FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO, 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

3 JUL 1980

WINDSOR POWER HOUSE COAL COMPANY, Contestant	:	Contest of Orders
v.	:	Docket No. WEVA 79-199-R
SECRETARY OF LABOR, MINE SAFETY ANDHEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 79-200-R
	:	Beech Bottom Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Respondent	:	

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Contestant; Michael Bolden, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Arlington, Virginia, for Respondent, MSHA.

Before: Administrative Law Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., upon the applications of the Windsor Power House Coal Company (Windsor) to contest two orders of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(1) of the Act. In challenging these orders, Windsor takes issue not only with the validity of the orders per se but also with the precedential underlying section 104(d)(1) citation which was the basis of the orders. An evidentiary hearing was held on December 12 and 13, 1979, and on January 23, 1980, in Wheeling, West Virginia.

I. The Underlying Section 104(d)(1) Citation

The section 104(d)(l) citation underlying both orders at bar was issued by MSHA inspector Charles Coffield, and received by Windsor, on May 3, 1979. 1/ Windsor did not file notice of its intent to contest that citation

1/ Section 104(d)(l) provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there hag been a violation of any

until December 12, 1979, more than 7 months later. Under section 105(d) of the Act the mine operator is afforded an opportunity to challenge such a citation if he notifies the Secretary within 30 days of its receipt of his intent to contest the issuance of the citation. Energy Fuels Corp. v. MSHA 1 FMSHRC 299 (Play 1, 1979).

While the former Interior Board of Mine Operations Appeals had permitted notices issued under section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 (comparable to citations issued under section 104(d)(1) of the 1977 Act) to be contested at the hearing challenging a section 104(c)(1) withdrawal order (comparable to a section 104(d)(1) withdrawal order under the 1977 Act) based on that notice, Ziegler Coal Company 4 IBMA 139 (1975), Eastern Associated Coal Co., 4 IBMA 184 (1975), and Kentland Eklhorn Coal Corp., 4 IBMA 166 (1975), the justification for such a procedure does not exist under the 1977 Act. Under the 1969 Act, as interpreted by the former Interior Board, an abated notice could not otherwise be immediately challenged except as an incident to review of the related withdrawal order. Under the 1977 Act, however, immediate review of the section 104(d)(1) citation is permitted. Energy Fuels, supra. Moreover, there is no specific authority in the 1977 Act to allow hearings on a citation at the hearing contesting a subsequent withdrawal order where the notice to contest that citation has not been timely filed independent of the withdrawal order. I conclude therefore that under the 1977 Act, the underlying section 104(d)(1) citation cannot be reviewed solely as an incident to review of the related 104(d)(1) order but must be independently and timely challenged under the provisions of section 105(d) of the 1977 Act. I find the decisions of the Interior Board, cited above, to be inapposite. Of course, once the right to review the underlying citation has been preserved by filing in accordance with section 105(d), then the hearing on that issue could be consolidated with any hearing requested on any subsequent order of withdrawal based on that citation.

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fn. 1 (continued)
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 a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of the 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to such comply, he shall forthwith issue an, order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such. violation has been abated."

Since Windsor did not file its notice of contest to the citation at bar until more than 30 days after its receipt it appears that in accordance with section 105(d) of the Act, I am without jurisdiction to consider that citation.

The Secretary suggested at hearing that since the citation could in any event be contested at subsequent penalty proceedings under section 105 of the Act, I was not without authority to grant immediate review of the citation. Moreover the parties waived the procedural formalities to the bringing of a civil penalty proceeding. I thereupon agreed to conduct a hearing on the underlying citation and issued a bench decision in which I found that the violation was proven as charged and in which I made special "significant and substantial" and "unwarrantable failure" findings. Upon closer examination of the statutory language and decisions of the Commission, I now conclude that I had no jurisdiction to make those special "significant and substantial" and "unwarrantable failure" findings. Since the provisions of the Act do allow the operator to challenge at civil penalty proceedings, the existence of the violation charged in a citation and since the parties in this case waived the procedural prerequisites to such a proceeding, it is apparent that I did have jurisdiction to review that limited issue at hearing. However, since there is no authority under the Act to consider the special findings of "significant and substantial" and "unwarrantable failure" in civil penalty proceedings, it is apparent that upon its failure to timely file a notice of contest to the citation herein Windsor was foreclosed from challenging those special findings. This conclusion is consistent with the Commission decisions in Pontiki Coal Corporation v. MSHA 1 FMSHRC 1476 (October 1979), and Wolf Creek Collieries Company 1 FMSHRC ____ (March 1979), that the validity of a withdrawal order is not an issue in a penalty proceeding. 2/

Under the circumstances, the Bench decision rendered at the hearing on December 12, 1979, and set forth below is applicable only to the issue of the violation itself and any special findings made therein are therefore surplusage. Windsor has waived its right to challenge these special findings by its failure to timely contest the citation under section 105(d) of the Act.

