

CCASE:
MSHA V. TEN-A-COAL
DDATE:
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TTEXT:
August 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. WEVA 89-274

TEN-A-COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), raises the issue of whether the Secretary of Labor may modify a terminated section 104(a) citation to a section 104(d)(1) order. Commission Administrative Law Judge Roy Maurer concluded that the citation could not be modified once it had been terminated. 12 FMSHRC 987 (May 1990)(ALJ). Consistent with our opinion in Wyoming Fuel Corp., 14 FMSHRC ÄÄÄÄ, No. WEST 90-112-R, et al. (August 1992), we reverse and remand this matter for further proceedings.

I.

Factual and Procedural Background

The facts are essentially undisputed. Ten-A-Coal Company ("Ten-A") operates the Ward Mine, a surface coal mine located in Barbour, West Virginia. On May 3, 1989, James Young, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection. Inspector Young noticed that the highwall, over 60 feet high, was not scaled back. Part of the highwall had collapsed. A five-foot barrier was left between the bench and the wall. The bench was generally seven to eight feet wide and 10 feet at its widest point. The high wall lacked any bench for over 40 feet. Loose clay and rocks were slipping from the highwall into the pit.

Inspector Young issued Citation No. 2944253, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. • 814(d)(1). It alleged a violation of 30 C.F.R. • 77.1000 in that Ten-A had not complied with its established ground ~1297

control plan, which required the highwall to be scaled back and a bench of 20 feet in width to be present along the highwall above the working pit. Young found the violation to be of a "significant and substantial" ("S&S") nature

and Ten-A's negligence to be high. Young terminated the section 104(d)(1) citation 15 minutes after its issuance, after loose material had been removed from the highwall.

Inspector Young had also issued Citation No. 2944252, pursuant to section 104(a) of the Act, 30 U.S.C. • 814(a), alleging a violation of 30 C.F.R. • 77.1004(b), for Ten-A's failure to correct or post the unsafe ground condition observed in the highwall. Young found the violation to be S&S and Ten-A's negligence to be moderate. He terminated the section 104(a) citation three hours after its issuance, having observed that the needed work on the highwall was being performed and in belief that an examination would be conducted before work in the pit resumed.

Before leaving, Inspector Young told Frank Cunningham, co-owner of Ten-A, that he should consider the cited matters still under investigation because he wanted to discuss his findings with his supervisor. Young subsequently had that discussion with his supervisor. They determined that the conditions underlying the violation met the criteria for unwarrantable failure and that the operator's negligence was high. The next day, Inspector Young modified the previously terminated section 104(a) citation to a section 104(d)(1) order and modified the negligence finding from moderate to high.

At the hearing, the judge, sua sponte, raised the issue of the appropriateness of modifying the section 104(a) citation, since it had been abated and terminated. Tr. 51, 53-54, 55. The judge expressed his opinion that a terminated citation could not be modified, but reserved judgment to allow the Secretary an opportunity to justify her position to the contrary. Tr. 55.

In his decision, the judge concluded that Inspector Young's attempted modification of section 104(a) Citation No. 2944252 to a section 104(d)(1) order could not stand. 12 FMSHRC at 988. The judge stated that once a citation is no longer in effect because it has been terminated, the inspector no longer has the authority to modify it. Id. The judge affirmed the citation as originally written, finding Ten-A's violation of section 77.1004(b) to be S&S. He assessed a civil penalty of \$200 for the violation. 12 FMSHRC at 992.(Footnote 1)

Ten-A did not seek review of the judge's determinations. The Commission granted the Secretary's petition for discretionary review, which challenges only the judge's conclusion that the modification of the inspector's section 104(a) citation to a section 104(d) order was impermissible.

1 The judge also affirmed Citation No. 2944253 as a section 104(d)(1) citation finding Ten-A's violation of section 77.1000 to be both S&S and the result of its unwarrantable failure to comply with the standard. 12 FMSHRC 989-92. He assessed a civil penalty of \$400 for the violation. 12 FMSHRC at 992. ~1298

II.

Disposition of Issues

In our companion decision issued this date in *Wyoming Fuel*, we held that, absent legal prejudice to the operator, the Secretary's modifications of section 104 citations, terminated pursuant to section 104(h) of the Act, 30 U.S.C. • 814(h), were permissible. *Wyoming Fuel*, 14 FMSHRC at , slip op. at 6-9. We concluded that termination of a section 104 citation or order is an administrative action of the Secretary which is meant to convey that a violative condition has been abated and to inform the operator that it will not be subject to a withdrawal order pursuant to section 104(b), 30 U.S.C. □ 814(b), for failure to abate. 14 FMSHRC at , slip op. at 8. We emphasized that termination does no more and no less than signal that abatement has been successfully completed, and that a citation or order, even though terminated, remains in effect for other purposes, such as subsequent contest and civil penalty litigation and vacation. 14 FMSHRC at , slip op. at 7-8. Accordingly, we approved the Secretary's administrative authority to modify terminated section 104 citations and withdrawal orders in appropriate circumstances. 14 FMSHRC at , slip op. at 8. We noted, however, that this administrative power is not without limits. We indicated that the Secretary could not use the modification process to direct further abatement. 14 FMSHRC at , slip op. at 8. We further likened the Secretary's modification of a terminated citation or order to amendment of a pleading pursuant to Fed. R. Civ. P. 15(a). *Id.* We concluded that a modification should be permitted unless the operator would be legally prejudiced by the modification. 14 FMSHRC at , slip op. at 9. In *Wyoming Fuel*, the Secretary sought to modify section 104(a) citations to allege violation of a different standard from the one originally cited. In the present proceeding, the Secretary seeks to modify a section 104(a) citation to a section 104(d)(1) order, alleging that the cited violation resulted from the operator's unwarrantable failure and from high, rather than moderate, negligence. Absent prejudice to the operator, we find this a permissible form of modification. Cf. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-97 (October 1982)(approving modification of vacated section 104(d) withdrawal orders to section 104 citations). Here, the Secretary's modification of the section 104(a) citation to a section 104(d)(1) order did not affect Ten-A's abatement of the citation. The modification was made about 24 hours after termination of the original citation. Inspector Young informed Ten-A that it should consider the matter still under investigation after he terminated the original citation and while he was still at the mine, because he wanted to discuss his findings with his supervisor. This action was demonstrative of good faith on the Secretary's part, and put Ten-A on notice that further Secretarial action concerning the alleged violation might occur. Ten-A has made no claim in this matter that it was legally prejudiced by the modification or that it was compromised in its ability to present a defense. (Indeed, it was the judge, not the operator, who raised the matter at hearing.) Under these circumstances, we perceive no legally recognizable prejudice to Ten-A. We therefore reverse the judge's

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determination that the terminated section 104(a) citation could not be modified, and recognize the modification of the citation to a section 104(d)(1) order.

III.

Conclusion

Based on the foregoing conclusions, we remand this matter to the judge.

The judge shall determine whether the issuance of a section 104(d)(1) order for Ten-A's violation of section 77.1004(b) was substantively appropriate and, if so, reconsider his assessment of the civil penalty.

Accordingly, we reverse the judge's conclusion as to the permissibility of the modification, approve the modification procedurally, and remand for further proceedings consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner