

CCASE:

GREENWICH COLLIERIES V. MSHA

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

May 22, 1990

GREENWICH COLLIERIES, DIVISION
OF PENNSYLVANIA MINES
CORPORATION

v.

Docket Nos. PENN 85-188-R
PENN 85-189-R
PENN 85-190-R
PENN 85-191-R
PENN 85-192-R

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

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

PENNSYLVANIA MINES
CORPORATION,
GREENWICH COLLIERIES

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

DECISION

BY THE COMMISSION

This consolidated contest and civil penalty proceeding, which is
before the Commission on interlocutory review for a second time, arises
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under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. •801
et seq. (1988) ("Mine Act" or "Act"). This case involves orders of
withdrawal issued pursuant to section 104(d)(1) of the Mine Act by the
Department of Labor's Mine Safety and Health Administration ("MSHA")
as the result of its investigation following a methane ignition and
explosion of the Greenwich No. 1 mine, an underground coal mine operated

by Greenwich Collieries, a division of Pennsylvania Mines Corporation ("Greenwich"). 1/

In Greenwich Collieries Corp., 9 FMSHRC 1601 (September 1987) ("Greenwich I"), the Commission reversed the judge's conclusion in his first decision (8 FMSHRC 1105 (July 1985)(ALJ)) that the withdrawal orders were invalid because they were issued based on an investigation after the violations had ceased to exist, and remanded to the judge for consideration of remaining issues. On remand, acting on Greenwich's motion for summary decision, the judge again invalidated the section 104(d)(1) withdrawal orders, this time on the ground that, although the violations in question had been "found" by MSHA within the 90-day time-frame mentioned in section 104(d)(1), the orders had not been issued "forthwith" within the meaning of that section. The judge therefore modified the section 104(d)(1) orders to section 104(a) citations.

1/ Section 104(d)(1) of the Act states in pertinent part:
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 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 ... 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).

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9 FMSHRC 2051 (October 1987)(ALJ). 2/ Both Greenwich and the Secretary petitioned the Commission for interlocutory review of the judge's order

granting partial summary decision, and we granted both petitions. For the reasons that follow, we affirm in result the judge's modification of the withdrawal orders and remand for further proceeding.

I.

In *Greenwich I*, we summarized the procedural history of this case leading to *Greenwich's* challenge:

On February 16, 1984, a methane ignition and explosion occurred at the *Greenwich No. 1* mine, an underground coal mine operated by *Greenwich Collieries ...*. Three miners were killed and eleven others were injured in the explosion. [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 safety standards contributed to the accident. Therefore, on March 29, 1985, MSHA Inspector

2/ Section 104(a) provides in part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this [Act] has violated this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act], he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the [Act], standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. • 814(a).

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Theodore W. Glusko issued to Greenwich the five section 104(d)(1) orders of withdrawal at issue in this case. [3/] 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.

9 FMSHRC at 1603. In addition, the orders alleged that each violation was of a significant and substantial nature.

Following out Greenwich I remand, Greenwich contended before the administrative law judge that the orders were invalid because they had not been issued within 90 days of the issuance of the section 104(d)(1) citation upon which they were based and because they had not been issued "forthwith," within the meaning of section 104(d)(1). The judge rejected Greenwich's contention that the orders were invalid because they were not issued within 90 days of the underlying section 104(d)(1) citation. He observed that although the orders were issued approximately 13 months after the predicate section 104(d)(1) citation was issued on February 24, 1984, section 104(d)(1) requires that a section 104(d)(1) withdrawal order shall issue "[i]f ... within 90 days after the issuance of ... [a section 104(d)(1) citation], an authorized representative of the Secretary finds another violation of any mandatory health and safety standard" caused by an unwarrantable failure. 9 FMSHRC at 2054 (emphasis added). The judge noted the Secretary's assertion that evidence of each of the violations was obtained between the date of the explosion, February 16, 1984, and April 27, 1984, when formal testimony in the investigation was concluded, and he accepted as true the Secretary's allegation that the contested violations were, therefore, "found" by the Secretary within 90 days of the February 24 section 104(d)(1) citation. 9 FMSHRC at 2054.

The judge further held, however, that the orders were not issued "forthwith" within the meaning of section 104(d)(1). 9 FMSHRC at 2056. The judge stated that in common usage "forthwith" means "immediately." He reviewed the chronology of events in this matter: the orders allege violations occurring in December 1983 and January-February 1984; the explosion occurred on February 16, 1984; MSHA examined the mine between February 25 and April 5, 1984; and MSHA took testimony regarding the explosion between March 27 and April 27, 1984. He found that although MSHA "could have" issued the orders on April 27, 1984, MSHA waited until March 29, 1985, and that the 11-month delay did not demonstrate

3/ On March 29, 1985, the mine was subject to the provisions of section 104(d)(2) of the Mine Act. The withdrawal orders in question were nevertheless issued by the Secretary under section 104(d)(1) to "make it clear that they ... relat[ed] back to the time the violations were found." Sec. Br. to ALJ 6.

