FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 6, 1999

UNITED MINE WORKERS OF AMERICA, LOCAL UNION 2232, DISTRICT 20, on behalf of MINERS, Applicants,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 99-79-C
v.	:	VP No. 8 Mine
	:	Mine ID 44-03795
ISLAND CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Max Kennedy, International Representative, United Mine Workers of America, Castlewood, Virginia, for the Applicants;
Elizabeth S. Chamberlin, Esq., Consol, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint for Compensation filed by the United Mine Workers of America ("UMWA"), pursuant to section 111 of the Federal Mine Safety and Health Act of 1977 ("the Act") seeking compensation due certain miners employed by Island Creek Coal Company ("Island Creek") on the ground that they were withdrawn from Island Creek's VP8 Mine pursuant to a section 107(a) Withdrawal Order issued on December 2, 1998. The case was heard in Kingsport, Tennessee, on June 24, 1999. On September 22, 1999, the Respondent filed a Post Hearing Brief. On September 24, 1999, the Applicants filed a Post Hearing Brief.

I. Findings of Fact

On December 2, 1998, David Fowler, an MSHA inspector, accompanied by Billy Eugene Shelton, a miner employed by Island Creek who was a union walk-around, and Michael Canada, Island Creek's mine safety inspector, inspected the three south entries, in Island Creek's VP8 Mine, an underground coal mine. Fowler, along with Canada and Shelton, proceeded to walk south down the No. 1 entry of the three north mains area. Fowler and Canada had digital methane detectors with them. Before they reached the No. 1 west development area, Fowler's methane detector indicated a reading of 2.1 percent, and Canada's detector indicated 1.8 percent.

Fowler told Canada that he would issue a citation if it would subsequently be determined that his detector was accurate.[1]

Since Fowler's digital methane detector had revealed elevated methane, the inspecting party proceeded to walk further south down the entry to investigate the source of the methane, and the areas affected in order to eliminate this hazard. In the area of the No. 1 entry east of the No. 19 seal, Fowler and Canada took additional methane readings with their digital detectors. Fowler's detector indicated a reading of 4.5 percent.[2] Fowler told Shelton to bring him his Riken methane detector which is more accurate than the digital detectors Fowler and Canada had been using. Canada than told Fowler that he would have to pull his people based on Virginia law, if the Riken detector would indicate methane of 4.5 percent. Fowler determined to continue his investigation.

At approximately 11:30 a.m., Shelton returned with the Riken detector which revealed a methane reading of 4.5 percent in the No. 2 development area. Canada left Fowler and Shelton to call the mine dispatcher. Canada told the latter to get everyone out of the mine due to elevated methane.

Fowler and Shelton then continued south down the No. 1 entry to investigate further. Elevated methane readings up to 10 percent were observed in the Nos. 4 and 5 development areas. In addition, plaster sealing the Nos. 4 and 5 development areas from the gob area was no longer intact, evidencing the presence of methane.

At approximately 12:00 n., Canada rejoined Fowler in the No. 4 development area where methane in the range of 8 to 9 percent was detected. Fowler told Canada that a section 107(a) order would be issued because ". . . [h]e knew what area was involved, how much methane was involved, and was sure of the origination"(Tr. 69). According to Fowler, he asked Canada or another management official "to remove the men from underground" (Tr. 73). According to Canada, Fowler never told him to withdraw any miners, nor did he discuss the scope of the 107(a) order, or whether it required the withdrawal of anyone from the mine. In this connection, on cross-examination, Fowler agreed that it is possible that he told Canada that he was not considering a 107(a) order because the men had already been withdrawn.

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[1]/ At 12:12 p.m., Fowler issued a section 104(a) citation, No. 7297958, alleging a violation of 30 C.F.R., § 75.323(e), which was subsequently vacated.

[2]/ Canada's detector indicated a methane level a few tenths less than indicated on Fowler's detector.

It was stipulated that the 107(a) order was issued at 12:12 p.m. Fowler explained that it was then that he determined that the miners should be withdrawn. The order, that Fowler reduced to writing when he exited the mine, contains Fowler's description of the conditions warranting the issuance of the order. In paragraph 15 of the order, under the hearing *Area or Equipment*, Fowler set forth as follows: "5 Dev. and 4 Dev." There are no other words used in the order to describe the area of the mine subject to the order i.e., the area from which miners were ordered to be withdrawn.[3]

Sometime after 1:00 p.m., after the order was issued, Fowler met some rank and file miners at the B shaft, and told them to go outside. Fowler informed Terry Suder, the mine's superintendent, that he needed to make sure to get everyone out of the mine. It was stipulated that the first miners exited the mine at approximately 1:30 p.m.

II. Section 111 of the Act

The Applicants' right to compensation is predicated upon section 111 of the Act, which, as pertinent, provides as follows:

> If a coal or other mine or area of such mine is closed by an order issued under . . . 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 results 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.

