickering & Gregory, Three Embarcadero Center, 23rd Floor, San Francisco, CA 94111 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 8 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 87-129-M
Petitioner	:	A.C. No. 05-02666-05504
	:	
v.	:	Trupp Quarry
	:	
NEIL SPRAGUE,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Citation No. 2638675 was issued on December 1, 1986, for Respondent's failure to provide for an elevated haulage road. On January 28, 1987, a Section 104(b) Withdrawal Order (Failure to Abate Order No. 2637460) was issued since the Respondent failed to provide the berm within the time period provided in the Citation and its extension. In issuing the Withdrawal Order, the Inspector noted that the Order was written to "replace" the Citation "which was not complied with."

In the parties' joint motion for approval of the settlement, the Petitioner moved to vacate the Order since preparation for the hearing "revealed that the failure to build a berm was caused by adverse weather conditions." As part of the settlement the administrative penalty originally sought by MSHA was reduced from \$195 to \$30. The reduction appears justified in view of the inference to be drawn from the fact that the Withdrawal Order has been withdrawn. I conclude that this reflects a change in Petitioner's initial belief that Respondent did not proceed in good faith to promptly abate the violation after notification thereof. It also appears that this is a small operator (8800 hours worked per year) who had a record of but 3 violations in the preceding 24-month period.

In the premises, the settlement is approved.

ORDER

1. Withdrawal Order No. 2637460 is vacated.
2. Citation No. 2638675 is affirmed.

3. Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date of this decision the sum of \$30.00 as and for the civil penalty for the violation described in Citation No. 2638675.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Arkins Park Sone, Mr. Neil C. Sprague, 5975 North County Road 27, Loveland, CO 80538 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

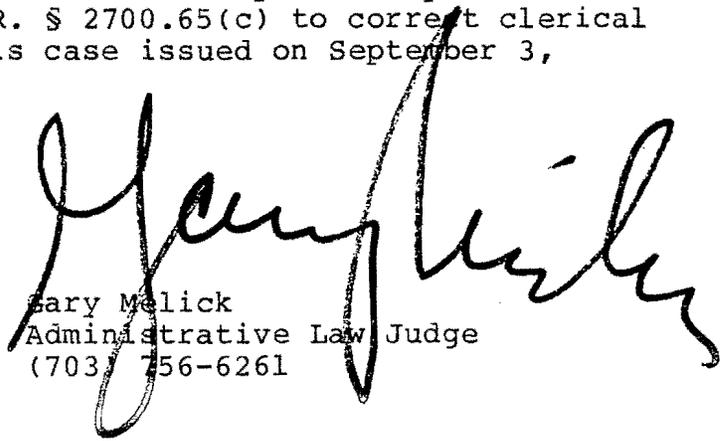
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 10 1987

PAULA L. PRICE : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 86-45-D
MONTEREY COAL COMPANY : VINC CD 85-18
Respondent : Monterey No. 2 Mine

ORDER

The attached Amended Decision is hereby issued pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c) to correct clerical mistakes in the decision in this case issued on September 3, 1987.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Linda Krueger MacLachlan, Esq., 314 North Broadway, Suite 1130,
St. Louis, MO 63102 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1100 Connecticut Ave.,
N.W., Washington, D.C. 20036 (Certified Mail)

npt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 10 1987 previously issued Sept. 3, 1987

PAULA L. PRICE : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. LAKE 86-45-D
v. : VINC CD 85-18
 :
MONTEREY COAL COMPANY : Monterey No. 2 Mine
Respondent :

AMENDED DECISION

Appearances: Linda Krueger, MacLachlan, Esq., St. Louis,
Missouri for the Complainant;
Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C. for the Respondent.

Before: Judge Melick

On July 28, 1985, Paula L. Price filed a complaint of discrimination with the Secretary of Labor under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act"^{1/}, alleging inter alia that Monterey Coal Company (Monterey) discriminated against her in violation of Section 105(c)(1) of the Act by suspending her for refusing to wear metatarsal safety boots provided by Monterey. Ms. Price maintains that the boots did not fit, caused foot injuries and presented a health and safety hazard.

^{1/} Section 105(c)(2) of the Act provides as follows:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order

Thereafter, on January 7, 1986, the Secretary's representative responded to the Complaint. The letter reads as follows:

Your complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a special investigator of the Mine Safety and Health Administration (MSHA).

A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that your complaint of discrimination has been satisfied and that no further pursuit of the complaint is required.

fn.1/ (cont'd)

the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

If you should disagree with MSHA's determination, you have the right to pursue your action and file a complaint on your own behalf with the Federal Mine Safety and Health Review Commission at the following address:

Federal Mine Safety and Health Review Commission
1730 K Street N.W.
Washington, D.C. 20006 (202) 653-5629

Section 105(c) provides that you have the right, within 30 days of this notice, to file your own action with the Commission.

After further unsuccessful efforts to have the Secretary represent her under section 105(c)(2) of the Act, Ms. Price filed the instant proceedings under Section 105(c)(3) of the Act and under what was then Commission Rule 40(b).^{2/}

In her initial request to the Commission Ms. Price stated in part as follows:

I would like to file a complaint in my own behalf concerning discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. MSHA has determined my complaint has been satisfied. I feel it has only been partially satisfied.

^{2/} Commission Rule 40(b), 29 C.F.R. § 2700.40(b), then provided as follows:

A complaint of discharge, discrimination or interference under section 105(c) of the Act may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

Subsequently, in a decision issued on August 25, 1987, a majority of the Commission invalidated Rule 40(b) in part and stated as follows:

Section 105(c) does not provide that complainants may file complaints on their own behalf if the Secretary has not determined whether a violation has occurred within 90 days of the filing of the complaint. To the contrary section 105(c)(3) expressly provides that the complainant may file his private action only after the Secretary has informed the complainant of his determination that a violation has not occurred:

Within 90 days of the receipt of the complaint filed under [Section 105(c)(2)], the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right within 30 days of the Secretary's determination, to file an action on his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].

Gilbert v. Sandy Fork Mining Company Inc. and Secretary on behalf of Gilbert v. Sandy Fork Mining Company Inc., Dockets No. KENT 86-49-D and KENT 86-76-D, slip opinion p.11.

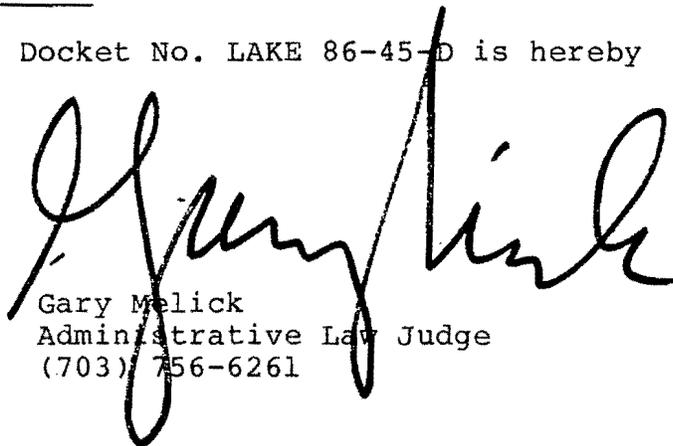
In that decision the majority also held that its ruling therein was applicable to any individual discrimination complaint then pending before the Commission.

In light of the above it is clear that I am now without legal authority to continue the instant proceeding under section 105(c)(3) of the Act. The Secretary has not informed the Complainant herein of a determination that a violation has not occurred.^{3/} Accordingly I have no choice but to dismiss this case.

^{3/} On the contrary, testimony at hearings in this case indicates that the Secretary's representatives found that there was a violation of section 105(c) but decided that in light of the purportedly small amount of damages involved and the heavy caseload in the Solicitor's office the case was not significant enough for the Secretary to pursue. Tr. 2589-2590.

