

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 3, 1996

UNITED MINE WORKERS OF : COMPENSATION PROCEEDING
AMERICA, LOCAL 1058, :
DIST. 31 : Docket No. WEVA 95-262-C
Complainant :
v. : Humphrey No. 7
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Judith Rivlin, Esq., United Mine Workers of
America, Washington, DC, for Complainant;
Elizabeth Chamberlin, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Fauver

This proceeding concerns a complaint for compensation pursuant to the first sentence of ' 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq., which provides:

If a coal or other mine or area of such mine is closed by an order issued under ' 103, 104, or 107, all miners working during the shift when such order was issued 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 not more than the balance of such shift.

The United Mine Workers of America on behalf of Local Union 1058, District 31, seeks compensation from Consolidation Coal Company for miners it alleges were idled by a withdrawal order issued by the Secretary of Labor under ' 103(k) of the Act during the dayshift on May 5, 1995. Respondent contends that ' 111 does not apply because the miners were idled by a management decision for economic reasons, not because of the withdrawal order.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent's Humphrey No. 7 Mine produces coal for sales in or substantially affecting interstate commerce. The mine has an elevator at each of its three portals, i.e., Bowers Portal, Mt. Morris Portal, and Sansone Portal. It also has a rail entry at Maidsville Pit Mouth, where coal is transported out of the mine. Miners may enter or exit the mine at any of the four locations. However, each miner is assigned to a portal where he or she keeps clothing and regularly enters and exits the mine.

2. On May 5, 1995, about 8 a.m., the day shift miners assigned to the Bowers Portal began entering the mine. The first group used the elevator without incident. When the next group was descending, the elevator malfunctioned by speeding up, slowing down, and creating a **Afalling@** or **Afloating@** effect. A miner pushed the emergency button, and the elevator stopped and then returned to the surface.

3. Primo Zini, master mechanic, examined the elevator while officials for Respondent contacted Millar Elevator Company, a service company that has a monthly maintenance agreement with Respondent. Two Millar servicemen arrived at the mine about 9 a.m. and began trouble shooting the elevator. About 35 day shift miners were at the Bowers Portal. Respondent directed them to stand by to await repair of the elevator. Some of the miners may have been given odd jobs to perform while waiting for the repair of the elevator, but all of them remained on duty while waiting.

4. Based on Millar's belief that the problem would be corrected shortly, Respondent decided to have the miners stand by at Bowers Portal, rather than send them to another portal for entry into the mine.

5. Around 10:25 a.m., believing the elevator was repaired, Respondent directed the miners to get back on the elevator. They did so. However, the elevator started down very slowly and then would stop suddenly and speed up again, creating the same **Afloating@** or **Afalling@** effect that occurred earlier in the morning. A miner pushed the emergency button and the elevator came to a stop and returned to the surface. The miners were very concerned for their personal safety, and complained to the chairman of their safety committee, David Laurie. About 10:30 a.m., Mr. Laurie called Gary Asher, international safety representative for UMWA, and informed him of the problems with the elevator.

6. About 10:40 a.m., Mr. Asher called Raymond Ashe, field supervisor with MSHA, and informed him of the problems with the elevator. Mr. Asher stated that he would be filing a safety complaint, and requested MSHA to issue a ' 103(k) order to prevent use of the elevator pending MSHA's investigation. About

10:45 a.m., Mr. Asher called Respondent and issued an oral ' 103(k) order preventing anyone from entering the elevator at the Bowers Portal until MSHA conducted an investigation. Between 10:25 and 10:45 a.m., when the ' 103(k) order was issued, Respondent and Millar tested the elevator and on one test run brought out miners from the midnight shift who were waiting underground.

7. Before the ' 103(k) order was issued, none of the union officials, including the safety committee, and none of the day shift miners had been informed by Respondent that the elevator was being taken out of service. The day shift miners were not informed by Respondent of the status of the elevator until shortly before noon, when Respondent decided to send the day shift miners home. It paid the miners 4 hours reporting pay, pursuant to collective bargaining agreement.

8. Under the collective bargaining agreement, Respondent could send miners home early, but had to pay them a minimum of 4 hours reporting time or pay them for their actual hours on duty if greater than 4 hours.

9. The day shift miners who entered the mine before the elevators malfunction traveled to their assigned sites underground and worked the entire shift.

10. While the day shift miners at the portal waited for repair of the elevator, Respondent had the option of transporting them to another portal for travel to their job sites. However, using another portal would have required a significant amount of travel time and coordination of forces. A commercial bus company would be contacted to transport the miners to the other portal. To get the miners back to their underground work sites on the Bowers side of the mine, several track-mounted personnel carriers from the Bowers Portal would be transported underground to the other portal. As a general rule, based on past experience, it would take 22 hours from the time the decision was made to transport the miners to an alternative portal until they arrived at their work sites underground. Another 2 hours would be required to take them outside and back to their home portal by the end of their shift.

