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ROCHESTER & PITTSBURGH COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ROCHESTER & PITTSBURGH COAL CO., CONTESTANT	CONTEST PROCEEDING
	Docket No. PENN 88-194-R
v.	Citation No. 2879240; 4/21/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Greenwich Collieries No. 2 Mine Mine ID 36Ä02404

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Respondent;
Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal Company, Ebensburg, PA, for Contestant.

Before: Judge Fauver

In this proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., Rochester & Pittsburgh Coal Company seeks to vacate a citation and the Secretary seeks a civil penalty for the violation cited. The parties stipulated at the hearing that the Secretary's petition for a civil penalty may be adjudicated in this proceeding.

Based upon the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Greenwich Collieries No. 2 Mine is operated and managed by Rochester & Pittsburgh Coal Company.

2. In 1979, the Mine Safety and Health Administration (MSHA) of the United States Department of Labor notified Leonard Edwards, a miner at such mine, that his X-ray report was positive for pneumoconiosis.

3. In April, 1985, due to a layoff at the mine, there was a realignment of the work force. Edwards, a shear operator, was scheduled to be transferred from Greenwich South Mine to Greenwich North Mine. He requested that he remain at the South Mine and was reclassified as a general laborer at the South Mine with a reduction in hourly pay from $14.41 to $13.31. When he

learned of the pay reduction, Edwards produced the 1979 MSHA letter, and mine management restored his pay to $14.41 per hour. Both Edwards and mine management apparently asssumed that Edwards was a Part 90 (Title 30, C.F.R.) miner in April, 1985.

4. However, Leonard Edwards did not exercise his Part 90 option until March 1, 1988, when he signed a "Notice of Exercise of Option" form and mailed it to MSHA.

5. MSHA received Edwards' signed form on March 3, and notified Rochester & Pittsburgh Coal Company of Edwards' status as a Part 90 miner in a letter received by the company on March 14. The letter stated, inter alia: "This letter is to inform you that the miner named above has exercised the option" and that "Part 90 requires that each Part 90 miner be compensated at not less than the regular rate of pay received by that miner immediately before exercising his or her option, or if ever transferred, at not less than the regular rate of pay immediately before the transfer."

6. At least as early as December, 1987, mine management knew that Edwards had not yet exercised his option as a Part 90 miner.

7. Edwards received MSHA's notification of his Part 90 status on March 12 and on March 14, his next work day, he told his foreman that he was exercising his option to work in a less dusty part of the mine. His foreman told him that his wages would probably be reduced if he transferred to a less dusty area. Edwards transferred March 14 and on March 15 his pay rate was reduced from $15.81 to $14.78 per hour.

8. After investigating Edwards' complaint of a pay reduction, MSHA issued Citation No. 2879240 on April 21, 1988.

DISCUSSION WITH FURTHER FINDINGS

Edwards exercised his option under Part 90, 30 C.F.R. on March 1, 1988, by mailing a signed "Notice of Exercise of Option" form to MSHA. MSHA acknowledged his status as a Part 90 miner by a notification letter received by Rochcester & Pittsburgh Coal Company on March 14 and received by Edwards on March 12.

On March 14, Edwards told his foreman that he was exercising his option to work in a less dusty part of the mine. His foreman told him that his wages would probably be cut if he transferred to a less dusty area. Edwards transferred to a less dusty area on March 14 and his wages were cut the next day, from $15.81 to $14.78 an hour.

His pay rate immediately before he mailed the Exercise of Option form on March 1, 1988, was $15.81 an hour and he was

receiving that rate the day (March 14) he told his foreman he was exercising his option to work in a less dusty area.

Rochester & Pittsburgh Coal Company defends Edwards' pay cut on the ground that it was done to correct a pay error made back in April, 1985. It offered some testimony that the decision to cut his pay to $14.78 an hour was made "on the 10th or 11th of March" in 1988 (Tr. 115).

