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LOCAL UNION 2333, UMWA V. RANGER FUEL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

LOCAL UNION 2333, DISTRICT 29, UNITED MINE WORKERS OF AMERICA (UMWA), PETITIONER	COMPENSATION PROCEEDING
v.	Docket No. WEVA 86-439-C
RANGER FUEL CORPORATION, RESPONDENT	Beckley No. 2 Mine

DECISION

Appearances: Webster J. Arceneaux, III, Esq., McIntyre, Haviland & Jordan, Charleston, West Virginia and Joyce Hanula, United Mine Workers of America, Washington, D.C. on behalf of the Petitioner;
John T. Scott, III, Esq., Crowell & Moring, Washington, D.C. on behalf of the Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission for further proceedings consistent with its decision issued May 13, 1988. The case was initiated by the United Mine Workers of America (UMWA) under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to obtain compensation from the Ranger Fuel Corporation (Ranger). (Footnote 1) The UMWA seeks compensation pursuant to the third sentence of section 111 for an idling of miners on May 30 and 31, 1986, following the issuance by the Secretary of Labor of "imminent danger" Withdrawal Order No. 2577281, issued pursuant to section 107(a) of the Act. The issues now before me are whether the underlying withdrawal order is "final" within the meaning of section 111 and, if so, whether that order was issued for a violation of a mandatory health or safety standard, i.e. whether there was a causal nexus between the fact of violation and the withdrawal order.

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The UMWA maintains that the Section 107(a) withdrawal order that idled the miners had become final upon Ranger's failure to contest it within the 30 day time period set forth in section 107(e)(1) of the Act. (Footnote 2) Ranger admits that it did not apply for review of the order under those statutory provisions and acknowledges that the order was therefor "final" between the Secretary of Labor and itself. It argues however that the order is not "final" as between itself and the UMWA and that issue can now be lititgated in this proceeding under section 111 of the Act.

Section 111 of the Act does not in itself however provide any specific right of action or proceeding to challenge the section 107(a) withdrawal order. To determine whether such an order is "final" within the meaning of section 111, reference must therefore be made to the specific provisions of the Act authorizing the form of action over which the Commission may judicially preside. See Kaiser Coal Corporation v. Secretary and UMWA, Docket WEST 88Ä131ÄR, decided September 27, 1988. In this case, since it involves an order issued under Section 107(a) of the Act, the relevant provisions are found in Section 107(e) of the Act. Since no application for review of the order herein was filed in any such proceeding that order is now "final" within the meaning of Section 111.

Moreover the Commission, by its earlier ruling in this case (10 FMSHRC 612) would appear to preclude litigation of the underlying order. In dealing with the issue of whether Ranger's payment of the civil penalty proposed for the underlying violation of 30 C.F.R. 75.329 and its failure to have contested the citation charging that violation precluded it from contesting the violation in this compensation proceeding, the Commission stated as follows:

> In addition, we agree with the Secretary that allowing an operator to challenge in a compensation proceeding the fact of violation despite having paid the relevant civil penalty would improperly place miners and their representatives in a prosecutorial role. The Secretary, as enforcer and prosecutor of the Mine Act, is a party to a section 105 enforcement proceeding but not to a section 111 compensation proceeding. [citations omitted] If an operator were permitted to make the kind of challenge advocated by Ranger, miners and their representatives would be required to perform functions properly resting within the Secretary's domain in order to prove the underlying violation or the validity of the citation or order in which the allegation of violation was contained. Given the unified scheme of the Mine Act, we find unconvincing Ranger's assertion that it would not be inconsistent to allow it to challenge the fact of violation in a compensation proceeding even though it chose not to contest the allegation of violation in an enforcement proceeding.

The situation herein is closely analagous and the underlying principle the same. Clearly the Commission would find it inappropriate to "place miners and their representatives in a prosecutorial role" to litigate in a section 111 compensation proceeding what, in essence, is the validity of the "imminent danger" withdrawal order. I am therefore constrained to find that Withdrawal Order No. 2577281 became final upon Ranger's failure to apply for review or contest that order within the time set forth in section 107(e)(1) of the Act and that the order and the underlying issue of whether that order was based upon an "imminent danger" cannot now be contested in this compensation proceeding under section 111 of the Act. The assertion of "imminent danger" contained in the order must accordingly be regarded as true. See Old Ben Coal Co., 7 FMSHRC 205 (1985).

