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SOL (MSHA) V. KITT ENERGY
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 18, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEVA 83-65-R

KITT ENERGY CORPORATION

DECISION

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), involves the interpretation of section 104(d) of the Mine Act. Section 104(d) authorizes the Secretary to issue mine withdrawal orders for a certain chain of violations, the chain to be broken only by an intervening "clean" inspection. The principal issue in this case is whether an inspection under section 104(d)(2) of the Mine Act, commonly referred to as a "clean inspection," must be a complete regular quarterly inspection. Also at issue is whether Kitt Energy Corporation (Kitt) unwarrantably failed to comply with 30 C.F.R. $ 75.1722(a), a machine guarding standard. A Commission administrative law judge concluded that Kitt unwarrantably failed to comply with the cited standard and affirmed the section 104(d)(2) withdrawal order issued to Kitt, concluding that an intervening clean inspection of the mine had not occurred so as to break the section 104(d) withdrawal order chain. 5 FMSHRC 201 (February 1983)(ALJ). For the reasons that follow, we reverse on the clean inspection issue, but affirm the conclusion that Kitt unwarrantably failed to comply with $ 75.1722(a).

On December 1, 1982, during a regular quarterly inspection of Kitt's underground coal mine, an inspector of the Department of Labor's Mine Safety and Health Administration (MSHA) issued a section 104(d)(1) citation to Kitt alleging a violation of $ 75.1722(a). The citation stated that "[a] guard was missing from the eccentric on the scalping screen and the guard over the belt drive was not adequate in the bin area." 1/ The citation

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1/ 30 C.F.R. $ 75.1722(a) provides:
Gears; sprockets; chains; drive, head, tail, and

takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

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indicated that the violation was "significant and substantial" and caused by Kitt's "unwarrantable failure." See section 104(d)(1), 30 U.S.C. $ 814(d)(1). The citation was terminated 1-1/2 hours later, after Kitt blocked access to the area with a mesh screen and posted a danger sign.

On December 22, 1982, the inspector issued a modification converting the section 104(d)(1) citation to a section 104(d)(2) withdrawal order. 2/ He did so after reviewing MSHA records and determining from those records that a clean regular inspection of the mine had not been completed since the issuance of a prior section 104(d)(2) withdrawal order on July 14, 1982. 3/

The alleged violative condition cited by the inspector involved moving parts of a vibrator machine which controlled the flow of coal and sorted it by size. The vibrator caused small pieces of coal to drop onto and through a scalping screen down onto the slope conveyor belt carrying the coal to the surface. Large pieces of coal were moved first to a crusher and then to the slope belt. The citation alleged that the belt drive on the vibrator motor was inadequately guarded and that the eccentric, a crescent-shaped wheel behind the belt drive that rotated and moved the scalping screen, was unguarded. The belt drive guard consisted of a sheet metal frame to which a mesh screen was attached. The frame was not bolted to the floor. The screen was attached loosely by wires, ended about 23 inches above the floor, and had a hole in its upper right-hand corner. The eccentric protruded above the belt guard at times during its rotation.

The inspector issued the citation during a regular inspection conducted from October 14 through December 17, 1982. MSHA had issued a prior section 104(d)(2) order on July 14, 1982, during a regular inspection conducted at Kitt's mine from July 2 through September 28, 1982. The administrative law judge construed section 104(d)(2) of the Mine Act as requiring a complete regular inspection of the entire mine, during which no "similar" violations are discovered, before an operator is removed from that section's continuing withdrawal order sanctions. Finding that no such intervening complete regular inspection had occurred here, he affirmed the order. The judge further found, however, that MSHA had "visited" all active sections of the mine in the period between the issuance of the July 14 withdrawal order and the order at issue in this proceeding.

On review, Kitt asserts that the judge's affirmance of the second

section 104(d)(2) order is inconsistent with Commission case law, and that the Secretary failed to carry his burden of proving the absence of an intervening clean inspection. Kitt further argues that the judge's finding that MSHA "visited" all sections of the mine, without citing another similar violation, required him to conclude that an intervening clean inspection sufficient to remove Kitt from section 104(d)(2) sanctions had been completed.

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2/ The inspector subsequently issued another modification deleting his finding that the violation was significant and substantial.

3/ The term "regular inspection" refers to the quarterly or semi-annual inspections of underground or surface mines, respectively, "in [their] entirety" mandated by section 103(a) of the Mine Act. 30 U.S.C. $ 813(a).

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Section 104(d)(2) of the Mine Act provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to [section 104(d)(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 [section 104(d)(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 [section 104(d)(1)] shall again be applicable to that mine.

