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LOCAL UNION 5817 (UMWA) v. MONUMENT MINING & ISLAND CREEK COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| LOCAL UNION 5817, DISTRICT 17, UNITED MINE WORKERS OF AMERICA (UMWA), COMPLAINANT | COMPENSATION PROCEEDING<br>Docket No. WEVA 85-21-C<br>No. 1 Surface Mine |
| v. | |
| MONUMENT MINING CORPORATION, AND ISLAND CREEK COAL COMPANY, RESPONDENTS | |

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint filed by the UMWA, Local 5817, District 17, against the respondents pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, seeking compensation for its member miners employed at the No. 1 Surface Mine who were idled by a section 104(d)(2) withdrawal order issued by MSHA Inspector Edward M. Toler at 5:15 p.m., on August 1, 1984. The order stated as follows:

> Protection of underground workers were not provided for the employees of the Brandy Mining Inc. No. 1 mine where blasting was performed at the Monument Mining No. 1 Surface mine exposing miners at the Brandy Mining Inc. No. 1 mine to falling rock and damage was done to mine property. 1 Drift canopy was destroyed and damage to the belt conveyor and miners were present outby of the underground area and one blast did occur.

The complaint asserts that as a direct result of the order, the miners scheduled to work from August 2 to August 3, 1984, were idled on certain work shifts scheduled for those days, and that they are entitled to compensation

at their regular rate of pay, plus interest at the rate of 20 percent per annum, and attorneys fees incurred in obtaining the claimed compensation.

The complaint was initially filed against the respondent Monument Mining Corporation. However, in view of Monument's failure to respond to several orders which I issued, and its failure to respond to the complainant's discovery requests, I issued a show-cause order directing the parties to show cause why Monument should not be held in default and a summary decision in favor of complainant should not be issued.

In response to my show-cause order, the complainant moved to amend its complaint to name Island Creek Coal Company as a respondent. Complainant asserted that at the time it filed its complaint against Monument, it had no knowledge that Island Creek was the owner of the No. 1 Mine. The motion was granted, and the matter was docketed for a hearing in Charleston, West Virginia. The hearing was subsequently cancelled after the parties advised me that a hearing was not necessary and that the matter would be submitted to me for decision by stipulations and supporting briefs.

## Applicable Statutory Provision

> * * * 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. * * *

## Stipulations

The joint stipulation of facts between the complainant and the respondent Island Creek Coal Company is as follows:

> 1. This proceeding is governed by the Federal Mine Safety and Health Act of 1977 (the Act) and the standards and regulations promulgated for the implementation thereof.
>
> 2. The Administrative Law Judge has jurisdiction over this proceeding.

3. Island Creek Coal Company (Island Creek) is an operator within the meaning of section 3(d) of the Act.

4. The No. 1 Surface Mine, which is part of the Holden No. 29 Mine, is located in Holden, Logan County, West Virginia, and is owned by Island Creek.

5. At all times relevant to this proceeding, Monument Mining Corporation (Monument) was an independent contractor hired by Island Creek, and was an operator within the meaning of section 3(d) of the Act.

6. In accordance with the contract between Island Creek and Monument, Monument was responsible for mining an area of land known as the No. 1 Surface Mine. A copy of the contract is attached as Exhibit A.

7. At 5:15 p.m., on August 1, 1984, MSHA Inspector Edward M. Toler issued Withdrawal Order No. 2438645 pursuant to section 104(d)(2) of the Act to Monument, which related to the No. 1 Surface Mine. A copy of Order No. 2438645 is attached as Exhibit B.

8. Order No. 2438645 prohibited work from being performed in the entire pit area of the No. 1 Surface Mine.

9. The blasting which resulted in the issuance of Order No. 2438645 was performed and controlled by Monument. Island Creek exercised no control over the manner in which Monument conducted such blasting.

10. As a direct result of Order No. 2438645 the miners at the No. 1 Surface Mine were idled from 6:45 a.m., August 2, 1984 to 5:30 a.m., August 4, 1984.

11. A list of the names of the idled miners, their rates of pay and amount of wages lost as a result of the withdrawal order is attached as Exhibit C.

12. On or about October 15, 1984, Monument unilaterally ceased performance under the contract with Island Creek.

13. Upon information and belief, Monument is no longer in business.

14. The miners at the No. 1 Surface Mine were members of Local Union 5817, District 17 and are represented by the United Mine Workers of America.