ORDER

Discrimination Proceeding Docket No. LAKE 86-45-D is hereby dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Linda Krueger MacLachlan, Esq., 314 North Broadway, Suite 1130,
St. Louis, MO 63102 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1100 Connecticut Ave.,
N.W., Washington, D.C. 20036 (Certified Mail)

npt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 15 1987

ARNOLD SHARP, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 86-149-D
 :
BIG ELK CREEK COAL CO., : No. 1 Surface Mine
INC., :
Respondent :

SUPPLEMENTAL DECISION

Appearances: Leon L. Hollon, Esq., Hazard, Kentucky, for
Complainant; Stephen C. Cawood, Esq.,
Pineville, Kentucky, for Respondent.

Before: Judge Fauver

A decision on liability was entered on July 22, 1987, holding that Respondent discharged Complainant in violation of § 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., on May 28, 1986. The decision provided that the parties should meet in an effort to stipulate the amount of back pay, interest and litigation expenses due the Complainant, and to submit a proposed order for relief.

The parties have submitted a proposed order, agreed to by Complainant and the attorneys for Complainant and Respondent, with their motion for approval of the settlement reflected by the proposed order.

Paragraphs one through six of the proposed order, with minor changes, are approved, but paragraphs seven and eight are not deemed to be appropriate in an order for relief under the statute.

ORDER

Based upon the proposed order as approved herein, it is ORDERED that:

1. Within three days following receipt of this Order Respondent shall pay to the Complainant the total sum of \$45,000, representing past wages, together with interest and all

reimbursible expenses incurred by Complainant in connection with this pending matter.

2. Respondent shall reinstate the Complainant to his previous job as a rock truck driver at the Respondent's No. 1 Surface Mine in Leslie County, Kentucky, at that mine's prevailing rate for said classification (or \$9.00 per hour), said reinstatement to be effective immediately upon receipt of this Order.

3. At the conclusion or termination of Respondent's operations or services for Blossom Coal Company at Respondent's No. 1 Surface Mine, Respondent shall transfer the Complainant, or cause the Complainant to be transferred, to either a mining operation conducted by Red Star Coal Company or a mining operation conducted by Golden Oak Mining Company, in a job classification to be determined by the Respondent, provided, however, that Complainant shall receive for such job classification the prevailing pay scale for rock truck drivers at the mining operation to which he is transferred.

4. Should a rock truck driver's job become available at such new mine location, Respondent shall offer such rock truck driver's job to Complainant, if he remains in the Respondent's employment at the time such rock truck driver's job becomes available.

5. Respondent shall retain Complainant in Respondent's employment for a period of at least one year from the date of his reinstatement under this Order, provided, however, that Complainant shall satisfactorily perform his job and comply with Respondent's work rules and provided that Respondent or its affiliates remain in the coal business in Eastern Kentucky.

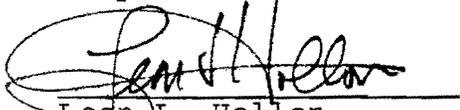
6. Respondent shall pay to Leon L. Hollon, Esq., counsel for the Complainant, a reasonable attorney's fee to be approved by the Judge.

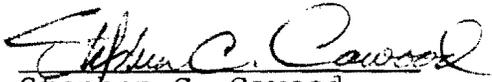
The decision entered on July 22, 1987, shall not be made final until an order is entered herein approving an attorney's fee for Complainant's attorney.


William Fauver
Administrative Law Judge

AGREED TO:


Arnold Sharp,
Complainant


Leon L. Hollon
Counsel for Complainant


Stephen C. Cawood
Counsel for Respondent

Distribution:

Leon L. Hollon, Esq., P.O. Drawer 779, Hazard, KY 41701
(Certified Mail)

Stephen C. Cawood, Esq., Cawood & Fowles, P.O. Drawer 280,
Pineville, KY 40977 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 18 1987

LOCAL UNION 1810, DISTRICT 6,	:	COMPENSATION PROCEEDING
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. LAKE 87-19-C
Complainant	:	
	:	
	:	
v.	:	
	:	Powhatan No. 6 Mine
NACCO MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, DC, for Complainant;
Thomas C. Means, Esq., Washington, DC, for Respondent.

Before: Judge Fauver

SUPPLEMENTAL DECISION ON COMPENSATION

This proceeding was brought by the UMWA under § 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for compensation for miners idled by a modification of a 104(d)(2) order.

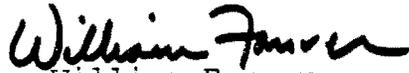
A decision on the merits was entered on August 4, 1987, holding that Complainant is entitled to the compensation claimed. The decision provided the parties an opportunity to stipulate the amount of compensation and provided that, "This Decision shall not be made final until a Supplemental Decision on Compensation is entered herein."

Based upon the record as a whole, including the parties' posthearing stipulation of the compensation due under the earlier decision, this Supplemental Decision awards compensation and orders payment of the compensation due plus interest.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a total of \$30,424.08 in compensation due the individuals shown in Attachment A to this Supplemental decision, plus interest on the amounts shown computed in accordance with the Commission's decision in Arkansas Carbona, 5 FMSHRC 2042 (1983).

The August 4, 1987, decision is hereby made FINAL along with this Supplemental Decision.



William Fauver
Administrative Law Judge

Distribution:

Earl R. Pfeffer, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004 (Certified Mail)

kg

ATTACHMENT A

WAGES OF 87 HOURLY PERSONNEL PLACED
ON LAYOFF STATUS OCTOBER 6, 7, 8, - 1986

<u>CHECK NO. & NAME</u>	<u>TOTAL 3-DAY WAGES</u>
4250 C. Neff	\$ 372.36
4322 W. Wain	372.36
4366 G. Palmer	372.36
4373 H. Cox	346.74
4490 R. Parish	346.74
4681 K. Roe	346.74
4504 P. Barath	346.74
4617 G. Makara	346.74
4629 T. Ackerman	346.74
4682 D. Dixon	346.74
4267 R. Betts	348.48
4337 K. Neal	348.48
4365 J. Holskey	372.36
4307 J. Jeffers	372.36
4603 R. Wiggins	353.82
4362 R. Basham	372.36
4402 J. Thornton	372.36
4484 R. Shreve	353.82
4422 T. Brill	372.36
4437 M. McCollum	372.36
4311 R. Jeager	372.36
4622 J. Gear	372.36
4558 M. Ackerman	353.82
4657 T. Myers	362.76
4206 D. Cunningham	362.76
4220 J. Graham	362.76
4344 F. Keylor	337.14
4408 J. Warner	337.14
4478 D. Hughes	337.14
4358 L. Palmer	338.88
4243 T. Cunningham	337.14
4340 S. Gossett	337.14
4684 J. Douglass	337.14
4550 S. Benson	337.14
4429 R. Kline	337.14
4394 J. Scott	337.14
4238 T. Lowe	337.14
4395 P. Scott	337.14
4498 J. Broemsen	337.14
4246 G. Cline	345.84
4547 W. Myers	362.76
4616 J. Thoburn	362.76
4310 J. Mellott	344.22
4269 D. Campbell	344.22
4430 M. Garten	362.76
4658 E. Parker	344.22
4470 T. Watson	344.22
4240 R. Major	362.76
4621 B. Hoskinson	362.76
4273 J. Faldoski	362.76
4320 G. Selmon	362.76
4391 J. Mercer	362.76
4359 R. Clift	344.22
4435 M. Bigelow	337.14
4202 L. Wise	369.96
4205 E. Bartnicki	369.96