30 U.S.C. $ 814(d)(2)(emphasis added). The dispute in the present case concerns the meaning of the phrase "an inspection of such mine" as used in section 104(d)(2). The Secretary argued that the judge correctly concluded that the phrase means only a complete regular inspection conducted pursuant to section 103(a). In the Secretary's view, only a complete regular inspection is comprehensive enough to satisfy section 104(d)(2)'s requirement, because only through such an inspection is a mine inspected "in its entirety." The Secretary further asserts that to hold otherwise would impose "serious enforcement problems" upon MSHA because the task of determining whether a complete inspection has occurred since the issuance of a preceding withdrawal order is complicated if a series of separate inspections can comprise "an inspection" of the mine.

We have previously considered and rejected these same arguments in construing the identical statutory provision in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 814(c)(1976)(amended 1977).

CF&I Steel Corp., 2 FMSHRC 3459 (December 1980); U.S. Steel Corp., 3 FMSHRC 5 (January 1981); Old Ben Coal Co., 3 FMSHRC 1186 (May 1981). In CF&I we stated:

> The requirement of a clean inspection before an operator could avoid being subjected to section 104(c)(2) [now 104(d)(2)] withdrawal orders was intended to further public interest in promoting earnest and continuous compliance with mandatory safety and health standards. Nothing in the record, however, suggests that the Secretary's position--that only a complete regular quarterly inspection can constitute a "clean" inspection of the entire mine--is necessary to achieve this interest.

2 FMSHRC at 3461. Our conclusion on this issue was in accord with the long-standing adjudicative interpretation of the Coal Act provision by the Department of Interior's Board of Mine Operations Appeals. In Eastern Associated Coal Corp., 3 IBMA 331 (1974), the Board held that the language at issue "appears to us to direct a thorough examination of the conditions and practices throughout a mine." 3 IBMA at 358 (emphasis in original).

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On reconsideration, the Board stressed that "several completed partial or completed spot inspections of a mine may be required to constitute a 'complete inspection' of a mine in order to lift the withdrawal order liability of an operator from the provisions of section 104(c)(2) [now 104(d)(2)]." 3 IBMA 383, 386 (1974)(emphasis in original).

Nothing in the text of the Mine Act or its legislative history indicates that this construction of the Coal Act's "clean inspection" provision was flawed or contrary to legislative intent. Furthermore, nothing in the arguments repeated by the Secretary here persuades us that our prior construction of this provision is inconsistent with and should not be applied to the Mine Act. In fact, as explained below, we believe that adoption of the Secretary's argument could prove a disincentive to maximum compliance efforts by mine operators.

By its terms section 104(d)(2) requires that there be "an inspection of such mine" disclosing no similar violations. A narrow, literal interpretation of the term "an inspection" to mean an inspection, including an inspection of only s portion of a mine, previously has been rejected. Eastern, 3 IBMA at 357-58. Instead, the term consistently has been construed to require the inspection of a mine in its entirety. CF&I, supra; Eastern. This construction is in complete accord with the passages in the Mine Act's legislative history cited and relied upon by the Secretary in his brief. See

S. Rep. No. 181, 95th Cong., 1st Sess. 31-34 (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 619-22 (1978).

The Secretary's attempt to exclude from consideration under section 104(d)(2) all inspections other than the so-called regular inspections is unconvincing. In previous litigation the Secretary has argued successfully that "spot inspections," i.e., any inspection conducted for enforcement purposes other than regular inspections, are conducted pursuant to section 103(a). UMWA v. FMSHRC and Helen Mining Co., et al., 671 F.2d 615 (D.C. Cir. 1982), cert den. sub nom. Helen Mining Co. v. Donovan, 459 U.S. 927 (1982). In that case the Secretary asserted that his designations of inspections as "spot" or "regular" inspections are administrative designations not established in the Act and that there is "substantial overlap" between the two "types" of inspections. See Sec. Brief in UMWA v. FMSHRC, at 20, 21, 24. We find this position consistent with our conclusion that inspections other than "regular" inspections can be taken into account under section 104(d)(2). Any MSHA inspector conducting any enforcement inspection authorized by the Mine Act is required to cite every observed violation of the Act or its standards. The fact that during a particular inspection an inspector may give emphasis to particular types of hazards does not serve to place blinders on the inspector or prevent the issuance of citations for other violations. For example, an inspector is required to cite roof control violations he observes even if he is present for an electrical inspection. Furthermore, the fact that a miners' representative is entitled to accompany a federal inspector during inspections (30 U.S.C. $ 813(f); see UMWA v. FMSHRC, supra) lessens the possibility that an inspector conducting an inspection with a particular emphasis will fail to detect the presence of other hazards.

