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OLD BEN COAL V. MESA
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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
Room W-2426, 2800 Cottage Way
Sacramento, California 95825
April 29, 1976

OLD BEN COAL CORPORATION,	)	Application for Review
Applicant	)	Docket No. VINC 74-157
v.	)	Order No. 1 HG; March 6, 1974
MINING ENFORCEMENT AND SAFETY ADMINISTRATION, (MESA),	)	Mine No. 24
Respondent	)	
UNITED MINE WORKERS OF AMERICA,	)	
Respondent	)	

DECISION

Appearances: Vilma L. Kohn, Esq., Squire, Sanders and Dempsey, Cleveland, Ohio, for Applicant;

Frederick W. Moncrief, Esq., Office of the Solicitor, Department of the Interior, for Respondent MESA.

Before: Administrative Law Judge Steiner

PROCEDURAL BACKGROUND

This action was brought by the Applicant pursuant to Section 105 of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. $ 815 hereinafter referred to as the Act) for review of an Order of Withdrawal issued on March 6, 1974 under $ 104(c)(2) providing, inter alia, as follows:

> Coal float dust ranging from a distinct black in color to 1/2 inch deep was deposited on rock dusted surfaces in the 61st north belt haulage entry from the belt head roller to the belt tail piece, and in the adjoining crosscuts along belt a distance of approximately 2000

> feet, there was also coal spillage along west side of 61st north belt, from 2 to 10 inches deep, and from drive to 800 foot survey tag.
>
> There has been a violation of $ 75-400 of Part 75 Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
>
> The violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
>
> The violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 1 J.A.R. on November 15, 1972, and no inspection of the mine has been made since such date which disclosed no similar violation.

MESA inspector Harry Greiner served the subject Order at 5:30 p.m. on March 6, 1974 on J. Green, Mine Manager on the third shift at Mine No. 24. The Order closed the 16th north belt haulage entry. The conditions were abated and the Order terminated at 3:00 p.m. on March 7, 1974.

The original application for review was filed on March 18, 1974. The United Mine Workers of America filed an answer in opposition to the application on March 21, 1974. MESA filed an answer on April 1, 1974. A hearing was held in St. Louis, Missouri. Charles Mauzy and Guy Yattoni testified on behalf of the Applicant; Harry Greiner testified on behalf of MESA. The United Mine Workers of America made no appearance at the hearing. Post hearing briefs were filed by the Applicant and MESA.

The Applicant filed an Amended Application for Review on September 23, 1974, expressly denying that there was a violation; denying that there was unwarrantable failure to comply with any mandatory health and safety standard; and alleging affirmatively that there is no valid Order under $ 104(c)(1) of the Act on which the subject order can be premised; that subsequent inspections of the subject mine have disclosed no violations similar to those resulting in the issuance of the underlying $ 104(c)(1) Order of withdrawal; and that the Regulations codified at 30 $ 75.400 et seq. were improperly promulgated and are therefore without legal force and effect.

FACTUAL BACKGROUND

Charles K. Mauzy, employed as face foreman by the Applicant, testified that he was working on the 61st north belt haulage entry on March 6, 1974; that one of his duties is the examination of pre-shift examiner's reports; that no mining activities were being conducted on the first sec:ion of the belt when the Order was issued; that after he was informed of the

closure by the inspector, he assigned four men to clean the belt; that one of the pre-shift reports dated 3/6 indicated there had been spillage at certain spots on the belt which should be cleaned; that other pre-shift reports indicated that the belt was clean; that in his 28 years of experience in mining coal, he had never seen one-half inch of float dust extending for a distance of 2,000 feet; that such an accumulation would take six months or more; that he had examined the belt "probably" a week before the Order was issued and determined that there was insufficient float coal dust on the belt to justify it to be "written up on the examiner's books" (Tr. 30); that the belt had been machine dusted; that the rock dust on the floor along the belt line was quite thick, two to two and one-half inches in some places; that the color was light gray which would indicate a film of float dust on top of the rock dust; that one belt shoveler was permanently assigned to the 2,000-foot belt on every shift; and that he did not believe water sprays had been installed on the subject belt on March 6th.

Guy Yattoni, witness for the Applicant, testified that in the 10 years of the existence of Mine No. 24, there had never been a gas ignition, dust explosion, gas explosion, or sudden release of gas necessitating evacuation; that, in his 42 years of experience in coal mining, he had never seen a blanket of coal dust one-half inch thick extended over a distance of 2,000 feet; and that such accumulations occur in isolated pockets and at dumping points.

