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NACCO MINING V. MSHA
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FMSHRC-WDC
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

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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

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> 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 subdistrict 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

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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

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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. UMWA 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 subdistrict 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 preshift 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

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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 violation...." The use of the phrase "finds that" clearly refers to a conclusive finding rather than a finding in the nature of a chance

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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 an 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.

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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 indisputedly 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.

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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.

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*/ 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 he 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 reenacted 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

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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

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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

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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 inadvertence. 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:

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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 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 con (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

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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

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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:

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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

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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 disincentivites 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

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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

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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.

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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 determent 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 reinstructed 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 harassment 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

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