CCASE:
MSHA V. YOUGHIOGHENY & OHIO COAL
DDATE:
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TTEXT:
FMSHRC-WDC
May 13, 1988
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket Nos. LAKE 86-121-R
LAKE 87-9
YOUGHIOGHENY & OHIO
COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act" or "Act"), two issues are presented: (1) Whether Commission Administrative Law Judge Gary Melick erred in concluding that the violation cited in a withdrawal order issued pursuant to section 104(d)(1) of the Mine Act was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard; and (2) whether the judge erred in modifying the withdrawal order to a citation issued pursuant to section 104(a) of the Act solely because the violation was not of a significant and substantial nature. 1/ We affirm the judge's finding that the violation

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

did not significantly and substantially contribute to the cause and

effect of a mine safety hazard. In addition, we hold that such a "significant and substantial" finding is not a prerequisite for the issuance of a section 104(d)(1) order of withdrawal. Accordingly, we reverse the judge's modification of the withdrawal order and remand this matter to the judge for further proceedings.

Youghiogheny and Ohio Coal Company ("Y&0") operates the Nelms No. 2 Mine, an underground coal mine located in Harrison County, Ohio. On August 1, 1986, Y&0 was in the process of restarting mining inby the last open crosscut in the main north section of the mine. Y&0 section foreman John Slates requested that the haulage road leading to the last open crosscut be cleaned of coal and other debris. The roof of the haulage road was fully and properly supported with resin-grouted roof bolts spaced on four-foot centers. David Parrish, a qualified scoop operator, offered to clean the road using a scoop. Parrish's electrically powered, self-propelled scoop was not equipped with a canopy. After operating the scoop for about 45 minutes, Parrish needed to dump some refuse and waste material ("gob") left from previous mining. Parrish could not take the gob to the feeder because a buggy and another scoop were in the way. Pursuant to instructions from foreman Slates, Parrish proceeded to dump the gob at a beltline located inby the last open crosscut.

After Parrish dumped the gob, Larry Ward, a union safety committeeman at the mine, alerted Parrish to the fact that it was a violation of a mandatory safety standard to operate the scoop without a canopy in the beltline area where Parrish had dumped the gob. Ward then discussed the situation with Slates, who agreed to have the scoop removed from that area.

On August 4, 1986, Department of Labor Mine Safety and Health Administration ("MSHA") Inspector Ervin Roy Dean was at the mine conducting an inspection pursuant to section 103(i) of the Act, 30 U.S.C. $ 813(i). While on this inspection, Dean received a request from Ward, pursuant to section 103(g)(1) of the Act, to conduct an immediate inspection at the mine regarding Parrish's operation of the scoop inby

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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) to be withdrawn from, and to be prohibited from entering, such area untilan authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. $ 814(d)(1) (emphasis added).

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the last open crosscut. 2/ ln response to this request, Dean went to the main north section and examined the area in question. Dean determined that the area had a mining height of 62 inches and concluded that operation of the scoop in that area without a canopy violated 30 C.F.R. $ 75.1710-1(a)(2), which requires that all self.propelled electric face equipment operated in the active workings of mines having mining heights of 60 inches or more be equipped with substantially constructed canopies or cabs. 3/ Dean issued to Y&0 an order of withdrawal that required Y&0 to refrain from using the scoop in the area until the scoop was provided with a substantially constructed canopy. Dean issued the order pursuant to section 104(d)(1) of the Act because he found that Slates authorized Parrish to operate the scoop in the area at issue even though Slates knew the scoop did not have a canopy and knew that a canopy was required. Dean found that Slates' actions constituted an unwarrantable failure to comply with the standard. (The parties stipulated at the hearing that a preceding valid citation issued pursuant to section 104(d)(1) was in existence when Dean issued the section 104(d)(1) order. Tr. 6.) Dean also found that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard.

Y&0 contested the validity of the section 104(d)(1) order as well as the Secretary's proposed civil penalty for the violation of section 75.1710-1(a)(2). In its notice of contest of the order of withdrawal,

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2/ Section 103(g)(1) of the Act provides in part that a miners' representative may obtain an "immediate inspection" of a 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...." 30 U.S.C. $ 813(g)(1).

