FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1996

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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, Commissioners¹

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). On December 10, 1996, the Commission granted the joint petition for discretionary review filed by Austin Powder Company and Bruce Eaton with respect to the issue of whether the judge erred by affirming the citation as one issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1).

According to the attachments to the Secretary's proposed penalty assessment filed March 24, 1995, and the Secretary's Preliminary Statement of May 16, 1996, Citation No. 4424405 was modified on December 6, 1994 to reflect that the Secretary was charging the violation under section 104(a) rather than section 104(d)(1). They indicate that the citation was further modified on March 8, 1995 to delete the allegation of unwarrantable failure (although the allegations of

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.

| negligence and the designation of significant and substantial were retained). The judge's decision makes no reference to these modifications, while affirming the inspector's original section 104(d)(1) determination. Therefore, we vacate the judge's decision and remand for the judge to determine the appropriate designation for the citation and whether any penalty reassessment is warranted. | |
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| | Mary Lu Jordan, Chairman |
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| | Marc Lincoln Marks, Commissioner |
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| | James C. Riley, Commissioner |