15. Monument contested Order No. 2438645 pursuant to section 105(d) of the Act. The Notice of Contest was assigned Docket No. WEVA 84-374-R.

16. On February 13, 1985, the Notice of Contest docketed WEVA 84-374-R was dismissed. See Order Dismissing Proceeding attached as Exhibit D.

17. On March 21, 1985, Elm Coal Corporation began operating the No. 1 Surface Mine and continues to do so.

Issue

Is Island Creek liable in whole or in part for payment of compensation owed to employees of its independent contractor Monument Mining under section 111 of the Act as a result of the closure order issued to Monument Mining?

UMWA Arguments

Citing Bituminuous Coal Operators Ass'n v. Secretary of the Interior, 547 F.2d 240, (4th Cir.1977); Republic Steel v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (D.C.Cir.1978); Secretary of Labor v. Old Ben Coal Co., 1 FMSHRC 1480, aff'd, D.C.Cir. No. 79-2367 (Dec. 9, 1980), (unpublished); Harman Mining Corp. v. FMSHRC & Secretary of Labor, 2 MSHC 1551 (4th Cir.1981); and Cyprus Industrial Minerals Co. v. FMSHRC & Donovan, 2 MSHC 1554 (9th Cir.1981), the UMWA asserts that it is well established that an owner-operator of a mine can be held responsible, without fault, for a violation of the Act committed by an independent contractor.

Recognizing the fact that the cited cases arose in the context of section 104 or 110 enforcement proceedings, the UMWA asserts that the statutory language which allowed imposition of liability on the owners in those cases, applies equally to cases brought under section 111. Since section 111, like sections 104 and 110, speaks in terms of the operator's liability to compensate idled miners, and since Island Creek is the mine owner, the UMWA concludes that it can be held liable for the compensation under section 111, regardless of the fact that it did not create the danger requiring the withdrawal of miners.

In its supporting brief, the UMWA asserts that the rationale of the Commission in Secretary of Labor v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982), and Secretary of Labor v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (1984), in obsolving the mine owner from liability for the violations of its independent contractor is inapplicable in the instant case.

Counsel argues that in the Phillips case, the Commission felt that the Secretary's "owner's only" enforcement policy undermined the Act in that it allowed large skilled contractors who violated the Act to "proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions, should the contractors again proceed to engage in unsafe practices." 4 FMSHRC at 553. In contrast, the owner would have the violation entered into its history, resulting in future large penalties. As a result of the violations, the owner could also be subjected later to the stringent section 104(d) and 104(a) sequence of violation provisions.

The UMWA points out that while the Commission never retreated from its holding of owner liablity, it vacated the citations and orders issued in the Phillips case because they stemmed from a litigation decision resting solely on considerations of the Secretary's administrative convenience, rather than on a concern for the health and safety of miners.

In the Cathedral Bluffs case, the UMWA points out that the violation occurred subsequent to the Secretary's adoption of independent contractor regulations, and that based on those regulations, the Secretary cited both the mine owner and the contractor. The Commission's vacation of the citation issued to the mine owner was based on its finding that the record did not support the Secretary's contention that the mine owner had control over the cited condition or that the owner's miners were exposed to the hazard.

The UMWA concludes that it is clear under the Old Ben, Phillips, and Cathedral Bluffs decisions, the Commission's review of the Secretary's decision to prosecute a mine owner for a contractor's violation will be made on the basis of whether or not the Secretary's choice was made for reasons consistent with the purposes and policies of the Act. The reasonableness of the Secretary's action will depend on the degree of control retained by the operator and whether the owner's miners are exposed to the hazard.

The UMWA points out that the instant case raises the issue of whether miners idled by a withdrawal order issued to an independent contractor should be required to demonstrate the owner's control of the contractor or exposure to the hazard by the owner's employees, before they can prevail in a section 111 proceeding against the mine owner. The UMWA concludes that they should not.

In support of its argument, the UMWA argues that unlike the situations in Old Ben, Phillips, and Cathedral Bluffs, compensation cases arising under section 111 of the Act do not involve review of the Secretary's enforcement policy. For that reason, the UMWA concludes, the policy issues that concerned the Commission in those cases are simply not present in cases like the instant one. The UMWA asserts that unlike the situations in those cases, it did not proceed against Island Creek under an owners-only policy. It points out that it first attempted to proceed against the contractor (Monument Mining) who created the condition requiring withdrawal, and that only after learning that Monument had gone out of business and that the idled miners would have no other way to enforce their statutory rights under section 111 did it seek to make Island Creek a respondent.

