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MSHA V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 29, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PENN 81-106-R

CONSOLIDATION COAL COMPANY

DECISION

This case involves the interpretation and application of section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. IV 1980). 1/ The specific issue before us is the procedural propriety of the administrative law judge's modification

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1/ Section 104(d) of the Mine Act, 30 U.S.C. $ 814(d) (Supp. IV 1980), provides:

(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 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 ... to be withdrawn from ... 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.
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of an invalid section 104(d)(1) withdrawal order to a section 104(d)(1) citation. 2/ For the reasons that follow, we conclude that, under the specific circumstances of this case, the judge acted properly and we accordingly affirm his decision.
The facts are not in dispute. On February 2, 1981, the Secretary of Labor issued a section 104(d)(1) citation to Consolidation Coal Company ("Consol") alleging a violation of Consol's ventilation plan. Consol filed a notice of contest of this citation. FMSHRC Docket No. PENN 81-92-R. On February 26, 1981, the Secretary issued Consol a section 104(d)(1) withdrawal order which the parties settled on July 10, 1981. 3/ On March 4, 1981, the Secretary issued another section 104 (d)(1) withdrawal order. This order alleged improper grounding of equipment in violation of 30 C.F.R. $ 75.701-3. 4/ The withdrawal order further alleged that the violation was significant and substantial and was caused by Consol's unwarrantable failure to comply with the law. On the same day the withdrawal order was issued, Consol abated the allegedly violative condition. Consol subsequently filed a notice of contest of this second order, which is the subject of the proceeding now before us.
On September 24, 1981, the administrative law judge issued his decision in Docket No. PENN 81-92-R, finding that the violation cited in the February 2, 1981, section 104(d)(1) citation, although significant and substantial, was not caused by Consol's unwarrantable failure to comply. Given this conclusion, the judge modified that citation to a section 104(a) citation, which he then affirmed. Consolidation Coal Co., 3 FMSHRC 2207, 2208-10 (September 1981) (ALJ). Neither party sought Commission review of this decision. After the judge's decision in Docket No. PENN 81-92-R, however, Consol filed a motion for summary decision in the present case, pursuant to Commission Rule 64, 29 C.F.R. $ 2700.64, 5/ seeking vacation of the March 4, 1981 withdrawal order on the grounds that it now lacked a necessary underlying 104(d)(1) citation.

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2/ The judge's decision is reported at 4 FMSHRC 49 (January 1982).

3/ This settlement is not before us.

4/ Section 75.701-3 provides in relevant part:

For the purpose of grounding metallic frames, casings and enclosures of any electric equipment or device ..., the following methods of grounding will be approved[:]

(b) A solid connection to the grounded power conductor of the system....

The order alleged improper grounding of an electrically-operated pump, in that uninsulated and exposed wiring was present in the pump frame.

5/ Commission Rule 64 provides in part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render summary decision disposing of all or part of the proceeding.

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

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At the outset of the hearing on Consol's contest of the March 4th withdrawal order, the judge ruled from the bench that a valid 104(d)(1) citation is a prerequisite to issuance of a 104(d)(1) withdrawal order. He found that, as a result of his September 24, 1981, decision invalidating the 104(d)(1) citation underlying the withdrawal order in this case, no precedential 104(d)(1) citation existed upon which to base the 104(d)(1) withdrawal order at issue. 4 FMSHRC at 50-51. 6/ He held, however, that the proper procedure under the circumstances was not vacation of the withdrawal order, as urged by Consol, but rather conditional modification of the order to a 104(d)(1) citation, followed by a full hearing on the merits of the modified citation. Id at 51; Tr. 4-19. The judge made the conditional modification on his own motion. The Secretary's counsel, upon being questioned by the judge, declined to make his own motion for modification of the second withdrawal order and expressed his "satisfaction" with the judge's sua sponte action. Tr. 17.

The judge thus granted Consol only partial summary decision. He denied total summary decision because in his view a factual dispute remained as to the validity of the conditionally modified citation. The judge emphasized that if the evidence failed to show

a significant and substantial violation caused by an unwarrantable failure to comply, the tentatively modified 104(d)(1) citation would fail, and that if the evidence failed to show a violation at all, the case would be dismissed. Tr. 16. At the close of the hearing, the judge confirmed his modification and affirmed the 104(d)(1) citation. 4 FMSHRC at 51-5. We granted Consol's subsequent petition for discretionary review. 7/

Consol's arguments on review are narrow and, for the most part, procedural. Consol contends only that the judge lacked authority to modify the withdrawal order in this case on his own initiative and prior to a hearing. At the hearing below, Consol admitted the underlying violation, and challenged only the special 104(d)(1) findings. Consol does not now, however, seek review of the judge's conclusion that the violation was significant and substantial and caused by its unwarrantable failure to comply with the law. We conclude that the judge acted properly.

