FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 4, 1995

UNITED STEELWORKERS OF AMERICA ON BEHALF OF LOCAL 5024, Complainant	:	COMPENSATION PROCEEDING
	:	
	:	Docket No. LAKE 94-614-CM
v.	:	White Pine Mine
	:	
COPPER RANGE COMPANY, Respondent	:	
	:	

SUMMARY DECISION

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a complaint filed by the United Steelworkers of America (USWA), Local 5024, against the respondent pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, seeking compensation for its member miners employed at the White Pine Mine who were allegedly idled by a section 103(k) order issued by MSHA Inspector William Carlson at 12:30 p.m., on May 11, 1994. The order, which did not allege that the operator had violated any mandatory safety standards, stated as follows:

> A mine fire was detected at 7:05 a.m., EST, in the area of 25/35 beltline (coordinates 23-G, 24-G & 23-H). All personnel have been evacuated from the underground areas in the mine. This order prohibits re-entry into underground areas until all have been checked for mine gases and/or unsafe ground, and other unsafe conditions in the fire area.

The complainant asserts that as a result of this order, the miners on the first shift on May 11, 1994, are entitled to compensation pursuant to the first sentence of section 111 of the Act which states 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.

Procedurally, this case is presently before me upon cross-motions for summary decision pursuant to Commission Rule 67, 29 C.F.R. ' 2700.67. Both parties assure me that there is no genuine issue as to any material fact and that this matter is ripe for summary decision.

STIPULATIONS

The parties have stipulated to the pertinent facts as follows:

1. At about 7:05 a.m., Security was notified of smoke observed underground in the area of 25 and 35 belt line. An evacuation alarm was immediately sounded by Security for the Northeast Mine.

2. At 7:10 a.m., the evacuation alarm was sounded for the Southwest Mine B Section.

3. At 7:30 a.m., the evacuation alarm was sounded to evacuate all Southwest Mine personnel to the surface. No smoke had been observed in the Southwest section of the mine at that time.

4. At 7:50 a.m., two mine rescue members were dispatched to Southwest Shaft to check for gases.

5. By 8:00 a.m., all personnel had been evacuated and were accounted for. Employees from day shift were either given additional training or were given work to do on the surface.

6. At 8:45 a.m., smoke was observed south of C Section by mine rescue team members.

7. At 8:50 a.m., the Mine Safety and Health Administration ("MSHA") office in Marquette was contacted by telephone and given a report of the information available at that time.

8. At about 11:30 a.m., the Company management made the decision to cease operations until the problem could be corrected. Employees were notified at that time to go home and that they would be notified when they could return to work. All employees received at least four hours of pay pursuant to the Collective Bargaining Agreement for "show-up pay" for May 11, 1994.

9. At 12:30 p.m., on May 11, 1994, MSHA Inspector William Carlson issued a control order pursuant to section 103(k) of the Act. At the time the 103(k) order was issued, all employees had been evacuated from underground, operations suspended, and the employees sent home until further notice. No employees were working in the area affected by the 103(k) order.

ISSUE

The parties also agree that the only issue to be resolved is whether miners who are voluntarily withdrawn from a working area because of a hazard against which a control order is subsequently written are entitled to pay under section 111 of the Act.

DISCUSSION, FINDINGS, AND CONCLUSIONS

Both parties rely on Local Union 1261, District 22 UMWA v. Consolidation Coal Co., 11 FMSHRC 1609 (1989), aff'd sub nom. Local Union 1261 v. FMSHRC, 917 F.2d 42 (D.C. Cir. 1990). In that case, the primary issue that concerns us here was whether miners are entitled to compensation under the first sentence of section 111 of the Act, ("shift compensation"), when the mine operator has voluntarily closed the mine for safety reasons prior to the issuance of the section 103(k) control order that is later written by MSHA.

As here, once the control order was written, no miner could enter the mine nor could mining activities resume until MSHA modified or terminated the order.