CHECK NO. & NAMETOTAL 3-DAY WAGES

4420	G. Schuster	\$ 369.96
4625	G. Edwards	369.96
4555	R. Williamson	351.42
4660	B. Long	351.42
4264	J. Yanosik	351.42
4317	J. Mowery	369.96
4449	R. Witsberger	344.34
4546	R. Swallie	344.34
4225	M. Goddard	344.34
4403	B. Clary	344.34
4483	G. Garczyk	344.34
4551	B. Stacy	344.34
4552	B. Evans	344.34
4557	R. Jones	344.34
4607	S. Boston	344.34
4506	J. Eichhorn	360.24
4505	D. Eichhorn	344.34
4413	E. Christinan	369.96
4627	K. McFarland	351.42
4553	D. Davis	351.42
2869	G. Goddard	369.96
4469	C. Thompson	369.96
4618	M. Voleck	369.96
4492	J. Arbogast	369.96
4319	W. Holland	351.42
4619	R. Homan	351.42
4272	S. Hayes	351.42
4436	M. Zaborek	351.42
4361	B. Knight	351.42
4411	C. Carpenter	346.08
TOTAL		\$30,424.08

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 18 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 87-66
Petitioner : A. C. No. 46-01433-03736
: :
v. : Loveridge No. 22 Mine
: :
CONSOLIDATION COAL COMPANY, :
Respondent :
: :
CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING
Contestant :
: Docket No. WEVA 87-8-R
v. : Order No. 2841392; 9/9/86
: :
SECRETARY OF LABOR, : Loveridge No. 22 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION
and
ORDER OF DISMISSAL

Appearances: Therese I. Salus, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Petitioner/Respondent;
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

The captioned civil penalty proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of \$750 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.400, as stated in a section 104(d)(2) "S&S" Order No. 2841392 served on the respondent on September 9, 1986. The order was issued after the inspector observed accumulations of float coal dust on the mine

floor along a conveyor belt haulage entry. The companion contest proceeding concerns Consolidation Coal's challenge to the legality of the order.

The respondent/contestant filed a timely answer and contest, and the cases were consolidated for hearing with several other cases in Morgantown, West Virginia, during the hearing term August 25-26, 1987. However, when the cases were called for trial, the parties advised me that they had reached a settlement in the civil penalty case, and that upon approval of the settlement, the contestant will withdraw its contest. Under the circumstances, the parties were afforded an opportunity to present oral arguments on the record in support of their proposed settlement (Tr. 3-8). The proposed settlement was approved from the bench, and my decision in this regard is herein re-affirmed.

Discussion

In support of the proposed settlement of the civil penalty case, the parties presented information pertaining to the six statutory criteria found in section 110(i) of the Act. They also discussed and disclosed the facts and circumstances with respect to the issuance of the violation, and a reasonable justification for a reduction of the original proposed civil penalty assessment. The proposed settlement requires the respondent to pay a civil penalty assessment of \$450 for the contested violation in question.

Conclusion

After careful review of the pleadings filed by the parties, and upon consideration of the arguments made in support of the proposed settlement of the civil penalty case, I conclude and find that the settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$450 in satisfaction of the violation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, the civil penalty proceeding is dismissed. In view of the settlement disposition of the civil penalty case, contestant's request to withdraw its contest IS GRANTED, and it IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Therese I. Salus, Esq., Office of the Solicitor, U.S. Department
of Labor, Room 14480 Gateway Bldg., 3535 Market St., Philadelphia,
PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800
Washington Rd., Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 21 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 86-67
Petitioner : A.C. No. 11-00599-03631
 :
v. : Orient No. 6 Mine
 :
FREEMAN UNITED COAL MINING :
COMPANY, :
Respondent :
 :
and :
 :
UNITED MINE WORKERS OF AMERICA, :
LOCAL UNION NO. 1591, :
Intervenor :

DECISION

Appearances: Rafael Alvarez, Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for Petitioner;
Harry M. Coven, Esq., Gould & Ratner,
Chicago, Illinois,
for Respondent;
Larry G. Eubanks, United Mine Workers of
America, Local Union 1591, Benton, Illinois,
for Intervenor.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

A hearing on the merits took place in St. Louis, Missouri on March 10, 1987.

Issues

The issues are whether a violation occurred. If a violation occurred, was it of a significant and substantial nature. Finally, if the citation is affirmed what penalty is appropriate.

Contested Order

Order Number 2823383, issued under Section 104(d)(2) of the Act, alleges respondent violated 30 C.F.R. § 75.316. The cited regulation reads as follows:

§ 75.316 Ventilation system and methane and dust control plan.

[Statutory Provisions]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Stipulation

At the hearing the parties stipulated as follows:

(1) The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

(2) Freeman United Coal Mining Company is a subsidiary of Material Service Corporation.

(3) Material Service Corporation is a subsidiary of General Dynamics Corporation.

(4) Freeman United Coal Mining Company owns and operates the Orient No. 6 mine.

(5) The Orient No. 6 mine is an underground mine, which extracts bituminous coal.

(6) The Orient No. 6 mine extracted 1,429,622 tons of coal from February 26, 1985 to February 26, 1986.

(7) Respondent extracted 6,471,856 tons of coal from February 26, 1985 to February 26, 1986.

(8) Respondent's business affects commerce.

(9) Respondent's business will not be affected by the payment of the proposed assessment of \$950.00.

(10) Orient No. 6 is a gassy mine.

(Tr. 8, 9, 68).

Summary of the Evidence

Secretary's Evidence

John D. Stritzel and Larry Eubanks testified for the Secretary.

JOHN D. STRITZEL, a ventilation specialist, has been a coal mine inspector with MSHA since 1971. His specialty includes reviewing plans and checking their adequacy (Tr. 15, 16). His expertise includes training in Beckley, West Virginia (Tr. 16, 17).

Prior to working for MSHA he started the safety division for respondent and served as a foreman trainee (Tr. 16-18).

On December 11, 1985 he conducted a technical ventilation inspection at the Orient No. 6 mine (Tr. 18). The inspection team consisted of Stritzel's immediate supervisor, Mark Eslinger, as well as Larry Eubanks of the UMWA; Howard Hill represented respondent (Tr. 19, 23).

The inspector took notes and drew a map of the area (Tr. 20, 23, Ex. P3). He stopped between room 31 and room 32 at the last open crosscut in the intake entry. As he passed through the pull-through curtain he observed a shuttle car being loaded at the face (Tr. 24, 54). He also observed the curtain down in the corner of room 31. There was about a three-foot gap in the plastic curtain. He did not know how long the gap had existed. He then began to take an air reading after first turning on the scrubber (Tr. 26-28, 64, 65). The air reading was taken with an anemometer. ^{1/}

^{1/} An anemometer is a device that measures the flow of air in feet per minute (Tr. 29).

The inspector then directed the miners not to rehang the curtain until he took his air reading (Tr. 29, 30). He calculated the air flow at 1662.5 cubic feet per minute, (cfm), at the end of the line curtain (Tr. 30, 31). He then advised Paul Little, the section foreman, that a violation existed (Tr. 31). Little said he thought there should be an air velocity of 3000 cfm in the entry. Mark Eslinger said 5000 cfm was required (Tr. 32). An order was issued; the ventilation plan requires 5000 cfm (Tr. 33, Ex. P4).

The order was issued because the condition they found short-circuited the air from the face area. The inspector issued a 104(d)(2) ^{2/} order because the section foreman didn't know how much air was required. The inspector believed it constituted an unwarrantable failure for the company to put in a man who did not know the air requirement in the gassy mine (Tr. 34, 35). Little stated this was his second day in the working section. His prior experience was as a belt and construction foreman for 15 years (Tr. 35).

The company abated the violation by having the entire crew repair the hole and reposition the curtain. They then had 5800 cfm (Tr. 36).