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We also believe that adoption of the Secretary's interpretation of section 104(d)(2) could undercut the incentive for maximum compliance efforts by mine operators. Under the Secretary's interpretation, if a "similar violation" under section 104(d)(2) results in the issuance of a withdrawal order at the beginning of a regular inspection (which can last for three months), the incentive to avoid further violations may be lessened because section 104(d)(2)'s sanctions have already been triggered. Thus, there is no possibility that the operator can remove itself from the operation of section 104(d)(2) until after the completion of the following regular inspection. In contrast, applying the plain words of section 104(d)(2), an operator has an immediate incentive to avoid future "similar" violations: the operator knows that continued avoidance of similar violations will remove it from the

possible sanctions of section 104(d)(2) as soon as the mine has been inspected in its entirety through any combination of regular and spot inspections.

We are not persuaded by the Secretary's argument that extending the construction consistently given to section 104(c)(2) of the Coal Act to the identical language of section 104(d)(2) of the Mine Act will result in insurmountable problems of enforcement and proof. The Secretary asserts that MSHA will be unduly burdened if, in order to sustain a section 104(d)(2) order, it is required to establish that it has not inspected a mine in its entirety, rather than simply showing that a clean regular inspection has not been completed. The burden complained of is in part caused by the fact that mines, or portions thereof, may be inspected at different times, in different sequences, by different MSHA inspectors. According to the Secretary, unless an inspector is permitted to refer to the simple benchmark of whether a complete clean regular inspection has occurred since the issuance of a prior section 104(d) order, the enforcement purpose behind section 104(d)(2) will be seriously frustrated by "complicated and time consuming problems of record keeping and proof." Sec. Brief at 16.

We have difficulty reconciling the result sought by the Secretary with the statutory requirements. Administrative convenience cannot be a basis for determining statutory rights. Section 104(d)(2) authorizes the issuance of withdrawal orders "until such time as an inspection of such mine discloses no similar violations." The burden of establishing the validity of such an order, necessarily including proof that an intervening clean inspection has not occurred, appropriately rests with the Secretary. It is not necessary to view this burden, as the Secretary asserts, as requiring proof of a negative. Rather, the Secretary must only demonstrate that when his inspector issued the contested order, portions of the mine remained to be inspected. We do not believe that this burden requires the Secretary to depend on evidence unavailable to him in order to establish his case. In order to carry out his statutory duties properly, the Secretary maintains records of all inspections conducted in a mine and the extent of those inspections. The contention that the Secretary or his representative cannot determine the areas of a mine that have been inspected in any given period, or the areas that remain to be inspected in a future period, gives us great concern. The very same record keeping, which the Secretary claims to be burdensome, is necessary in order to support the claim that a "regular" clean inspection has not occurred. If the Secretary's record keeping system is not presently

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up to this task, of which we are not persuaded, proper administration of the Mine Act requires that the Secretary maintain a workable mine

inspection record keeping system. 4/

For the foregoing reasons, we reject the Secretary's argument that under section 104(d)(2) of the Mine Act, a clean inspection can only be comprised of a complete regular inspection. Instead, we extend to section 104(d)(2) the prior consistent interpretation of section 104(c)(2) of the Coal Act, and hold that the essential determinant of a clean inspection under section 104(d)(2) is whether the entire mine has been inspected since the issuance of a prior 104(d) order with no "similar" violations cited. 5/

The factual question presented in this case is whether the inspection conducted by MSHA between the first section 104(d)(2) order issued on July 14, 1982, and the second order issued on December 1, 1982, comprised, in the aggregate, a clean inspection of the entire mine. The judge made three findings crucial to this question:

[1] MSHA began a complete quarterly inspection ("AAA inspection") of the subject mine on July 2, 1982, and completed it on September 28, 1982. Another quarterly inspection was begun on October 14, 1982....

[2] A special technical inspection ("CEF investigation") was commenced on July 19, 1982, and completed on August 6, 1982.

[3] All the active sections of the mine were visited by MSHA inspectors (in either the regular inspection or the technical inspection) between July 19, 1982, and September 28, 1982.

5 FMSHRC at 202. If supported by substantial evidence, these findings lead to the conclusion that an intervening clean inspection had occurred between the two withdrawal orders. (The Secretary does not argue, and there is no suggestion in the record, that the judge's use of the term "visited" was intended to mean anything other than "inspected.")

Because of his view that a complete regular inspection was necessary to remove the operator from the effect of section 104(d)(2), maintained despite CF&I, U.S. Steel, and Old Ben supra, the Secretary did not attempt to

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4/ The Secretary further claims that rejection of his view would lead to section 104(d)(2) orders being issued as a "matter of hindsight." We note that in this case, where the inspector followed the Secretary's interpretation, he issued the subject 104(d)(2) order only as a modification to a citation issued three weeks earlier, after reviewing relevant MSHA records.