3/ In relevant part, 30 C.F.R. $ 75.1710-1(a)(2) provides:

(a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1), (2), (3), (4), (5),

and (6) of this section, be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment, he shall be protected from falls of roof, face, or rib, or from rib and face rolls.
The requirements of this paragraph (a) shall be met as follows:
(2) On and after July 1, 1974. in coal mines having mining heights of 60 inches or more, but less than 72 inches.
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Y&0 conceded that it had violated section 75.1710-1(a)(2) but argued that "[t]he facts surrounding the issuance of [the] order do not meet the requirements for unwarrantable failure." At the hearing, Y&0 also asserted that during a section 103(g)(1) inspection it is improper for an inspector to cite a violation that has occurred in the past.
In his decision the judge found it unnecessary to address Y&O's section 103(g)(1) argument due to his conclusion that the order of withdrawal was otherwise deficient. 9 FMSHRC at 1066. The judge found that because the Secretary did not prove that the violation significantly and substantially contributed to the cause of a mine safety hazard, the order must fail under section 104(d)(1). Accordingly, the judge modified the order to a section 104(a) citation. 30 U.S.C. $ 814(a). The judge made no finding as to whether the violation was the result of Y&O's unwarrantable failure to comply with the cited standard, but found that the violation was the result of "gross operator negligence" and assessed a civil penalty of $400. 9 FMSHRC at 1067. 4/
We granted the Secretary's petition for discretionary review of the judge's decision. The Secretary asserts that, contrary to the judge's decision, the evidence of record establishes that the violation was of a significant and substantial nature. In addition, the Secretary argues that the judge erred by modifying the section 104(d)(1) withdrawal order to a section 104(a) citation on the basis of his conclusion that the violation did not significantly and substantially contribute to the cause and effect of a mine safety hazard. 5/
The first issue is whether the judge erred in concluding that the violation was not of a significant and substantial nature. The judge found that the Secretary had not "met the requisite burden of proof for establishing the [violation] was ... significant and substantial." 9 FMSHRC at 1067. Because we find the judge's finding to be supported by substantial evidence, we affirm.
A violation is properly designated as being of a significant and substantial nature "if, based on the particular facts surrounding that

4/ The Mine Act authorizes the Commission to make an independent penalty assessment based upon the criteria set forth in section 110(i) of the Act. 30 U.S.C. $ 820(i). See, e.g., Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (August 1985). One of the statutory criteria upon which the assessment of a civil penalty is based is "whether the operator was negligent." 30 U.S.C. $ 820(i). The Commission has recognized that the penalty criterion of negligence and an inspector's finding of unwarrantable failure made pursuant to section 104(d) of the Act are not identical, although frequently they are based upon the same or similar factual circumstances. Quinland Coals, Inc., 9 FMSHRC 1614, 1622. (September 1987).

5/ Before the judge, however, the Secretary asserted that a significant and substantial finding was a prerequisite for the issuance of a section 104(d)(1) order, and the inspector testified to the same effect. S. Post-Hearing Br. 8; Tr. 18.

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violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC at 822, 825 (April 1981); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 677 (April 1987); see also Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1078-79 (D.C. Cir. 1987). In Mathies Coal Co., 6 FMSHRC at 1, 3-4 (January 1984) the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co.,Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836. Further, the violation itself "must be evaluated in terms of continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In the present case, there is no dispute as to the fact of violation or that the discrete safety hazard contributed to by the violation was the danger posed to the scoop operator by the lack of a canopy in the event of a roof fall. Additionally, there is no dispute that any injury resulting from the roof fall would likely be serious. The chief issue, therefore, is whether there was a reasonable likelihood of a roof fall.

As noted above, the significant and substantial nature of a violation must be determined "based on the particular facts surrounding the violation." National Gypsum, supra, 3 FMSHRC at 825. The particular facts surrounding the violation at issue support a finding that a roof fall was not reasonably likely to occur. It is undisputed that while operating the scoop in the area of the violation, Parrish was under roof supported with resin-grouted rods on centers of four-feet or less at all times. Although the inspector stated that the roof was "shaly" and had been given a chance to "work" while the area was being rehabilitated, the Secretary does not argue nor imply that the roof support in the area was out of compliance with the mine's MSHA-approved roof control plan or was not adequately supported as required by 30 C.F.R. $ 75.200. Because the particular facts surrounding this violation indicate that the roof was properly and adequately supported, the judge correctly accorded little weight to the general rationale of

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the inspector that "most roof falls occur" within 25 feet of the face -- a zone in which the scoop was operated. 9 FMSHRC at 1067. In sum, given the undisputed fact that the scoop was operated at all times under supported roof, and the lack of evidence to establish a reasonable likelihood of a roof fall in the area involved, we conclude that substantial evidence supports the judge's finding that this violation was not of a significant and substantial nature. Compare Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011-13 (December 1987).

