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UMWA V. KAISER COAL CORP.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

LOCAL UNION 9958, DISTRICT 22,
UNITED MINE WORKERS OF
AMERICA,
COMPLAINANT

COMPENSATION PROCEEDING
Docket No. WEST 87-186-C
Sunnyside No. 1 Mine

v.

KAISER COAL CORPORATION,
RESPONDENT

DECISION

Appearances: Brad Rayson, Esq., United Mine Workers of America,
Denver, Colorado, for Complainant;
John A. Macleod, Esq., Crowell & Moring, Washington,
D.C., for Respondent.

Before: Judge Cetti

Introduction

The United Mine Workers of America, Local 9958, District 22, (UMWA) pursuant to Section 111 of the Mine Safety and Health Act 30 U.S.C. 821, (Mine Act), filed this action seeking one week compensation for miners at Kaiser Coal Corporation's (Kaiser's) Sunnyside No. 1 Mine, for the period of time in 1987 during which they were idled, allegedly as a result of a Section 104(d)(1) withdrawal order issued on March 27, 1987 (and subsequently vacated), by the Mine Safety and Health Administration (MSHA).

Issue

The primary issues are whether all or only some of the miners are entitled to compensation and the period of time for which the miners are entitled to compensation.

Conclusion

After careful consideration of the facts and the law I have determined that (1) all the miners working on the 21st left and 20th left longwall section were idled as a result of the Section 104(d)(1) Order issued on March 27, 1987; (2) that they are entitled to up to a shift and a half of compensation at their

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regular rate of pay under the first two sentences (Footnote 1) of Section 111 of the Mine Act but are not entitled to a week's compensation under the third sentence (Footnote 2) of Section 111 because the Order never became final.

STIPULATIONS

At the hearing the parties entered into stipulations as follows:

1. A closure order was issued under Section 104(d)(1) of the Mine Act at the Sunnyside mine at 8:00 a.m. on March 27, 1987 (Ex. 1).

2. All miners working the day shift at the Sunnyside mine on March 27, 1987 were paid for the balance of the shift. The shifts at the Sunnyside mine run from 7:00 a.m. to 3:00 p.m.; 2:00 p.m. to 10:00 p.m. and midnight to 8:00 a.m.

3. Kaiser contested the closure order under Section 105 of the Mine Act. The case was docketed as WEST 87Ä116ÄR and

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assigned to Administrative Law Judge Melick. The United Mine Workers of America intervened in that proceeding.

4. The closure order was modified by MSHA a number of times to allow mining to continue under specified conditions while settlement negotiations in the contest proceeding were ensuing (Ex. 2). The modifications were issued pursuant to negotiations between Kaiser and MSHA.

5. The contest proceeding was ultimately settled by Kaiser and MSHA by a Memorandum of Understanding dated April 24, 1987. Paragraph four of the Memorandum of Understanding states in part, "Upon the granting of the petition for modification or the completion of the development of the 21st left section which ever occurs first, MSHA shall vacate the order under contest in Docket No. WEST 87Ä116ÄR. Until the order is vacated it shall remain in effect subject to the terms of the modification issued by MSHA on April 24, 1987, incorporating the requirements set forth in attachment A to this agreement."

6. Kaiser sought leave to withdraw its notice of contest on April 29, 1987. Administrative Law Judge Melick granted leave and dismissed the proceeding with prejudice (Ex. 3).

7. The United Mine Workers of America did not seek Commission review of Administrative Law Judge Melick's dismissal of the contest proceeding.

8. MSHA subsequently sought to assess a civil penalty against Kaiser based on the closure order (Ex. 4).

9. Kaiser contested the imposition of a civil penalty, contending before Administrative Law Judge Merlin in WEST 87Ä228, that since the order was to be vacated, there was no violation to which any civil penalty could attach (Ex. 5).

10. By Order dated October 19, 1987, Administrative Law Judge Merlin dismissed the civil penalty proceeding (Ex. 6).

11. The UMWA did not seek Commission review of any of MSHA's Orders modifying that closure order of March 27, 1987.

12. In accordance with the settlement agreement, the closure order issued March 27, 1987 was vacated by MSHA. The action vacating the Order was taken by MSHA inspector Bruce Andrews at 8:45 a.m. on February 16, 1987 (Ex. 15).

