

CCASE:
MSHA V. WOLF CREEK COLLIERIES

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

March 26, 1979

RAY MARSHALL, SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

Civil Penalty Proceeding
Docket No. PIKE 78-70-P
(Assessment Control No. 15-04020-2013V)

v.
WOLF CREEK COLLIERIES COMPANY,
Respondent No. 4 Mine

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969 .1/ The issue is whether the validity of an order of withdrawal under section 104(c)(2) can be challenged in a proceeding under section 109(a)(3) for assessment of a civil penalty for the alleged violation cited in the order. Wolf Creek did not request review of the order of withdrawal pursuant to section 105(a); rather, the first time it questioned the order's validity was at the penalty assessment hearing. The Administrative Law Judge vacated the withdrawal order on the ground that "the record in this case does not disclose the precedential notice and order cited by the inspector in his withdrawal order." 2/ Although he vacated the withdrawal order, the Judge did find a violation of a mandatory safety standard and assessed a penalty of \$300. In assessing a penalty the Judge mitigated the amount because he had vacated the withdrawal order in which the violation was cited.

We have reviewed the decision in light of previous decisions of the Interior Department's former Board of Mine Operations Appeals interpreting the 1969 Act. Section 109(a)(3) provided, in relevant part, that "[a] civil penalty shall be assessed by the Secretary [of the Interior] only after ... a public hearing and the Secretary has determined ... that a violation did occur, and the amount of the penalty which is warranted, ..." 3/ The Board consistently held that the validity of a

1/ 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("the 1969 Act"). This case presents no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978).

2/ Section 104(c)(2) of the 1969 Act provided, in relevant part: "If a withdrawal order with respect to any area in a mine

has been issued pursuant to paragraph (1) of this subsection [referred to as "precedential notice and order" by the Judge below], 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) of this subsection ..."

3/ In determining the amount of penalty warranted, section 109(a)(1) set forth six statutory criteria which the Secretary of the Interior was to consider.

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withdrawal order is not an issue in a penalty proceeding under Section 109 and that it is error to vacate an order in such penalty proceeding. Zeigler Coal Company, 2 IBMA 216, 223-224 (1973); Plateau Mining Company, 1 IBMA 303 (1973); Buffalo Mining Company, 2 IBMA 327 (1973); North American Coal Corporation, 3 IBMA 93, 120 (1974). We concur in the Board's interpretation of the 1969 Act. Accordingly, the withdrawal order (No. 1-TF, January 29, 1976) is reinstated. This case is remanded for reassessment of the penalty