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"immediacy." 9 FMSHRC at 2055.

The judge further noted that while section 104(a) provides the delay in issuing a citation "shall not be a jurisdictional prerequisite to the enforcement of any provision of [the] Act," he found no similar "saving provision" in section 104(d). 9 FMSHRC at 2056. The judge also found no indication in the Mine Act or its legislative history that the timeliness requirements of section 104(d) were not jurisdictional prerequisites to the issuance of valid section 104(d) withdrawal order. 9 FMSHRC at 2056.

The judge concluded that a showing of prejudice was not required to invalidate section 104(d)(1) orders that are not issued "forthwith." 9 FMSHRC at 2056. He further concluded that, even if prejudice were required, he agreed with Greenwich that an 11-13 month delay in notification was "inherently prejudicial in some degree to ... [the] operator's ability to defend itself." Id. Based on the foregoing, the judge invalidated the five orders and again modified them to section 104(a) citations. 9 FMSHRC at 2056. The Secretary and Greenwich petitioned for interlocutory review, and we granted both petitions.

II.

Greenwich contends that the judge erred in holding that MSHA's failure to issue the contested orders within 90 days of the section 104(d)(1) citation did not invalidate the orders. Greenwich argues that section 104(d) focuses on the issuance of the citation and orders, not the detection of the underlying violations. Thus, Greenwich asserts that the Mine Act requires that a section 104(d)(1) order must be issued within the 90-day probationary period following the date of the predicate section 104(d)(1) citation.

The Secretary asserts that the judge erred in concluding that the contested orders were invalid because they were not issued "forthwith" after the violations were "found." The Secretary argues that there is no jurisdictional time limit in section 104(d)(1) precluding issuance of withdrawal orders containing unwarrantable failure findings outside the 90-day time limit in circumstances where it takes the Secretary more than 90 days to "finalize" her "findings" and to issue the appropriate orders. The Secretary explains that here, although preliminary findings of violations were indeed made within three months of the explosion, in accident or disaster situations it may be many more months (or even years) before MSHA is able to conclude its investigation, "finally" find violations, and issue the appropriate withdrawal orders. The Secretary

argues that it is contrary to the purposes of the Act to conclude that such delay precludes the Secretary from citing the operator for the unwarrantable failure violations that it committed.

The parties' raise two potentially important issues: (1) whether failure to issue section 104(d)(1) withdrawal orders within 90 days of a predicate section 104(d)(1) citation invalidates the orders; and (2) whether the judge erred in invalidating the orders because they were not issued "forthwith."

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These arguments raise important issues concerning the construction and implementation of section 104(d) of the Mine Act. Upon close analysis, however, we conclude that the facts and procedural posture of this case do not squarely present the issues, and that their resolution is not required for a proper disposition of this case. Therefore, we conclude that it is prudent to reserve consideration of such questions to a future case truly presenting the issues raised.

It is important here to understand the relationship between sections 104(a) and 104(d) of the Act and, in particular, the specific purpose and structure of section 104(d). Under section 104(d) of the Act, if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and resulted from an operator's unwarrantable failure to comply with a mandatory standard, a citation noting these findings is issued. For the sake of convenience, this citation, the "predicate" citation in the section 104(d) "chain," is commonly referred to as a "section 104(d)(1) citation." *Nacco Mining Co.*, 9 FMSHRC 1541, 1545 n. 6 (September 1987). The Commission has explained, however, that a "section 104(d)(1) citation" nevertheless is a citation issued pursuant to section 104(a) of the Act containing the special findings referred to in section 104(d)(1). *Utah Power and Light Co.*, 11 FMSHRC 953, 956-57 (June 1989).

Section 104(d)(1) provides that "[i]f, during the same inspection or any subsequent inspection ... within 90 days after the issuance of such citation," the inspector finds a further unwarrantable failure violation, a withdrawal order is to be issued under section 104(d)(1). Further, if more unwarrantable violations are found during any subsequent inspection of the mine, withdrawal orders under section 104(d)(2) of the Act are to be issued. 30 U.S.C. § 814(d)(2). The operator remains on probation, and issuance of withdrawal orders based on unwarrantable findings does not cease, until an inspection of the mine discloses no further unwarrantable failure violations. *Kitt Energy Corp.*, 6 FMSHRC 1596 (July 1984), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). This, then, is the section 104(d) "chain."

