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MSHA V. EASTERN ASSOCIATED COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 25, 1991

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

v. Docket No. WEVA 89-192

EASTERN ASSOCIATED COAL
CORPORATION

BEFORE: Backley, Acting Chairman; Doyle. Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). It involves the validity of two orders of withdrawal issued for the same violative condition to Eastern Associated Coal Company ("Eastern"), by the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to sections 104(d)(2) and 107(a) of the Mine Act. 30 U.S.C. 814 (d)(2) & 817(a). Commission Administrative Law Judg Avram Weisberger affirmed both withdrawal orders. In an Order denying Eastern's Motion for Summary Decision, he concluded that neither the Mine Act nor its legislative history prohibits MSHA from issuing a section 104(d)(2) order of withdrawal in conjunction with a section 107(a) imminent danger order of withdrawal. 11 FMSHRC 1868 (September 1989)(ALJ). On the basis of stipulated facts, the judge granted the Secretary of Labor's Motion for Summary Decision, affirmed the withdrawal orders end assessed a civil penalty of $1,500. Unpublished Decision dated April 20, 1990. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Eastern operates a surface coal facility at the Federal No. 2 Mine in Monongalia County, West Virginia. On January 26. 1989 MSHA Inspector Joseph Migaiolo issued several withdrawal orders at the mine including Order No. 3106731, under section 107(a) of the Mine Act, and Order No. 3106732,

under section 104(d)(2), for a violation of 30 C.F.R. 77.400. 1/ The inspector issued the section 107(a) imminent danger order because he determined that a guard for the tail roller of a conveyor belt had been removed and that miners had cleaned spillage from both sides of the unguarded tail roller while the belt was operating. The section 104(d)(2) order alleged a violation of 30 C.F.R. 77.400 for the same unguarded tail roller that was described in the imminent danger order. The order also stated that "[t]his is a repeat violation at this location identical in nature from a previous inspection as well as repeated when observed at least twice by safety committee inspections [sic]." Order No. 3106732.

The orders were issued at 8:21 a.m. The cited condition was abated at 8:45 a.m. on the same day, when Eastern installed the guards at the cited locations and "presented education and training to the miners on safe work procedures." Orders 3106731 and 3106732. Eastern contested both orders.

On August 21, 1989 Eastern filed a Motion for Summary Decision with the judge on the basis that, as a matter of law, only a 104(a) citation may be issued in conjunction with a 107(a) imminent danger order." Eastern asked the judge to modify the section 104(d)(2) order to a section 104(a) citation. It conceded that the conditions set forth in the orders existed but denied that they were the result of its unwarrantable failure. Eastern contended that section 107(a) of the Mine Act 2/ allows an inspector to issue a citation

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1/ Section 77.400 entitled "Mechanical equipment guards" provides, in pertinent part:

> (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.
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> * * *
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> (d) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

2/ Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an

authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine through out which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)] of this [Act], to be withdrawn from, and to be

under section 104(a) along with an imminent danger order but prohibits him from issuing another withdrawal order for the same condition. Eastern further argued that section 104(d)(1) of the Mine Act 3/ also supports its position that only a section 104(a) citation may be issued with an imminent danger order because section 104(d)(1) expressly limits the issuance of a citation under that section to circumstances in which "the conditions created by such violation do not cause imminent danger." 30 U.S.C. 814(d)(1). Eastern reasoned that because section 104(d)(2) of the Mine Act 4/ is dependent upon

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> prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this [Act] or the proposing of a penalty under section [110] of this [Act].

30 U.S.C. 817(a)(emphasis added).

4/ Section 104(d)(1), in relevant part, provides:

> 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 standard, he shall include such finding in any citation given to the operator under this Act.

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

4/ Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary

who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1)

104(d)(1), the prohibition in (d)(1) against an inspector finding an imminent danger in conjunction with issuing a section 104(d)(1) citation also applies to (d)(2). Eastern argued that "as only 'violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) may result in a (d)(2) order, and as paragraph (d)(1) citations may be issued only when there is no imminent danger, it follow[s] that a (d)(2) order may not be issued in conjunction with the 107(a) order." Memorandum of Law in Support of Respondent's Motion for Summary Decision at 4 (emphasis in original).

In response to Eastern's motion, the Secretary stated that she is not precluded from issuing a section 104(d)(2) unwarrantable failure order in conjunction with a section 107(a) imminent danger order for two basic reasons. First, she contended that the language of the Mine Act and the legislative history do not preclude the conjunctive issuance of such orders. Second, she maintained that her position on this issue is based on a permissible construction of the statute, is reasonable, and furthers the purpose of the Act. She concluded by arguing that "[o]ne order addresses the heightened negligence of the operator while the other addresses the heightened gravity of the condition cited, and an inspector should not be made to choose which order he will issue." Secretary's Response to Motion for Summary Decision at 12.