The UMWA asserts that imposing liability of Island Creek in this case will not increase Island Creek's history of violations, thereby leading to increased future penalties. Nor will it increase Island Creek's potential for liability under sections 104(d) or 104(e). Imposing liability on the owner in this case does not mean the contractor will move onto the next job with a "clean slate," since the violations have become part of Monument's history of violations, and Monument will not be going onto any other job since it has gone out of business. Further, the UMWA asserts that the imposition of section 111 liability on the owner does not mean Island Creek will be unfairly penalized for a violation over which it had no control. It may, however, motivate

Island Creek to refrain from hiring "fly by night" contractors who have little incentive to comply with mandatory standards.

The UMWA argues that contrary to the situation in Old Ben, Phillips, and Cathedral Bluffs, imposing liability on Island Creek in this case would further the underlying purposes and policies of the Act. In support of this conclusion, the UMWA asserts that section 111 was not intended as a punitive measure but was considered a way to equalize some of the financial hardships that occurred when mines were idled by withdrawal orders. "It does not insulate the miners from loss due to withdrawal orders . . . [r]ather it distributes the loss between miner and operator in the manner Congress apparently decided was the most equitable means of achieving mine safety." Rushton Mining Co. v. Morton, 520 F.2d 716, 721-22 (3d Cir.1975); Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess., at 634-35 (Comm. Print 1978).

The UMWA argues further that section 111 compensation is seen as a way of lessening possible inhibitions miners might have in reporting unsafe conditions, or that MSHA inspectors might have in issuing withdrawal orders. A miner who felt his safety complaint might lead to the loss of several days pay for himself and his fellow workers might hesitate before bringing the problem to the attention of the federal inspectors. Likewise those inspectors might be reluctant to issue a withdrawal order if they felt it would result in severe economic distress to the miners.

The UMWA maintains that since section 111 compensation furthers important purposes of the Act, denying miners the opportunity to collect such compensation frustrates those purposes. The UMWA asserts that refusing to impose liability on the mine owner in this proceeding forecloses the possiblity of the miners establishing a viable claim under section 111, and that such a ruling would encourage mine owners to shield themselves from liability by hiring independent contractors. There would be no incentive to hire large stable contractors who will be around for a long time, because the mine owner could escape liablity even if the contractor goes out of business. The possibility of no compensation will seriously deter the employees of those contractors who might otherwise be inclined to report unsafe conditions. The MSHA inspectors may find themselves reluctant to issue a withdrawal order to a small, or newly-formed company performing work as an independent contractor. These same MSHA inspectors would also feel proscribed, under

Commission decisions, from issuing the order to the mine owner, unless there was evidence of owner control.

The UMWA asserts that imposing section 111 liablity on the mine owner for the contractor's violations is no more unfair or inconsistent with the Act than the imposition of liability against an operator under section 111 even though the withdrawal order was later vacated as having been "issued in error." Rushton, supra, 520 F.2d at 718. In Rushton, the operator argued that such imposition of liability had "the effect of holding Rushton liable without fault for the acts of the Government's agent. . . ." The Court was unpersuaded by Rushton's argument, however, and required compensation to be paid to the idled miners. The UMWA observes that if an erroneously issued withdrawal order can trigger an operator's liability under section 111, then an order issued to the contractor should be able to trigger liability on the part of the mine owner.

The UMWA concludes that the Commission and the courts have emphatically held that, as a matter of law, mine owners are liable without fault for the violations that occur in their mines. It further concludes that only where the decision to impose liability on the owner would conflict with the underlying policies and purposes of the Act, has the Commission refused to apply this principle. Since Island Creek can show no such conflict in this case, the UMWA believes that it is entitled to a summary decision in its favor. In support of its argument, the UMWA cites the case of Local Union 8454, UMWA v. Pine Tree Coal Company and Buffalo Mining Company, 7 FMSHRC 236, 240, February 15, 1985, 3 MSHC 1747 (1985), Commission review denied on March 27, 1985. In that case Judge Broderick held the mine owner and its independent contractor jointly and severally liable under section 111 to pay compensation to the miners idled as a result of an order of withdrawal. The UMWA states that because the conditions giving rise to the withdrawal order were the responsibility of the owner, Judge Broderick had no need to analyze the issue of owner liability under section 111 when there is no evidence of supervision or control by the owner.