The citation at bar charges a violation of 30 C.F.R. § 75.302-1(a). In relevant part, the citation reads as follows:

> [The] inby end of the line brattice that was being used to ventilate the working face of No. 1 entry of 2 right 6 east (029) section was approximately 44 feet 2 inches plus the cutter bar sumped in and coal was being cut with a 15 RU Joy cutting machine SN 18046 operated by John V. Mann * * *.

2/ Although the Commission was concerned in these cases with penalty proceedings under section 109(a)(3) of the 1969 Act, there is no reason to believe that the same construction would not apply as well to the generally similar provisions of section 110 of the 1977 Act.

The cited standard provides, in relevant part, as follows:

> Line brattice or any other approved device used to provide ventilation. to the working face from which coal is being cut, mined or loaded and other working faces so designated by the coal mine safety manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced * * *.

At the conclusion of the evidentiary hearing as to the citation and upon request of counsel, I rendered a bench decision providing, in essence, as follows:

There is no doubt that when Inspector Coffield came upon the working face of the No. 1 entry, the end of the line brattice was at least 44 feet, plus 8 feet (for a total distance of at least 52 feet) from the point of the cutter bar's deepest penetration. The inspector's testimony is undisputed in this connection. Indeed, it is corroborated to a great extent by the operator's own witness, safety inspector Mike Roxby, who testified that in order to abate the violation he needed more than two 20-foot sections of brattice to abate the violation.

I also observe that in the order itself, Inspector Coffield noted that the violation was terminated by extending the brattice to within 8 feet of the working face. Considering the testimony of Roxby that in order to abate the violation it required more than two additional 20-foot sections of brattice, it is apparent that there was in fact an extensive distance between the end of the line brattice to the deepest point of penetration of the working face.

Now, it is also essentially undisputed that some nails for hanging the brattice were in the roof when Coffield came upon the scene at the No. 1 entry. The testimony is also undisputed that these nails did not extend to more than 20 or 22 feet from the existing brattice before abatement. There was some suggestion, I think by Mr. Roxby, that the nails could have pulled out, but there is no affirmative evidence of that, and Roxby himself testified that he did not see any nails lying about. There is no contradictory evidence therefore to indicate that any hangers or hanging devices, nails or whatever, did extend beyond 20 or 22 feet. This becomes significant because the operator has suggested that its employees, without knowledge of supervisory personnel, had taken the line brattice down. But the evidence indicates that the nails extended only 20 to 22 feet beyond the line brattice as found by Coffield thereby indicating that at best the brattice was only hung an additional 20 or 22 feet from the line found by Coffield, thus leaving an additional distance without brattice of 20 or 22 feet, or even more than that depending on how you look at it, but a minimum of 20 or 22 feet from the end of the line brattice to the working face.

There is also testimony from Roxby that in order for work to advance a distance of 30 feet in an entry such as the No. 1 entry would require 5-1/2 hours of actual operating time and could actually involve or be spread over three working shifts. He or one of the other witnesses testified that the work cycle is to cut, drill, shoot, remove the loose coal and roof bolt. When Inspector Coffield arrived at 9:35 at the No. 1 entry, the cutting cycle was underway. According to the most conservative calculation, that would place Foreman Wheeler at that particular location (Wheeler thought he was last there at 8:45) when he was in a position to have seen the brattice (again, even assuming the employees had the brattice hung on the nails observed by Coffield) some 20 or 22 feet from the existing working face. Therefore Foreman Wheeler should have seen that it was in violation of the regulations. Wheeler testified that he thought the line brattice was then actually 10 to 12 feet from the working face when he saw it. However, based on the evidence previously noted, it is apparent that Wheeler's approximation was totally erroneous.

I also consider in this case the fact that the company mine safety inspector, Roxby, testified that he knew of no enforcement policy for correcting employee violations of the brattice regulation and that there had been a history, according to Coffield, of a rather cavalier disregard on the part of other foremen in this particular mine for the maintenance of the brattice regulation.

