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GREENWICH COLLIERIES V. MSHA & UMWA
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FMSHRC-WDC
September 30, 1987
GREENWICH COLLIERIES, DIVISION
OF PENNSYLVANIA MINES
CORPORATION
v. Docket Nos. PENN 85-188-R
PENN 85-189-R
SECRETARY OF LABOR, PENN 85-190-R
MINE SAFETY AND HEALTH PENN 85-191-R
ADMINISTRATION (MSHA) PENN 85-192-R
and
UNITED MINE WORKERS
OF AMERICA (UMWA),

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
and
UNITED MINE WORKERS OF
AMERICA (UMWA)
v. Docket No. PENN 86-33
GREENWICH COLLIERIES

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY: Backley, Doyle and Nelson, Commissioners
This consolidated contest and civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), presents us with a question of law, similar to that decided 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 investigations, issue orders pursuant to section 104(d) of the Mine Act based upon violations that are detected after the violations have ceased
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to exist? 1/ Commission Administrative Law Judge Roy L. Maurer held that such orders could not be issued. 8 FMSHRC 1105 (July 1986)(ALJ). For the reasons stated in our decision in Nacco. supra, we reverse and remand.
The essential facts are as follows: On February 16, 1984,

a methane ignition and explosion occurred at the Greenwich No. 1 mine, an underground coal mine operated by Greenwich Collieries, Division of Pennsylvania Mines Corporation ("Greenwich"), and located in south-western Pennsylvania. Three miners were killed and eleven others were injured in the explosion. Representatives of the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived at the mine, engaged in rescue and recovery efforts, observed conditions at the site, and began an investigation of the cause of the explosion. As part of its investigation, MSHA examined the entire mine between February 25 and April 5, 1984, and between March 27 and April 27, 1984, took sworn statements from numerous individuals who participated in the recovery operations or who had information regarding the conditions in the mine prior to the explosion. The Secretary's investigators concluded that the operator's unwarrantable failure to comply with five mandatory

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

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 and 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).

safety standards contributed to the accident. Therefore, on

March 2, 1985, MSHA Inspector Theodore W. Glusko issued to Greenwich, the five section 104(d)(1) orders of withdrawal at issue in this case. The orders alleged that violations of various safety standards had occurred in December 1983 and January and February 1984. Each of the section 104(d)(1) orders indicated that they were based on a section 104(d)(1) citation issued to Greenwich on February 24, 1984. The orders also indicated that they were terminated at the time that they were issued. No miners were withdrawn from the mine as a result of the orders. Greenwich contested the orders and subsequently filed a motion for summary decision, arguing that the orders were not issued properly under section 104(d) because the inspector had not observed the violations during an inspection but had concluded that the violations occurred based on MSHA's investigation after the violations had ceased to exist. In granting Greenwich's motion, the judge relied upon certain unreviewed decisions of Commission administrative law judges, including two decisions that we reverse today. 2/ He held that the orders were invalid "because an order issued under section 104(d) should be based on an inspection as opposed to an investigation and the above orders state on their face that the violations which had allegedly occurred are based on an investigation and no longer then existed." 8 FMSHRC at 1107. Consequently, the judge vacated the unwarrantable failure allegations included in the section 104(d) orders, modified the orders to citations issued pursuant to section 104(a), 30 U.S.C. $ 814(a), and stated that further proceedings would be held to resolve the remaining issues. 8 FMSHRC at 1107. Greenwich s motion for summary decision also contended that the orders did not meet certain procedural prerequisites of section 104(d)(1) in that they were not issued within 90 days of the underlying section 104(d) citation and were not issued "forthwith." Given his disposition of the motion, the judge did not reach the merits of these contentions. The Secretary of Labor, joined by the United Mine Workers of America, which intervened in the proceeding, filed with the Commission a Petition for Interlocutory Review and a Motion to Stay Proceedings. We granted both the petition and the motion and heard oral argument. We conclude that the judge erred. In Nacco, supra, we set forth the proper interpretation and application of section 104(d). We held that the enforcement sanctions of section 104(d) are not restricted to existing violations observed personally by the inspector. Rather, these sanctions may also 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 of their detection. Nacco, slip 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 enforcement scheme of the Mine Act. We emphasized the importance of unwarrantable failure findings within the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for

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

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.
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> 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).

In addition, we rejected the suggestion that Congress intended to distinguish between enforcement actions based upon an inspection and those based upon an investigation, and held that inclusion of the terms "inspection or investigation" in section 104(a) as compared to use of the term "inspection" alone in section 104(d) was without legal significance regarding enforcement pursuant to section 104(d). Slip op. at 7-8. We based this conclusion upon the fact that the

terms are not defined in the Mine Act, and that "common 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." Slip op. at 8. The varied use of these terms within the Act and its legislative history also support this conclusion. Slip op. at 8-9.

