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UTAH POWER & LIGHT V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 15, 1989

UTAH POWER AND LIGHT COMPANY,
MINING DIVISION

v. Docket No. WEST 89-161-R

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

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Utah Power and Light Company, Mining Division ("UP&L"), pursuant to the provisions of section 105(b)(2) of the Mine Act and Commission Procedural Rules 45 and 46, has filed with the Commission an Application for Temporary Relief from an enforcement action taken against it by the Secretary of Labor. 1/ For the following reasons, we deny UP&L's

1/ Section 105(b)(2) of the Mine Act provides:

An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section [104] of this [Act] together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may

prescribe, if --

(A) a hearing has been held in which all parties were given an opportunity to be heard;

Application.

Briefly, the relevant factual and procedural background is as follows. On March 16, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to UP&L at its Cottonwood underground coal mine a citation containing significant and substantial and unwarrantable failure findings made pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). With this citation as

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section [104] of this [Act]. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

30 U.S.C. § 815(b)(2).

Commission Procedural Rules 45 and 46 implement section 105(b)(2) of the Act and state:

45 Procedure.

(a) When to file. An application for temporary relief may be filed at any time before the issuance of a final order in the proceeding to which the application relates.

(b) Statements in opposition. The parties opposing the application shall file statements in opposition within 3 days after receipt of the application.

(c) Prior hearing required. Temporary relief shall not be granted prior to a hearing.

46 Contents of application.

(a) An application for temporary relief shall contain: (1) A statement of the specific relief requested; (2) a showing of substantial likelihood that the findings and decision of the Judge or the Commission in the matters

to which the application relates will be favorable to the applicant; and (3) a showing that such relief will not adversely affect the health and safety of miners in the affected mine.

(b) An application for temporary relief may be supported by affidavits or other evidentiary matter.

29 C.F.R. §§ 2700.45 & .46.

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a predicate, MSHA issued a 104(d)(1) order of withdrawal at the same mine on March 20, 1989. The order alleges that UP&L violated 30 C.F.R. § 75.400, a mandatory safety standard dealing with accumulation of combustibles, and also charges that the violation was significant and substantial and resulted from UP&L's unwarrantable failure to comply with the standard. The order was terminated within an hour of issuance upon UP&L's abatement of the alleged violative conditions. In separate proceedings, UP&L challenged both alleged violations. The two proceedings were assigned to Commission Administrative Law Judge John J. Morris.

In an expedited decision issued on April 12, 1989, Judge Morris vacated the special finding of unwarrantable failure contained in the March 16 citation, and modified the citation to one issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Utah Power and Light Co., 11 FMSHRC 586 (April 1989)(ALJ). Neither party sought review of that decision. In an expedited decision issued on April 24, 1989, Judge Morris upheld the cited violation and the validity of the March 20 section 104(d)(1) withdrawal order. 11 FMSHRC 710 (April 1989)(ALJ). The April 24 decision makes no reference to the judge's modification of the March 16 citation in his earlier decision.

UP&L filed its Application for Temporary Relief with the Commission on May 12, 1989. The Secretary filed an Opposition to UP&L's Application for Temporary Relief and we permitted UP&L to file a Reply to the Secretary's Opposition. UP&L also petitioned the Commission for discretionary review of the judge's decision challenging, inter alia, the judge's upholding of the special finding of unwarrantable failure. On June 2, 1989, we granted UP&L's petition for discretionary review.

In its Application for Temporary Relief, UP&L specifically seeks relief from the finding of unwarrantable failure set forth in the March 20 citation. It argues that, because the judge's decision leaves intact the finding of unwarrantable failure, the Cottonwood mine is exposed to closure under the 104(d) "chain" in the event that unwarrantable failure allegations are made in subsequent enforcement actions taken by the Secretary pending Commission review of the judge's April 24 decision. Both UP&L and the Secretary agree that, because of the judge's modification of the March 16 predicate citation, the 104(d)(1) order in this matter should be deemed to be modified by operation of law to a citation. UP&L App. 4-5; S. Opp. 3-4. See Consolidation Coal Co., 4 FMSHRC 1791, 1794-96 (October 1982). The Secretary argues in opposition that the express language of 105(b)(2) of the Mine Act provides for temporary relief only from

orders issued pursuant to 104 and, because the order was modified to a citation by operation of law, the Commission lacks jurisdiction to grant the temporary relief requested. Further, the Secretary asserts that relief under 105(b)(2) is obtainable only from unabated withdrawal orders and the order in this case was abated within an hour of its issuance. In reply, UP&L contends that the plain language of 105(b)(2) also provides for relief from modifications of orders issued under 104, which UP&L claims is the case here. UP&L also argues that only citations issued under subsections (a) and (f) of 104 are expressly excluded from temporary relief under th

language of 105(b)(2). According to UP&L, because the enforcement action presently at issue is a "104(d)(1) citation," resulting from the modification of the original 104(d)(1) order, temporary relief is not precluded by the terms of 105(b)(2).