The inspector concluded that the violation was S & S because the volume of air was approximately a third of the required amount. But he did not know how long this condition existed. An ignition would be possible if a buildup of methane gas occurred in this gassy mine (Tr. 41, 42, 45). The inspector further felt that the gravity of the violation could affect the two miner operators and the buggy runner. In addition, the operator's negligence was high (Tr. 42, 43).

In considering whether a violation is S & S, various factors to be considered include the duration and the seriousness of the condition (Tr. 45, 46). The inspector felt the condition described in his order existed for probably two minutes (Tr. 46).

^{2/} The parties stipulated that a predicate 104(d) order was issued (Tr. 38, Ex. P5).

The methane concentration in the section was not dangerous; it measured one-tenth of one percent (Tr. 47, 49).

It was necessary to turn the scrubber on so they would know how much air was coming out at the end of the line curtain. The scrubber pulls out about 1000 cfm (Tr. 62).

The shift started at 8:00 a.m. and the inspector's air reading was taken at 9:35 a.m. (Tr. 63).

No reading was taken between the time the three-foot opening was closed and the repositioning of the curtain (Tr. 65). The inspector had not observed any excessive gaps in the curtain before it was repositioned. The three-foot hole and the minimal air at the end of the line curtain were the only violations (Tr. 66).

LARRY G. EUBANKS is a coal miner for respondent. He is presently a laborer and pit committeeman for the UMWA (Tr. 71).

The witness was a member of the inspection team (Tr. 73). While underground he made notes during the investigation (Tr. 75, Ex. P7). During the inspection Little said the required air was 3000 cfm.

Eubanks saw the hole in the curtain. The air reading was 1662 cfm (Tr. 76, 78).

Respondent's Evidence

Robert Newton and Howard O. Hill testified for respondent.

ROBERT NEWTON, a shuttle car operator for respondent, is presently unemployed. On December 11, 1985, he was unloading coal from the continuous miner. With his on-side standard shuttle car he took coal to the tail belt (Tr. 88, 89, Ex. R2, R4). The off-side car will become entangled and will tear down curtains when there is a lot of air coming through (Tr. 89).

The off-side buggy follows a different route than the on-side buggy (Tr. 91, Ex. R4).

It takes about four or five minutes between the time the buggy is filled and until it unloads at the belt tail. When operating the buggy the witness always looks back to be sure the curtain hasn't been torn down. The off-side car operator doesn't have this advantage (Tr. 94). On his trip to the belt tail the curtain was in good shape (Tr. 96). After dumping his load and returning to the mining machine he was sitting in the crosscut waiting for the other buggy to leave room 31.

While in that position he heard a "big snap." The other buggy operator had to stop and unroll some of his cable (Tr. 97). Just as the shuttle car passed in front of him he heard a noise like a tear and the witness saw that the curtain was gone. In about three seconds the witness then stopped his buggy, got his hammer and nails and he was going to rehang the wadded-up curtain. At that point the inspector directed him not to rehang the curtain (Tr. 98, 99, 101-104, 113, 115). About 16 or 18 feet of curtain had been torn down. Newton estimated he could rehang the curtain in three or four minutes (Tr. 99, 100). The cable of the off-side machine will frequently become entangled with the curtain (Tr. 100).

Newton identified the position of the tear on Exhibit R4 (Tr. 112, Ex. R4). If he had not been stopped by the inspector, the curtain would have been down no more than five or six minutes (Tr. 122).

HOWARD O. HILL, a field ventilation engineer, is a retired employee of respondent (Tr. 123). The witness, who helped develop the ventilation plan, produced the pre-shift and shift reports covering December 11, 1985 (Tr. 124, 125, 158). The reports indicated all of the faces and entries had been determined to be safe. No indication of methane gas was found (Tr. 126, 127). The ventilation in the intake entry was 14,400 cfm and 12,000 cfm at the point of return (Tr. 127, 129, Ex. R6).

The witness accompanied the inspection team and observed that 16 to 20 feet of the curtain was down.

The inspector's initial air reading was about 1600 cfm; the next one was almost 6,000 cfm (Tr. 139). Mr. Stritzel and Eubanks both said there was a 2- to 3-foot opening in the curtain. The smaller opening would still leave enough air at the end of the line curtain. But a 16- to 20-foot gap would have totally short-circuited the air (Tr. 131, 132).

In Hill's opinion 14,400 cfm of air on the intake is sufficient. Further, in his opinion, the inspector did not correctly recreate the conditions for which he issued the citation (Tr. 145). If the curtain had been restored by Mr. Newcom, the ventilation would have been around 7,000 cfm (Tr. 146). Further, in Hill's opinion the curtain was down less than five minutes (Tr. 147). It is the practice in this mine to rely on intake air readings to determine whether it is safe to cut coal at the face (Tr. 151).

In Hill's opinion a 16- to 20-foot gap in the curtain would create a hazard over a period of time (Tr. 153, 154). Methane could build up to the point of ignition (Tr. 154).

A violation exists if the continuous miner is cutting coal at the face below 5,000 cfm (Tr. 159).

Discussion

The credible evidence adduced by the inspector shows that he took an air reading after he observed a three-foot gap in the line curtain. On the other hand, the credible evidence adduced by respondent's witnesses establishes that the off-side shuttle car became entangled in the line curtain at about the same time, thereby tearing an 18- to 20-foot gap in the curtain. Under these conditions the air velocity was measured at 1,662 cfm.

Respondent initially contends that the Secretary did not establish a violation. I disagree. The evidence is uncontroverted that the air velocity measured 1,662 cfm at the end of the line curtain. A velocity of 5,000 cfm is required. Accordingly, the Secretary's evidence establishes a violation of the regulation.

Respondent further asserts that the inspector interfered with the mining cycle when he ordered the employee to stop hanging the curtain. Further, respondent argues that such action constitutes a violation of MSHA's policies.

Respondent's arguments lack merit. It can hardly be considered a part of any mining cycle for a shuttle car to tear down a portion of the line curtain. It accordingly follows it is not proper, as the operator urges, to issue an advisory directive to the inspector prohibiting such activities. Respondent cites no MSHA directives and no case law in support of its view that the inspector overreached his authority in prohibiting the shuttle car operator from rehangng the curtain while he took an air reading.

Respondent further claims the inspector did not accurately recreate the conditions he initially observed. Further, the operator claims the air measurement did not reflect a three-foot hole in the blowing line curtain.

Respondent's arguments are misdirected. It is true that respondent's expert witness testified that a three-foot gap in the curtain would not cause the cfm to drop sufficiently to cause inadequate air. However, the violation occurred when the air velocity was below 5,000 cfm. It is immaterial whether such velocity was caused by a three-foot gap or a twenty-foot gap.

The Secretary contends that the violation herein was both S & S and that it constituted an unwarrantable failure on the part of the operator.

I disagree. An S & S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In the instant case there was no methane hazard and the reduction of the air flow only lasted a short time.

An unwarrantable failure occurs if the operator is indifferent, shows a willful intent or if there is a serious lack of reasonable care. U.S. Steel Corporation, 6 FMSHRC 1423, 1437 (1984). The record fails to establish the necessary factors to establish unwarrantable failure on the part of the operator.

The inspector's opinion was based, in part, on the fact that the foreman did not know the amount of air required at the end curtain. This factor, in and of itself, is insufficient to establish an S & S violation or an unwarrantable failure within the Commission decisions outlined above.

Civil Penalty

The statutory criteria to assess civil penalties is contained in 30 U.S.C. § 820(i).

The stipulation of the parties addresses the size of the business of the operator and the effect of a penalty on its ability to continue in business. The company has an adverse prior history which is high: in the period ending September 3, 1986, the company incurred 571 violations and was assessed \$68,141. The operator was negligent but the gravity of the violation was low since the violative condition existed only for a minimal period of time. The company's good faith is apparent in that the inspector interrupted the abatement effort. On balance, I deem a civil penalty of \$200 to be appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law:

1. Respondent violated 30 C.F.R. § 75.316.
2. Citation 2823383 should be affirmed and a civil penalty assessed.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

Citation 2823383 is affirmed and a penalty of \$200 is assessed.