5/ Administrative law judges of this Commission must follow our precedent where applicable. The judge's failure in this case even to mention our prior decisions construing section 104(c)(2) of the Coal

Act is inexplicable.
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establish that portions of Kitt's mine had gone uninspected since the issuance of the July 14 order. Therefore, the Secretary failed to establish an essential element of his prima facie case. In addition, in this case the operator presented evidence as to the extent of the inspections made during the relevant period. The prior section 104(d)(2) withdrawal order was issued on July 14, 1982, during a regular inspection that had begun only twelve days earlier. This regular inspection was not completed until September 28, 1982. During the period of July 14 to September 28, two to three MSHA inspectors were in all active sections of the mine conducting the regular inspection as well as a combination of spot and technical inspections. During this period no other unwarrantable failure citations were issued by any of the inspectors. On October 14, 1982, another regular inspection was begun. Between that date and December 1, 1982, when the violation at issue was cited, no other unwarrantable failure citations were issued. 6/ Thus, substantial evidence supports the judge's finding that all active sections of the mine were inspected in the period between the issuance of the July 14 order and the December 1 citation. Therefore, we reverse the judge and vacate the order.

Invalidation of the order does not end the case, however. We have held that the underlying violation survives the vacation of a section 104(d) withdrawal order. Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980); see also Consolidation Coal Co., 4 FMSHRC 1791, 1793-97, (October 1982). 7/ Here, the inspector cited a violation of 30 C.F.R. $ 75.1722(a). Kitt does not challenge the judge's finding that one of the conditions described by the inspector, i.e., the unguarded eccentric, violated the standard. Kitt does contest, however, the judge's finding that the belt guard was inadequate. Although our affirmation of the judge's finding of a violation of $ 75.1722(a) could rest on the unguarded eccentric alone, we will address briefly Kitt's arguments regarding the belt drive.

The judge concluded that the belt guard was in violation of the cited standard because injury could result from contact with the moving belt drive due to the gap at the bottom of the screen, the hole in the upper right-hand corner of the screen and its looseness. He found further that at least one employee was in the area during each of three shifts and that a rope or wire across the area was not adequate to prevent access and in any event was not present on the day the inspector issued the citation. 5 FMSHRC at 204-05, 207. These findings are supported by substantial evidence. The record establishes that on each of three shifts a miner was in the area to remove spillage from

6/ The dates of the MSHA inspections and the sections inspected were contained in Exhibit C-18, a cumulative record of MSHA inspections of active sections of the mine during this period. The Secretary objected to the introduction of the exhibit solely because it did not specify the types of inspections conducted, particularly the regular quarterly inspections, without which in his view there could be no intervening clean inspection. The judge properly admitted the exhibit.

7/ Since the "significant and substantial" designation was removed from the 104(d)(2) order, it does not become a 104(d)(1) order but a 104(a) citation.

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the scalping screen and other miners were intermittently in the area to perform maintenance work. These miners had access to the scalping screen; they merely lifted the rope or wire across the area when it was present. The scalping screen operated almost continuously. Although most of the spillage dropped through the metal floor grating, some spillage and grease were on the floor near the scalping screen, creating a slip and fall hazard. The defects in the screen and the level of employee exposure, taken together, support affirmance of the judge's conclusion that the condition of the belt guard violated the standard.

The judge further concluded that the lack of a guard on the eccentric, as well as the inadequate guard on the belt drive, were caused by Kitt's unwarrantable failure to comply with the standard. The judge found Kitt's awareness of the unguarded eccentric demonstrated by recurring notations of the condition in the preshift book, fabrication of replacement guards, the ordering of a new guard, and the ineffective use of a wire to block access to the area. 5 FMSHRC at 207-08. He found unwarrantable failure as to the belt guard because it was clearly visible and Kitt's chief electrician, who visited the area monthly, should have been aware of it. 5 FMSHRC at 208. Kitt challenges both of these findings.

For the reasons stated by the judge, we affirm his determination that Kitt unwarrantably failed to guard the eccentric. See U.S. Steel Corp., Docket Nos. LAKE 81-102-RM. et al., June 26, 1984. Whether the judge properly found unwarrantable failure as to the belt drive guard is a closer question, and we might have reached a different result de novo. The judge's finding is based on his apparent belief that the belt drive guard had existed in the condition observed by the inspector for some time and that the operator had to have been aware of its condition. The record sheds little direct light on the questions of how long the condition had existed and who was aware of the violative condition. Nevertheless, in view of the conspicuous

nature of the defective condition of the belt guard, the testimony of Kitt's chief electrician that he was in the area periodically, and the lack of compelling contrary record evidence on these points, we conclude that substantial evidence supports the judge's unwarrantable failure finding as to the belt drive guard. We note, however, that only one citation was issued and only one violation alleged.
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Accordingly, we reverse the judge's finding that the section 104(d)(2) withdrawal order was validly issued, but affirm his conclusions that Kitt violated the standard and that the violation was caused by Kitt's unwarrantable failure.
Richard V. Backley, Commissioner
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