

CCASE:

MSHA V. OLD BEN COAL

DDATE:

19800602

TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, DC 20006

June 2, 1980

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

Docket Nos. VINC 75-267

75-269

75-270

75-271

75-273

v.

OLD BEN COAL COMPANY

IBMA No. 76-21

DECISION

This proceeding arises under the Federal Coal Mine Health  
Safety Act of 1969, 30 U.S.C. §801 et seq. (1976 & Supp. I 1977)  
[the 1969 Coal Act]. 1/ It involves the provisions for issuance of  
orders of withdrawal set forth in section 104(c) of that Act.<sup>2/</sup>

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1/ On March 9, 1978, this case was pending on appeal before the  
Secretary of Interior's Board of Mine Operations Appeals. This  
appeal is before the Commission for disposition under section 301 of  
the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A.  
§961 (1978).

2/ Section 104(c) of the 1969 Coal Act provided:

(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, 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 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 be also  
caused by an unwarrantable failure of such operator to 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referred to in subsection (d) of this section, to be withdrawn from,  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 an 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 violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine. [Emphasis added.]

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In October 1974, a Mining Enforcement and Safety Administration withdrawal to Old Ben Coal (MESA) inspector issued five orders of Company. The orders stated that they were issued under the authority of section 104(c)(1) of the 1969 Coal Act. Old Ben filed an application for review of the withdrawal orders.

At the hearing, the parties stipulated in substance the following facts:

1) On July 9, 1974, MESA issued notice 2-MK to Old Ben under section 104(c)(1) of the 1969 Coal Act.

2) On October 1, 1974, a section 104(c)(1) order of withdrawal (1-WRM) was issued based on the underlying July 9th notice

3) On October 19th and October 21st, four additional section 104(c)(1) withdrawal orders were issued. These withdrawal orders refer to the section 104(c)(1) notice of July 9.

4) A fifth order of withdrawal described an underlying section 104(c)(1) notice that had been issued on July 11, 1974.

Old Ben argued that the five withdrawal orders issued on October 19 and 21 were issued more than 90 days after the underlying section 104(c)(1) notices and were therefore issued contrary to the provisions of section 104(c)(1) of the 1969 Coal Act. MESA agreed that more than 90 days elapsed between the underlying notices and the issuance of the withdrawal orders in question. However, MESA argued, inter alia, that the passage of 90 days ceased to be determinative after the issuance on October 1, 1974 of the first section 104(c)(1) order; that the orders issued during the October 19 and 21 inspections became section 104(c)(2) orders for which there is no 90-day limit.

A written opinion was rendered by the judge on July 16, 1975. He concluded that the first withdrawal order issued under section 104(c)

must be issued within 90 days after the issuance of the underlying notice of violation. Noting the issuance on October 1, 1974 of a section 104(c)(1) order of withdrawal (1-WRM) within 90 days after the issuance of the underlying July 9 and 11 notices, the judge held that the circumstances presented in this case would support the issuance of withdrawal orders under section 104(c)(2) of the 1969 Coal Act. He found no conceptual distinction between section 104(c)(1) and section 104(c)(2) orders of withdrawal, and held that Old Ben, which was charged with knowledge of the intervening October 1 order issued under section 104(c)(1), was not prejudiced by a "clerical" mistake by the MESA

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inspector in indicating on the face of the documents that the withdrawal orders in question were issued under section 104(c)(1), rather than under section 104(c)(2). Accordingly, the judge held that each of the orders under review was properly issued under section 104(c) of the 1969 Coal Act. The applications for review of the withdrawal orders were dismissed.

Old Ben appealed the judge's decision to the Board of Mine Operations Appeals. It again argued that because the withdrawal orders were issued more than 90 days after the issuance of the underlying notices, they were not validly issued under section 104(c)(1). 3/

The primary issue before us is whether the judge erred in finding that the withdrawal orders in question were validly issued under section 104(c) of the 1969 Coal Act. We hold that he did not. Subsection (1) of section 104(c) provided for the issuance of a withdrawal order within 90 days after the issuance of an underlying notice. After an order of withdrawal was issued under subsection (1), subsection (2) provided for additional orders of withdrawal based on violations similar to that which led to the first, without regard to time limitations, and until there had been an inspection of the mine which revealed no such similar violations.

The parties stipulated that the underlying July 1974 notices were the predicate for an order of withdrawal issued under subsection (1) on October 1, 1974 (1-WRM). They also stipulated that the orders in question were subsequently issued based on the same July 1974 notices. Thus, under the scheme set forth in section 104(c), the latter orders of withdrawal were authorized by subsection (2). That they were facially issued under subsection (1) is the crux of the instant dispute.

We hold that the judge had the authority under section 105(b) of the 1969 Coal Act 4/ to modify the withdrawal orders from 104(c)(1) to (c)(2) in his written decision after hearing, and the effect of what he

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3/ Old Ben also argued that the judge erred in not dismissing the withdrawal order in Docket No. VINC 75-273. It contended that notice 1-HG issued on July 11, 1974, as the underlying notice for that order, had been vacated by another judge in a separate proceeding. We take official notice, however, of the subsequent developments in Docket No. VINC 75-246, the proceeding to which Old Ben refers. The initial decision in that docket was appealed to the Board of Mine Operations Appeals (IBMA 76-5) and it was in turn remanded for further consideration. In June 1977, the judge assigned to that case issued a second decision, in which notice 1-HG was affirmed. (VINC 75-246, et al, June 23, 1977).

4/ Section 105(b) of the 1969 Coal Act provided:  
Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

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did is just that. We note, as the judge did in his written decision, that Old Ben was in no way prejudiced. Old Ben did not claim lack of notice, and it did not otherwise indicate how its defense to a withdrawal order issued under section 104(c)(2) would differ from its defense to an order issued under section 104(c)(1).

For the foregoing reasons, the withdrawal orders in issue are affirmed.

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