11. MSHA Inspectors Ron Wyatt and Rocky Sperry arrived at the mine around 12:50 p.m. Following their investigation, MSHA issued ' 104(a) Citation No. 3317958 charging Respondent with a violation of 30 C.F.R. ' 50.10 for failure to immediately report an accident to hoisting equipment. It also issued other citations charging Respondent with violations of several safety

standards regarding the condition of the elevator.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

The UMWA contends that the day shift miners who were sent home at noon on May 5 were idled by the ' 103(k) order, which prohibited any personnel to enter the Bowers Portal elevator until MSHA investigated the elevator malfunction.

Respondent contends that its decision to send the miners home at noon was for business reasons and not caused by MSHA's withdrawal order. It contends that around 11:45 a.m. it decided that there would not be enough time to send the miners to another portal or to wait for repair of the elevator, and therefore sent them home by noon. It also contends that it had removed the elevator from service around 10:35 a.m., before MSHA's withdrawal order at 10:45 a.m.

The Commission has held that the application of ' 111 should not hinge on the chance timing of an inspection and the orders issuance rather than on the complainants actual deprivation of work. @ Consolidation Coal Co., 11 FMSHRC 1609, 1616 (1989), aff'd sub nom. Local Union 1261 v. FMSHRC, 917 F.2d 42 (D.C. Cir 1990). Nor does it hinge on technical distinctions between performing active work and waiting for a repair of equipment to perform active work. If miners are directed to stand by pending repair of an elevator, they are on duty and working @ within the meaning of ' 111.

The controlling issue is whether there is a nexus between the withdrawal order and the miners' deprivation of work and pay. Local 701, District 17 UMWA v. Eastern Associated Coal Co., 3 FMSHRC 1175, 1178 (1981). This requires an examination of the relationship between the withdrawal order issued at 10:45 a.m. and the underlying reasons for the operators' decision to send the miners home at noon.

Respondent had a number of options when the elevator malfunctioned, including: (1) to send the day shift miners home; (2) to transport them to another portal for travel to their underground jobs; and (3) to have them stand by at the Bowers Portal awaiting repair of the elevator.

Respondent chose to keep the miners at the Bowers Portal to await the repair of the elevator. This option ran the risk that MSHA would be called by the union and would issue a withdrawal order. This was a serious risk, because the regulations required Respondent to report any interruption of elevator service that

lasted more than 30 minutes, and Respondent had failed to report the elevator malfunction, which exceeded 30 minutes. The union had the right, under ' 103(g) of the Act, to report the safety problem to MSHA and to request an immediate investigation and withdrawal order.

MSHA's withdrawal order, issued at 10:45 a.m., excluded all personnel from the elevator, including repair workers, until MSHA investigated the matter. This meant that Respondent no longer had an economically sound option to have the miners perform their assigned underground jobs. Instead, Respondent now had a strong economic incentive to send them home by noon. The reasons for this are plain. First, it would take time for MSHA inspectors to come to the mine and investigate the matter to see whether they would modify the withdrawal order to permit resumption of troubleshooting and repair work on the elevator. If they modified the order, the troubleshooting and repair work would require some indefinite period that could easily go beyond the day shift on May 5.¹

Secondly, it was not economically sound to transport the miners to another portal for travel to their underground jobs, because this would require 42 hours travel time.

The net result was that the withdrawal order, by stopping troubleshooting and repair work on the elevator, had a clear nexus with the reasons for the operators decision to send the miners home at noon. Accordingly, the miners were idled by the withdrawal order within the meaning of ' 111 and are entitled to compensation for the remainder of their shift on May 5, 1995.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. The day shift miners who were sent home by Respondent on May 5, 1995, were idled by MSHA's withdrawal order within the meaning of ' 111 of the Act and are therefore entitled to compensation for the remainder of their shift.

ORDER

1. The parties shall confer (by telephone or otherwise) within 15 days of the date of this Decision in an effort to

¹ In fact, the repair work was not completed until the next day.

stipulate the names of the idled day shift miners and the amount of compensation due each for the remainder of their shift on May 5, 1995, plus interest accrued since May 5, 1995. The applicable rate of interest may be determined by consulting the rates published by the Executive Secretary of the Commission. Stipulation of compensation and interest will not prejudice the operators' right to seek review of this Decision.

2. If the parties are able to stipulate the amounts of compensation and interest, they shall file their stipulation with the judge within 20 days of the date of this Decision. If they are unable to stipulate, Complainant shall file a proposed Order for Relief within 20 days of this Decision, setting forth the names of the affected miners and the amount of compensation and interest claimed to be due each miner under this Decision. Respondent shall have 10 days to reply to the proposed order. If issues of fact are raised, a hearing on damages shall be scheduled.

William Fauver
Administrative Law Judge

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