The Commission in Local Union 1261, 11 FMSHRC at 1613-14 held:

> The meaning of the first [sentence] of section 111 is clear. If a specified withdrawal order has been issued, "all miners working during the shift when such order was issued who are idled by such order" are entitled to compensation for the remainder of their shift. (Emphasis added). . . . The language is in no wise qualified.
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> Here, the preconditions for entitlement to shift compensation were not met. At the time the order was issued, no miners were working nor had they been since . . . Consol had voluntarily withdrawn all miners in order to guarantee their safety. Therefore, none of those for whom compensation is claimed were "working during the shift when . . . [the] order was issued." . . . We therefore hold that the claimants, not having met these plainly stated prerequisites, were not eligible to be compensated.

The Court of Appeals, on review, held that the Commission's interpretation of the phrase "working during the shift," to mean that miners must be actually working when the control order issues was a reasonable one. Local Union 1261, 917 F.2d at 47.

The Commission, in their decision, further rationalized that:

> Apart from the plain wording of the statute, there are also practical considerations. A statute should not be construed in a way that is foreign to common sense or its legislative purpose. Sutherland Statutory Construction '' 45.09, 45.12 (4th ed. 1985). As discussed, the Mine Act involves a balancing of the interests of mine operators, and miners, with safety being the preeminent concern. Section 2 of the Mine Act specifies at the outset that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource -- the miner," and section 2(e) adds that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." The Mine Act was not intended to remove from an operator the right to withdraw miners from a mine for safety reasons. While MSHA has the authority to order such withdrawal, it does not have that power exclusively.
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> Thus, apart from the fact that no miners were present in the mine when the MSHA closure order was issued, it is apparent that the safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the Mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here. [Footnote omitted].
>
> The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the Senate Committee setting forth the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible

> inhibition of the inspector in the issuance of closure orders." Leg. Hist. at 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners.

11 FMSHRC at 1614-15

It thus would appear that the second section of the Commission's Local Union 1261 case contains the rule of the case as well as the Commission's rationale for so holding. It also appears to be compelling precedent for deciding the instant matter adversely to the complainant.

The USWA, however, relies on Part III of the same case to urge the opposite result. Under Part III, which begins at 11 FMSHRC 1615, the Commission states that they do not disavow earlier precedent which held that:

> [A] miner who has been previously withdrawn from a mine can still be "idled" by a subsequently issued withdrawal order in the sense that the miner is barred by the order from returning to work and that miners so idled may be entitled to compensation.

11 FMSHRC at 1615.

But the Commission continued on and also stated that to be entitled to first sentence compensation, miners must also be "working during the shift" when the subject order was issued, and just two pages earlier, the majority had said that meant that miners must actually be working when the order is issued. In the instant case they were not.

The United States Court of Appeals for the D.C. Circuit concluding that the Commission was "less than forthcoming in dealing with [Commission] precedent," pointed out that the Commission's majority had focused on the words "working during the shift" in the first sentence of section 111 and had concluded that these words meant "actually working" when the control order issued, rather than "scheduled to work". Local Union 1261, 917 F2d at 45.

The court also agreed with the dissenting Commissioners that the majority had departed from the reasoning and result of Peabody Coal Co., 1 FMSHRC 1785 (1979), and had therefore effectively overruled that decision. In the earlier Peabody Coal case, the Commission had expressly rejected the operator's argument that the Mine Act provides first sentence compensation only for miners actually at work when a withdrawal order issues. Local Union 1261, 917 F2d at 46-47.

In the final analysis, the court noted that the word "working" can indeed mean "on-the-job in the mine," and although they disagreed that the Commissions's position was the only permissible interpretation, they did find that "[b]y attributing that meaning to section 111's first prescription, the Commission reasonably maintains that it is advancing the overriding mine safety aim of Congress." Local Union 1261, 917 F.2d at 47.

Accordingly, in my opinion, the stipulated facts of this case, as they relate to first sentence compensation under section 111 of the Mine Act are subject to the controlling precedent of the legal conclusions and the rule of law announced by the majority in Local Union 1261, District 22 UMWA v. Consolidation Coal Company, cited supra and affirmed by the D.C. Circuit Court of Appeals. I am bound to follow this clearly applicable Commission precedent.

In view of the foregoing, I conclude and find that the miners are not entitled to shift compensation because of the issuance of the 103(k) order. Accordingly, the respondent's Motion for Summary Decision is GRANTED, and the complaint for compensation is DISMISSED.

Roy J. Maurer
Administrative Law Judge

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