

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

July 3, 2003

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2002-184
	:	KENT 2002-238
v.	:	
	:	
LODESTAR ENERGY, INC.	:	

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Lodestar Energy, Inc. (“Lodestar”) petitioned for review of a decision by Administrative Law Judge Gary Melick on the basis that the judge failed to modify an order issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a).<sup>2</sup>

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<sup>1</sup> 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 delegated to exercise the powers of the Commission.

<sup>2</sup> Section 104(a) provides in part, “If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator . . . has violated this Act, or any mandatory health or safety standard, . . . he shall . . . issue a citation to the operator.” 30 U.S.C. § 814(a).

Section 104(d)(1) of the Mine Act provides 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

25 FMSHRC 13 (Jan. 2003) (ALJ). For the reasons discussed below, the Commission modifies the order.

I.

Factual and Procedural Background

A more detailed factual background is set forth in the judge's decision. 25 FMSHRC at 13-21. On April 4, 2001, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Lodestar Citation No. 7647114, pursuant to section 104(d)(1) of the Mine Act, alleging that Lodestar violated an approved petition for modification by failing to seal circuit breakers, set the circuit breakers to trip at a required amperage, and to provide miner training. *Id.* at 13-17. The citation further alleged that the violation was significant and substantial ("S&S") and caused by the operator's unwarrantable failure. *Id.* at 17. In addition, the inspector issued Order No. 7647121, pursuant to section 104(d)(1) of the Mine Act, alleging an S&S and unwarrantable violation of 30 C.F.R. § 75.342(a)(4). *Id.* at 18-21. The order alleged that the operator failed to provide a properly functioning methane monitor for a continuous miner. *Id.* at 19. Lodestar challenged the section 104(d)(1) citation and order, and the matter proceeded to hearing before Judge Melick. *Id.* at 13.

The judge affirmed both violations, concluded that the violations were not S&S, and reached different conclusions as to the allegations of unwarrantable failure. *Id.* at 16-21. As to the 104(d)(1) citation, the judge concluded that the issue of whether the circuit breaker violation was caused by the operator's unwarrantable failure was moot in the absence of an S&S finding. *Id.* at 18. Accordingly, the judge modified the section 104(d)(1) citation to a section 104(a) citation. *Id.* As to the section 104(d)(1) order, the judge concluded that the methane monitor violation was caused by the operator's unwarrantable failure. *Id.* at 19-20. The judge did not modify the section 104(d)(1) order.

Lodestar filed a petition for review, challenging the judge's failure to modify the section 104(d)(1) order to a section 104(a) citation. PDR at 1-2. The Commission granted the petition.

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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].

30 U.S.C. § 814(d)(1).

## II.

### Disposition

Section 104(d) of the Mine Act creates a “chain” of increasingly severe sanctions that serve as an incentive for operator compliance. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). If an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by the operator’s unwarrantable failure to comply with the cited standard, he issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a “section 104(d)(1) citation” or a “predicate citation.” *See Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990). If during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply, the inspector issues a withdrawal order under section 104(d)(1), sometimes referred to as a “predicate order.” 30 U.S.C. § 814(d)(1); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector finds upon any subsequent inspection a violation caused by an unwarrantable failure to comply, he issues a withdrawal order for the violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). If subsequent inspections of the mine reveal additional unwarrantable failure violations, withdrawal orders are issued under section 104(d)(2) of the Act until an inspection of the mine discloses no further unwarrantable failure violations. *Wyoming Fuel Co.*, 16 FMSHRC at 1622 n.7; *see also Nacco*, 9 FMSHRC at 1545.

