

CCASE:  
OLD BEN COAL V. SOL (MSHA) & (UMWA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

OLD BEN COAL COMPANY,  
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No: LAKE 82-75-R  
Order No: 1223403 3/3/82

SECRETARY OF LABOR, AND  
UNITED MINE WORKERS OF  
AMERICA,  
RESPONDENTS

DECISION

Appearance: Mark M. Pierce, Esq., Old Ben Coal Company, Chicago, Illinois, for Contestant Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondents

Before: Judge Moore

The above case was re-assigned from Judge Lasher to me on June 23, 1983. Withdrawal order No: 1223403 was issued under 104(d)(1) of the Federal Mine Act and the underlying citation listed on the order is No: 1222957 issued on March 11, 1982. The matter came on for hearing before Judge Lasher on October 20, 1982, in Evansville, Indiana. At that time certain stipulations were read into the record. Old Ben admits the violation occurred, admits it was due to an unwarrantable failure and that it was significant and substantial. In fact it has agreed to pay the full proposed assessment associated with this citation. It challenges, however, the technical validity of the order.

Old Ben argues that the underlying citation was invalid. It also argues that even if the underlying citation is valid, the order in issue in this case is not valid because it should have been issued under 104(d)(2) instead of 104(d)(1). Old Ben argues that once a citation is issued under 104(d)(1) only one order can be issued thereafter under that section. It bases this argument on the fact that the wording of the section states that if the inspector finds an unwarrantable violation within 90 days after issuing

~1455

the citation "he shall forthwith issue an order requiring . . . ." Old Ben contends that that section does not authorize issuing multiple orders under 104(d)(1).

I disagree. If a 104(d)(1) citation is issued early in an inspection and shortly thereafter a 104(d)(1) order is issued, any additional order for unwarrantable failure issued during that inspection would have to be issued under (d)(1). The (d)(2) orders can only be issued during "any subsequent inspection . . . ." Old Ben's interpretation would not allow for the issuance of (d)(1) orders during the same inspection in which the (d)(1) citation was issued and for that reason alone is incorrect. I would agree, however, that once a (d)(1) order is issued, that any unwarrantable violation found during a subsequent inspection, should be issued under 104(d)(2).

At the time that the briefs were prepared Judge Lasher had already rendered a bench decision in which he had upheld the underlying 104(d)(1) citation. Counsel for Old Ben nevertheless requested Judge Lasher to vacate the order because Judge Lasher's decision on the underlying citation was erroneous. No reasons as to why counsel thought the decision to be erroneous were given. It is curious as to how counsel expected to prevail in that kind of argument.

I can see no difference in the effect of the two orders that can be issued under 104(d). Once the orders start issuing they continue until an inspection of the mine "disclose no similar violations." Such an inspection puts the operator back at the beginning of 104(d)(1). I therefore can not see any prejudice to Old Ben resulting from the fact that this order was issued under a (d)(1) rather than a (d)(2).

In *Secretary of Labor v. Old Ben Coal Company*, 2 FMSHRC 1187 (June 1980) the Commission approved Judge Broderick's treatment of a notice of violation and 3 withdrawal orders issued under (104)(c) of the 1969 Coal Act. All of the withdrawal orders had been issued under 104(c)(1) of the old act, but only one of the three had been issued within 90 days of the notice of violation. The Commission held that the effect of Judge Broderick's decision was to modify the third and fourth orders so as to base them on the first order rather than on the notice of violation. The Commission said he had that authority.

In *Secretary of Labor v. Consolidation Coal Company*, FMSHRC 1791 (October 1982) the Commission approved Judge Melick's action of converting a 104(d)(1) order into a 104(d)(1) citation and then holding a hearing on the citation. Judge Melick had earlier held the original 104(d)(1) citation upon which the order in question was based to be invalid.

~1456

Counsel for Old Ben Coal Company considers the Commission's 1980 Old Ben Company case discussed above as "ill-advised, unsound and premature ...." (See brief at P.14). The brief goes on to urge Judge Lasher, and me by substitution, "to discount" the Commission's decision. I have no authority to disregard or "discount" a Commission decision and I am surprised that counsel would urge that action.

In my view both of these cases are helpful to Old Ben. Relying on these cases, I am converting the instant 104(d)(1) order to a 104(d)(2) order. Since the citation was issued during an "ABC" inspection and the order in question here was issued during a "CAA" inspection, this order was issued during a subsequent inspection and should have been issued under 104(d)(2).

As such, its validity does not depend on the validity of the 104(d)(1) citation but on the validity of 104(d)(1) order No: 1222940 which was converted to a 104(a) citation in Docket No: LAKE 82-67-R.

The order therefore fails since it is not underlain by a valid 104(d)(1) order. But because Old Ben admits the violation was unwarrantable and significant and substantial, I can not convert the order to a 104(a) citation. I hereby convert it to a 104(d)(1) citation and as such it is AFFIRMED.

Charles C. Moore, Jr.  
Administrative Law Judge