Island Creek Arguments

Island Creek states that under Article 7 of the mining contract, Monument had full and complete control of the work to be performed at the No. 1 Surface Mine and, except as was necessary to protect Island Creek's property, or to insure conformity to its mining plans and projections, Island Creek

had no control over Monument's employees or mining operations. Under Article 8 of the mining contract, Monument was clearly an independent contractor and title to coal mined by Monument remained with Island Creek. Monument was responsible under Article 11 for compliance with all of the laws applicable to its operations. Pursuant to Article 13, Monument was solely and exclusively responsible for its employees in performance of the mining contract. Compliance with the standards and regulations issued by the Mine Safety and Health Administration was also the responsibility of Monument under Article 13 of the mining contract.

Conceding that it had certain rights to monitor the work of Monument under the contract, Island Creek points out that the blasting activity on August 1, 1984, which gave rise to the issuance of the Order of Withdrawal was performed and controlled by Monument, and Island Creek exercised no control over the manner in which the blasting was conducted.

With regard to the UMWA's reliance on the Pine Tree decision, Island Creek states that the imminent danger order which triggered the claim for section 111 compensation was issued when an active gas well was mined into by Pine Tree. Buffalo Mining Company was brought into the compensation proceeding by both Pine Tree and the UMWA, and the issue presented was whether Pine Tree or Buffalo or both were liable under the facts presented to pay compensation to the miners idled by the order.

Island Creek points out that in the Pine Tree case, Pine Tree was held liable since it operated the mine, employed and paid wages to the miners, and was served with the withdrawal order. The condition giving rise to the withdrawal order was found to be the responsibility of Buffalo. Further, Island Creek points out that in relying on several cases which addressed the liability of owners for safety violations of their contractors, Judge Broderick found by analogy that Buffalo was jointly and severally liable. The test applied was, ". . . 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."

Island Creek maintains that while the overall contractual relationship between Pine Tree and Buffalo may be similar to that of Monument and Island Creek, the operative facts in this proceeding are significantly different from those in Pine Tree. By contract right and in practice,

Buffalo undertook, for a charge paid by Pine Tree, to furnish written plans and projections to be followed by Pine Tree. Pine Tree was operating with mine maps so furnished by Buffalo when the gas well, not identified on such maps was struck. Having undertaken preparation of mine maps, the conditions (inaccurate maps) which gave rise to the withdrawal order were clearly the responsibility of Buffalo. As further evidence of this responsibility, Buffalo actively assisted in the work of abating the withdrawal order.

Island Creek argues that in the present proceeding, the conditions (blasting) which gave rise to the withdrawal order were clearly performed by and within the sole control of Monument. Island Creek had not undertaken responsibility for Monument's operations nor did it exercise any control over the manner in which Monument conducted the blasting at those operations. These conditions were, by contract and in practice, the responsibility of Monument. Island Creek concludes that the facts in the instant proceeding do not support, under the test enunciated in Pine Tree, a finding that Island Creek is liable for compensation in whole or in part for payment of compensation to employees of Monument under section 111 as a result of the closure order issued to Monument.

## Findings and Conclusions

In the Pine Tree case, Judge Broderick held Buffalo liable jointly and severally with its independent contractor Pine Tree because Buffalo supplied the contractor with certain mine maps which did not identify the location of the gas well which was struck. When the contractor mined into the well, it contacted Buffalo's engineering department who assured the contractor that no such well existed. When it was discovered that a well was in fact mined into, an imminent danger withdrawal order was issued, and it was the basis for the claimed compensation. Since Buffalo had failed to note the existence of the gas well which it furnished its contractor, and since it gave further inaccurate advice to the contractor concerning the existence of the well, Judge Broderick found that Buffalo was culpable, that it assisted in the abatement, and that the violation was its responsibility. In essence, Judge Broderick found a nexus between Buffalo's conduct and the issuance of the order which idled the miners, and one may conclude that he found the proximate cause of the withdrawal order was Buffalo's failure to advise its contractor of the existence of the gas well, and the mis-information or advice it gave to Pine Tree after the matter was called to its attention.

In the Pine Tree case, Judge Broderick found that Buffalo supervised the contractor's mining and mapping projections, and supervised its activities in this regard. These facts are not present in the instant case. In this case, there is nothing to suggest that Island Creek's conduct in any way impacted on the issuance of the withdrawal order. The blasting operation which prompted the issuance of the withdrwal order was performed and controlled by Monument, and Island Creek played no role in that incident, nor did it in any way assist in the abatement. In short, I find no connection whatsoever between Island Creek and the violative conditions which prompted the withdrawal order giving rise to the compensation claims.

