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EMERALD MINES V. MSHA & UMWA
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FMSHRC-WDC
SEPTEMBER 30, 1987

EMERALD MINES CORPORATION

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Docket No. PENN 85-298-R

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 Administrative Law Judge

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

> If, upon an 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

Gary Melick held that the section 104(d) citation was not properly issued because the cited violative event had occurred several days before the inspector visited the mine. The judge concluded that, because the inspector had been engaged in an 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 324 (March 1986)(ALJ). The Commission granted the petition for discretionary review filed by the United Mine Workers of America ("UMWA") and heard oral argument. In another case decided this date, Nacco Mining Co., 9 FMSHRC , Docket Nos. LAKE 85-87-R and 86-2 (September 30, 1987), we concluded that the Mine Act permits the issuance of a section 104(d)(1) citation under circumstances similar to those presented in this proceeding. For the reasons set forth in Nacco. we reverse and remand.

The essential facts are not in dispute. On July 30, 1985, MSHA Inspector Joseph Koscho received a complaint pursuant to section 103(g)(1) of the Mine Act (n. 1 infra). The complaint alleged that a

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> 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) provides in part:

> Whenever a representative of the miners or a miner in the case of a ... 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.... 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).

violative accumulation of methane had occurred at the No. 1 Mine of Emerald Mines Corporation ("Emerald"), an underground coal mine located in Pennsylvania.

On July 31, 1985, Inspector Koscho went to the mine and reviewed records with respect to the methane detectors and interviewed miners who were present when the alleged methane accumulation occurred. On August 1, 1985, the inspector visited the site of the alleged accumulation, tested for methane, and found only a small amount. He also tested the methane monitor on the continuous mining machine used on July 29 and found it to be working. However, on the basis of statements of miners whom he interviewed, the inspector determined that on July 29 there had been a violation of mandatory safety standard 30 C.F.R. $ 75.308 when, following the detection of methane accumulations of 2.5% to 2.6% in the 002 section, the continuous mining machine was not immediately de-energized while changes were being made in the ventilation of the working places. 2/

On August 8, 1985, the inspector issued to Emerald a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. $ 814(a), alleging a violation of section 75.308. The inspector also designated the violation as being of a "significant and substantial" nature. On August 24, 1985, at the direction of his supervisor, Inspector Koscho modified the citation to a citation issued pursuant to section 104(d)(1) of the Act to reflect MSHA's assertion that the violation was caused by Emerald's unwarrantable failure to comply with section 75.308.

Emerald contested the propriety of the section 104(d)(1) citation essentially on the basis that it was issued for a violation that no longer existed when detected by the MSHA inspector. Emerald then paid the civil penalty proposed by the Secretary for the alleged violation. In his decision, the judge found that Emerald's payment of the proposed penalty waived any contest of the violation itself and of the significant and substantial finding. 8 FMSHRC at 325. However, the judge also found that Emerald had tendered its payment under the mistaken impression that the citation was issued pursuant to section 104(a) of the Act rather than section 104(d)(1). The judge ruled that, in fairness, and to avoid any future detriment to the operator stemming from an inaccurate record of its history of violations, Emerald's challenge to

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2/ 30 C.F.R. $ 75.308 states in part:

> If at any time the air at any working place,

when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off....

the unwarrantable failure finding survived. 3/

With respect to the allegation of unwarrantable failure, the judge held that such a finding under section 104(d) must be based upon an inspection of the mine, and that the citation in this matter was not founded upon an inspection but rather upon an investigation conducted through subsequent interviews and the examination of records several days later. 8 FMSHRC at 328. This conclusion resulted from the judge's view that inspections pertain only to examinations of existing conditions and investigations pertain only to past events. Id. The judge then modified the section 104(d) citation to a citation issued pursuant to section 104(a) of the Act and dismissed the case. 8 FMSHRC at 328-29. We conclude that the judge erred.

We have held today in Nacco that the enforcement sanction of a section 104(d) citation is not restricted to existing violations observed by the inspector. Rather, a citation issued pursuant to section 104(d)(1) may be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards--regardless of whether the violations are in existence at the time that they are detected by an inspector. Nacco, slip op. at 5.10. We based this conclusion upon an examination of the text of section 104(d), its legislative history, the section's purpose of deterrence, and the overall enforcement scheme of the Mine Act. Id. We pointed specifically to the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for increasingly serious violations or operator behavior." 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

3/ No issue concerning this aspect of the judge's decision has been raised on review and we intimate no view as to the propriety of that ruling.