John J. Morris
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Eighth Floor, Chicago, IL 60604 (Certified Mail)

Harry M. Coven, Esq., Gould & Ratner, 222 North LaSalle Street, Suite 800, Chicago, IL 60601 (Certified Mail)

Mr. Larry G. Eubanks, United Mine Workers of America, Local 1591, 1101 East Grayson, Benton, IL 62812 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 22 1987

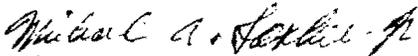
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-101
Petitioner : A.C. No. 42-00121-03634
 :
v. : Docket No. WEST 87-207
 : A.C. No. 42-00121-03644
UTAH POWER AND LIGHT COMPANY, :
Respondent : Deer Creek Mine
 :
 :
UTAH POWER AND LIGHT COMPANY, : CONTEST PROCEEDINGS
Contestant :
 : Docket No. WEST 87-4-R
 : Citation No. 2504025; 9/3/86
 :
v. : Docket No. WEST 87-5-R
 : Citation No. 2504224; 9/3/86
 :
 : Docket No. WEST 87-6-R
 : Citation No. 2504226; 9/3/86
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. WEST 87-7-R
ADMINISTRATION (MSHA), : Citation No. 2504227; 9/3/86
Respondent :
 : Deer Creek Mine

DECISION

Before: Judge Lasher

Based on the Secretary's motion, Utah Power and Light Company agreeing, to vacate the four Citations involved in these consolidated penalty/contest proceedings, and good cause appearing therefor, it is ORDERED,

1. The Secretary's motion is GRANTED.
2. Citation No. 2504025 (Dockets WEST 87-101 and WEST 87-4-R), and the three Citations involved in penalty Docket WEST 87-207, 2504224 (Docket WEST 87-5-R), 2504226 (Docket WEST 87-6-R and 2504227 (Docket WEST 87-7-R) are VACATED, and
3. These proceedings are DISMISSED.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, NW, Washington, D.C. 20004-2505 (Certified Mail)

Mr. Frank Fitzek, Miners' Representative, Utah Power and Light Company, P.O. Box 310, Huntington, UT 84528 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 23 1987

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 86-55-D
ON BEHALF OF :
JAMES C. GRAY, JR., : BARB CD 85-47
Complainant :
v. :
CHANEY CREEK COAL CORP., :
B. D. C. COAL CORPORATION, and :
WOODS CREEK CORPORATION, :
Respondents :

ORDER APPROVING SETTLEMENT
AND DISMISSING PROCEEDING

Before: Judge Maurer

On September 21, 1987, the Secretary submitted a settlement agreement, signed by all parties to this proceeding, including the individual complainant himself, for approval.

By the terms of the settlement agreement, the respondents have agreed to pay to James C. Gray, Jr., the total sum of \$16,365 in full and complete settlement of his claim. There is no longer any issue of reinstatement in the case. Respondents have further agreed to expunge from Mr. Gray's record any reference to his discharge in this case. The Secretary of Labor has agreed to waive pre-judgment interest and the civil penalty.

I have considered the agreement in the light of the policies of the Act and conclude that it should be approved.

Accordingly, the settlement agreement IS APPROVED, and, subject to the payment of the agreed amount, \$16,365, to Complainant Gray, this proceeding IS DISMISSED.


Roy J. Maurer
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 801 Broadway, Rm. 280, Nashville, TN 37203
(Certified Mail)

Julie Muth Goodman, Esq., Miller, Griffin & Marks, P.S.C., 700 Security Trust Bldg., Lexington, KY 40507 (Certified Mail)

Billy Don Chaney, B. D. C. Coal Corp., Rt. 1, Box 286-B, East Bernstadt, KY 40729 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 25 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 86-250-M
Petitioner : A.C. No. 42-01423-05503
v. : Triple C Gravel Pit
TIMBER LAKES CORPORATION, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Veigh Cummings, President, Timber Lakes
Corporation, Murray, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits took place on January 7, 1987 in Salt Lake City, Utah. The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citations

Respondent is charged with violating four safety regulations.

Citation No. 2644388 alleges a violation of 30 C.F.R. § 50.20. The regulation, in its pertinent part, provides as follows:

SUBPART C - REPORTING OF ACCIDENTS, INJURIES,
AND ILLNESSES

§ 50.20 Preparation and submission of
MSHA Report Form 7000-1 - Mine Accident,
Injury, and Illness Report.

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in § 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 11 of section C of Form 7000-1 shall be completed and mailed to MSHA in accordance with the instructions in § 50.20-1 and criteria contained in §§ 50.20-4 through 50.20-6.

Citation No. 2644389 alleges a violation of 30 C.F.R. § 56.18020. The regulation provides as follows:

§ 56.18020 Working alone

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

Citation No. 2644390 alleges a violation of 30 C.F.R. § 56.15002. The regulation provides as follows:

§ 56.15002 Hard hats.

All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

Citation No. 2644391 alleges a violation of 30 C.F.R. § 56.14029. The regulation provides as follows:

§ 56.14029 Machinery repairs and maintenance.

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Summary of the Evidence

Richard H. White, a person experienced in mining, has been an MSHA inspector for 10 years. In May 1986 he inspected respondent, a sand and gravel operation (Tr. 8-10).

The inspection occurred because Ray Caillouette, an employee, reported to the MSHA office that an accident had occurred. No report had been filed at the office prior to May 5, 1986 (Tr. 11).

In checking at the site the inspector learned Caillouette had been struck in the head by a 24-inch pipe wrench when he was attempting to restart a tail pulley (Tr. 12, 13). After taking some measurements and photographs the inspector interviewed Caillouette (Tr. 13, 14).

After the interview he contacted Dave Cummings, the foreman of the crusher operation. The inspector and Cummings then checked the equipment. Cummings did not know if the accident had been reported to MSHA. Caillouette was not back at work on May 6th; he was still having problems with his head and still under a doctor's care (Tr. 14, 15).

The interview between Caillouette and the inspector formed the basis for the citations in the case (Tr. 16).

From his investigation the inspector concluded that on the date of the accident Caillouette, who had 22 years of experience, performed his routine duties. This included running the loader, filling the feed trays and crushing rock (Tr. 21, 54).

During the day Cummings, the foreman, went into Salt Lake City for supplies (Tr. 21). No other person was at the site (Tr. 22). At about 4:00 p.m. the conveyor belt in front of the feed tray stopped (Tr. 22, Ex. P, P4). Caillouette went below the hopper which measures 17 inches from the outside wall to the structure of the conveyor belt. With the aid of a 24-inch pipe wrench and a four-foot cheater bar he tried to get the conveyor belt to move. The conveyor belt was not shut off or blocked; it moved and the pipe wrench struck him in the head (Tr. 23, 24, Ex. P4, P5).

Caillouette said he was unconscious for 15 to 20 minutes. Since his head was hurting he wanted to drive home. When he came to work the next day he again became dizzy and returned home (Tr. 25). Berg, who was present after the accident, is an independent truck driver hauling materials (Tr. 26).

The first citation was written due to the operator's failure to report an accident within 10 days (Tr. 27). MSHA Inspector Wilson had given Form 7001 to the operator two years before this accident occurred (Tr. 27). The citation was abated after the company filled out the MSHA form (Tr. 29). The inspector believed the failure to notify involved a high degree of negligence (Tr. 29).

Caillouette stated he was working alone at the time of the accident; further, he had been working alone most of the day. The inspector also considered the work to be hazardous (Tr. 30). He was running the loader on a built-up bank; also moving parts can be hazardous. In addition, the area below the feed trap was confined and very hazardous (Tr. 31).