Inspector Harry Greiner testified that he was making a regular inspection, walking all belt haulage entries when he noticed that there were no water sprays installed to alleviate float coal dust at the belt head of the 61st north belt where it dumps on the west belt and thereupon issued a 104(b) notice; that, as he proceeded up along the 61st north belt, "on the framework of it, there was quite a bit of float coal dust and along close to the ribs where it is kind of a triangle shape, where the ribs meets [sic] the bottom, * * * float coal dust did range up to half an inch in depth on this framework (of the belt drive) and over close to the ribs"; that as he proceeded on up the entry to the tailpiece of the belt, the floors were very black and the floors were also black in the crosscuts on either side of the belt; that the specific areas where he found accumulations of one-half inch of float coal dust was where the belt ran through an overcast, perhaps eighty or one hundred feet and on the framework of the drive itself; that there was float coal dust on the floor along the ribs and very little upon the ribs; that he identified the coal dust by its powdery-like texture and very distinct black color; that coal spillage began at the belt drive and went inby for 800 feet on the west side of the belt; that he did observe float coal dust extending 2,000 feet along the belt; that, in his opinion, the spillage on the west side of the belt could be cleaned up in six or seven hours; that he estimated the depth of the float coal dust visually and by continually scratching through it with a flat blade attached to a bar; that he did not measure the size of the float coal dust particles; that the float coal dust could propagate

an explosion; that the presence of the float coal dust did not constitute an imminent danger at the time the Order issued, but could become dangerous if a source of ignition were present; that very few pre-shift examiners even put float coal dust on the book; that a thin film of float dust is "Dangerous, anticipating if something else happens. * * * It could contribute to a health and safety hazard." (Tr. 70); that he did not cite the operator for inadequate rock dust; that the float coal dust would contribute to the danger of other factors such as an explosion or fire, or the liberation of methane gas.

RELEVANT STATUTORY SECTIONS AND REGULATIONS

1. Section 104(c) of the Act, 30 U.S.C. $ 814:

> (c)(1) If, upon any inspection of a coal 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, the conditions created by such violation do while not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a 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 notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, 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 so 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 (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, 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 until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violation, the provisions of paragraph (1) of this subsection shall again be applicable to that mine.

2. Section 75.400 of volume 30 of the Code of Federal Regulations, 30 CFR 75.400:

Coal dust, including float coal dust deposited on rockdusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

ISSUES

1. What are the elements of a section 104(c)(2) order of withdrawal?

2. Which party has the burden of proof with respect to each element of a 104(c)(2) order of withdrawal?

3. Whether the 104(c)(2) order may be sustained on the basis of the existence of a 104(c)(1) notice and 104(c)(1) order without regard to the substantive validity of the underlying notice and order.

4. Whether section 75.400 was promulgated improperly and is invalid.

5. Whether a violation of 30 CFR 75.400 occurred.

6. Whether the violation was caused by an unwarrantable failure of the Applicant to comply with the regulations.

7. Whether the operator's liability for 104(c)(2) orders ends when a single inspection or series of inspections of the mine discloses no violations similar to those upon which the underlying 104(c)(1) notice and order were based.

ELEMENTS OF A 104(c)(2) ORDER OF WITHDRAWAL

A section 104(c)(2) withdrawal order may be issued if a withdrawal order with respect to any area in the mine has been issued pursuant to section 104(c)(1) and subsequent inspection reveals: (1) that

a similar violation of a mandatory health or safety standard occurred, and (2) that the violation was caused by the unwarrantable failure of the operator to comply with such health and safety standard. The United States Court of Appeals for the District of Columbia Circuit recently held in International Union, United Mine Workers of America v. Thomas S. Kleppe, Secretary of the Interior, et al., No. 75-1003, April 13, 1976), that there is no gravity criterion required to be met before a section 814(c)(1) withdrawal order may properly issue.

BURDEN OF PROOF

Section 4.587 of Volume 43 of the Code of Federal Regulations, 43 CFR 4.587, 1/ and section 7(c) of the Administrative Procedure Act (A.P.A.), 5 U.S.C. $ 556(d), 2/ assign the burden of proof in administrative hearings under the Act.

The burden of proof is divided in proceedings reviewing the validity of section 104(c)(2) withdrawal orders. MESA must establish the fact of violation by a preponderance of the evidence. See Zeigler Coal Co., 4 IBMA 88, 102 82 I.D._____, 1974-1975 OSHD par. 19,478 (1975). The burden of persuasion with respect to the other elements of the order rests upon the Applicant. Kentland-Elkhorn Coal Corp., 4 IBMA 166, 82 I.D. 234,_____ OSHD par._____ (1975). Before Applicant must attempt to meet this burden of persuasion, however, MESA must establish a prima facie case that the order was validly issued.