> 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).

As noted in Nacco, many violations, by their very nature, are unlikely to be observed until after they occur. Slip op. at 7. The violation at issue in this case presents precisely such a situation. The condition precedent to a violation of section 75.308 is the presence of 1% or more of methane in a working place. The transitory nature of methane accumulations and the vital necessity of immediately reducing the level below 1% makes it unlikely that an inspector would discover a violation of section 75.308 while it was occurring. Under the judge's decision, such a past violation, even though caused by an operator's unwarrantable failure, would escape the sanction and deterrent effect of section 104(d), which is designed to address unwarrantable failure. As we concluded in Nacco: "Were we to agree with the approach adopted by the judge, the statutory disincentive for [such] operator misconduct would be lost." Slip op. at 7.

As we indicated in Nacco. the term "inspection" in section 104(d) of the Mine Act is not limited, for purposes of that section, to observation of presently existing circumstances but includes inquiry into past events as well. Slip op. at 7-8. The present case was initiated by a complaint of a possible violation made to MSHA pursuant to section 103(g)(1) of the Act. That section provides to representatives of miners the right to obtain an immediate "inspection" whenever the representative has reasonable grounds to believe that a violation exists. We stated in Nacco:

> 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.

Slip op. at 8.

Arguments similar to those advanced by the operator in Nacco concerning the meaning of "investigation" and "inspection," the meaning of the term "finds" in section 104(d), and the asserted "present time" focus of section 104(d), have been raised herein by Emerald and are rejected for the reasons set forth in Nacco.

In sum, we conclude that a section 104(d) citation resulting from a section 103(g)(1) inspection may be based upon a violation detected during an inspection occurring after the violation has ceased to exist. Thus, we hold that the judge erred in concluding that the citation was issued improperly under section 104(d) of the Mine Act.

Accordingly, we reverse the judge and vacate his modification of the section 104(d) citation to a section 104(a) citation. Because the judge held that the section 104(d) citation was not issued properly, he did not consider the merits of the unwarrantable failure allegation included in the citation. Therefore, we remand this matter to the judge for further proceedings consistent with this decision.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

In this case the administrative law judge granted a motion by Emerald Mines Corporation for partial summary decision. Although Emerald raised several alternative grounds upon which it believed summary decision was appropriate, the sole basis articulated by the judge for his grant of the motion was that because "the citation at bar was not based on an inspection of the mine but upon an investigation through subsequent interviews and the examination of records conducted by the inspector several days after the incidents giving rise to the violation", the violation could not be properly cited under section 104(d). 8 FMSHRC at 328. See also Tr. at 114-16. Accordingly, the judge modified the citation to one issued pursuant to section 104(a) of the Mine Act. Id.

I agree with the majority that the judge's grant of partial summary decision was erroneous. I write separately to set forth the basis for my conclusion in the context of the particular circumstances of this case.

Although the judge concluded that the citation was not properly issued pursuant to section 104(d) because it was not based "on an inspection" of Emerald's mine, the record flatly contradicts his premise. It is undisputed that the MSHA inspector was at Emerald's mine pursuant to a miner's report of an alleged violation of the Mine Act and his request for an inspection pursuant to section 103(g) of the Act. The miner's handwritten report to MSHA stated:

July 30, 1985

> I am requesting a 103G [sic] at the Emerald Mine, Waynesburg Pa. of an incident that occurred [sic] on July 29, 1985 in the 002 section on the 8am to 4pm shift. Amount of 2.6% [methane] was detected and the mine foreman did not take the appropriate action according to the law, but proceeded to make adjustments in air by pulling tubing out.

Exh. R-1.

Section 103(g) of the Mine Act, referenced in the miner's report to MSHA, provides:

> Whenever a representative of the 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. Any such notice shall be

> reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. 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)(emphasis added). Pursuant to this grant of statutory authority, the MSHA inspector conducted the requested inspection and, as a result, issued the contested citation. Therefore, the challenged enforcement action taken by the Secretary under section 104(d) was indeed taken "upon an inspection" and the judge erred in finding otherwise.