Section 90.3 of the regulations provides:

> (a) Any miner employed at an underground coal mine or at a surface work area of an underground coal mine who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis based on a chest X-ray, read and classified in the manner prescribed by the Secretary of Health and Human Services, or based on other medical examinations shall be afforded the option to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continously maintained at or below 1.0 milligrams per cubic meter of air. Each of these miners shall be notified in writing of eligibility to exercise the option.
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> * * *
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> (d) The option to work in a low dust area of the mine may be exercised for the first time by any miner * * * by signing and dating the Exercise of Option Form and mailing the form to the Chief, Division of Health, Coal Mine Safety and Health, 4015 Wilson Boulevard, Arlington, Virginia 22203.
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> (e) The option to work in a low dust area of the mine may be re-exercised by any miner * * * by sending a written request to the Chief, Division of Health, Coal Mine Safety and Health, MSHA, 4015 Wilson Boulevard, Arlington, Virginia 22203. The request should include the name and address of the mine and operator where the miner is employed.
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> (f) No operator shall require from a miner a copy of the medical information received from the Secretary or Secretary of Health and Human Services.

Section 90.103(a) provides:

> (a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the option under 90.3 (Part 90 option; notice of eligibility; exercise of option).

Section 90.2 defines a "Part 90 miner" as "a miner...

who has exercised the option under ... 90.3...."

In Matola v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir.1981), the court held that "the regular rate of pay is the dollar rate -- the rate at which the miner was actually remunerated for the work he did -- irrespective of his job classification." In Mullins v. Andrus, 664 F.2d 297, 305, 310 (D.C.Cir.1980), the court rejected an interpretation that "a transferring miner is entitled to receive the rate of pay to which he had a right immediately prior to transfer" and held that "the phrase "regular rate of pay' ... means the rate at which the transferring miner was actually and regularly compensated when the transfer occurred."

I hold that, when a miner becomes a Part 90 miner the operator may not go back several years from that date to change the miner's pay rate to one the operator decides the miner "should have been" receiving immediately before he became a Part 90 miner. To permit such retroactive changes would have a chilling effect on the exercise of Part 90 rights. Rochester & Pittsburgh Coal Company is bound by the pay rate that Leonard Edwards was actually and regularly receiving immediately before his exercise of the Part 90 option.

Rochester & Pittsburgh Coal Company contends that Edwards did not become a Part 90 miner until the company received MSHA's notice of his exercise of the Part 90 option, on March 14. However, the regulations, 90.3(d), provide that "the option to work in a low dust area of the mine may be exercised for the first time...by signing and dating the Exercise of Option Form and mailing the form [to MSHA]." Edwards signed and mailed the required form on March 1, 1988. It was received by MSHA on March 3. He became a Part 90 miner on March 1, 1988, and effective that date he was protected against a reduction of the pay rate he was regularly receiving immediately before March 1.

Thus, for the purpose of determining when a Part 90 miner's pay rate becomes protected against reduction, the effective date is the date the miner mails a signed "Exercise of Option" form to MSHA under 90.3(d). However, for the different purpose of determining when liability for a civil penalty occurs, I hold that a violation subject to a civil penalty can occur only after the operator receives notice that the miner is a Part 90 miner. If an operator reduces a miner's pay rate after the miner becomes a Part 90 miner but before the operator receives MSHA's notice of the miner's Part 90 status, the operator has a reasonable opportunity to revoke the pay cut and restore the pay to the rate the miner had been receiving immediately before exercising the Part 90 option. Failure to restore the miner's pay to the correct rate after receiving MHSA's notice of the Part 90 status would be a constructive pay cut in violation of 90.103(a) and subject to a civil penalty.

In this case, the pay cut was direct, and not constructive. Rochester & Pittsburgh Coal Company received MHSA's notice of Edwards' Part 90 status on March 14, 1988. It violated 90.103(a) by reducing his pay rate on March 15.

Considering the criteria for a civil penalty in 110(i) of the Act, I find that the Secretary's proposed civil penalty of $78 for this violation is appropriate.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Rochester & Pittsburgh Coal Company violated 30 C.F.R. 90.103(a) as alleged in Citation No. 2879240.

3. Leonard Edwards is entitled to be restored to the pay rate he received immediately before his exercise of the Part 90 option on March 1, 1988, plus any pay increases he would have received thereafter in the employment, and to receive back pay (the difference between the pay rate he received and the rate he should have been paid) retroactive to March 15, 1988, with interest at the rate or rates published by the Internal Revenue Service for the period involved.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2879240 is AFFIRMED.

2. Rochester & Pittsburgh Coal Company shall pay a civil penalty or $78 within 30 days of this Decision.

William Fauver
Administrative Law Judge