So all these factors combined lead me to the conclusion that certainly the operator should'have known of the violation in this particular case and that it was caused by unwarrantable failure, as defined in Zeigler Coal Company, 7 IBMA 280 (1977). The citation herein was therefore valid.

II. Order of Withdrawal--Docket No. WEVA 79-199-R

Order of Withdrawal No. 811582 alleged violations of 30 C.F.R. § 75.400, charging that there were accumulations of loose dry coal in five different locations in the north main section of the mine and oil, grease and coal on various mining equipment including a shuttle car, a cutting machine, the coal feeder and the loading machine. The cited regulation provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, should be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The cited regulation had been interpreted by the Interior Department's Board of Mine Operations Appeals in Secretary v. Old Ben Coal Company, 8 IBMA 98 (August 17, 1977), as requiring proof of: (1) An accumulation of combustible materials, (2) the operator's knowledge, actual or constructive, that such accumulations existed, and (3) the failure of the operator to clean up or undertake to clean up such accumulations "within a reasonable time after discovery, or, within a reasonable time after discovery should have been made." On December 12, 1979, the date on which the hearing in this case commenced, the Federal Mine Safety and Health Review Commission reversed the

Board's decision and held that a violation of 30 C.F.R. § 75.400 exists upon a finding alone that an accumulation of combustible materials exists. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (1979).

While as a matter of fundamental fairness to operators who have been permitted to rely upon the Interior Board's Old Ben decision and consistent with the criteria set forth by the Supreme Court of the United States in its holdings regarding retroactive application of judicial and agency decisions, 3/ I believe the Commission's Old Ben decision should not be applied retroactively to orders and citations issued after the Board's decision and

3/ As pointed out by the United States Supreme Court in Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2 601, 85 S. Ct. 1731 (1965), retroactive operation of an overruling decision is neither required nor prohibited by the Constitution and the determination of whether and to what extent a new rule adopted and an overruling decision will be given retroactive effect is not a matter of constitutional compulsion but a matter of judicial policy, to be determined by the court after weighing the merits and demerits of the particular case, by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation. Retroactive effect to an overruling decision will be denied where there has been justifiable reliance on decisions which are subsequently overruled and where those who have so relied may be substantially harmed if retroactive effect is given to the overruling decision. Safarik v. Udall, 113 App. D.C. 303, 304 F.2d 944 (1962), cert. denied, 371 U.S. 901, 9 L.Ed.2d 164, 83 S.Ct. 206; Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526 (1964 D.C. N.Y). The Supreme Court in NLRB v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267, 40 L.Ed.2 134, 94 S. Ct. 1757 (1974), again suggested that retroactivity will be denied when a party has relied upon prior administrative agency holdings and such reliance would result in adverse consequences. If new liabilities are being imposed, fines levied, or damages awarded, reliance on past agency practices and rules will not be penalized. Mezines, Stein and Gruff, Administrative Law, § 14.01; and Annotations at 14 L.Ed.2 992; 10 ALR.3d 1371 and 22 L.Ed.2 821.

Within this framework, it appears that the Commission's decision in Old Ben should not be applied retroactively to the order in this case nor to any order or citation issued after the date of the Board's Old Ben decision and before the date of the Commission's Old Ben decision. Windsor in this case and other operators similarly situated clearly had a right to rely upon the Board's Old Ben decision until modified by the Commission. They should not therefore now be penalized for such reliance.

As also pointed out in Linkletter, another factor to be considered in determining whether to give general retroactive effect to a new judicial rule adopted in overruling earlier precedents is the purpose of the rule. If the purpose of the new rule can be adequately effectuated without applying it retroactively, retroactive operation may properly be denied. Lyons v. Westinghouse, supra; U.S. ex. rel. Angelet v. Fay, 333 F.2d 12 (1964 CA 2 N.Y.), aff'd., 381 U.S. 654, 14 L.Ed.2d 623, 85 S.Ct. 1750; Sisk v. Lane, 331 F.2d 235 (1964 CA Ind.), cert. denied, 380 U.S. 959, 13 L.Ed.2d 977,

before the Commission decision, the Commission has in fact given it retroactive effect. Secretary v. C.C.C.-Pompey Coal Company, Inc., 2 FMSHRC (June 12, 1980). Accordingly, I apply in this case the law set forth in old Ben Coal Co., 1 FMSHRC 1954 (1979). Thus, in proving the violations of 30 C.F.R. § 75.400 now before me, MSHA need only establish the existence of an accumulation of combustible materials. The term "accumulation," has been simply defined as "a mass of something heaped up or collected." The American Heritage Dictionary of the English Language, Houghton, Mifflen Co. (1976); 1A Words and Phrases, "Accumulate, Accumulation." 4/ I find that this definition appropriately reflects the meaning of the term as used in the cited regulation. Applying this standard to the facts, I find that MSHA has proven violations in five of the nine factual circumstances cited.