Although the present case involves orders issued pursuant to section 104(d)(1), whereas Nacco involved a citation issued pursuant to that section, for the reasons stated in Nacco, we hold that orders issued under section 104(d)(1) can also be based upon prior violations not observed by the inspector at the time of occurrence. In another case decided today, we have reached an identical conclusion. White ~1605

County Coal Corp., 9 FMSHRC , Docket Nos. LAKE 86-58-R and LAKE 86-59-R (September 30, 1987). Further, as we held in White County, supra, in general and assuming the other prerequisites for their issuance have been met, "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." Slip op. at 4.

We noted in Nacco that many violations, by their very nature, are not likely to be observed or detected until after they occur. Slip op. at 7. This is particularly so where the violation is a failure to act as required or where the violation causes or contributes to the event being investigated. Both types of violation are present here. Two of the section 104(d) orders allege a failure to conduct required mine examinations, one being the pre-shift examination of the active workings and the other being the weekly examination of the mine's ventilation system. These examinations are designed to monitor potentially hazardous conditions, including the accumulation of excessive levels of methane. As such, they warn the operator of impending danger and are necessary to assure overall mine safety. Under the judge's decision, such critical violations, even though caused by an operator's unwarrantable failure, would escape the unwarrantable failure sanction established by Congress.

The remaining contested orders allege an insufficient volume and velocity of air ventilating the mine, violations of the mine's approved ventilation system and methane and dust control plan, and a failure to take required precautions when making changes in mine ventilation. These allegations arose out of the inspection and investigation that the Secretary was required to conduct in order to determine, among other things, the cause of the accident and whether there was compliance with mandatory health and safety standards. 30 U.S.C. $ 813. One purpose of such inspections and investigations is to avoid future accidents. If the Secretary

determines that violations contributing to an accident were caused by the operator's unwarrantable failure to comply with mandatory health and safety standards. citation of the violations pursuant to section 104(d) may deter future unwarrantable failure by an operator to assure compliance with mandatory health or safety standards. Congress did not intend to limit the inspectors' power to sanction unwarrantable operator conduct by removing from the purview of section 104(d) violations that occurred prior to a disaster but which were discovered only after the disaster. As we noted in Nacco, "[t]he 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. For purposes of section 104(d), Congress did not intend to make distinctions between the citation of past and presently existing violations when it used the words "inspection" and "investigation" in the Act. Slip op. at 7-8. Consequently, section 104(d) enforcement actions may result from "inspections" as well as "investigations."

Finally, although Greenwich argues that requiring the withdrawal of miners for a violation that no longer exists violates due process

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considerations, no miners were withdrawn from the mine when the orders in this matter were issued. The Secretary asserts that under such circumstances the issuance of an order that does not require withdrawal is consistent with his enforcement policy. Tr. Oral Arg. 20-21. This policy is appropriate in such circumstances and in no small way has persuaded us to conclude that the operator's due process argument on this issue is not well founded.

For the foregoing reasons, we reverse the judge's legal conclusion that the orders here are invalid because they were issued based upon an investigation and after the violations ceased to exist. As noted above, Greenwich also challenged the validity of the orders because they were not issued within 90 days of the section 104(d)(1) citation upon which they were based and were not issued "forthwith." Slip op. at 3. The judge did not reach these issues and on remand shall rule specifically on them. Further, there are other issues in this case regarding the merits of the alleged violations and the Secretary's unwarrantable failure allegations that should be resolved by the judge on remand.

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 in part a motion by Greenwich Collieries for summary decision. In its motion

Greenwich challenged the validity of five orders issued by MSHA pursuant to section 104(d)(1) of the Mine Act. Greenwich specified three grounds upon which it believed summary decision was appropriate:

(1) The orders were not issued as a result of, and the alleged violations were not detected during, an inspection, as required by section 104(d)(1); on the contrary, MSHA concluded that the alleged violations had occurred based on an investigation after the alleged violations no longer existed;

(2) the orders were not issued within 90 days of the issuance of the section 104(d)(1) citation upon which they were based; and

(3) the orders were not issued "forthwith" as required by the Mine Act.

Greenwich's Motion for Summary Decision at 2.

The administrative law judge granted Greenwich's motion on the first ground, finding it "dispositive." 8 FMSHRC at 1107. Therefore, he did not reach Greenwich's other arguments in support of its request for summary decision.

I agree with the majority that the judge's decision granting summary decision must be reversed and the case remanded for further proceedings. I write separately to explain 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, here, the Secretary. United States v. Diebold. Inc., 369 U.S. 654 (1962). See 6 Moore's Federal Practice, $56.15[8](1985). In any event, the essential facts are undisputed and can be summarized as follows. On February 16, 1984, three miners were killed and several others were injured as a result of an explosion at the Greenwich No. 1 Mine. This incident triggered MSHA's exercise of most of the various statutory responsibilities assigned to it under the Mine Act. MSHA participated in rescue and recovery efforts, conducted inspections of the mine, investigated the cause of the explosion, issued numerous citations and orders alleging violations of the Mine Act and issued a final report setting forth its findings and conclusions concerning the explosion.

