FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20001

May 4, 2006

UNITED MINE WORKERS OF AMERICA, LOCAL 1248,	:	COMPENSATION PROCEEDING
Complainant	:	Docket No. PENN 2002-24-C
v.	:	
MAPLE CREEK MINING, INC.,	:	Maple Creek Mine
Respondent	:	Mine ID 36-00970

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine. The complaint was later amended to assert claims by miners who worked at Maple Creek's preparation plant who also were allegedly idled by the same order. Respondent has moved for summary decision, and the UMWA has opposed the motion. As explained more fully below, the motion is granted.

The Issue to be Resolved

Miners typically are not paid if they do not work. MSHA enforcement actions that result in closing all or part of a mine can, therefore, have a significant economic impact on both the mine operator and any miners idled by the enforcement action. Section 111 of the Act provides limited relief to miners under certain conditions.[1] The first two sentences of the section provide

[1] Section 111 reads, in pertinent part:

> 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. 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

less than one shift's pay for miners idled by certain closure orders. That limited compensation is available regardless of the result of any review of such orders.

The third sentence of the section, upon which the instant claim is based, provides for up to one week's compensation for miners idled by orders entered under sections 104 or 107 of the Act, because of an operator's failure to comply with any mandatory health or safety standard, but only "*after all interested parties are given an opportunity for a public hearing, . . . and such order is final*." The complaint here seeks compensation for miners idled by Order No. 7082610, which was issued pursuant to section 104(d)(2) of the Act.

Maple Creek contends that Order No. 7082610 was later modified to a citation issued pursuant to section 104(a) in conjunction with settlement of a civil penalty proceeding and, consequently, that no compensation is available under the third sentence of section 111. The UMWA argues that compensation is due because the miners were, in fact, idled by the order and, since Maple Creek paid a civil penalty for the as-modified citation, its culpability for the alleged violation has been conclusively established. The issue presented by the motion is whether Order No. 7082610 is "final" within the meaning of section 111. For the reasons set forth below, I find that the order did not become final and grant Maple Creek's motion.

Facts

On August 28, 2001, at 11:00 a.m., an MSHA inspector observed hazardous roof conditions in Maple Creek's mine and issued Order No. 7082606, an "imminent danger" withdrawal order, pursuant to section 107(a) of the Act. The order required the withdrawal of miners from an area described as "The 6 West bleeder system from the No. 15 crosscut to No. 18 crosscut and the 7 West bleeder system from No. 34 crosscut to No. 35 crosscut." The same day, at 4:30 p.m., the inspector issued Order No. 7082610 pursuant to section 104(d)(2) of the Act, alleging a violation of 30 C.F.R. § 75.370(a)(1), which requires that a mine operator develop and follow an approved ventilation plan.[2] Maple Creek's ventilation plan had been amended on August 8, 2001, to lower action levels for methane concentrations from 4.5% to 4.0%, Maple Creek had failed to implement the change.

> they are idled, but not for more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled by 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. . . . [30 U.S.C. § 821].

[2] Copies of Order Nos. 7082606 and 7082610 are attached to the Complaint.

On March 27, 2002, MSHA issued proposed civil penalty assessments for various citations and orders issued to Maple Creek, including Order No. 7082610, for which a penalty of $3,500.00 was proposed. Maple Creek contested that and other proposed penalties on April 9, 2002. On May 22, 2002, the Secretary filed with the Commission a Petition for Assessment of Civil Penalties against Maple Creek, Commission Docket No. PENN 2002-132, which sought the imposition of civil penalties in the total amount of $59,550.00, for 19 alleged violations of the Secretary's regulations prescribing mandatory safety standards for underground coal mines.

The petition in PENN 2002-132 was served on Maple Creek and Local Union 1248 of the UMWA. The UMWA did not seek party status in that case. On December 12, 2002, the Secretary filed a Motion for Decision and Order Approving Settlement, which sought Commission approval of a settlement of all of the violations at issue.[3] As to Order No. 7082610, the motion described the proposed settlement as follows:

> Order No. 7082610 was issued on August 28, 2001 by CMI Anthony R. Guley, Jr. He cited a § 104(d)(2) violation of 30 C.F.R. § 75.370(a)(1) based upon his determination that Respondent was not in compliance with its ventilation plan. Respondent's examiners had detected methane in concentrations of up to 4.0% and 4/1%. Respondent took no action to correct this hazard. Three weeks prior, MSHA approved Respondent's amendment to its ventilation plan, which requires Respondent's examiners to take action when concentrations of 4.0% methane are detected. This action level was decreased from 4.5% in its prior plan.
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> The inspector assessed the gravity of the violation as "significant and substantial" and found that it was reasonably likely that an event would occur against which the standard is directed, lost workdays could be sustained from resultant injuries, and one miner was exposed to the hazard. The inspector found Respondent's negligence to be high. A penalty of $3,500.00 was specially assessed based on the high negligence rating.
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> The parties submit that Respondent's negligence was not as high as initially determined. Respondent represents that it had inadvertently instructed its examiners that the action level was 4.5% methane and had failed to update its instructions to include the new 4.0% action level. Moreover, the gravity is somewhat less based on the incremental change in the action level which was also below the lower explosive limit of methane. Therefore, reclassification of the Order to a "significant and substantial" § 104(a) violation and a reduction in the specially assessed penalty to $2,000.00 is warranted in these circumstances.