There was a telephone in the electrical control trailer van, about 75 feet from the feed trap area (Tr. 32). Caillouette also indicated it was a regular practice to work alone at that pit. The foreman also knew Caillouette was working alone (Tr. 33).

The inspector considered the "working alone" citation to be an S & S violation. It was reasonably likely to cause an accident; if it happened it was reasonably likely to be serious. Both of these events came to pass (Tr. 34).

Caillouette spent some time in the hospital and he was unable to work for a month (Tr. 35). Accordingly, the inspector felt the violation was reasonably likely to result in a reasonably serious injury (Tr. 35). The "working alone" citation involved a high degree of negligence because the practice was known to management (Tr. 35).

Caillouette also related to the inspector that he was not wearing a hard hat at the time of the accident (Tr. 35). There could be falling objects in the area where he was working (Tr. 36, Ex. P1, P2). The foreman indicated hard hats were available. A hard hat not only protects your head from falling objects but protects your head when going into low areas. Failure to wear a hard hat can cause head injuries, concussions and lacerations. Such injuries are serious (Tr. 37, 38).

The Kolberg conveyor belt equipment had not been turned off (Tr. 39, 40, Ex. P1, P3, P5). He was repairing the equipment to get it to run without turning it off or blocking it (Tr. 40). If the power had been deenergized, locked out, or blocked against movement, the accident would not have occurred. Caillouette and Dave Cummings said it was routine practice to start the conveyor belt by using a pipe wrench on the tail pulley without turning off the power (Tr. 41). The inspector felt this was an S & S violation (Tr. 42). Further, in his opinion the negligence was high (Tr. 43). However, the foreman stated he had instructed the men not to have the power on when they tried to start the equipment (Tr. 43).

Respondent is a three-man sand and gravel operation (Tr. 44). The foreman, who was cooperative, immediately abated the violations (Tr. 45, 47).

The belt stopped because Caillouette placed an excessive amount of material on it (Tr. 51).

David Cummings and Veigh Cummings testified for respondent.

David Cummings runs the company and does the excavation work.

Mr. Caillouette, 37 years old, worked for Timber Lakes about two and a half years (Tr. 76, 77, 79, 80). He was experienced in doing mechanical work and also works in the pit. On the day of the accident the County had been hauling gravel out of the pit all day (Tr. 77, 79).

Cummings talked to Caillouette the morning after the accident. He explained that when the belt stopped he left the power on and tried to restart it with a cheater pipe. Cummings did not see any visible signs of injury on the worker (Tr. 78). However, he did a little complaining; he also worked the next full day.

The company has a strict rule prohibiting anyone from working on equipment with power on. The company's practice is to clean up such a problem with the power off (Tr. 80). Using a pipe wrench does not solve the problem because the buildup remains (Tr. 80).

The company has made it clear to its employees that they do not work alone. Hard hats are available on the property (Tr. 82). They are required to be worn.

The witness did not file a report of the accident. The citations were abated (Tr. 83). The pit has two or three workers most of the time (Tr. 84).

One of the operator's complaints is that the company will have the pit in good shape with one inspector. But another inspector will cite the company for a violation previously passed over (Tr. 84, 85).

Caillouette stated to the witness that he was wearing a hard hat at the time of the accident (Tr. 86). Caillouette was very reckless in the way he handled the situation. He should have first turned the power off before cleaning it out with a shovel (Tr. 87).

Caillouette was hurt on a Wednesday and he received a drunk driving citation on Friday. But he was a good, hard worker (Tr. 90).

The number of workers at the gravel pit varies from two to five (Tr. 93). The gravel is used in the company's cabin development and some is sold to the County.

About 10,000 tons are crushed annually (Tr. 94).

On previous occasions Caillouette had turned off the power before cleaning rock off of the equipment. Cummings had never seen Caillouette go in by himself without turning off the power (Tr. 100). Caillouette was also wearing a hard hat that morning. The next morning he said he got a bump on the head but it wasn't serious (Tr. 102). The witness told Caillouette he had done a foolish thing (Tr. 103).

Veigh Cummings, the President and owner of Timber Lakes, indicated Ray Caillouette had been shot in the head in Viet Nam. When he was injured at the pit it affected his previous war injury (Tr. 115).

The company felt that Caillouette was a willing worker (Tr. 116).

The payment of a penalty would not make it impossible for the company to continue in business. The company holds safety meetings (Tr. 117).

The company has also received previous MSHA citations.

Evaluation of the Evidence

MSHA Inspector White indicated that the operator did not report Ray Caillouette's accident. The event was known to the company. Further, David Cummings confirmed that no report was filed. Citation No. 2644388 should be affirmed.

The three remaining citations are mainly based on the hearsay statement of Caillouette to the MSHA inspector.

Concerning Citation No. 2644389 (working alone): the statement of Caillouette confirms that the employee was, in fact, working alone. David Cummings, the foreman, had gone to Salt Lake City for supplies. The company's claim that it had a strict policy against employees working alone was certainly not followed.

Citation No. 2644389 should be affirmed.

Concerning Citation No. 2644390 (hard hats): the statement of Caillouette was to the effect that he was not wearing a hard hat. However, I credit the contrary evidence of David Cummings and Veigh Cummings. Hard hats were available and Caillouette even hunted deer while wearing one. This evidence indicates his dedication to the use of hard hats.

Citation No. 2644390 should be vacated.

The final citation, No. 2644391, involves the failure to shut off power or block off machinery against motion. The statement of Caillouette establishes the violative condition, and it is apparent that the accident would not have happened if the power had been shut off. Cummings stated that Caillouette's acts were against company policy. However, the operator is strictly liable for violations of the Mine Act. Asarco, Incorporated-Northwestern Mining Department, 8 FMSHRC 1632 (1986).

Citation No. 2644391 should be affirmed.

An issue raised by respondent concerns the fact that one MSHA inspector will give respondent a "clean bill of health." But a later inspector will cite the company for a previously existing violation. Events of this type can occur because MSHA inspectors have varying degrees of expertise. A violative condition may be observed by one inspector but not another. Further, the legal defense of estoppel does not lie against MSHA in these circumstances, Servtex Materials Company, 5 FMSHRC 1359, 1369 (1983).

CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is contained in Section 110(i) of the Act, now 30 U.S.C. § 820(i). It provides as follows:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Concerning the operator's history of prior violations it appears the company was assessed 10 violations for the two years ending May 5, 1986. But no dollar amount has ever been assessed or been paid. Accordingly, I consider that the operator has

no adverse prior history (Ex. P6). The company's tonnage and its maximum of five employees causes me to conclude that it is a small operator. Concerning negligence: the company could have reported the accident to MSHA as it knew about the event. The negligence in the "working alone" citation is high since the foreman should have known Caillouette would be alone if he left the site. The company's negligence is low in the last two citations: Caillouette's activities were contrary to company policy. The assessment of a civil penalty, according to the President, will not affect the company's ability to continue in business. The gravity of the violations is high inasmuch as severe injury could occur. Finally, the company demonstrated good faith in rapidly abating the violations.

In view of the statutory criteria, I consider that the penalties set forth in the order of this decision are appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law.

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. § 50.20 and Citation No. 2644388 should be affirmed.
3. Respondent violated 30 C.F.R. § 56.18020 and Citation No. 2644389 should be affirmed.
4. Respondent did not violate 30 C.F.R. § 56.15002 and Citation No. 2644390 should be vacated.
5. Respondent violated 30 C.F.R. § 56.14029 and Citation No. 2644391 should be affirmed.