We first consider the question of modification from a general perspective. Sections 104(h) and 105(d) of the Mine Act expressly

6/ The judge also denied the Secretary's motion to convert to a 104(d)(1) citation the first withdrawal order of February 26, 1981, which, as noted above, had been settled by the parties. 4 FMSHRC at 50-51. The Secretary has not challenged this aspect of the judge's ruling.

7/ We also granted the motion of the United Mine Workers of America to intervene on review, and subsequently heard oral argument in this case.

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authorize the Commission to "modify" any "orders" issued under section 104. 8/ This power is conferred in broad terms and we conclude that it extends, under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations. In this case, and in future ones raising similar issues, we will define such "appropriate circumstances." Where, as here, the withdrawal order issued by the Secretary contains the special findings set forth in section 104(d)(1), but a valid underlying 104(d)(1) citation is found not to exist, an absolute vacation of the order, as urged by the operator, would allow the kind of serious violation encompassed by section 104(d) to fall outside of the statutory sanction expressly designed for it--the 104(d) sequence of citations and orders. The result would be that an operator who would otherwise be placed in the 104(d) chain would escape because of the sequencing of citations and orders. Such a result would frustrate section 104(d)'s graduated scheme of sanctions for more serious violations. 9/

8/ Section 104(h) of the Mine Act, 30 U.S.C. $ 814(h)(Supp. IV 1980),

provides:

Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106.

Section 105(d) of the Mine Act, 30 U.S.C. 815(d)(Supp. IV 1980), provides:

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 104,... 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 on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance....

9/ Modification under such circumstances is also consistent with our settled precedent. We held in Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980), that allegations of a violation survived the Secretary's vacation of the 104(d)(1) withdrawal order in which they were contained and, if proven at a subsequent hearing, would have required assessment of a penalty. We reached a similar result in a companion case in which we held that allegations of violation also survived Secretarial vacation of an invalid 107(a) order (imminent danger). Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (February 1980). In both cases, we thus contemplated future trial.of the allegations as possible 104(a) violations. (Neither of the vacated withdrawal orders had contained significant and substantial findings.) If less serious allegations of 104(a) violations survive, then, a fortiori, the more serious allegations in the present type of case should survive as potential 104(d)(1) violations. In short, the purport of our decisions is that such allegations survive, and modification is merely the appropriate means of assuring that they do.

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Any modification must be carried out on fair notice and otherwise comport with relevant requirements of due process. In an analogous situation arising under section 104(d)'s virtually identical predecessor provision, section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801.et seq. (1976) (amended 1977)("the 1969 Coal Act"), we approved an administrative law judge's modification of invalid 104(c)(1) orders to 104(c)(2) orders. Old Ben Coal Co., 2 FMSHRC 1187, 1189-90 (June 1980). 10/ We premised our

approval of the modification on the fact that the operator had not shown prejudice, had not claimed lack of notice, and had not indicated how its defense to a (c)(2) order would differ from its defense to a (c)(1) order. Id. Similar considerations guide our disposition of the present case.

In light of these general principles, we now return to Consol's specific objection that the judge's modification in this case was procedurally improper. From all that appears on the record, had the Secretary sought modification of the second withdrawal order prior to trial, Consol would not have believed itself procedurally aggrieved. The essence of Consol's complaint is that the Secretary, not the judge, should have modified the order, and that even if a Commission judge may modify a 104 order, section 105(d) of the Mine Act mandates that he act only after--not before--"afford[ing] an opportunity for a hearing." We cannot agree to so restrictive a reading of the powers conferred by section 105(d).

Consol contends that the responsibilities of the Secretary and Commission judges differ, and that the judge's modification was a usurpation of Secretarial duties. The Secretary's responsibility is to issue section 104(d)(1) citations and orders, and to prosecute them upon contest by the operator. Accordingly, where as here an order fails for lack of a valid citation, the preferable procedure after contest and assumption of jurisdiction by the Commission, would be for the Secretary to move for modification or amendment to recharacterize the order as a citation. 11/ In this case, however, for reasons unexplained, the Secretary's counsel declined to make such a motion, but rather acquiesced in the judge's preliminary modification. Had the judge vacated the withdrawal order, a trial of the special 104(d)(1) findings would not have occurred, a result that would have frustrated the purpose of section 104(d).