The second issue before me is whether a causal nexus existed between the violation of a mandatory standard and the "imminent danger" order. In its earlier decision in this case the Commission held that section 104(a) Citation No. 2577283, which charged a violation of a mandatory standard, was final and that it could not now be relitigated. 10 FMSHRC at 619. Accordingly in the context of this case the assertions of violation in that citation must be accepted as true. Old Ben Coal Co., supra. Thus it is established and proven that on May 29, 1986, at the Ranger Beckley No. 2 Mine "the bleeder system failed to function adequately to carry away an explosive mixture of methane in the tail entries of the 7 East Longwall Section (013Ä0) starting at survey station 3824 in the No. 3 entry and extending inby for at least 500 feet". (See Petitioner's Exhibit No. 2)

The specific issue remaining is whether these conditions establishing a violation of the mandatory standard were sufficiently related to the existence of the "explosive mixture of methane gas in excess of five percent ... present in the Seven East 0Ä13Ä0 Section in the No. 3 entry side of the longwall beginning at Spad No. 3824 and extending inby" [as charged in the section 107(a) withdrawal order] so as to constitute the required causal nexus. As previously noted, in evaluating the evidence in this regard the allegations in the withdrawal order must also be accepted as true. Old Ben Coal Co., supra. I therefore disregard any evidence conflicting with the relevant allegations of fact set forth in Citation No. 2577283 and Order No. 2577281.

Given these established facts and considering the credible testimony of the issuing inspector, William Uhl, it is clear that the required causal nexus did in fact exist. (Footnote 3) Inspector Uhl testified that while conducting his inspection on May 29, 1986, he heard what he considered to be a major roof fall in the gob area and opined that this was the underlying cause for the excess methane cited in the withdrawal order. Uhl also testified however that these methane levels which led to the issuance of the withdrawal order would not have been present had the cited bleeder system been working properly. According to the expert testimony of Inspector Uhl then, the inadequate bleeder system was also a factor in causing the excess methane charged in the withdrawal order.

Ranger Senior Safety Supervisor, Ken Purdue, disagreed with Uhl. He testified that the amount of air in the bleeder system was adequate under MSHA standards and that the inundation of methane in this case was so exceptional and abnormal as to be beyond the capabilities of even an adequate bleeder system.

I find however that the testimony of Inspector Uhl is the more credible. According to Uhl if the bleeder system was adequate it would have diluted the excess methane and rendered it harmless. Indeed it may reasonably be inferred that if the bleeder system does not perform the very function it is designed for, then it is not an adequate system. Accordingly I find that the cited violative condition i.e. an inadequate bleeder system, was a causal factor for the existence of the explosive mixture of methane found and cited by Inspector Uhl in the withdrawal order at bar. Under the circumstances the requisite causal nexus has been established.

Accordingly the miners listed in the Joint Stipulation (incorporated by reference hereto) are entitled to compensation equal to the wages which would have been paid to them (set forth in the Joint Stipulation) for work they were scheduled to perform on May 30Ä31, 1986, but were unable to because they were idled by Withdrawal Order 2577281.

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ORDER

Ranger Fuel Corporation is hereby directed to pay compensation in accordance with the Joint Stipulation submitted in this case and incorporated by reference hereto in the stated amounts and to the designated miners, plus interest calculated in accordance with the formula set forth in Secretary v. Arkansas Carbona Co., and Walker, 5 FMSHRC 2042 (1986), within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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Footnote starts here:-

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1 Section 111 provides in part as follows:

> [1] 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 their shift. [2] 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. [3] 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....

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2 Section 107(e)(1) provides as follows:

> Any operator notified of an order under this section or any representative of miners notified of the issuance, modication, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forth with afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without

> regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

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3 Although the subject citation was issued on June 3, 1986, it is clear that it was based upon conditions existing as early as May 29, 1986. The issuance was delayed by the analysis of an air sample which had been collected on May 29, 1986.