

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

FEB 15 1985

LOCAL UNION 8454, DISTRICT 17 : COMPENSATION PROCEEDING  
UNITED MINE WORKERS OF :  
AMERICA (UMWA), : Docket No. WEVA 84-65-C  
Complainants :  
v. : No. 5 Mine  
PINE TREE COAL COMPANY, :  
Respondent :  
and :  
BUFFALO MINING COMPANY, an :  
affiliate of THE PITTSTON :  
COMPANY, a corporation :  
Respondent :

DECISION

Appearances: Joyce A. Hanula, Legal Assistant, UMWA,  
Washington, D.C. for Complainants;  
Carter Elkins, Esq., and W. N. Reynolds, Esq.,  
Campbell, Woods, Bagley, Emerson, McNeer and  
Herndon, Huntington, West Virginia, for  
Respondent Pine Tree;  
Donald R. Johnson, Esq., Lebanon, Virginia,  
for Respondent Buffalo.

Before: **Judge' Broderick**

STATEMENT OF THE CASE

The United Mine Workers Union Local 8454 (UMWA), representing the miners employed at the Pine Tree Coal Company's (Pine Tree) No. 5 Mine, brought this action against Pine Tree, claiming compensation for the miners who were idled as a result of an order of withdrawal issued by MSHA on October 4, 1983. The withdrawal order was issued under section 107(a) of the Act, alleging an imminent danger, because an active gas well was mined into in the subject mine. On March 6, 1984, Pine Tree filed a "Third-Party Complaint" against Buffalo Mining Company (Buffalo) alleging (1) that the condition resulting in the withdrawal order was the result of Buffalo's failure to provide proper engineering

services to Pine Tree, and (2) that Buffalo had agreed to indemnify Pine Tree for claims asserted against the latter with respect to matters related to the October 3, 1983, accident. Buffalo filed a Motion to Dismiss the Third Party Complaint. Complainants filed an amended Complainant naming Buffalo as an additional Respondent. All parties filed briefs and I denied the motion by order issued May 7, 1984.

Pursuant to notice, the case was called for hearing in Charleston, West Virginia, on December 20, 1984. Complainants did not call any witnesses. Gale B. Stepp testified on behalf of Pine Tree and **Lenox** Profitt testified on behalf of Buffalo. All parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

#### FINDINGS OF FACT

1. The following miners were employed by Pine Tree at its No. 5 Mine in Logan County, West Virginia, on October 4, 1983. Each was idled as a result of the withdrawal order issued on that date. The rate of pay of each and the number of hours idled are listed beside each name:

	<u>Miner</u>	<u>Hourly Rate</u>	<u>Hours Idled</u>
1.	Mitchell Hensley	13.565	36
2.	Michael Hensley	13.565	36
3.	Bob Bryant	13.093	36
4.	<b>Woodrow</b> Chambers	13.565	36
5.	Steve Meade	13.565	36
6.	Calvin Tomblin	13.565	36
7.	Clifton Tomblin	13.565	36
8.	Tim Adams	13.093	40
9.	Billy Tomblin	12.57	40
10.	Thomas Hensley	13.865	40
11.	James Smith	13.460	40
12.	Herbert Stramon	13.865	40
13.	David Meade	13.460	40
14.	Roger Adkins	12.87	40
15.	Michael Bailey	12.97	32
16.	Jim <b>Gullett</b>	12.97	32

2. Pine Tree operated the subject mine under a contract with Buffalo. Buffalo had a lease to the mineral rights on the mine property. In the contract, Buffalo is described as the owner and Pine Tree the contractor. Pine Tree agreed to mine coal and deliver it to Buffalo's tipple. Pine Tree agreed to furnish labor, machinery, supplies, and equipment

required in the performance of the contract. Buffalo reserved the right to furnish written plans and projections which Pine Tree agreed to follow. Title to the coal remained in Buffalo. Buffalo agreed to furnish "such engineering services as may in its judgment be required for contractor's guidance and to protect owner's interest in realty, in complying with the terms of this Contract. A reasonable charge will be made for such service, to be deducted from the proceeds due Contractor under this contract." Pine Tree was responsible for payment of its employees' wages and other benefits. Pine Tree agreed to comply with applicable State and Federal laws and regulations including those relating to health and safety. (Buffalo Exh. 1). The mine maps were furnished to Pine Tree by Buffalo. Pine Tree operated the mine with an MSHA ID number and a license from the State of West Virginia, both issued in the name of Pine Tree.

3. On October 3, 1983, at about 8:00 p.m., the mining crew told Gail Stepp, Pine Tree's President, that it had hit something which appeared to be a gas well. Stepp called **Lenox** Profitt, the contract manager for Buffalo. Profitt consulted the Buffalo engineering department and all available maps but found no indication of any gas well. Profitt told Stepp that there was no gas well in the area, so mining continued. The following morning, Stepp himself went in the mine and saw what appeared to be a gas well. He again called Profitt who told him it was probably just a casing someone had left. Profitt then discussed the matter with Buffalo's chief engineer and it was "quickly agreed that there had been a gas well in that **area**." (Tr. 60-61). Profitt called Stepp and told him to get his men out and shut down the mine.