13. April 1st (1987) was a contractual holiday and the miners were paid for that day.

Statement of the Case

Kaiser at its Sunnyside No. 1 Mine was developing the 21st left section in the mine to accommodate longwall mining. In this development Kaiser was driving only two entries and was using one of these entries as both a belt haulageway and as an air course. On March 27, 1987, at 8:00 a.m., MSHA Inspector Larry Rameriz issued a Section 104(d)(1) Order citing an alleged violation of 30 C.F.R. 75.326 because "[t]he belt haulage entry in the 21st left section was not separated and was being used as a [sic] air course" (Exhibit 1). The Order did not expressly require any miners to be withdrawn from the 21st left section or from any other part of the mine. The Order by its terms applied only to the 21st left conveyor belt. However, since that conveyor belt was the only economically feasible means to transport the coal mined in the 21st left section to the surface, the Order did effectively preclude further development of that section. Consequently, after the Order was issued Kaiser withdrew all the miners working on the section and directed them to complete their shifts working on the surface.

The only other section that was being mined at the time of inspection was the adjacent 20th left section which was being mined with longwall equipment. When the March 27, 1987 Order was issued Kaiser withdrew the miners on the 20th left longwall section and directed them to complete their shifts on the surface. Thus, all miners working the day shift in both sections completed their shifts working on the surface and at the end of the day shift the miners working on both sections were told to not report back to work until the mine reopened.

When the miners working the afternoon shift reported for work on the day the withdrawal order was issued, Kaiser also directed the miners working on the 21st left and the 20th left longwall section to work on the surface. No one went underground. After working four hours Kaiser sent the miners on the afternoon shift home with the same instruction it gave the miners working on the day shift. Kaiser told them not to report back to work until the mine reopened.

The miner working on the 21st left and 20th left were idled until they returned to work when the mine reopened at 6:23 p.m. on April 7, 1987.

The only reason given to the miners for their idlement was the action taken by MSHA on March 27, 1987 when it issued the 104(d)(1) withdrawal order. The testimony presented indicates that prior to the issuance of the withdrawal order both sections were working 3 shifts a day, six days a week and there had been no discussion by the miner's supervisors about curtailing operations. They had in fact been talk about expanding the work forces and claimant asserts that this in fact was done after the mine resumed operations.

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Kaiser contends that any compensation awarded under Section 111 must be limited to those miners who were working on its 21st left section. It points out that this withdrawal order by its terms applied only to the 21st left section. Kaiser contends that its withdrawal of miners working on the 20th left longwall section was an independent business decision. In support of its contention it offered into evidence the transcribed testimony of former Kaiser President, Charles McNeil, given during the contest proceeding in Docket No. WEST 87Ä116ÄR before Judge Melick. Mr. McNeil on direct examination by Kaiser's counsel John A. Mcleod, starting on page 108, line 14 of the transcript, testified as follows:

Q. Now, let me call your attention to the Sunnyside mine, Mr. McNeil. How many active sections do you have in the Sunnyside mine?

A. Two sections, a longwall section a continuous miner development section.

Q. What is the designation of the longwall section?

A. Twentieth left.

Q. Twentieth left?

A. Hm-hmm.

Q. And that is on retreat, is it not?

A. Yes, it is.

Q. Taking out the longwall panel?

A. Yes, it is.

Q. What is the designation of the development section?

A. That is 21st left.

Q. What's the relative proximity of that section to the longwall section?

A. It is one panel down from the 20th left longwall panel. And the continuous miner development section, 21st left, is developing the adjoining panel for the next longwall panel.

Q. When you say it's developing for the next longwall panel, does that mean it's framing out the panel?

A. Yes. It's blocking out a block of coal that will be roughly 500 foot face and about 5,000 foot long. Roughly a mile long.

Q. As it's doing its development work, what type of mining equipment is utilized?

A. We have a continuous miner with a shuttle car and a rough boulder and then, also, belting in that entry, in those sections.

Q. It's a continuous mining operation, driving two entries?

A. Yes.

Q. All right. Is coal actually mined in the process of that development effort?

A. Yes, it is.

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Q. Is there a relationship, a timing relationship, between the work being done on the development section and the work being done in the longwall section?