Based on the findings of fact and conclusions of law I enter the following:

ORDER

1. Citation No. 2644388 is affirmed and a penalty of \$50 is assessed.

2. Citation No. 2644389 is affirmed and a penalty of \$300 is assessed.

3. Citation No. 2644390 and all penalties therefor are vacated.

4. Citation No. 2644391 is affirmed and a penalty of \$400 is assessed.

5. Respondent is ordered to pay to the Secretary the sum of \$750 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Veigh Cummings, President, Timber Lakes Corporation, 4609 South State Street, Murray, UT 84109 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 25, 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 87-156-D
ON BEHALF OF	:	HOPE CD-87-5
BRYANT M. HATFIELD, JR.,	:	
Complainant	:	No. 1 Mine
v.	:	
	:	
SMITH BROTHERS CONSTRUCTION,	:	
INC.,	:	
Respondent	:	
	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This is a discrimination proceeding arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On March 30, 1987, the Secretary of Labor, on behalf of the complainant, Bryant M. Hatfield, Jr., filed this complaint alleging violations of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1).

The Secretary's complaint alleged inter alia, that the Complainant was illegally discriminated against, on or about December 16, 1986, when a foreman employed by the Respondent threatened him with physical harm because of complaints Mr. Hatfield expressed, or intended to express, concerning preshift belt examinations at Respondent's No. 1 Mine.

On August 5, 1987, the Secretary and the Respondent, Smith Brothers Construction, Inc., filed a joint motion to approve settlement for the violations involved in this case. The Complainant has signed a separate notice evidencing his approval of the settlement agreement.

The joint motion to approve the settlement provides, in relevant part:

Smith Brothers construction, Inc., admits that Bryant M. Hatfield, Jr., was illegally discriminated against, in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1)

(hereinafter "the Act"), on or about December 16, 1986 when a foreman employed by Smith Brothers Construction, Inc., threatened Mr. Hatfield with physical harm because of complaints Mr. Hatfield had made, or was intending to make, concerning preshift belt examinations at Respondent's No. 1 mine.

* * * * *

Smith Brothers Construction, Inc., agrees to remove from Mr. Hatfield's employment records all adverse remarks about his having exercised his statutory right to file or make complaints alleging dangers on safety or health violations under the Act.

Smith Brothers Construction, Inc., agrees to pay a civil penalty of \$200.00 for its violation of Section 105(c) of the Act. This penalty is reasonable under the criteria set forth at Section 110(i) of the Act and will serve to effect the intent and purposes of the Act. The amount of this penalty is appropriate to the size of the business and the history of previous violations. The Respondent displayed a moderate degree of negligence in failing to prevent interference with Mr. Hatfield's exercise of his statutory rights. Respondent's management assigned extra duties to its foremen because of complaints made by Mr. Hatfield, but no precautions had been taken to protect Mr. Hatfield's rights in this potentially volatile situation. Although Mr. Hatfield was not intimidated by the threat made by Respondent's foreman, it is reasonably likely that the four other miners who were present when this threat was made would be deterred from exercising their right to make or file complaints because of this action on the part of Respondent. Good faith was demonstrated by the foreman's subsequent verbal apology to Mr. Hatfield, and by the Respondent's decision not to arouse further animosity by contesting this matter. There has been no assertion by the Respondent that its continued ability to conduct business would be threatened by the payment of a civil penalty in this case.

I accept the foregoing representations and approve the recommended settlement. Accordingly, the joint motion to approve

settlement is GRANTED and the operator is ORDERED TO PAY \$200 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Ronald E. Gurka, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Mr. Bryant M. Hatfield, Jr., General Delivery, Delbarton, WV 25670 (Certified Mail)

Mr. Sidney R. Young, Jr., President, Smith Brothers Construction, Inc., P. O. Box 1518, Williamson, WV 25661 (Certified Mail)

Mr. Richard C. Cooper, UMWA, P. O. Box 839, Logan, WV 25601 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

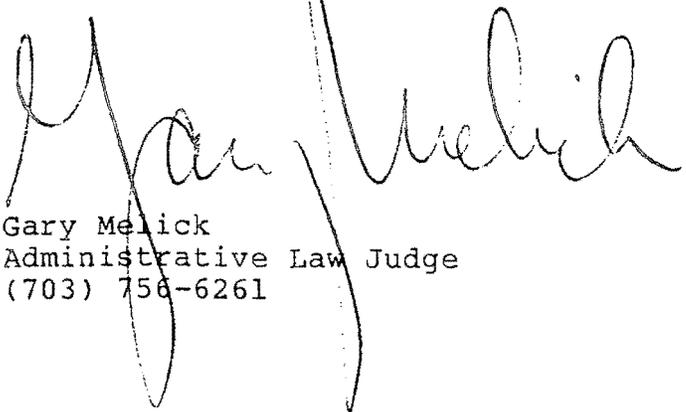
SEP 28 1987

WESTMORELAND COAL COMPANY : CONTEST PROCEEDING
Contestant :
v. : Docket No. HOPE 78-236
: Order No. 1 FTC; 2/10/78
: Hampton No. 4 Mine
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :
AND :
UNITED MINE WORKERS OF :
AMERICA (UMWA), :
Intervenor :

ORDER LIFTING STAY AND DISMISSING PROCEEDINGS

Contestant requests approval to withdraw its Contest in the captioned case based upon an agreement between Contestant and Respondent captioned "Statement of Modification and Agreement and Motion to Dismiss" filed by Respondent on August 11, 1987. The Intervenor has not filed any objection to the requested withdrawal.

Under the circumstances herein, permission to withdraw is granted. 29 CFR § 2700.11. The Stay Order previously issued is accordingly now lifted and the case is therefore dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

C. Lynch Christian III, Esq., Jackson, Kelly Holt &
O'Farrell, P.O. Box 553, 1500 One Valley Squagre, Charleston,
WV 25322 (Certified Mail)

Mary Lu Jordon, Esq., United Mine Workers of America, 900
15th St., N.W., Washington, D.C. 20005 (Certified Mail)

James Crawford, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Arlington, VA 22203
(Certified Mail)

npt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 29 1987

RICHARD W. PETERS, SR., : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. LAKE 87-37-D
v. :
 : MORG CD 86-19
BUCKEYE INDUSTRIAL MINING :
COMPANY, INC., :
Respondent :

DECISION

Appearances: Richard W. Peters, East Palestine, Ohio, pro se;
John Orr Beck, Esq., Lisbon, Ohio, for Respondent.

Before: Judge Maurer

This case is before me upon the Complaint of Discrimination filed by Richard W. Peters under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Buckeye Industrial Mining Company discriminated against him in employment after he had an accident on the job by returning him to work as a laborer at a reduced wage from that of a truck driver, which he was prior to the accident.

The case was heard in Pittsburgh, Pennsylvania, on July 6, 1987. Both parties waived the filing of post-hearing briefs.

The parties have stipulated that:

1. Complainant has been an employee of the company since October 22, 1968.
2. During his employment, he has been employed as a laborer, pitman, "2400" dragline operator, truck driver, and for short periods as a bulldozer and highlift operator.
3. On July 14, 1986, complainant was involved in an accident on the job when the truck he was driving rolled over.
4. Following that accident, complainant was off work until on or about July 21, 1986, and then was returned to work as a laborer and pitman at a reduced wage (70¢ per hour less) from that of a truck driver.

5. Complainant worked as a laborer-pitman until October 1986. At that time he allegedly hurt his back on the job and has been off work from the date of that injury until at least the date of the hearing (July 6, 1987).

The essence of this pro se complaint is that the respondent allegedly put the complainant in a lower-paying job on or about July 21, 1986, in violation of Section 105(c)(1) of the Act 1/ in retaliation for him having the accident a week earlier, and for making repeated safety complaints about the brakes on the truck he was assigned to drive. The complainant further alleges that it was these faulty brakes that in fact caused the accident.