The particular action taken by MSHA that is challenged by the operator in the present case is the issuance of five orders pursuant to section 104(d)(1) of the Mine Act. Each of these orders allege a violation of a mandatory standard, which MSHA determined contributed to the cause of the explosion. The orders were issued on March 29, 1985, thirteen and one-half months after the explosion. The orders state that the violative conditions were observed "during the

investigation" of the explosion.
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The challenge to the procedural validity of these orders that was found by the judge to be dispositive in part concerns whether, as a matter of law, the Secretary properly can cite under section 104(d) of the Mine Act violations of the Act that occurred, but which were no longer in existence at the time of an MSHA inspection so as to be observable by an inspector. As to this aspect of the question of law before us, I agree with the majority that simply because a violation occurs out of the sight of an MSHA inspector and the violative condition no longer exists at the time the inspector arrives at the mine, the Secretary is not precluded from charging the violation in a citation or order issued pursuant to section 104(d). For the reasons stated in my concurring opinions in Nacco Mining Co., White County Coal Corp., and Emerald Mines Corp., all issued this date, the Secretary's authority to proceed under section 104(d) in such circumstances is consistent with the plain language of section 104(d). Furthermore, as I emphasized in Nacco White County and Emerald depending on the particular circumstances involved, the citation of unobserved violations pursuant to section 104(d) can serve to accomplish that section's intended purpose without damaging its underlying enforcement logic and without creating impractical implementation problems.

Greenwich's challenge to the orders at issue includes the further assertion that the Secretary properly cannot proceed under section 104(d) if his determination that a violation of the Mine Act occurred resulted from an MSHA "investigation", rather than an MSHA "inspection." This argument also was raised by the operators in Nacco, White County and Emerald. As explained in my concurring opinions in those cases, however, consideration of their argument was unnecessary because each of those cases involved MSHA enforcement activity under section 104(d) that was, in fact, undertaken "upon an inspection." 30 U.S.C. $ 814(d)(1). The factual circumstances surrounding MSHA's enforcement action in the present case are fundamentally different from those in the other three cases and serve to better focus consideration of the "inspection/investigation" issue. 1/

Section 104(d)(1) of the Mine Act provides that the enforcement action specified therein can be undertaken by the Secretary "upon any inspection of a coal or other mine." 30 U.S.C. $ 814(d)(1) (emphasis added). The operator argues, and the judge agreed, that because the word "inspection" and the word "investigation" are both used in the Mine A"t in referring to various statutory responsibilities of the Secretary, a distinctive impact on the nature of the Secretary's activities was intended depending on the particular word used in

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1/ Even in this case the Secretary suggests that consideration of the issue may be inappropriate because, he asserts, the violative conditions actually were observed by MSHA inspectors conducting post-accident inspections. Oral Arg. Tr. at 3-4; Sec. Br. at 11-12. It is clear, however, that the Secretary's issuance of the orders some thirteen and one-half months after the explosion was, in large part, based on information derived from MSHA's extensive investigation into the causes of the explosion. Therefore, the question of law reserved in the other cases is fairly presented in the present case.

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a particular statutory provision. See, e.g., sections 103(a), 104(a) and 107(a)(inspections and investigations); sections 103(b) and 105(c)(2)(investigations); and sections 104(d) and (e) (inspections). As related to the particular circumstances of the present case, the argument advanced is that the challenged orders were all issued upon an "investigation", rather than an "inspection", and therefore were not properly issued under section 104(d).

The varying uses in the Mine Act of the words "inspection" and "investigation" are too numerous to attribute simply to editorial oversight or imprecise draftsmanship. The Mine Act does not define the words, however, requiring that common usage be the first resort to determine their meaning. 2A Sutherland Statutory Construction, $$ 47.01, 47.28 (4th ed. 1984). In Webster's Third New International Dictionary (1971) common definitions of the words are provided which suggest that there are shades of distinctions in their meanings, but which also suggest that the meanings of the two words overlap to a certain extent and are not mutually exclusive. 2/ As is stated in the majority opinion in Nacco, in common usage "[b]oth words can encompass an examination of present and past events and of existing and expired conditions and circumstances." Nacco, supra, slip op. at 8.

The question therefore becomes whether the distinctions or the similarities in the meanings of the words are to be given emphasis in the context of section 104(d). If the distinctions in meanings are emphasized, then the operator is correct and the Secretary is not authorized to issue citations or orders pursuant to section 104(d) if his determination that a violation occurred is based on information derived from an investigation. Conversely, if the similarities in the meanings of the words are given emphasis, then violations determined to exist as a result of MSHA investigations properly may be cited under section 104(d).