> * * * In the instant case, MESA must make out a prima facie case that the Order in issue was validly issued pursuant to section 104(c)(2) of the Act. Although, as we held above, MESA need not establish the validity of the underlying section 104(c) Notices and orders, it must establish a prima facie case with respect to the section 104(c)(2) chain of citations, the fact of violation, unwarrantable failure, and the other requirements for issuance of a section 104(c)(2) order. Kentland Elkhorn Coal Corp., 4 IBMA at 173.

_____

l/ In proceedings brought under the Act, the applicant, petitioner, or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence provided that * * * (b) wherever the violation of a mandatory health and safety standard is an issue the Mining Enforcement and Safety Administration shall have the burden of proving the violation by a preponderance of the evidence.

2/ Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. * * *

The Board cited Zeigler in support of this holding. Zeigler involved an application for review of a section 104(a) imminent danger withdrawal order. The Board interpreted 30 CFR 4.587 and section 7(c) of the A.P.A. as follows:

> We believe that although that regulation places the ultimate burden of proof on the operator in a review proceeding involving an imminent danger withdrawal order, such regulation nonetheless, does not relieve MESA from the statutory obligation of making out a prima facie case in the first place. If, after MESA establishes a prima facie case, the operator fails to overcome MESA's case by a preponderance of the evidence with respect to each element of proof in dispute, then, MESA prevails and the operator's request for relief must be denied. 4 IBMA at 101.

This decision was cited with approval in Old Ben Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 39, 40 (7th Cir. 1975), another section 104(a) proceeding:

> * * * in practice, therefore, the burden of proof is split, with the Government bearing the burden of going forward, and the mine operator bearing the ultimate burden of persuasion. We think that this accords with the intent of Congress as expressed in the following Committee comment on Section 7(c) of the Administrative Procedure Act (now codified as 5 U.S.C. $ 556(d)):
>
> > That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Sen. Doc. No. 248, 79th Cong., 2d Sess., 208, 270 (1946).
>
> Although 43 CFR $ 4.587 might have been more artfully drafted, we read it to mean simply that the petitioner who initiates the proceedings--here Old Ben--has the ultimate burden of persuasion. We do not think that the regulation was intended to relieve--nor, indeed, can it relieve--the proponent of an imminent danger order from the burden of putting forth a prima facie case in the administrative hearings.

Pursuant to 43 CFR 4.587 and section 7(c) of the A.P.A., MESA must establish by a preponderance of the evidence that a violation of the mandatory health and safety standards occurred. MESA must also present a prima facie case with respect to the other elements of the 104(c)(2) withdrawal order. Once MESA has established this prima facie case, the burden of persuasion falls upon the operator to establish by a preponderance of the evidence that one or more of the elements essential to a valid 104(c)(2) withdrawal order was not present when the order was issued.

VALIDITY OF UNDERLYING 104(c)(1) NOTICE AND ORDER

MESA introduced into evidence a section 104(c)(1) notice issued September 27, 1972 (Exhibit C), and a section 104(c)(1) order issued November 15, 1972 (Exhibit B), to establish a prima facie case that the required underlying (c)(1) order and notice had been issued (Tr. 51-52). The validity of the precedent notice and order is not in issue in a proceeding for a review of an Order of Withdrawal issued pursuant to section 104(c)(2) of the Act. Zeigler Coal Company, 5 IBMA 346, 352,_____ I.D._____, OSHD par._____ (1975); Kentland-Elkhorn Coal Corp., 4 IBMA 166, 171, 82 I.D. 234, 1973-1974 OSHD par. 19,633 (1975).

VALIDITY OF SECTION 75.400

The applicant challenged the validity of 30 CFR 75.400 based on the decision of the Sixth Circuit in United States v. Finley Coal, 493 F.2d 285 (6th Cir. 1974), aff'd 345 F. Supp. 62, 66 (E.D. Ky. 1972). In Union Carbide Corp., 3 IBMA 314, 81 I.D. 532,_____OSHD par._____ (1974), the Board held that Finley does not hold that section 75.400 was invalidly promulgated and that operators may be cited for violations of that regulation.

FACT OF VIOLATION

Inspector Greiner's testimony that float coal dust was observed over an extended section of the belt, with some concentrations, has not been refuted. The existence of a pre-shift report dated March 6th indicating spillage along the belt supports that testimony. Spillage, requiring at least "spot" cleaning, occurred even though a belt shoveler had been assigned regularly on every shift to this section of the belt.

Mesa has established by a preponderance of the evidence that float coal dust was permitted to accumulate along the belt in violation of 30 CFR $ 75.400.