We now turn to the issue of whether the judge erred by modifying the section 104(d)(1) withdrawal order to a section 104(a) citation. We agree with the Secretary's argument on review that the basis of the judge's modification was erroneous. The statutory language of section 104(d)(1) expressly makes a significant and substantial finding a prerequisite for the issuance of a section 104(d)(1) citation. There is, however, no statutory requirement that the inspector base a section 104(d)(1) order upon a finding that the violation significantly and substantially contributes to the cause and effect of a mine safety or health hazard. Rather, the plain language of section 104(d)(1) establishes three prerequisites for the issuance of a section 104(d)(1) withdrawal order: (1) an

underlying section 104(d)(1) citation; (2) a violation of a mandatory health or safety standard found within 90 days after the issuance of the section 104(d)(1) citation; and (3) a finding by the inspector that the violation was "caused by an unwarrantable failure of [the] operator to ... comply." See n.1 supra. This construction is confirmed by judicial precedent and legislative history. Section 104(d)(1) of the Mine Act was carried over without substantive change from section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. $ 814(c)(1) (1976) (amended 1977). In UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied sub nom. Bituminous Coal Operators' Assn., Inc. v. Kleppe, 429 U.S. 858 (1976), the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether a significant and substantial finding was a "prerequisite to be met before a withdrawal order may issue pursuant to section [104(c)(1)]" of the Coal Act. 532 F.2d at 1405. 6/ After reviewing the language of section 104(c)(1) and the legislative history of the section, the court concluded: "The statute and the legislative history are clear. There is no [significant and substantial finding] required to be met before a section [104(c)(1)] withdrawal order may properly issue." 532 F.2d at 1407. The Mine Act's legislative history indicates no Congressional intent to change this interpretation when enacting section 104(d)(1). S. Rep. No. 181, 95th Cong., 1st Sess. 30-31 (1977), reprinted in Senate Subcommittee on

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6/ The court in Kleppe referred to the significant and substantial finding requirement of section 104(c)(1) as the section's "gravity criterion." It is clear that the phrase "gravity criterion" is the court's shorthand for the statutory language of section 104(c)(1) that the violation be "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." 532 F.2d at 1405.

Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 618-19 (1978).

This Commission has, on numerous occasions, addressed the statutory prerequisites for the issuance of sanctions pursuant to section 104(d) and has never held nor implied that a significant and substantial finding is required to sustain a section 104(d)(1) order. See United States Steel Corp., 6 FMSHRC 1908, 1915 n.3 (August 1984); see also Nacco Mining Co., 9 FMSHRC 1541, 1545 (September 1987), pet. for review filed, No. 88-1053 (D.C. Cir. January 27, 1988). Accordingly, we hold that a "significant and substantial" finding is not a prerequisite for the issuance of a

section 104(d)(1) order.

Since the judge ruled in error that a significant and substantial finding was necessary to sustain a section 104(d)(1) order, he did not reach Y&O's contention that the violation of section 75.1710-1(a)(2) was not the result of its unwarrantable failure to comply with that mandatory safety standard. We remand this matter in order that the judge may rule on this issue and re-examine the penalty in light of that ruling. Compare Youghiogheny & Ohio Coal Co., supra, 9 FMSHRC at 2003. 7/

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7/ On remand it is unnecessary for the judge to consider Y&O's assertion that the violation was invalidly cited because the violative condition was no longer in existence when cited by the inspector during an inspection conducted pursuant to section 103(g)(1) of the Act. 30 U.S.C. $ 813(g)(1). Following issuance of the judge's decision, the Commission held (Chairman Ford, dissenting) that a section 104(d) sanction may be based upon a prior violation cited during a section 103(g)(1) inspection. Nacco Mining Co., supra. See also Emerald Mines Corp., 9 FMSHRC 1590 (September 1987), pet. for review filed, No. 87-1816 (D.C. Cir. December 23, 1987).

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Accordingly, we affirm the judge's finding that the violation was not of a significant and substantial nature. In addition, we vacate the judge's modification of the section 104(d)(1) order to a section 104(a) citation and remand this matter to the judge to determine whether the violation was caused by Y&O's unwarrantable failure to comply with the cited standard and to re-examine the penalty.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner

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