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MSHA V. ISLAND CREEK COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
February 25, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 79-129

ISLAND CREEK COAL COMPANY

DECISION

On October 6, 1978, an inspector of the Mine Safety and Health Administration inspected Island Creek Coal Company's Big Creek No. 2 mine. He observed an alleged violation of 30 CFR 75.400 (accumulation of combustible materials), which he believe was caused by an unwarrantable failure of the operator to comply with that standard. As a result of his finding, the inspector issued a withdrawal order under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(d)(1), because he believed that a citation containing the findings that must precede a section 104(d)(1) withdrawal order had been issued on September 27, 1978. 1/

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

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation

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to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

On August 21, 1979, the Secretary filed with the Commission a proposal for a penalty, seeking the assessment of a penalty under section 110 of the Act for the alleged violation of 30 CFR 75.400cited in the October 6 withdrawal order. A penalty of $2,00 was sought.

Thereafter, the Secretary discovered that the September 27, 1978 citation had been modified by the inspector on September 28, 1978 to provide that "[t]he 104 D-1 citation and termination is hereby modified to a 104-A citation and termination." 2/ Thus, a citation containing the prerequisite findings did not in fact precede the October 6 withdrawal order under section 104(d)(1). On November 21, 1979, the Secretary filed a motion to dismiss the instant penalty proceeding, on the ground that "[a]s a result of the modification of [the September 27 citation, the October 6 order] is without foundation and does not properly allege a violation of section 104(d)(1) of the Act." On November 29, 1979, without explanation, the administrative law judge granted the Secretary's motion to dismiss. On December 28, 1979, we directed review on our own motion to determine whether the judge erred in granting the Secretary's motion to dismiss. We reverse.

The Secretary's motion, and the judge's dismissal, proceeded on an erroneous understanding of the Act's penalty provisions. Section 110(a) of the Act provides in part:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation.

The Act mandates assessment of a penalty for any violation of a mandatory safety standard, such as 30 CFR 75.400, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order issued under section 104(d) or other section of the Act. Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation of a mandatory safety standard was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Thus, whether the October 6, 1978 withdrawal order was properly issued under section 104(d)(1) is not relevant to the assessment of a penalty under section 110 for an

alleged violation of a safety standard cited in that order. Therefore, the judge erred in granting the motion to dismiss.

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2/ Presumably, the inspector meant that he was modifying the September 27 citation to delete either or both of the "significant and substantial" or "unwarrantable failure" findings in that citation.

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Accordingly, the judge's order of dismissal is reversed and the case is remanded for further proceedings.

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