The UMWA's argument that refusing to impose liability on Island Creek in this case would permit it to shield itself from future liability for contractor violations because there would be no incentive for it to hire responsible contractors who have little incentive to comply with mandatory standards are not well taken. In the first place, there is no evidence to support the UMWA's assertion that Monument Mining was a "fly by night" contractor. Further, I find it highly unlikely that Island Creek would knowingly retain such a contractor and subject itself to liability for civil penalty assessments and closure orders for violations of the Act's mandatory safety or health standards. On the facts of this case, it seems obvious to me that the UMWA is looking to Island Creek for payment of the claimed compensation because it has no other recourse, and has no one else to look to. Rather than filing a responsive answer to my Show Cause Order as to why Monument should not be held in default and liable for payment of the claimed compensation because of its failure to file responses to my pretrial orders, the UMWA joined Island Creek as a convenient party-respondent simply because it is the owner of the coal lease and has reachable financial resources for payment of the compensation. I believe that something more must be established.

With regard to the UMWA's arguments that a failure to hold the mine owner liable for compensation on the facts of this case will inhibit MSHA inspectors from issuing withdrawal orders, and will inhibit miners from filing complaints because of the economic consequences, I can only observe that an inspector's first consideration should be the safety of the miners. He has a duty to act regardless of any economic considerations. This applies equally to miners. Their first consideration should be their safety,

not the fact that they might not be compensated for time lost because of a closure order.

Judge Broderick's decision to hold Buffalo liable for the acts of its contractor Pine Tree was based on his conclusion that the conditions giving rise to the withdrawal of miners was the responsibility of Buffalo, Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982). He also cited Bituminous Coal Operators Association v. Secretary, 547 F.2d 240 (4th Cir.1977), and Secretary v. Republic Steel Corporation, 1 FMSHRC 5 (1979), 1969 Coal Act cases which held that mine owners may be held liable for safety violations committed by independent contractors.

In the Philips case, a case arising under the 1977 Mine Act, the Commission ordered the dismissal of Phillips as the responsibility party for the violations which gave rise to the civil penalty assessments, and it did so on the basis of its conclusion that the Secretary had reason to know that the contractor created the violative conditions which gave rise to the citations and orders, and was in the best position to eliminate the hazards and prevent them from recurring. The Commission applied this same test in a recent case decided on August 20, 1985, Secretary v. Calvin Black Enterprises, Docket Nos. WEST 80-6-M, 80-21-M, and 80-82-M, where it affirmed a judge's conclusion that Calvin Black Enterprises, as the mine owner-operator, contributed to the violation and was in the best position to eliminate the hazard and prevent it from recurring.

With regard to the Rushton case cited by the UMWA to support its "no fault" theory of liability for compensation claims, I note that the case was decided under the 1969 Coal Act before the Commission's decisions interpreting independent contractor liability under the 1977 Mine Act and the Secretary's independent contractor regulations. I also note that the Court in Rushton relied on the statutory distinctions concerning the issuance and "finality" of the orders in question, particularly with respect to the Congressional understanding as to the differences between an order which is ultimately upheld and one which is ultimately vacated, and the compensation which should be paid by the mine operator as a result of such orders. That case did not involve an independent contractor. It turned on the liability of an operator for orders subsequently found to have been issued in error by MSHA. I reject the UMWA's suggestion that this "no fault" theory should be applied across-the board in compensation cases adjudicated subsequent to the 1977 Mine Act.

I believe that such adjudications must be made on a case-by-basis, with the focal point being the Commission's test as applied in the Phillips and Calvin Black Enterprises cases.

In view of the foregoing findings and conclusions, particularly my findings that Island Creek was in no way responsible for the violative conditions which gave rise to the withdrawal order idling the miners, I reject the UMWA's assertion that as the mine owner, Island Creek should be held liable to pay the compensation in question. To the contrary, I conclude and find that the responsibility for paying the compensation lies with Monument Mining Company, the responsible mine operator. While it is unfortunate that Monument is no longer in business, I find no basis for the UMWA's attempts to hold Island Creek liable for the payment of these claims.

I further find and conclude that in view of Monument Coal's failure to respond to my pretrial orders, to the complainant's discovery requests, or to otherwise defend this case, it is in default, and IT IS ORDERED to pay the compensation claims filed against it by the UMWA.

Insofar as the UMWA's complaint against Island Creek Coal Company is concerned, IT IS DISMISSED.

George A. Koutras
Administrative Law Judge