

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 24, 1997

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

:

v.:

:

AUSTIN POWDER COMPANY :

:

Docket Nos. YORK 95-57-M

SECRETARY OF LABOR,;

YORK 96-13-M

MINE SAFETY AND HEALTH:
ADMINISTRATION (MSHA):

:

v.:

:

BRUCE EATON :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners

DIRECTION FOR REVIEW

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@). On October 31, 1996, Administrative Law Judge Paul Merlin affirmed Citation No. 4424405 under section 104(d)(1), 30 U.S.C. ' 814(d)(1) of the Act. 18 FMSHRC 1878, 1889. On December 10, 1996, the Commission granted in part the joint petition for discretionary review filed by Austin Powder Company and Bruce Eaton. The Commission agreed to review the issue of whether the judge erred by affirming the citation as one issued under section 104(d)(1) of the Act.

On December 12, 1996, the Commission issued its decision finding that the judge failed to take into account the Secretary=s modification of the citation. The judge=s decision was vacated and the matter was remanded to the judge to determine the proper designation of the citation and whether the penalty should therefore be reduced.

On December 16, 1996, the judge issued a decision on remand wherein he deleted the

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

unwarrantable failure finding and affirmed the citation under section 104(a). He did not modify his penalty assessment because he continued to find very high negligence.

On December 19, 1996, Austin Powder Company and Bruce Eaton filed a petition and motion seeking reconsideration of the Commission's decision to deny review of the remaining issues raised in their original November 27, 1996 petition for discretionary review. Subsequently, on December 20, 1996, petitioners also filed a petition for discretionary review of the December 16, 1996 decision on remand. That petition incorporates the essential assignments of error contained in both the November 27, 1996 petition for discretionary review and the petition and motion filed on December 19, 1996.

Upon consideration of the foregoing, we grant the petition for discretionary review filed on December 20, 1996.

² The December 19, 1996, petition and motion, which requests substantially the same relief as the subject petition for discretionary review, is moot.