Although the judge did not discuss any further rationale for his grant of partial summary decision, he did cite several administrative law judge decisions, including that in Nacco Mining Co., 8 FMSHRC 59 (January 1986)(ALJ), in support of his disposition. Today, the Commission has issued its decision in Nacco reversing the judge's decision relied upon by the judge in the present case. In Nacco the majority and concurring opinions extensively discuss the reasons why, as a matter of law, it is not improper for MSHA to proceed under section 104(d) for violations that occurred but no longer exist at the time of an MSHA inspection. Because the arguments raised by the operator in the present case parallel, in all essentials, those raised and addressed in Nacco I reject them for the reasons stated in my concurring opinion in Nacco, slip op. at 12-20.

I also note that in the present case, as in Nacco and White County Coal Corp., FMSHRC Docket No. LAKE 86-58-R, etc., also issued this date, the record discloses no impediment to a logical application of the enforcement scheme provided for in section 104(d). The violation at issue was alleged to have occurred on Monday, July 29, 1985. It was reported to MSHA on Tuesday, July 30th. On July 31st and August 1st the MSHA inspector conducted a section 103(g) inspection at the mine concerning the reported violation. On

August 8th he issued a citation pursuant to section 104(a) of the Mine Act, which citation also found the violation to be "significant and substantial". On August 24th, a further finding that the violation resulted from an unwarrantable failure on the part of the operator was made. All the necessary predicates for a section 104(d)(1) citation being met, the citation accordingly was modified to a section 104(d)(1) citation. With the issuance of this modification, Emerald was given timely notice that it was subject to a section 104(d) probationary chain and that further unwarrantable violations during the next 90 days would result in the issuance of withdrawal orders.

Thus, in the circumstances of this case, the Secretary's action in proceeding under section 104(d) in citing the violation at issue was procedurally proper and consistent with the intended purpose underlying section 104(d). As in Nacco, "no injustice to the operator or ... perversion of section 104(d)'s enforcement scheme has been caused by the Secretary's actions' Nacco slip op. at 20 (concurring opinion).

Accordingly, I join the majority in reversing the judge's decision and in remanding for further proceedings.

James A. Lastowka, Commissioner

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. That dissent, therefore, is incorporated herein by reference. In my view, sanctions issued pursuant to section 104(d), 30 U.S.C. 814(d) are limited to ongoing violations actually observed by inspectors in the course of their inspections. Here, the citation, originally issued pursuant to section 104(a), 30 U.S.C. $ 814(a), specified that it was based upon an investigation conducted in the course of several days after the violation was alleged to have occurred. Section 104(d) clearly limits unwarrantable failure sanctions to those violations discovered in the course of inspections, not investigations into past occurrences.

Furthermore, the facts of this case raise the same issues with respect to the 90 day probationary period of section 104(d) as were raised in Nacco, supra. Here, the violation was alleged to have occurred on July 29, 1985. It was charged in a section 104(a) citation issued August 8, 1985. Twenty-five days after the violation was alleged to have occurred, the citation was modified August 23, 1985, on orders from the issuing inspector's superiors, to allege unwarrantable failure under section 104(d).

As in Nacco, the majority gives no guidance as to how the 90 day period is now to be computed when the triggering citation can be issued post hoc, even though Emerald specifically raises the issue. Brief at pp. 17-18.

Does the probationary period begin on July 29, August 8, or August 23? If, as the Secretary argues, the latter date is correct, the operator in effect is subject to a 115 day probationary period and the statutory period of 90 days is jettisoned. See generally, Nacco dissent, supra at pp. 33-34.

Lastly, on the facts of this case, it is apparent that the term "inspection" has now been thoroughly elasticized to encompass all Secretarial enforcement activity. The so-called finding of unwarrantability was in fact made by the issuing inspector's superiors who conducted no investigation let alone inspection with respect to the alleged violation. Such transparent bootstrapping so as to impose the unwarrantable failure chain for a past abated violation seriously compromises the voluntary compliance philosophy of the Act. See Nacco dissent, supra, p. 26.

Accordingly, I dissent.

Ford B. Ford, Chairman

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