For the reasons stated below, I agree with the majority's discussion and conclusion in Nacco (slip op. at 7-9) that, in the particular context of section 104(d), the presence of the word "inspection" and the absence of the word "investigation" in referring

to the Secretary's enforcement activities authorized therein was not intended to have the substantive effect on the Secretary's authority argued for by the operator.

The distinguishing feature of section 104(d) is its authorization of the Secretary to make a special finding that a violation was caused by an

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2/ E.g., "inspection: a strict of close examination; ... an examination or survey of a community, or premises, or an installation by an authorized person (as to determine compliance with regulations or susceptibility to fire or other hazards."

"investigation: detailed examination: study, research; a searching inquiry, an official probe." Webster's, supra, at 1170, 1189.

"unwarrantable failure" of the operator to comply with the Act or a mandatory standard. The particular importance of an unwarrantable failure finding stems from the probationary effect triggered by its presence in a citation or order. 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. UMWA v. FMSHRC & Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984). Thus, the plain focus of section 104(d)'s enforcement scheme is on the conduct of a mine operator in relation to the occurrence of a violation. If 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 has occurred, the operator has not acted unwarrantably." Nacco, slip op. at 18 (concurring opinion).

Section 104(d) is one of "the Secretary's most powerful instruments for enforcing mine safety" (Kitt Energy, supra. 768 F.2d at 1479), and the construction of unnecessary impediments hindering the Secretary's ability to fully exercise this special authority should not be undertaken lightly. As described above the focus of section 104(d) is on the conduct of an operator in connection with a violation. In this regard it must be emphasized that the nature of an operator's conduct in relation to a particular violation will not change depending on whether MSHA discovered the fact of violation through an inspection or through an investigation. Acceptance of the operator's argument in the context of section 104(d) would mean that the enforcement procedure established by Congress to specifically

address and deter unwarrantable conduct on the part of mine operators could not be invoked in a large number of instances simply because the operator's unwarrantable violation was discovered during an MSHA "investigation" rather than during an MSHA "inspection."

Given the remedial purpose of the Mine Act, the deterrent purpose of section 104(d) in particular, the lack of special definitions of "inspection" and "Investigation" in the Mine Act, the substantial overlap in the commonly understand meanings of the words and the lack of any overriding contrary indication in the legislative history as discussed by the majority and dissenting opinions in this decision and the other decisions issued this date, I conclude that the Secretary properly can proceed under section 104(d) of the Mine Act in issuing citations and orders for violations that MSHA determines, during the course of an investigation, to have occurred at a mine. Therefore, I concur in the majority's reversal of the judge's contrary conclusion and in the remand for further appropriate proceedings.

I note that the further proceedings in this case necessarily will encompass consideration of the operator's remaining challenges to the validity of the section 104(d) orders at issue which were not reached by the judge in his first decision. These arguments concern the effect, if any, on the validity of the section 104(d) orders caused by the lapse of time between the occurrence of the violations, MSHA's determination that the violations occurred and the date that the orders ultimately were issued. In rejecting those arguments of the operator discussed in this opinion, I intimate no view as to the merits of the remaining arguments. They too raise

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important questions that will have to be resolved in light of the language and purpose of section 104(d), the particular circumstances surrounding the violations and the manner in which the Secretary proceeded in issuing the contested orders. 3/

James A. Lastowka, Commissioner

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3/ I believe that the majority's expression of opinion concerning the Secretary's policy of issuing withdrawal orders that have no idling effect is premature. Slip op. at 5-6. In my view, that aspect of this case requires full consideration in conjunction with the disposition of the important issues remaining in this case.

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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 Maurer in this case. That dissent is, therefore, incorporated herein by reference. In my view the statutory

restrictions on the use of unwarrantable failure sanctions for past completed violations unobserved by the inspector apply equally to citations and orders issued under section 104(d). 30 U.S.C. 814(d). Furthermore, as noted in my Nacco dissent, supra, at pp. 33-36, the majority's decision places no temporal restrictions on the imposition of section 104(d) sanctions. The majority suggests that a procedural challenge may lie where section 104(d) orders are issued 13 months after the issuance of an underlying 104(d)(1) citation. However, the surer remedy against such gross distortions of the unwarrantable failure "chain" would be to restrict the application of section 104(d) to extant violations observed by inspectors in the course of their inspections. I firmly contend that the statute so provides.

Unlike my colleagues, I am not persuaded that a closure order that closes no mine or part thereof - or that withdraws no miners - serves the Secretary's enforcement policy. As noted in my Nacco dissent at p. 15, such an enforcement action is a dead letter, or as Greenwich contends, a "sham." Brief at p. 13.

Accordingly, I dissent.

Ford B. Ford, Chairman

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