Section 104(d) is an integral part of the Mine Act's graduated enforcement scheme, a scheme providing for "increasingly severe sanctions for increasingly serious violations or operator behavior." *Nacco*, *supra*,

9 FMSHRC at 1545, quoting Cement Division, National Gypsum Co., 3 FMSHRC

822, 828 (April 1981). Like the overall enforcement scheme of the Act, section 104(d) imposes sanctions in a graduated manner, with increasingly serious consequences. White County Coal Corp., 9 FMSHRC 1578, 1581 (September 1987). The focus of section 104(d) is upon the operator's unwarrantable conduct. Section 104(d) seeks to discourage repetition of such conduct by placing the operator on a probationary "chain." This probationary period, backed up by the threat of a withdrawal order, is "among the Secretary's most powerful instruments for enforcing mine safety." *UMWa v. FMSHRC*, supra, 768 F.2d at 1479.

In order to preserve the use of section 104(d) as an effective deterrent, the use of section 104(d) sanctions has been upheld in situations where unwarrantable failure violations have been detected
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after they have ceased to exist, recognizing that many violations by their very nature cannot be, or are unlikely to be, observed or detected until after they occur. Emerald Mines Corp., 9 FMSHRC 1590, 1594 (September 1987), *aff'd sub nom. Emerald Mines Corp. v. FMSHRC*, 862 F.2d 51, 58-59 (D.C. Cir. 1988); *Nacco*, 9 FMSHRC at 1581-82; *Greenwich I*, 9 FMSHRC at 1605. The Secretary's use, in general, of section 104(d) withdrawal orders for past violations has also been upheld because such orders are the procedural vehicles specified and required by the Mine Act for alleging unwarrantable violations once a predicate section 104(d)(1) citation has been issued. *White County*, supra, 9 FMSHRC at 1581. The *Emerald* court noted that, in general, such use of section 104(d) orders is not "pointless" because it serves to place or keep the mine operator on the section 104(d) probationary chain. 863 F.2d at 57.

Here, however, the Secretary issued purported section 104(d)(1) orders, but the "orders" served one of section 104(d)'s special and important purposes. The Secretary concedes that when the contested orders were issued, the *Greenwich No. 1* mine was under the section 104(d)(2) portion of the section 104(d) "chain." Nevertheless, rather than issuing the orders pursuant to section 104(d)(2), the Secretary chose instead to issue section 104(d)(1) orders "related back to the time the violations were found" or to the time of their occurrence some 13 months earlier. *Sec. Br. to ALJ* at 6; *Sec. Br. 6*. Because the enforcement action pursued by the Secretary relates the orders back 11-13 months in time, the orders had absolutely no probationary effect, either then or at the time of their actual issuance. Further, because the specific violations cited in the orders had been abated months before, the orders were terminated simultaneously with their issuance and no miners were withdrawn by these withdrawal orders. See *Sec. Br. 6*, 16. Thus, the section 104(d)(1) orders challenged here served none of the special probationary or protective purposes of section 104(d). They

did not affect the existing probationary section 104(d)(2) "chain," they did not require the withdrawal of miners from the areas affected by the violations; and, because the violations had ceased to exist, they did not require the abatement of unsafe and violative conditions. In sum, with these orders the Secretary did not impose any of the special sanctions serving as the hallmark of section 104(d) action, and the orders served none of section 104(d)'s special purposes.

The important issues raised by the parties concerning the imposition of section 104(d)'s special sanctions should be considered and resolved in a case where such sanctions actually have been invoked by the Secretary. In resolving challenges to the Secretary's enforcement authority, it is important to examine the reality of the Secretary's enforcement actions. Emerald, 863 F.2d at 58. Here, under the guise of section 104(d) sanctions, the Secretary's enforcement action actually amounts to nothing more than citations of violations, which citations contain special findings of significant and substantial and unwarrantable failure. Were we to pursue here the important issues raised by the parties, we would be interpreting section 104(d) in a factual context devoid of consequential section 104(d) enforcement action. In the exercise of our prudential judicial discretion,

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therefore, we conclude that resolution of such important issues under these circumstances would be unwise.

III.

Accordingly, under the circumstances of this case, the contested orders, in essence, are nothing more than section 104(a) citations containing special findings, but lacking section 104(d) effect. We therefore affirm in result the judge's modification of the orders to section 104(a) citations and we remand the matter for his determination of the merits of the violations, the significant and substantial and unwarrantable failure allegations, and, if necessary, the civil penalties to be imposed.

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