The judge rejected each of Eastern's arguments and denied Eastern's motion. 11 FMSHRC at 1868. First, the judge stated that he could find no support in the language of section 107(a) or the legislative history for Eastern's argument that by expressly not precluding the issuance of a citation under section 104(a), Congress intended thereby to preclude the issuance of a section 104(d) order. 11 FMSHRC at 1868-69. Second, he determined that the language referred to by Eastern in section 104(d)(1) was "insufficient to base a conclusion that Congress intended that a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order." 11 FMSHRC at 1869. The judge agreed with the Secretary that if Eastern's interpretation is adopted "it will result in the frustration of the statutory scheme embodied in section 104(d)(1) and (2), as an inspector would be prevented from issuing orders required by section 104" whenever an imminent danger exists. Id. He concluded that "it has not been established, that, as a matter of law, the section 104(d)(2) order herein was improperly issued and should be amended to a section 104(a) citation." 12 FMSHRC at 1870.

Eastern petitioned the commission for interlocutory review of the judge's order (29 C.F.R. 2700.74). and the Commission denied the petition on October 26. 1989. Eastern's petition to reconsider the denial was also denied by the Commission on November 30, 1989.

After the judge set the case for hearing, the parties stipulated to the following key facts: (1) "An imminent danger as defined by Section 107(a) of the Act existed at the belt roller;" (2) "A violation of 30 C.F.R. 77.400 existed at the belt roller;" (3) "The violation was of such a nature as to

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shall again be applicable to that mine.

30 U.S.C. 814(d)(2) (emphasis added).

significantly and substantially contribute to the cause and effect of a mine safety hazard;" and (4) "The violation was the result of an unwarrantable failure on the part of [Eastern]." Stipulated Facts, filed March 27, 1990, at 2.

The Secretary filed a Motion for Summary Decision, asserting that the Stipulated Facts disposed of all issues except whether section 107(a) and 104(d)(2) orders can be issued for the same condition. She argued that since the judge decided that issue in his Order of September 12, 1989, the judge should issue a decision affirming the orders and assessing a penalty.

In an unpublished decision dated April 20. 1990, the judge held:

> The Secretary ... on March 27, 1990, filed a Motion for Summary Decision concerning Order Nos. 3106731 and 3106732. This Motion was not opposed by Respondent. Accordingly, and based on the stipulated facts filed along with the Motion, the Motion is GRANTED.

The judge assessed a civil penalty of 1,500.

II.

Disposition of Issues

Eastern's position before the Commission is essentially the same as it was before the judge. First, it argues that the last sentence of section 107(a) prohibits the issuance of a companion section 104(d)(2) order of withdrawal. It contends that the terms "order" and "citation" are not used interchangeably in the Act because each has "a precise meaning and precise ramifications." Eastern Br. 3. It maintains that a court may not insert words or phrases into a statute and that if Congress had intended that section 104(d} orders could be issued in conjunction with 107(a) orders, it would have so stated. Eastern argues that because the language of section 107(a) is clear on its face, the Commission cannot expand that section beyond its plain meaning and that resort to the legislative history to aid construction is proper only where the language of the Mine Act is ambiguous.

Second, Eastern contends that the judge read section 104(d) in isolation, without considering "the balance of the enforcement scheme contained in 104" of the Mine Act. Eastern Br. 5. As an example, Eastern offers the fact that conditions supporting the issuance of a withdrawal order pursuant to section 104(b). 30 U.S.C. 814(b) may also support the

issuance of a section 104(d) order. Eastern argues that "MSHA correctly makes no effort to issue concurrent withdrawal orders at that point for the obvious reason that they would be in derogation of the statutory scheme of enforcement." Eastern Br. 6. Likewise, Eastern asserts that issuing concurrent 107(a) and 104(d) orders would be "in derogation of the statutory scheme of enforcement." Id. In addition, Eastern maintains that the only plausible explanation for the last sentence of section 107(a) is that it enables the Secretary to propose a penalty should any violation be found.

Finally, Eastern argues that the statutory purpose of protecting the safety of miners will not be frustrated if a 104(d)(2) order cannot be issued with a 107(a) order because a withdrawal of miners will be required by the imminent danger order in any event.