We conclude that the plain language of 105(b)(2) requires denial of UP&L's Application. Section 105(b)(2) sets forth the conditions under which temporary relief may be granted under the Act and Commission Procedural Rules 45 and 46 merely implement this statutory provision. Section 105(b)(2) of the Act provides for temporary relief from "any modification or termination of any order or from any order issued under section [104]" of the Act, and specifically states that "[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) ... of [104]" of the Act. The legislative history of 105(b)(2)'s nearly identical predecessor provision in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("1969 Coal Act"), indicates that Congress intended, as the language of the Mine Act and the 1969 Coal Act clearly reflects, that temporary relief lie only from withdrawal orders, not from citations or from the equivalent "notices of violation" under the 1969 Coal Act. See Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1603 (1975) ("1969 Coal Act Legis. Hist."). We recently made clear in denying a request for section 105(b)(2) temporary relief that such relief applies only to orders of withdrawal issued under section 104 of the Act. *Pennsylvania Electric Co.*, Docket No. PENN 88-227, Order at 1-2 (May 8, 1989).

Moreover, the enforcement action in question is, contrary to UP&L's characterization, a citation issued pursuant to the authority of 104(a) of the Act. As such, it is expressly excluded from the reach of temporary relief. As discussed below, the commonly used phrase "section 104(d)(1) citation" is merely a term of convenience and does not indicate a separate basis for issuance of citations independent from section 104(a).

Section 104(a) is the source of the Secretary's power to issue citations for alleged violations of the Act. See, e.g., *Nacco Mining Co.*, 9 FMSHRC 1541, 1545 & n. 6 (September 1987); *Consolidation Coal Co.*, 6 FMSHRC 189, 191-92 (February 1984). Section 104(d)(1) states that if 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 the Act." (Emphasis added). Thus, the statutory language makes clear that "significant and substantial" and "unwarrantable failure" determinations by MSHA inspectors constitute special findings that are "includ[ed]" in any citation issued under the authority otherwise conferred upon the Secretary by the Act.

This view of the Act is reinforced by the legislative history of section 104(a)'s predecessor provisions in the 1969 Coal Act, in which a key House Committee report explained that when a "representative [of the Secretary] finds a violation of a standard and further finds that the violation is caused by an unwarrantable failure on the part of the operator in complying with the particular standard, he includes such additional finding in the notice [of violation] issued under sub- section (b)" [section 104(b) of the 1969 Coal Act essentially now is section 104(a) of the Mine Act]. H. Rep. No. 653. 91st Cong., 1st Sess. 8 (1969), reprinted in 1969 Coal Act Legis. Hist. 1038. This relationship between citations issued pursuant to section 104(a) and the special findings provided for in section 104(d) was also discussed in *Consolidation Coal*, supra, 6 FMSHRC at 191-92, in which we approved the inclusion of significant and substantial findings in a citation issued under section 104(a). Finally, in *Nacco*, supra, we expressly referred to a "citation issued with section 104(d) findings" and explained that the term "section 104(d) citation" was used for convenience to distinguish it from a section 104(a) citation not containing such findings. 9 FMSHRC at 1545 n.6.

Accordingly, we hold that the citation from which temporary relief is sought by UP&L is a section 104(a) citation with special findings and as such is not within the purview of section 105(b)(2) relief. Accordingly, UP&L's Application for Temporary Relief is denied. 2/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ UP&L also argues that it may seek relief from the modification, by operation of law, of the original section 104(d)(1) order to a citation containing special findings. We disagree. This modification operated to UP&L's benefit, not harm. Therefore, the need to consider temporary relief from an order that is no longer extant is not apparent. Further, we express no opinion as to the Secretary's alternative assertion that temporary relief may be obtained only from unabated orders. Similarly, we intimate no view at this time as to whether temporary relief may lie from the effect of special findings contained in section 104(d) orders.

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Distribution

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Susan E. Chetlin, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Blvd.
Denver, Colorado 80204