Inspector Coffield testified that the first three accumulations were located outby the survey station marked 120 + 59 in the No. 5 entry of the north main section and ranged in size from 2-1/2 to 3 feet high, 3 feet to 8 feet wide and 2 feet to 5 feet long. Another pile of loose dry coal was located inby the 7 West tailpiece and was 10 to 20 inches deep, 8-1/2 feet wide and 8 to 14 feet long. The fifth pile of loose dry coal, located at the No. 5 entry of the 7 West North main section, was 2 to 8 inches deep 14 feet wide and 40 feet long. The piles were measured by Coffield in the presence of Windsor's safety inspector, Michael Roxby.

Coffield opined that the first three piles had been created as a result of dumping because of the way they were formed. He thought they had been there from 1 day to as long as 3 weeks because the coal was excessively dry and there was evidence that a scoop tractor or similar equipment had pushed it to the side and run over it. He dug into the piles with a stick, examined them and concluded that they consisted entirely of coal. He took no samples and performed no tests on the coal.

Coffield also concluded that all five piles of coal were located in areas traveled in preshift examinations. He observed that the shift then in operation had begun about 8:00 or 8:30 that morning. He discovered the first of the subject piles around 9:05 a.m. and found the rest before 9:50 a.m. Coffield concluded that since coal had not yet been mined during that shift

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fn. 3 (continued)
85 S.Ct. 1100. Since the primary purpose of the standard cited in this case is to prevent future dangerous accumulations of coal dust, loose coal and other combustible materials, the purpose of the Commission's interpretation of the rule can be properly effectuated without applying it retroactively.
4/ Although the term may also connote a buildup over a period of time, 1A, Words and Phrases, supra, the Commission has in its Old Ben decision implicitly rejected any such time concept. The Commission rejected the use of the time concept adopted by the former Interior Board in its Old Ben decision and found that the "vast spillage" found in Old Ben was, in itself and without consideration of time for buildup, sufficient evidence of a violation of 30 C.F.R. 75.400.

and because coal had not been mined during the midnight shift, the coal must have been spilled on the previous day's 4 to 12 shift. He also concluded that the accumulations of loose coal were combustible and presented a hazard of fire or possible explosion because of energized equipment located in the area.

I find Coffield's testimony to be credible and his visual observations sufficient to support the violations regarding the five accumulations of loose coal. Coal Processing Corporation, 2 IBMA 336 at pp. 345-346. I find from the large size of these piles that each constituted an accumulation under the cited standard. I further find that the operator had at least constructive knowledge of the accumulations and should.have known of their existence from a properly conducted preshift examination. It is undisputed that coal had not been mined after the 4 to 12 shift on the previous day and that the piles remained as late as 9:50 on the morning of the inspection. Moreover company safety man Michael Roxby conceded that the scoop tractor had placed the first pile there earlier in the shift so that the tractor could be used to load posts to correct a roof condition.

In reaching my conclusions herein, I have given full consideration to the testimony of Roxby, mine superintendent John Skeens, and mine safety supervisor David Maulkey. However, for the following reasons I can give but little weight to that testimony. While Roxby testified that the cited piles of coal were either too wet to be combustible or so intermixed with incombustibles so as to be virtually incombustible itself, he conceded that he was not present during the entire inspection, that he took no samples from any of the cited piles and performed no test of combustibility or wetness. Roxby's silence and lack of protest when Inspector Coffield measured the cited coal piles may also be construed as an admission. If Roxby indeed believed that the piles were too wet or that they were intermixed with noncombustibles, it is reasonable to expect that he would have protested in the face of what must have been obvious preparation for a citation or order.

Similarly, I can give but little weight to the testimony of Skeens and Maulkey because they did not accompany Coffield on his inspection and their observations were made sometime later. It is apparent moreover, that since Skeens' testimony differed from both Coffield's and Roxby's regarding the nature of some the coal piles it is quite likely that the witness was not even referring to the same piles that were cited.