10/ The original orders had been issued outside the 90-day limit in section 104(c)(1) (carried over to the Mine Act) and therefore, assuming other requirements were met, should have properly been issued as 104(c)(2) orders.

11/ Such change after a notice of contest has been filed must occur by motion, and not on the Secretary's own initiative. See Climax Molybdenum Co.,.2 FMSHRC 2748, 2750-51 (October 1980)(Secretary cannot unilaterally vacate a contested citation.)

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We emphasize that the necessary special findings were contained in the order when it was issued. Hence the judge was not adding new findings to "create" a 104(d)(1) citation. Given the purpose of section 104(d) and the broad power to modify granted the Commission and its judges in section 105(d), we cannot agree with Consol that under these circumstances the judge erred.

Our decision might have been different had Consol demonstrated prejudice. We find, however, that there was no prejudice and that the judge's actions were entirely consistent with due process. The judge granted Consol a full hearing to contest the violation and the special 104(d)(1) findings. Consol did not, as it could have done, claim prejudice or request a continuance when it was required to defend against the tentatively modified 104(d)(1) citation. Consol did not show--nor do we see how it could have shown--how its defense to the 104(d)(1) citation would differ from its defense to the 104(d)(1) withdrawal order which contained precisely the same allegations. When asked about prejudice at the oral argument, Consol claimed it was prejudiced because it was forced to go to hearing on the merits of the citation. Arg. Tr. 13. However, a party moving for summary decision must always be prepared to go to trial if the motion is wholly or partially denied; that does not constitute prejudice. Cf. Old Ben Coal Co., supra.

Consol also argues that, in any event, the judge could not modify the order prior to the hearing. However, the judge did not modify the order in a final sense prior to hearing. His action was no more than a preliminary procedural ruling expressly conditioned on the outcome of the subsequent evidentiary hearing. Tr. 16, 18-19. Only after the hearing did the judge issue his decision finally modifying the order and affirming the citation. Thus, we are satisfied that Consol received an "opportunity for a hearing" before the final binding modification occurred in this case.

Finally, Consol argues that cases arising under the 1969 Coal Act, in which the Interior Board of Mine Operations Appeals held that administrative law judges lacked the authority to modify withdrawal orders, should control resolution of the issues in the present Mine Act proceeding. This precedent is not dispositive. Section 105(b) of the 1969 Coal Act, 30 U.S.C. $ 815(b)(1976), 12/ authorized the Secretary

12/ Section 105(b) of the 1969 Coal Act provided:

Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

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of Interior to modify withdrawal orders issued under section 104(c), the statutory predecessor of section 104(d) of the Mine Act. The Board and its judges were part of the Department of Interior, and the Secretary had, by regulation, delegated to them his adjudicative functions under the Coal Act. 43 C.F.R. $ 4.500 et seq. (1971)

(rescinded 1978). The Board held that administrative law judges had no power to convert invalid 104(c) orders to notices of violation. See for example, Freeman Coal Mining Co., 2 IBMA 197 (1973), aff'd on other grounds, 504 F.2d 741 (7th Cir. 1974). The Board viewed such modification as a usurpation at the Secretary's prosecutorial authority to issue notices of violation. Freeman, supra, 2 IBMA at 209-10. The Board determined that only certain specified adjudicative powers had been delegated to it, and that issuance or modification of notices or orders were not among them. Id. In contrast, under the Mine Act, the Commission and the Secretary are independent and wholly distinct entities, each possessing the powers specified in the Act. Section 105(d) expressly authorizes the Commission to modify 104 orders. Thus, given the language of section 105(d), and the allocation of powers under the Mine Act, the delegation problems perceived by the Board in Freeman simply do not arise under the present Act. 13/ See generally, Sewell Coal Co., 3 FMSHRC 1402, 1404 (June 1981).

13/ Consol also contends that the judge erred by failing to grant it total summary decision. The moving party is only entitled to summary decision if there is no genuine issue as to any material fact, and if summary decision should be rendered as a matter of law. As we decided above, Consol was not entitled as a matter of law to a vacation of the subject order.

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We conclude that the judge below did not err procedurally in modifying the 104(d)(1) withdrawal order to a 104(d)(1) citation and proceeding to hearing on the citation. Accordingly, we affirm the judge's decision.

A. E. Lawson,
Commissioner

14/ Commissioner Nelson assumed office after this case had been considered by the other Commissioners. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Nelson's assumption of office, and participation by Commissioner Nelson would therefore not affect the outcome. Accordingly, in the interest of efficient decision-making, Commissioner Nelson elects not to participate in this case.

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