A. Yes, we're very critical, right now, in our development as far as the fact that we have to retreat-- for every one foot of retreat we have to advance our development section at 1.7 feet, otherwise we will be at the point where the longwall will be completed on its panel and we will have not completed development for the next panel and, therefore, would not be able to move the longwall and the mine would be shut down while we completed development for that next panel on 21st left.

Q. What do your present projections show in terms of when the mining of the longwall panel would be completed?

A. We have roughly 86 days left on the longwall panel. And, right now, assuming we can maintain the productivity we are projecting them, the development panel, we have 85 days to get it completed.

Q. Mr. McNeil, you are familiar with the Order that's involved in this case?

A. Yes.

Q. Are you aware, sir, that by its terms, it closes down the 21st left section?

A. Yes.

Q. What is the reason that the 20th left section is closed down as well?

A. Right now it's a case of, as I mentioned, we either shut down now or shut down later. If we don't keep the development sections advanced at the rate that is of that ratio I just mentioned, that the longwall panel will be shut down later. We do have adequate inventory, right now, in our stockpile, where we can make our shipments during this period of time. And later on we will not have that inventory so it's a decision that we're better off to take the shut down now because it will occur anyway if you're not in the development process.

Q. Did the timing of miner's vacation enter into that decision at all?

A. Yes, we're trying to structure that around our longwall move would coincide with miners' vacation. And the extent you run the longwall, again, without continuous development on the development section, we will be in a position where we will not be able to move over miners' vacation.

Q. What is the current bank account that Kaiser enjoys?

A. Roughly, within Kaiser Coal, we have roughly \$3 million.

Q. And when you're in a situation, with Sunnyside shut down, as you have been this past week, what are the costs associated with operating the mine?

A. Right now, in our idled mode, we're running at a cost of about \$200,000 a week, of the continued monitoring of the mine from the fire boxing standpoint, the pumping of the mine, the ventilation of the mine, and continuing of our salaried work force.

Q. Mr. McNeil, have you given any thought to the implications of a continuation of the Closure Order that we're talking about here in terms of Kaiser's legal status?

A. Yes, the main concern, as I see it, would be the fact that we do run out of cash at a point that in two of three months it forced Kaiser Coal into the Chapter 7, which would shut the mines down and the Company would be liquidated, which would ultimately cause the liquidation of Kaiser Steel.

THE REQUIRED NEXUS WAS ESTABLISHED

The evidence presented demonstrates a sufficient causal relationship between the issuance of the withdrawal order and the idlement of the miners working on the 20th left longwall section (as well as on the 21st left section) to constitute the causal nexus required to entitle the miners to compensation under the first two sentences of Section 111.

Furthermore, it appears to me that the essential question is whether Kaiser would have shut down the 20th left section during the week in question but for the issuance of the March 27, 1988 withdrawal order. The evidence clearly demonstrates that the work on both sections of mine would have continued through the period of idlement in question but for the 104(d)(1) withdrawal order.

THE WITHDRAWAL ORDER WAS VACATED AND NEVER BECAME FINAL

Kaiser is correct in its contention that it challenged the validity of the withdrawal order and it never became a final Order. On March 27, 1987, the same day that the Order was issued, Kaiser filed a Notice of Contest and Request for Expedited Hearing contending that the Order was improper because the safety standard cited, 30 C.F.R. 75.326, was expressly inapplicable to Kaiser's Sunnyside No. 1 Mine. After notice to the parties there was a hearing on April 7, 1987, before the Commission's Administrative Law Judge Melick in Docket No. WE 87Ä116ÄR. The UMWA, represented by Mr. Earl Pfeffer, intervened and was a party to that proceeding. There were settlement discussions and negotiations. By agreement of the Order was modified on April 7, 1987, to permit the 21st left conveyor belt to resume operations subject to a number of conditions.

On April 24, 1987, Kaiser and MSHA entered into an agreement to settle the contest proceeding. One aspect of that settlement was the express understanding that the Order would be vacated by MSHA either when the 20th left section, the longwall, was mined out or when Kaiser's then pending Petition for Modification was granted, whichever occurred first. Kaiser contends that based upon MSHA's commitment to vacate the Order, Kaiser filed a motion to withdraw its Notice of Contest. Without objection by the UMWA or any other party Judge Melick granted that motion and dismissed the proceeding with prejudice on April 29, 1987. (Footnote 3) The parties stipulated that the withdrawal order was vacated by MSHA on February 16, 1988 (Ex. 15).