III. Discussion

The present controlling authority for the issues at bar is *Local Union 1261, District 22, UMWA* v. *Consolidation Coal Company*, 11 FMSHRC 1609 (1989), *Aff'd sub nom. Local Union 1261* v. *FMSHRC*, 917 F.2d 42 (D.C. Cir. 1990). As in the case at bar, the issue therein was whether miners are entitled to compensation under the first and second sentences of section 111 when the mine operator has voluntarily closed the mine for safety reasons prior to the issuance of an order described in section 111, but where such an order is subsequently issued.

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[3]/ In paragraph 10 of the order, *Gravity*, subparagraph D, *The Number of Persons Affected*, Fowler set forth as follows "060." Fowler explained in his testimony that he thought at the time that there were 60 miners underground. On its face, the number of persons affected relates to the gravity of the violative conditions, rather than being a specific designation of the area of the mine being subject to an order of withdrawal.

The Commission in that case, at 11 FMSHRC 1613-1614, held as follows:

> The meaning of the first two sentences 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.) If the order is not terminated prior to "the next working shift, all miners on that shift who are idled by such order" are entitled to compensation for up to four hours. (Emphasis added.) The language is in nowise qualified. Thus, to be entitled to shift compensation, a miner must either be working during the shift when the specified order was issued and have been idled by the order or, if the order is not terminated prior to the next working shift, must be on the next working shift.
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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 the previous evening at which time 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." Further, Consol advised miners on the other two shifts that "the mine is idled until further notice." [Citation omitted.] Therefore, none of those for whom compensation is claimed were on "the next working shift." (Emphasis added.) [Footnote omitted.] 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 limiting the phrase "working during the shift," to miners actually working when the order is issued, was a reasonable interpretation. *Local Union 1261*, 917 F.2d at 47.

The Commission majority explained the rationale for its decision as follows:

> 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 interest 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.

* * * * *

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

In the case at bar, the sequence of events is basically not at issue. I find that at approximately 11:30 a.m., Canada told the dispatcher to get everyone out of the mine due to elevated methane. Thus, when Fowler issued the section 107(a) order, an order had already been given by Consol withdrawing the miners. Under the holding and rationale of *Local Union*, supra, the removal of the miners previously ordered to be withdrawn by Canada, was not effectuated by Fowler's order. These miners were no longer "working" when Fowler issued the 107(a) order, and are not entitled to compensation under section 111, supra.

Applicants argue, however that the instant case is distinguishable from *Local Union*, supra, in that here, Consol attempted to avoid section 111 liability by withdrawing miners in anticipation of withdrawal action by MSHA. The Commission in *Local Union*, supra, appeared to suggest that this might be a possible distinguishing factor. See *Local Union 1261*, fn6 at pp. 1614-1615. However, this suggestion by the Commission is clearly dictum as it was not necessary for a disposition of the issues presented therein. Nor is there any authority that would compel a ruling that where an operator withdraws miners in anticipation of the issuance of a 107(a) order, the withdrawn miners are entitled to section 111 compensation where the 107(a) order is subsequently issued.

Moreover, such a broad ruling, if applied to a situation where an operator might have anticipated the possibility of the issuance of a 107(a) order, but also withdrew miners based on

safety concerns, would appear to thwart the Commission's concerns regarding the purpose of section 111, supra. As stated by the Commission in *Local Union*, supra, at 1614,

> . . . it would be a departure from the clear intent and purpose of the 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.

Further, Applicants have not established that Consol's decision to remove miners was made in anticipation of the issuance of a 107(a) order. When the digital detectors revealed methane in excess of 4 percent, Canada expressed his intent to remove miners to comply with Virginia Law, should readings in excess of 4.5 percent be confirmed with the Riken detector. In contrast, the only communication Fowler had made to Consol regarding action that he was considering was his statement that he was contemplating issuing a section 104(a) citation[4] should the reading that he had obtained with his digital methane detector be subsequently verified with the Riken detector. At 11:30 a.m., when the Riken testing indicated methane at 4.5 percent, Canada told Fowler that he was going to withdraw miners, and then he (Canada) ordered their withdrawal, Fowler had not indicated that he was even contemplating issuing a withdrawal order, or that he had found the conditions to constitute any type of imminent danger. Fowler's decision to issue the withdrawal order was first made by him shortly after 12:00 p.m., only after he had ascertained the source and extent of methane accumulations.

For all the above reasons, I conclude that the Applicants are not entitled to compensation under section 111 of the Act.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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[4]/ On direct examination, Fowler indicated that he had told Canada or some other management official that he would be issuing a section 107(a) order as he was sure of the origination of the methane, and asked them to remove the men form underground. However, on cross-examination, it was clarified that after he had concluded that the 3, 4, and 5 development areas were involved, i.e., after 12:00 n., he told Canada that he would be issuing a section 107(a) order.

Distribution:

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