The Secretary's position also is essentially the same as it was before the judge. First, she argues that the language of the last sentence of section 107(a) is permissive, not restrictive. She argues that had "Congress meant to restrict the type of enforcement action the Secretary may issue in conjunction with a section 107(a) order, it would have stated that 'only' section 104(a) citations may be issued' or that 'citations, but not orders' may be issued." Sec. Br. 6. She concurs with the judge's conclusion that Eastern's interpretation is not supported by a plain reading of section 107(a) or its legislative history. She states that the disputed language in section 107(a) was included merely to make clear that the enforcement mechanisms available under section 104 and 110 are available to the Secretary even when the particular violation creates an imminent danger.

The Secretary maintains that "Congress could not reasonably have intended that [an operator's unwarrantable] misconduct be removed from the reach of section 104(d) sanctions merely because of the happenstance that such misconduct resulted in conditions that arose beyond merely 'significant and substantial' and created an imminent danger." Sec. Br. 9. She maintains that, if an operator could evade the sanctions of section 104(d) on the basis that the violation was so egregious as to result in an imminent danger, "the incentive to improve conduct, which the 104(d) withdrawal order threat places on an operator, would be lost." Id. Finally, she concludes that, because her interpretation of the disputed language of section 107(a) is reasonable, the Commission should hold that the issuance of a section 107(a) order does not affect her ability to issue orders under section 104(d).

A. Section 107(a)

Each party argues that the plain meaning of the last sentence of section 107(a) supports its respective position in this case. By its terms, the disputed sentence permits an inspector to issue a section 104 citation in conjunction with an imminent danger order. The language of this sentence, however, does not address the issuance of other orders. Consequently, we believe that the language is sufficiently ambiguous to require a more thorough analysis than that provided by the parties.

The legislative history of the last sentence of section 107(a) is instructive. The imminent danger provision of the Coal Mine Health and

Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977) ("Coal Act"), was contained in that statute's section 104(a). That provision was very similar to section 107(a) of the Mine Act of 1977 but did not contain the language in dispute in this case. 5/ Section 104(b) of the Coal Act authorized an

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5/ Section 104(a) of the Coal Act provided:

> If, upon any inspection of a coal mine, an

inspector to issue to an operator a notice of violation (the equivalent of a citation) if he found a violation of a safety or health standard that did not create an imminent danger. 6/ Under the Coal Act, if an inspector found that a violation created an imminent danger, he issued an imminent danger order under section 104(a) and the same order also charged the operator with a violation of a safety or health standard. A civil penalty was assessed for the violation alleged in the order. Eastern Associated Coal Corp., 1 IBMA 233, 236, 1 BNA MSHC 1046, 1048-49 (December 1972). In such a case, a separate notice of violation (citation) was not issued by the inspector.

The version of the Mine Act that passed the House in 1977 did not amend the imminent danger provision of the Coal Act. Senate Subcommittee on Labor. Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1260 et seq. (1978) ("Legis. Hist."). Thus, the House bill did not purport to change the above-described method of charging operators with violations in imminent danger orders and assessing civil penalties for such violations. The Senate bill, on the other hand, moved the imminent danger provision to a separate section of the Act. From the outset, the Senate bill contained the disputed language permitting the issuance of a citation for a violation under what became section 104 of the Mine Act. Legis. Hist. at 150, 551 & 1121. In addition, the section of the Senate bill that became section 105(a) of the Mine Act, 30 U.S.C. 815(a), provided for the assessment of a penalty "after ... the Secretary issues a citation or order under section [104]...." Legis. Hist. at 1118.

> authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) 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 imminent danger no longer exists.

30 U.S.C. 814(a) (1976) (amended).

6/ Section 104(b) of the Coal Act provided, in pertinent part:

> [I]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or

> safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation.

30 U.S.C. 814(b) (1976) (amended) (emphasis added).

The Conference Report states:

> Under both [the Senate and House] versions, the issuance of an imminent danger withdrawal order would not preclude the issuance of a notice (or citation) or the proposal of a civil penalty assessment.
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> The conference substitute conforms to the Senate bill....

S. Rep. No. 461, 95th Cong., 1st Sess. 55 (1977) reprinted in Legis. Hist. at 1333. Thus, under the structure of the Mine Act, the Secretary's allegation of a violation must be issued under section 104 rather than section 107(a) because section 105(a) provides for the assessment of a penalty only after "the Secretary issues a citation or order under section 104...." 30 U.S.C. 815(a).

Further analysis of the language of the disputed sentence in section 107(a) through intrinsic aids to construction helps explain its purpose. 2A Sutherland Statutory Construction. 45.14, at 70 (Sands 4th ed. 1984 rev.). One frequently used principle of statutory construction provides that "the mention of one thing implies the exclusion of another; ex ressio unius est exclusion alterius." 73 Am Jur. 2d Statutes. 211, at 405. This principle of construction provides that the [l]egislative prescription of a specified sanction for noncompliance with statutory requirements ... exclude[s] the application of other sanctions." Sutherland, supra, 47.23 at 194. In essence, Eastern relies upon this principle to support its view that Congress knew the difference between citations and orders so that its failure to include orders in the disputed language means that it intended to exclude them.