DISCUSSION

It is a fundamental principle of statutory construction that courts must start with the plain language of the statute. *Rubin v. United States*, 449 U.S. 424, 430 (1981). Where Congress has addressed an issue, "the plain meaning of the statute decides the issue presented." *FERC v. Martin Exploration Management Co.*, 108 S.Ct. 1765, 1768 (1988) (citations omitted).

In this case, Congress has spoken directly to the issue. In enacting Section 111, it established a graduated scheme of compensation entitlement triggered incrementally by the gravity of an operator's conduct. See *UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317. Thus, the first two sentences of Section 111 provide that miners who are idled by an order are entitled to full compensation "for the period they are idled, but not for more than the balance of [their] shift . . . [or for] more than four hours of [the next working] shift." (Emphasis added.) The third sentence, however, is expressly predicated upon the existence of an actual violation; that is, it applies only where, after an opportunity for a public hearing, the closure order is "final."

Miners are to be paid up to a shift and a half by an operator even where the operator is innocent of wrongdoing; to receive a week's compensation by the operator, however, requires a showing of culpability on the operator's part -- a showing, after he had an opportunity to defend himself at a public hearing, that he had committed a violation which caused the miners to be idled. The requirement of a "final order" after an "opportunity for a public hearing" plainly confirms Congress' intent to limit the availability of third sentence compensation. As a Third Circuit held in *Rushton Mining Company v. Morton*, 520 F.2d 716, 720 (3rd Cir.1975):

[I]t is clear that in drafting 820(a) [the predecessor to Section 111 of the Mine Act] Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, that in [the third sentence] Congress intended to compensate miners only where the order is ultimately upheld, but that in [the first two sentences] . . . Congress intended to compensate miners even where the order is ultimately vacated.

REIMBURSEMENT OF COST, EXTRA EXPENSE
AND ATTORNEY'S FEES ARE DENIED

Kaiser contends that the UMWA should be required to pay Kaiser its reasonable expenses, including attorney's fees,

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"occasioned by UMWA's misconduct." This contention is rejected. Section 111 does not provide for recovery of costs or attorney's fees in compensation proceedings and furthermore on review of the record as a whole it is determined that it would be unjust in this case to award Kaiser such expenses under Federal Rule 37. Kaiser Motion for reimbursement is denied.

Likewise Kaiser's motion to dismiss UMWA's claim for lack of prosecution and "gross noncompliance with Commission's rules is denied.

A third motion taken under submission was Kaiser's motion to dismiss UMWA's claim for a week's compensation under the third sentence of Section 111 of the Mine Act. This motion is moot in view of my findings and conclusion of law that the miners are entitled to compensation only under the first two sentences of Section 111.

The parties agreed that it would not be necessary to indicate in the first instance individual amounts for individual miners if the rulings were sufficiently specific to indicate in general terms the miners working on which shifts, and in which section or sections of the mine are entitled to compensation. If there are disagreements over whether individual miners might have been scheduled to work, jurisdiction is reserved to resolve those matters.

It is concluded that all the miners working both day and swing shift on the 21st left and 20th left longwall section of Kaiser's Sunnyside No. Mine were idled as a result of the Section 104(d)(1) Order (Order No. 3043010) issued March 27, 1987; said miners are entitled to compensation at their regular rate of pay for the period of time provided in the first two sentences of Section 111 of the Mine Act.

ORDER

Kaiser Coal Corporation, if it has not already done so, is directed to pay compensation to the miners working the day and swing shift on the 20th left and 21st left sections of Kaiser's Sunnyside No. Mine, at the miners regular rate of pay for the period of their idlement by Withdrawal Order No. 3043010 not to exceed the period of time provided by the first two sentences of Section 111 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.

August F. Cetti
Administrative Law Judge

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Footnotes starts here :-

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1 The first two sentences states:

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 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.

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2 The third sentence of Section 111 provides:

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.

(emphasis added)

~Footnote_three

3 Kaiser also points out that Chief Administrative Law Judge Merlin on October 19, 1987, dismissed the related civil penalty proceeding in Docket No. WEST 87Å228 on the grounds that MSHA's decision to vacate the Order eliminated any violation for which a penalty could be assessed.