CCASE:
WHITE COUNTY COAL V. MSHA
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FMSHRC-WDC
SEPTEMBER 30, 1987
WHITE COUNTY COAL
CORPORATION
v. Docket Nos. LAKE 86-58-R
LAKE 86-59-R

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

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

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1/ Section 104(d) states:
(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized

such orders could not be issued. 8 FMSHRC 921 (June 1986)(ALJ).

For the reasons set forth in Nacco, supra, we reverse and remand.

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

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

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of the Secretary finds another representative of the Secretary finds another violation of any mandatory health or safety and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

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

30 U.S.C. $ 814(d)(1) & (2).

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

No person shall proceed beyond the last permanent
support unless adequate temporary support is
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section 104(d)(6) order because, as the record reflects, a preceding section 104(d)(1) citation had been issued approximately one month earlier. 30 U.S.C. $ 814(d)(1). According to the inspector's affidavit, the chalk line had been drawn one hour before he detected the violation. The inspector terminated the order twenty-five minutes later, after the miners were reinstructed on the roof control plan.

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

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

In Nacco, supra, we addressed the closely related question of whether an inspector may issue a citation under section 104(d)(1) for a violation not in existence at the time of its detection by an inspector. We held that the enforcement sanctions of section 104(d) are not restricted to existing violations observed by the inspector.

Rather, these sanctions are to be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards -- regardless of whether they are in existence at the time of detection. Nacco, slip

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

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

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

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

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

detection and existence of the violation.
Slip op. at 6 (citations omitted; emphasis in original).
Although the present case involves section 104(d)(1) and (2) orders, whereas Nacco involved a section 104(d)(1) citation, the reasons that led us to conclude that 104(d) citations could be issued for prior violations not detected by the inspector at the time of occurrence apply to orders issued under sections 104(d)(1) and (2) as well. Those reasons apply whether a citation or order is involved because the focus of section 104(d) is upon unwarrantable failure by the operator not upon whether its detection occurs concurrently with its commission. Further, section 104(d) orders are the procedural vehicles both specified and required by the Mine Act for alleging violations involving unwarrantable failure once a section 104(d)(1) citation has been issued. Therefore, we hold that section 104(d) orders may be based upon violations detected by the inspector during an inspection occurring after the violation has
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ceased to exist. See Nacco, slip op. at 5-10; Emerald, slip op. at 4-6. 4/
With respect to the chalk line violation in this proceeding, the inspector issued the contested section 104(d)(1) order within one hour after learning that the coal drill operator had proceeded under unsupported roof. The dangers of unsupported roof are well documented, and the violation in this case, proceeding under unsupported roof, is the type of violation that is unlikely to occur in the presence of an inspector. See Nacco, slip op. at 7. The same considerations apply with respect to the subsequent footprint violation. Such violations will ordinarily be detected by an inspector only after they have occurred. Under the rationale adopted by the judge, however, such unwarrantable conduct would not be subject to the unwarrantable failure sanctions mandated by the Mine Act.
To the extent that the judge's decision rests upon a conclusion that only the term "inspection" appears in section 104(d) (as opposed to the use of both "inspection" and "investigation" in section 104(a)) and that the term inspection is limited to detection of presently existing events only, we reject that rationale. First, the orders issued in this case arose from a section 103(i) "spot" inspection and from a regular quarterly inspection and, more importantly, as we held in Nacco, the term inspection is broad and includes inquiry into past as well as present events. Nacco, slip op. at 7-8.

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4/ See Greenwich Collieries. Div. of Pennsylvania Mines Corp., 9 FMSHRC , slip op. at 6, Nos. PENN 85-188-R, etc. (September 30,

1987), as to the Secretary's policy regarding withdrawal of miners from a mine in those instances where section 104(d) orders are issued for violations no longer in existence.

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

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
L. Clair Nelson, Commissioner

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Commissioner Lastowka, concurring:

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

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

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

drill admitted that he had drawn the chalk line and that in doing so he had placed himself under unsupported roof. 2/ The

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1/ Section 103(i) provides:

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

30 U.S.C. $ 813(i).

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

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

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

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

The legal challenge raised by the operator against the issuance of both orders is that because the inspector did not observe the violations being committed, i.e., he did not actually

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

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

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

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

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

Third, as in Nacco no damage is done to the enforcement

logic underlying section 104(i) by upholding the Secretary's right to proceed under section 104(d) in citing the violations at issue. The distinguishing characteristic of section 104(d) is its focus on the operator's conduct in connection with a violation, i.e., did the operator act "unwarrantably". The nature of this inquiry and the manner in which it is determined are the same regardless of whether an MSHA inspector is present to observe the violative conduct. Nacco, slip op. at 17-18 (concurring opinion). Furthermore, an important safety purpose is served by upholding the Secretary's right to direct one of his "most powerful instruments for enforcing mine safety" against violative conduct occurring out of the sight of an MSHA inspector. Id. at 18-19, quoting UMWA v. FMSHRC & Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir., 1984). As is the case with an observed violation, applying section 104(d)'s enforcement scheme against unobserved violations will serve to forcefully dissuade repetition of the violative conduct. Id.

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

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Finally, the one facet of the enforcement of section 104(d) that distinguishes the present case from Nacco requires no difference in result. In Nacco the enforcement action taken by the Secretary was the issuance of a section 104(d)(1) citation. Here, the MSHA inspector issued section 104(d)(1) and section

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

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

James A. Lastowka, Commissioner

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Chairman Ford, dissenting:

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

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

Accordingly, I dissent.

Ford B. Ford, Chairman

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