UNWARRANTABLE FAILURE

The second requirement of a valid 104(c) order is that the violation be caused by the "unwarrantable failure" of the operator to comply with t!e regulations. Congress pointedly omitted any binding definition of "unwarrantable failure" in its list of statutory definitions embodied in

section 2 of the Act, thus leaving the resolution of its meaning to case-by-case adjudication by the Secretary, with only the scantiest guidance in the legislative history. Zeigler Coal Company, 4 IBMA 139, 156.

> * * * [T]he legislative history unmistakably suggests that a given 104(c) violation possesses the requisite degrees of fault where, on the basis of the evidentiary record, a reasonable man would conclude that the operator intentionally or knowingly failed to comply or demonstrated a reckless disregard for the health or safety of the miners. [3/] Eastern Associated Coal Corp., 3 IBMA 331, 356.

The Board has on other occasions dealt with the definition of unwarrantable failure and has defined it as "intentional knowing or reckless deviations from the mandatory standard of care. Zeigler Coal Company, 4 IBMA 139, 154.

The violation in this case was the result of the Applicant's unwarrantable failure to comply with the regulations. A pre-shift examiner's report had shown spillage at certain spots on the belt. Admittedly, there were no water sprays installed at the belt head to alleviate the accumulation of float coal dust. It is clear that the violation occurred as the result of a lack of due diligence on the part of the Applicant.

INTERVENING CLEAN INSPECTION

Applicant contends that a series of spot inspections covering the entire mine intervened between issuance of the underlying section 104(c)(1) Withdrawal Order and issuance of the 104(c)(2) withdrawal order under review in this proceeding and that this series of spot inspections constitutes an "inspection of such mine which discloses no similar violations" thereby removing Applicant from liability for withdrawal

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3/ Legislative history is a relevant authority only where the statute is patently ambiguous. In pertinent part, the history bearing on the meaning of unwarrantable failure appears at page 1030 of House Comm. on Ed. and Labor, Legislative History Federal Coal Mine Health and Safety Act, Comm. Print, 91st Congress, 2d Session and reads as follows: * * * The managers note that an unwarrantable failure of the operator to comply means the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care, on the operator's part. (Emphasis added.)

orders under section 104(c). Applicant also contends that a single clean spot inspection can relieve the operator of liability under 104(c)(2). This latter contention is without merit.

> If the legislators had intended to lift liability upon a clean spot inspection subsequent to the issuance of a (c)(2) closure order, we think that they would have used the words "any inspection" rather than "an inspection" in the phrase quoted above. The language actually employed appears to us to direct a thorough examination of the conditions and practices throughout a mine. Indeed the intensive and quite possibly prolonged scrutiny seems entirely called for in the case of an operator which may have repeatedly demonstrated its indifference to the health or safety of miners and where its record suggests that other equally grave infractions resulting from unwarrantable failures to comply may exist elsewhere in the mine.

Eastern Associated Coal Corp., 3 IBMA 331, 358, 81 I.D. 567, OSHD par._____ (1974), aff'd on reconsideration, In the Matter of Eastern Associated Coal Corp., 3 IBMA 383,_____ I.D._____,_____OSHD par._____ (1974).

MESA concedes that a series of spot inspections may constitute a complete inspection. This position is in accord with the Board's decision upon reconsideration of Eastern:

> Under our interpretation, as set forth in the opinion of September 20, 1974, several completed partial or completed spot inspections of a mine may be required to constitute a "complete inspection" of a mine in order to lift the withdrawal order liability of an operator from the provisions of section 104(c)(2). In the Matter of Eastern Associated Coal Corp., 3 IBMA 383, 386.

MESA denied, however, that the series of clean spot inspections from November 13, 1973, to December 19, 1973, constituted the required complete inspection because they were not all health and/or safety inspections.

During this period, MESA conducted 36 spot inspections of this mine, as follows:

Spot Ventilation	13 inspections
103(i)	13 inspections
Spot Safety	4 inspections
Spot Health & Safety	4 inspections
Spot Health	2 inspections

MESA concluded that this "SERIES OF SPOT INSPECTIONS NOVEMBER 13 to DECEMBER 19, 1973, COVERED THE ENTIRE MINE" (Emphasis added) (Applicant's Exhibit #1). MESA argues, however, that only the four annual inspections of the entire mine required by section 103(a) of the Act (30 U.S.C. $ 813(a)) qualify as complete inspections and that the initial procedure of issuance of section 104(c) notices can be reinstated only if no 104(c) orders are issued during one of these four inspections. This stance is consistent with the instructions given by MESA to its inspectors with respect to the issuance of 104(c)(2) orders.