This principle of statutory construction, however, "cannot apply when the legislative history and context are contrary to such a reading of the statute." U.S. v. Castro, 837 F.2d 441, 442-43 & n. 2 (11th Cir. 1988). It is also clear that this principle is not a rule of law. Loc. Union 2274 UMWA v. Cinchfield Coal Co., 10 FMSHRC 1493, 1502 (November 1988), aff'd sub. nom. Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990); Sutherland, supra, 47.23 at 194. As a consequence, it can be overcome by indications of contrary legislative intent or policy. Id. In addition, when the word "include" or "including" is used in a statute, "it is generally improper to conclude that entities not specifically enumerated are excluded." Sutherland, supra, 47.23 at 194.

As a matter of statutory construction, we believe that the "shall not preclude" language is, as the Secretary maintains. permissive and not

restrictive. This language does not expressly exclude or otherwise address the issuance of orders of withdrawal. Rather, this language is similar to statutory provisions that contain the word "include" or "including," with the result that "entities not specifically enumerated" are not to be excluded unless such exclusion is warranted by the context or legislative history.

Nothing in the legislative history suggests that the purpose of the

disputed language was to restrict the authority of the Secretary. As noted, this language was apparently added because section 105(a) provides a mechanism for assessing civil penalties only for citations and orders issued under section 104. Thus, at a minimum, this language was included to permit the Secretary to allege violations of safety and health standards in conjunction with imminent danger closure orders and to assess civil penalties for these alleged violations. We conclude from the legislative history that Congress did not intend the last sentence of section 107(a) to circumscribe the Secretary's enforcement authority under section 104 of the Act.

We also conclude from the Mine Act's remedial purpose that the disputed language should not be construed to limit the Secretary's enforcement authority. The Act's enforcement scheme provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (April 1981). Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. See S. Rep. No. 181, 95th Cong., 1st Sess. 30-32, reprinted in Legis. Hist. 618-20. The threat of a chain of section 104(d) orders "provides a powerful incentive for the operator to exercise special vigilance in health and safety matters" because this sanction is triggered by the unwarrantable conduct of the operator. Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987). A determination that an operator's conduct in relation to a violation ia unwarrantable is as relevant to situations where the violation creates an imminent danger as to violations involving lesser hazards. To read out of the Act the protections and incentives of a section 104(d)(2) order on the basis that the hazard created by the violation is so great that it creates an imminent danger would seem peculiar on its face and would blunt the effectiveness of this sanction.

The importance of section 104(d)(2) orders stems from the fact that the chain of withdrawal order liability continues under that section until broken by an intervening clean inspection. UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984). The fact that the section 104(d)(2) 'order would not require the actual withdrawal of miners, inasmuch as they would be withdrawn by the imminent danger order in any event, does not render the unwarrantable failure order meaningless. The unwarrantable failure order "would not be pointless, for it would serve to place or keep the mine operator on the section 104(d)(2) probationary chain." Emerald Mines Co. v. FMSHRC, 863 F.2d 51, 57 (D.C. Cir. 1988) (footnote omitted).

Based on the legislative history, the remedial purposes of the Act and the role of section 104(d) orders in the statutory scheme of

enforcement, we conclude that the Secretary is not prohibited by the disputed language from issuing the two orders in this case.

B. Section 104(d)

Eastern also argues that section 104(d) itself prohibits the issuance of an imminent danger order in conjunction with a section 104(d)(2) order. The judge held that neither the language nor the legislative history supports Eastern's position. 11 FMSHRC at 1869. He further stated that he did not find merit in Eastern's argument that "inasmuch as section 104(d)(1) citations

may be issued only where there is no imminent danger. it follows that similarly a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order." Id. We agree with the judge.

We reach our conclusion based on the plain meaning of the text of the Mine Act. Section 104(d)(1) provides, in pertinent part, that [1] if an inspector "finds that there has been a violation of any mandatory health or safety standard, and [2] 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 [3] 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." (Emphasis and bracketed numbers added). We read the language in clause [2] to mean that the conditions created by an S&S violation "need not be so grave as to constitute an imminent danger." National Gypsum, 3 FMSHRC at 828. Because a section 104(d)(2) order need not be S&S, we conclude that the "do not cause an imminent danger" language contained in (d)(1) is not relevant to the issue of whether a (d)(2) unwarrantable failure order can be issued in conjunction with an imminent danger order.

III.

Conclusion

Accordingly, on the foregoing basis, the judge's decision is affirmed.