The general principles governing analysis of discrimination cases under the Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

1/ Section 105(c)(1) of the Act provides in pertinent part as follows: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject to this Act because such miner...has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine...or because of the exercise by such miner...on behalf of himself or others of any statutory right afforded by this Act."

There is no question that Mr. Peters engaged in protected activity by repeatedly complaining to his foreman, Art Brown, about what he believed to be faulty and dangerous brakes on the truck he was assigned to drive. He made numerous complaints about the state of the brakes on his assigned truck in the two or three weeks prior to the accident. Each time his foreman would call maintenance and one of the mechanics would come out and check them. When the mechanic would get there, there was invariably nothing the matter with the brakes. Foreman Brown and Peters both further testified that the driver of the truck on the other shift, one Gene Liber, never complained about the truck's brakes and in fact denied having any problem when specifically asked about the brakes by Brown or Peters. Nevertheless, reading the record as a whole, I find that it is entirely possible that Peters was experiencing an intermittent problem with the truck's brakes, and, in fact, inadequate brakes may well have at least contributed to the July 14 accident. Accordingly, Mr. Peters has established the first element of a prima facie case of discrimination, i.e., he has shown to my satisfaction that he did indeed engage in protected activity.

Foreman Brown testified that in every event, in response to every complaint, even though he was beginning to wonder about Peters' complaints, he called maintenance and had the brakes checked out and they always checked okay. Peters concurs with this testimony in substantial part. I also find Brown's testimony credible to the effect that he never told Peters to operate the truck without brakes or with bad brakes, but rather told Peters that if the brakes were bad, "take it to the parking lot and park it". I therefore find that Mr. Peters has failed to establish the second element of a prima facie case, that is, he has not shown that the adverse action by the operator was motivated in any part by the protected activity.

Even had Mr. Peters established a prima facie case herein, I find that case rebutted by the operator's evidence of valid non-protected business reasons for the removal of Mr. Peters as an equipment operator. Mr. Robert J. Bacha testified that the only piece of equipment Peters was ever able to satisfactorily operate for the company was a "2400" dragline, and that particular machine is no longer in use. Thereafter Peters was tried out as a highlift operator, bulldozer operator and, lastly, as an end dump operator (truck driver).

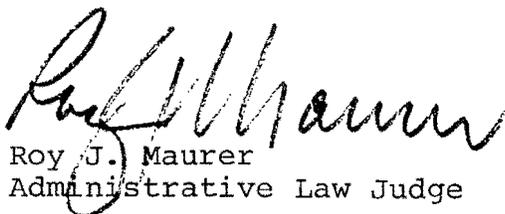
He had problems with operating the end dump truck independent of the July 14 accident as a result of which, according to Bacha, the company removed him from the truck driving job and re-assigned him as a laborer. After he had been operating the end dump for several months there were numerous complaints

from both the other operators and foremen that he worked too slow, and that he would not back all the way up so as to dump over the hill. Rather, he would dump where the bulldozer had to follow-up after him and push his load off. Mr. Peters himself acknowledged on the record that "the trouble I had running some of the other equipment" might also have been part of the reason he was re-assigned.

Specifically, I find the respondent's evidence credible to the effect that Peters was removed from his job as a truck driver and re-assigned as a laborer due to his general lack of competence at running machinery. Therefore, the re-assignment of Peters had a legitimate business-related and non-protected basis. Under the circumstances, the Complaint herein must be dismissed.

ORDER

The Complaint of Discrimination herein is dismissed.


Roy J. Maurer
Administrative Law Judge

Distribution:

Richard W. Peters, Sr., 5215 Jimtown Road, East Palestine, OH 44413 (Certified Mail)

John Orr Beck, Esq., 26 N. Park Avenue, Lisbon, OH 44432 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 29, 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 87-91
Petitioner : A. C. No. 01-00328-03623
: :
v. : Bessie Mine
: :
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlements of the two violations involved in this case. The total of the originally assessed penalties was \$272 and the total of the proposed settlements is \$40.

The motion discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The subject citations were issued for violations of respirable dust standards, 30 C.F.R. § 70.100(a). Both violations were designated as significant and substantial on the citations. The parties represent that a reduction from the original assessment is warranted because the employees who were working in the designated occupation were wearing personal protective equipment in the form of respirators. The parties further represent that MSHA will modify the subject citations to delete the significant and substantial characterization.

The rationale of the proposed settlements is justified by Commission precedent. Under Consolidation Coal Company, 8 FMSHRC 890 (1986), aff'd, 824 F.2d 1071 (D.C. Cir. 1987), a rebuttable presumption exists that all respirable dust violations are significant and substantial. However this presumption may be rebutted by establishing that miners in the designated occupation were not exposed to the hazard posed by the excessive concentration of respirable dust. The Commission specifically noted that the use of personal protective equipment would satisfy this evidentiary requirement. Based upon the representations of the parties, this appears to be a case where the presumption is rebutted.

In light of the fact that the miners in this case were wearing personal protective equipment, I find the violations were nonserious and approve the proposed settlements. Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY \$40 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

Harold D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., Post Office Box C-79, Birmingham, AL 35283 (Certified Mail)

H. Gerald Reynolds, Esq., Jim Walter Corporation, P. O. Box 22601, Tampa, FL 33622 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 29, 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 87-95
Petitioner	:	A. C. No. 01-01247-03768
	:	
v.	:	No. 4 Mine
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	
	:	
	:	
JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 87-56-R
	:	Order No. 2810626; 2/4/87
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	No. 4 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Judge Merlin

The parties have submitted a joint motion to approve settlements of the three violations involved in this case. The total of the originally assessed penalties was \$2,600 and the total of the proposed settlements is \$1,900.

The motion discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Order No. 2811815 was issued for a violation of 30 C.F.R. § 75.1403-7K because an employee was riding in the service cage while material was being transported therein. This penalty was assessed at \$500 and the proposed settlement is for \$350. The parties represent that a reduction from the original amount is warranted on the basis that gravity is less than originally assessed because the equipment being transported consisted of 2 ram bar assemblies. These assemblies are approximately 4 or 5 feet long and are approximately 10 inches in diameter. The assemblies are also very heavy and

therefore would not easily slide across the floor of the cage. Thus, the likelihood of a resulting injury is not as great as originally thought. I accept the foregoing representations and approve the recommended settlement.

Order No. 2810449 was issued for a violation of 30 C.F.R. § 75.200 because the approved roof control plan was not being complied with. The roof control plan requires that when fully grouted resin rods are used, that they shall be installed within 8 hours after the coal is mined or loaded, or the area shall be supported with temporary supports. In this instance, the cutting of the faces was concluded on the day shift at approximately 3:00 p.m. The roof bolting machine then became disabled on the evening shift and prevented the commencement of bolting operations. The order was issued at approximately 1:00 a.m. on the night shift. Once the roof bolting machine was repaired, the operator bolted the No. 2 entry with resin pins and temporarily supported the No. 2 entry. This penalty was originally assessed at \$1,100 and the proposed settlement is for \$550. The parties represent that a reduction from the original amount is warranted because gravity is less than originally assessed in that the roof remained intact, even after ten hours of cutting, which permitted the proper installation of the resin bolts. I accept the foregoing representations and approve the recommended settlement.

Order No. 2810626 was issued for a violation of 30 C.F.R. § 75.303 because the operator failed to comply with pre-shift and on-shift inspection requirements. The operator has agreed to pay the originally assessed amount of \$1,000. I approve this settlement and hereby DISMISS the corresponding Notice of Contest to this order, Docket No. SE 87-56-R.

Accordingly, the joint motion to approve settlement is APPROVED and the operator is ORDERED TO PAY \$1,900 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

Harold D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., Post Box C-79, Birmingham, AL 35283 (Certified Mail)