> For the purposes of "wiping the slate clean" after the issuance of a 104(c)(1) or 104(c)(2) order and reinstating the initial procedure of issuance of 104(c)(1) Notices before issuance of an Order under 104(c), a complete inspection of the entire mine * * * must be made which reveals no unwarrantable failure violation (a "clean" inspection). United States Department of the Interior, MESA, Health and Safety Manual for Orders, Notices and Report Writing, $ 1.2A (1973).

A complete inspection is defined by MESA as "the examination of the entire mine by authorized personnel to determine compliance with regulations." United States Department of the Interior, MESA, Coal Mine Inspection Manual for Underground Mines, $ 1.5 (1973). The Manual then goes on to specify the procedures for conducting and recording "complete" health or safety spot inspections and hazardous spot inspections.

1. Schedule each spot inspection toward the end result of having inspected each section within a mine. Report such inspections in the present manner of reporting such inspections.

2. After each section within a mine has been inspected through a series of such spot inspections, an additional spot inspection shall be made of the other areas of the mine.

> Report such an inspection in the same manner that spot inspections are presently being reported; however, in the written report of this inspection, * * * record the statement that this inspection completes a series of spot inspections which covered the entire mine.

3. Depending on circumstances, such a series of spot inspections can be either safety, health, or combination health and safety spot inspections. Such a series of hazardous spot inspections must be safety type spot inspections.

4. For reporting purposes when the last of such a series of spot inspections is completed, report a "complete" health or safety or a "complete" combination health and safety inspection as the case may be.

The series of spot inspections from November 13 to December 19, 1973, was not a "complete inspection" in the sense that it was not one of the four required annual inspections and was not composed solely of health and safety spots. It was, however, an inspection of the entire mine and designated as such by MESA. The record is clear that the entire underground mine was inspected by this series of spot health, safety, health and safety, ventilation and 103 inspections and that no section 104(c)(2) orders were issued during this series. The record also establishes that every inspector carries "all required equipment" underground (VINC 73-113, Tr. 116); that an operator is in no way limited as to the kinds or numbers of closure orders or notices of violation he may issue during his inspection, regardless of the type of inspection he may be conducting (VINC 73-113, Tr. 101); that the designation of an inspection as "spot health" or "spot ventilation" merely indicates what the inspector is emphasizing (VINC 73-113, Tr. 118); that, in fact, an inspector "is required to" pay attention to and cite any violation he sees (VINC 73-113, Tr. 101, 116); and, finally, that the operator could not tell any difference between the different kinds of inspections (VINC 73-113, Tr. 250, 291, 297, 298).

Neither the Act as written nor as interpreted by the Board requires that "an inspection of the mine which discloses no similar violations" under section 104(c)(2) be comprised entirely of health and/or safety spots. MESA has introduced no evidence to explain or refute its own designation of this series of spots as constituting an inspection of the entire mine. The inspections were conducted over a period of time longer than that required to complete some of the four annual inspections (Gov't. Exh. B). Old Ben Mine No. 24 was subjected to the "intensive and quite possibly prolonged scrutiny" called for in Zeigler (3 IBMA 331, 358) during this series of spot inspections. No "other equally grave infractions resulting from unwarrantable failures to comply" (Id.) were found in the mine during this period. I therefore find that a clean inspection of the entire mine occurred prior to issuance of Order No. 1 HG, wiping the Applicant's slate clean with respect to liability for 104(c)(2) orders and that Order No. 1 HG was invalidly issued.

CONCLUSIONS OF LAW

1. These proceedings are governed by the provisions of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. $ 801 et seq. (1970)) and the regulations promulgated in implementation thereof.

2. At all times relevant to this proceeding, Applicant, Old Ben Coal Company, was subject to the provisions of the Act.

3. Section 30 CFR 75.400 is valid.

4. A violation of 30 CFR 75.400 was established.

5. The violation was the result of the operator's unwarrantable failure to comply with the Act.

6. A complete inspection of the mine disclosing no similar violations intervened between the issuance of the original 104(c)(1) notice and order and the issuance of the withdrawal order at issue in this proceeding.

7. Based on Conclusion No. 6, Order of Withdrawal 1 HG, dated March 6, 1974, was improperly issued and should be vacated.

ORDER

Based upon the record in these proceedings and the Conclusions of Law, it is ORDERED:

1. That the Application for Review be GRANTED, and

2. That Order of Withdrawal No. 1 HG, issued March 6, 1974, to Old Ben Company be VACATED.

R. M. Steiner
Administrative Law Judge

Distribution:
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