Settlement Motion, at 6.

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[3] Copy attached as Exhibit 2 to Respondent's motion.

The UMWA was served with a copy of the motion, but did not file anything in response. On December 17, 2002, a Decision Approving Settlement was entered, granting the Secretary's motion, specifically approving the proposed reduction of the civil penalty assessed for Order No. 7082610, and ordering its modification to a citation issued pursuant to section 104(a).[4]

Discussion

The complaint for compensation, as amended, seeks up to one week's compensation, plus interest, for each miner idled by the issuance of Order No. 7082610, pursuant to section 111 of the Act.[5] Based upon the representations in the Secretary's settlement motion in PENN 2002-132, and the fact that the order granting the motion directed the modification of Order No. 7082610 from a section 104(d)(2) order to a citation issued under section 104(a) of the Act, Respondent argues that Order No. 7082610 never became final, and cannot form the basis for an award of up to one week's compensation under section 111.

Section 111 stands apart from the interrelated structure for reviewing citations, orders and penalties created by section 105. The purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 370-71 (March 1990); *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). The Secretary is a party to enforcement proceedings under section 105, whereas in compensation proceedings under section 111, only the miners, or their representatives, and the operator are parties. Consequently, the finality of any order, or modification thereof, must be determined by reference to the outcome of any relevant section 105 proceedings between the Secretary and the operator, and a claim for compensation under the third sentence of section 111 cannot be adjudicated until the subject order has become final under section 105.

As noted above, Maple Creek duly contested Order No. 7082610 pursuant to section 105(a), after being notified of the civil penalty that had been assessed for the violation. The disposition of the violation, as stated in the Decision Approving Settlement entered in the penalty proceeding before the Commission, was that the order was modified to a citation issued pursuant to section 104(a) of the Act, i.e., the order was successfully challenged by Maple Creek and did not become final. The UMWA did not seek to intervene in that case, and expressed no objection to the proposed disposition.

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[4] Copy attached as Exhibit 3 to Respondent's motion.

[5] The Complaint cited both Order No. 7082606 and Order No. 7082610 as the bases for compensation claims. However, in response to interrogatories, Complainant identified Order No. 7082610 as the sole basis for the claim. A copy of Complainant's responses to interrogatories is attached as Exhibit 1 to the motion.

The section 105 proceeding having been concluded, the claim for compensation may now be addressed.[6] Because the section 104(d)(2) order upon which the claim is based did not become final, the claim for compensation under the third sentence of section 111 must be rejected.

Despite the clear wording of the statute, Complainant argues that section 111 is to be interpreted broadly and that its miners are entitled to compensation even though the order is no longer valid. However, its argument is directly rebutted by the statute. In construing a similar provision of the Federal Coal Mine Health and Safety Act of 1969, the court in *Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975) stated:

> We believe that it is clear that in drafting § 820(a) Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, and that in clause [2] [providing up to one week's compensation] Congress intended to compensate miners only where the order is ultimately upheld, but that in clauses [1] and [3] Congress intended to compensate miners even where the order is ultimately vacated. Any other reading of the section would be inconsistent with the section's overall design, since it would ignore the fact that clause [2] explicitly predicates compensation on the order's being held valid after a hearing, whereas clauses [1] and [3] have no such requirement.

In enacting the successor to this provision, section 111 of the Mine Safety and Health Act of 1977, Congress did not change the critical wording with respect to the finality of orders, except that a phrase was added in the first clause clarifying that such compensation was due "regardless of the result of any review of such order." That phrase incorporated into the legislation the holding in *Rushton*, i.e., that the short-term compensation provided in clause one was due whether or not the order was ultimately upheld.

The UMWA's argument that up to one week's compensation may be awarded, whether or not the subject order is ultimately upheld must be rejected. The order was timely contested and was ultimately modified to a citation issued under section 104(a). The statute does not provide for compensation based upon the issuance of a citation.

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[6] Proceedings in this case had been stayed pending resolution of enforcement proceedings related to this case, and to a companion compensation proceeding between the same parties. Motions for summary decision were filed by Respondent in both cases in February 2006. The cases were reassigned to the undersigned Administrative Law Judge on April 5, 2006. An order denying Respondent's motion in the companion case, Docket No. PENN 2002-23-C, was entered this date.

ORDER

Upon consideration of the above, Respondent's Motion for Summary Decision is hereby **GRANTED**, and the complaint for compensation is **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

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