4. The matter was reported to State and Federal authorities and at **11:45** a.m., October 4, 1983, Federal Mine Inspector Oscar R. **Nally** Jr., issued an Order of Withdrawal covering the entire mine. The condition found was described in the Order as follows: "The certified mine map was not accurate in that an active **gas** well was mined into in the No. 2 entry 001 section. This well nor any other well was shown on the certified map ...." (Union Exh. 1).

5. The condition was abated by Pine Tree building a **concrete** wall around the well. Buffalo delivered the necessary supplies and reimbursed Pine Tree for the wages paid the miners who did the abatement work. Buffalo also drew up the plan for sealing the well and directed and instructed Pine Tree how to do the work.

6. On October 28, 1983, Buffalo signed an "Indemnity Agreement," whereby it agreed to indemnify and hold harmless Pine Tree "from and against all liability for claims, actions, demands, fines, penalties, citations and other actions which have been or which might be asserted ... against Pine Tree . . . by state and/or federal agencies . . . with respect to **matters** directly related to the . . . accident on October 3, 1983." (Union Exh. 2).

#### STATUTORY PROVISIONS

Section 111 of the Act provides in part as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that **shift who** are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Section 3(d) of the Act provides as follows: "'Operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

## ISSUES

Is Pine Tree or is Buffalo or are both liable to pay compensation to the miners idled by the withdrawal order?

## CONCLUSIONS OF LAW

1. Pine Tree is liable under section 111 to pay compensation to miners idled as a result of the order of withdrawal. Pine Tree operated the mine, employed and paid wages to the miners and was served with the withdrawal order. Pine Tree is liable even though the condition giving rise to the withdrawal order was the responsibility of Buffalo. Fault is not an element in determining liability under section 111.

2. Buffalo is liable, jointly and severally with Pine Tree, under section 111 to pay compensation to the miners idled **as a** result of the order of withdrawal. Buffalo was the "owner" or "lessee" of the mine. Buffalo supervised Pine Tree's activities, in particular with respect to projections and mapping. The mining into the gas well which caused the withdrawal was specifically directed by Buffalo. Mine owners have been held liable for safety violations committed by independent contractors. Bituminous Coal Operators Association v. Secretary, 547 F.2d 240 (4th Cir. 1977) (under the 1969 Coal Act); Secretary v. Republic Steel Corporation, 1 FMSHRC 5 (1979) (1969 Coal Act). By analogy, the owner may be held strictly liable to pay compensation to miners idled by a withdrawal order, even though the owner is not the employer of the miners. In Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982) (1977 Mine Act), the **Commission** said that the test to determine an owner's liability depends on "whether the Secretary's decision to proceed against an owner for the contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." By analogy, the decision to proceed in a compensation matter against an owner may be upheld if, as is the case here, the conditions giving rise to the withdrawal were the responsibility of the owner. I conclude that Pine Tree and Buffalo are jointly and severally liable to pay the compensation hereafter awarded to the miners in this case.

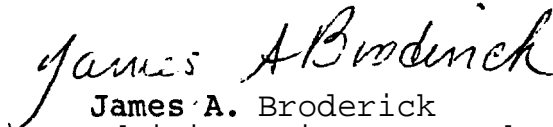
3. The Commission is without authority to interpret the indemnity agreement referred to in Finding of Fact No. 6. I do not decide whether under that agreement Buffalo is liable over to Pine Tree for the compensation due the miners herein.

ORDER

Respondents are ORDERED to pay the following compensation under section 111 of the Act to the miners named below:

Mitchell Hensley	\$ 488.34
Michael Hensley	488.34
Bob Bryant	471.35
Woodrow Chambers	488.34
Steve Meade	488.34
Calvin Tomblin	488.34
Clifton Tomblin	488.34
Tim Adams	523.72
Billy Tomblin	502.80
Thomas Hensley	554.60
James Smith	538.40
Herbert Stramon	554.60
David Meade	538.40
Roger Adkins	514.80
Michael Bailey	415.04
Jim Gullett	415.04

Respondents are FURTHER ORDERED to pay interest on the above compensation in accordance with the Commission - approved formula in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983). Interest shall be paid at the rate of 11 percent per annum (.03055 percent per day) from October 4, 1983 to June 30, 1984, and at the rate of 13 percent per annum (.0361 percent per day) from July 1, 1984 until paid. 1/

  
James A. Broderick  
Administrative Law Judge

1/ Interest on compensation awards-was upheld by the Commission in Mine Workers Local 5869 v. Youngstown Mines Corp., 1 FMSHRC 990 (1979). This case was decided prior to the adoption of the Arkansas-Carbona formula for discrimination awards. I believe the same formula should apply to compensation awards.

**Distribution:**

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