Since I have already found that the operator should have known of the five loose coal accumulations cited and failed to exercise reasonable care in cleaning up those accumulations, I find that the violations were caused by the unwarrantable failure of the operator to comply with the cited standard. Ziegler Coal Company, 7 IBMA 280 (1977). 5/

5/ "Unwarrantable failure" is defined therein as the failure by an operator to abate a condition that it knew or should have known existed, *or* the failure to abate because of indifference or lack of due diligence or reasonable care. Under this sweeping definition, it is apparent that practically any violation would be the result of such "unwarrantable failure."

I do not find on the other hand that any violation existed with respect to the alleged oil, grease and coal found on a shuttle car, the cutting machine, the coal feeder and the loading machine. The Government failed to satisfactorily establish that these substances existed in sufficient quantity to constitute an "accumulation." Indeed, Inspector Coffield admitted on cross-examination that he could not recall the amount of 'accumulations" on this equipment. Moreover, as a finder of fact I need, more than the inspector's bare conclusions in this regard.

III. Order of Withdrawal--Docket No. WEVA 79-200-R

Inspector Coffield issued Order of Withdrawal No. 811583 on May 16, 1979, for a violation of 30 C.F.R. § 75.202 alleging that "there were overhanging ribs -up to 58 inches wide in Nos. 1 through 9 entries and the last open crosscut previous to No, 1 entry of North Mains of 7 West North Mains, 027 Section, for a total of approximately 900 feet and approximately one-half of the ribs were loose" (Tr. 30). The cited regulation provides as relevant herein that "[l]oose roof and overhanging or loose faces and ribs shall be taken down or supported."

Windsor concedes in its pleadings that it was in violation of the cited standard in the No. 1 entry and does not deny that it was the result of "unwarrantable failure." It contends only that the violations and "unwarrantable failure" findings in entries Nos. 2-9 were erroneous.

Inspector Coffield entered the subject mine on May 16 around 8:30 a.m. and observed upon his arrival at the No. 1 entry, loose ribs and top along the left rib of the entry. Proceeding to the Nos. 2 and 3 entries, he observed more loose ribs on the roof on both sides with up to 4 feet of overhang. In the No. 4 entry, he observed loose ribs on both sides and in the No. 5 entry observed loose ribs behind the curtain on the right side, In the No. 6 entry, he observed loose ribs on the right side overhanging 3 to 3-1/2 feet. In the No. 7 entry, he observed loose ribs and overhanging on the right side. In the No. 8 entry, the right rib was loose and overhanging up to 58 inches and in the No. 9 entry, loose ribs were overhanging on the right side. Coffield determined that the overhangs were loose by observing cracks and breaks in the strata between the roof and rib. In some places, Coffield tested the roof with a pick-like instrument and discovered that it fell "real easily, just a touch." There were no supports for any of the overhanging ribs. In his opinion, the condition was obvious and had existed in nine entries for about a week and in the last open crosscut for more than a week. Coffield thought the condition was serious because of the possibility of fatal injury from a rib or roof fall.

I find the inspector's testimony to be credible and his expert opinions to be based on sufficient evidence to support the withdrawal order. His testimony in significant respects is indeed corroborated by Windsor's own safety inspector Roxby and mine superintendent Skeens. Both of these men observed numerous cracks in the ribs. Roxby conceded that some of the ribs were not perpendicular and that some contained loose material. Neither

specifically denied that the ribs were, as a factual matter, "overhanging" but claimed only that in their opinion the ribs posed no danger. Since the essence of the violation charged is the mere existence of unsupported "loose roof and overhanging.or loose faces and ribs," their opinion that such ribs posed no danger is immaterial.

Under the circumstances, I find that the violations existed as charged and that Windsor should have known of their existence. They were therefore the result of "unwarrantable failure." Zeigler Coal Company, 7 IBMA 280 (1977). The order of withdrawal was therefore valid in its entirety and no modification is warranted.

ORDER

I. Docket No. WEVA 79-199-R

Order of Withdrawal No. 811582 is affirmed as to the first five accumulations described therein but modified and found invalid as to the last four alleged accumulations described therein.

II. Docket No. WEVA 79-200-R

Order of Withdrawal No. 811583 is affirmed and the contest of Docket No. WEVA 79-200-R is therefore dismissed.

Gary Melick
Administrative Law Judge

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