The Commission has further clarified the bases for predicate citations and orders. The Commission has recognized that section 104(d)(1) requires that a predicate citation be based upon both S&S and unwarrantable failure findings. *Youghiogheny & Ohio Coal Co.*, 10 FMSHRC 603, 608 (May 1988) (“Y&O”); *Greenwich Collieries*, 12 FMSHRC at 945. It has stated, however, that there is no statutory requirement that a section 104(d)(1) order be based upon an S&S finding. *Y&O*, 10 FMSHRC at 608. Rather, the Commission has listed the following prerequisites for a predicate order: (1) an underlying section 104(d)(1) citation; (2) a subsequent violation of a mandatory health or safety standard found within 90 days after the issuance of the section 104(d)(1) citation; and (3) a finding by the inspector that the subsequent violation was caused by an unwarrantable failure to comply. *Id.*

The Commission also has recognized that the Commission and its judges are authorized to modify citations or orders issued under section 104(d) to citations under section 104(a). *See U.S. Steel Corp.*, 6 FMSHRC 1908, 1915 & n.3 (Aug. 1984); *Southern Ohio Coal Co.*, 10 FMSHRC 138, 143-44 (Feb. 1988). Such authorization is provided for in sections 104(h) and 105(d) of the Mine Act.<sup>3</sup> The Commission has reasoned that such modification is appropriate because the

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<sup>3</sup> Section 104(h) of the Mine Act provides: “[A]ny citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to [section 105 or 106].” 30 U.S.C. § 814(h).

allegation of violation survives the vacation of the section 104(d) citation or order in which it is contained. *Island Creek Coal Co.*, 2 FMSHRC 279, 280 (Feb. 1980). The allegation of violation survives because section 110(a) of the Mine Act, 30 U.S.C. § 820(a),<sup>4</sup> mandates the assessment of a penalty for a violation that has been proven. *Island Creek*, 2 FMSHRC at 250.

Lodestar asserts that the judge was required to modify Order No. 7647121 from a section 104(d)(1) order to a section 104(a) citation because the order lacked the required bases to stand as either a section 104(d)(1) order or 104(d)(1) citation. PDR at 1-2.<sup>5</sup> It requests that the Commission issue an order, making the modification. *Id.* at 2. The Secretary of Labor agrees that the Commission should make such a modification. S. Position Statement at 2. The Secretary further explains that she conducted a survey of violations committed at Lodestar’s mine within the 90 days prior to the issuance of the order and that, during that period, no valid citations or orders were issued under section 104(d). *Id.*

We agree with the parties that the judge erred by failing to modify Order No. 7647121 from a section 104(d)(1) order to a section 104(a) citation. The withdrawal order cannot stand as a section 104(d)(1) order because it lacks one of three prerequisites, that is, a predicate citation, since the judge deleted the S&S allegation associated with Citation No. 7647114. *See Y&O*, 10 FMSHRC at 608. Moreover, the Secretary represents that there were no other section 104(d) citations or orders issued at Lodestar’s mine 90 days prior to the issuance of Order No. 7647121. S. Position Statement at 2. Furthermore, the withdrawal order cannot be modified to a section 104(d)(1) citation because it lacks one of the prerequisites as a predicate citation, that is, a finding that the violation was S&S. *See Y&O*, 10 FMSHRC at 608. Finally, the judge’s finding that Lodestar violated section 75.342(a)(4) should survive the procedural defects associated with the withdrawal

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Section 105(d) of the Mine Act provides:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section [104], . . . the Commission shall afford an opportunity for a hearing . . . , and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or directing other appropriate relief.

30 U.S.C. § 815(d).

<sup>4</sup> Section 110(a) of the Mine Act provides that “[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard . . . , shall be assessed a civil penalty . . . .”

<sup>5</sup> Lodestar adopted its petition as its brief. Resp. to Position Statement at 1.

order so that Lodestar will be liable for the civil penalty assessed by the judge for its proven and undisputed violation. *See Island Creek*, 2 FMSHRC at 280.

III.

Conclusion

For the foregoing reasons, we hereby modify Order No. 7647121 from a section 104(d)(1) order to a section 104(a) citation.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Stanley C. Suboleski, Commissioner

Distribution

Stanley S. Dawson, Esq.  
Fulton & Devlin  
Browenton Place, Suite 165  
2000 Warrington Way  
Louisville, KY 40222

Jerald S. Feingold, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

Administrative Law Judge Gary Melick  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021