FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 6, 1998

LOCAL 1702, DISTRICT 31, UNITED MINE WORKERS OF AMERICA (UMWA), on behalf of 141 miners, Applicant	:	COMPENSATION PROCEEDING Docket No. WEVA 98-10-C
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Blacksville No. 2 Mine Mine ID No. 46-01968

DECISION

Appearances: Richard Eddy, United Mine Workers of America, District 31, Fairmont, West Virginia, on behalf of Applicant;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This Compensation Proceeding is before me pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et. seq.*, the "Act" upon the application filed by the United Mine Workers of America, Local 1702, District 31 (UMWA), against the Consolidation Coal Company (Consol). The UMWA seeks compensation for 141 of its members employed at the Blacksville No. 2 Mine, who were allegedly idled by a withdrawal order issued by the Secretary of Labor pursuant to Section 107(a) of the Act.[1]

The subject order, No. 3492298, issued by Inspector Joseph Migaiolo, of the Department

---

[1] Section 107(a) of the Act provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under Section 110.

of Labor=s Mine Safety and Health Administration (MSHA), on May 15, 1997, at 8:17 a.m., alleges as follows:

> A 107(a) Order is being issued for the 75 longwall section and affected area due to a failure of the bleeder system which has shown excessive methane at the tailgate area which has retreated to between 12 and 13 block markers. Management has been experiencing longwall methane monitoring of 2% + for the past two shifts at tail. Readings as high as 2.7 - 3.0 were recorded by management by methane detectors at tail. Air at the tail is returning from the gob down the tailgate. The longwall Shear experienced greater than 2.0% which deenergized the system at least twice on the day shift on 05/14/97, however, methane detection by hand held showed .4 - .5% CH4 and a split at tail to gob. Due to a progressive methane build up this order is issued for control purposes until the operator prepares a plan and complies with the [illegible word].
> The operator experienced excessive methane on 5/14/97 at the tail and also on the midnite shift of 5/15/97. As such the operator discontinued operation on the longwall and deenergized the power from the affected area. The day shift has been idled.

The order was terminated at 6:30 p.m., on May 15, 1997 (Applicant=s Exhibit No. 1, Pg. 3). Consol subsequently contested the order before this Commission, but on February 26, 1998, the Secretary vacated the order on the grounds that it was issued in error (Applicant=s Exhibit No. 1, Pg. 4). There is no dispute that for purposes of compensation under the first two sentences of Section 111 of the Act, it is irrelevant whether or not the requisite order was issued in error or has been vacated.

Applicant asserts that because this order idled the miners on the day shift on May 15, 1997, those miners are entitled to compensation pursuant to the first sentence of Section 111. That sentence provides 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.

Applicant further maintains that because the order also idled the miners on the afternoon shift on May 15, 1997, those miners are entitled to compensation pursuant to the second sentence of Section 111. That sentence provides as follows:

> 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.

It is undisputed in this case that the day shift on May 15, 1997, was scheduled to work from 8 a.m. to 4 p.m., and that the afternoon shift on that date was scheduled to work from 4 p.m. to 12 midnight. It is further undisputed that the operator decided at approximately 3:30 a.m., on May 15, 1997, to make a major air change in the mine pursuant to 30 C.F.R. ' 75.324. In accordance with that regulation, Consol was required to evacuate all non-essential persons and remove electrical power until such time as the affected areas had been inspected and found safe. It is undisputed that all affected miners had accordingly been withdrawn by 8 a.m., before the issuance of the order, and the mine did not return to full production until May 16, 1997. Both the May 15 day shift and afternoon shift miners were advised by Consol not to appear for work in light of its prior voluntary idlement of the mine.

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.

The Commission in that case, at 11 FMSHRC at 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.
>
> 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 miners 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.
>
> * * * * *
>
> 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

Applicant argues, however that the instant case is distinguishable from the *Local Union 1261* case in that here, it maintains, Consol attempted to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by MSHA. The Commission in that case appeared to suggest that this might be a possible distinguishing factor. *See Local Union 1261*, fn6 at pp. 1614-1615. However, even assuming, *arguendo*, that this could be a distinguishing factor, I find insufficient evidence that Consol withdrew the subject miners other than for their safety and for compliance with the withdrawal requirements under 30 C.F.R. ' 324. On the facts of this case Consol could reasonably not have anticipated the issuance of an imminent danger or other prerequisite withdrawal order. Indeed, the Secretary herself subsequently vacated her withdrawal order in this case admitting that she had issued it in error, presumably for insufficient evidence.

As Consol notes in its brief, the air flow condition existing on the 7S longwall was not, in any event, of such a nature as to lead management to anticipate a closure order involving any area of the mine. While methane in excess of 1 percent required the section to be deenergized and the condition corrected, there was no particular need to notify MSHA. Consol did in fact deenergize the section and corrected the condition and, as evidenced by the absence of citations for safety violations, the response was adequate.

Applicant also maintains that Consol was cognizant of a ventilation problem on the 7S section for two weeks prior to May 15, 1997, and should accordingly have anticipated an order from MSHA. While there is evidence that the power had been taken off the longwall several times in the two week period before May 14th, due to methane, there is no evidence that Consol was aware of any imminent danger or violative condition. Moreover, the reverse airflow problem apparently was not discovered until May 14th. Safety Committeeman Michael Eddy testified that he was not aware of any problem with reverse air flow in the longwall tailgate entry before that afternoon. Moreover, Mine Superintendent Edward Pride believed that the reverse air flow condition in the tailgate entry had not existed prior to the 14th because it was checked daily by the mine foremen.

Applicant further maintains that even though Consol may not have had actual knowledge that an MSHA inspector would visit the mine it nevertheless should have expected such a visit when Safety Committeeman Michael Eddy, notified the foreman of the 7S longwall section in the early hours of the May 14, afternoon shift, that he was excusing himself from work to go on union

business. However, since Eddy could have conducted any number of activities while on "union business" it does not reasonably follow that an MSHA inspector would appear and issue a withdrawal order. Morever, Consol did not thereafter immediately idle the mine well in advance of the day shift as one would expect under Applicant=s theory. Rather, Consol continued trying to correct the condition on the 7S section during the afternoon shift of May 14, 1997, and into the midnight shift on May 15, 1997. Applicant=s proposed inference is therefore not reasonable nor is there a rational connection between the evidentiary fact (that Eddy went on "union business") and the ultimate fact to be inferred (that an MSHA inspector would thereafter appear and issue a withdrawal order). *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148 (November 1989).

Under all the circumstances, I conclude that when Consol took the prudent action of withdrawing the miners, which was also consistent with the requirements of 30 C.F.R. ' 324, it could reasonably not have anticipated the issuance of any withdrawal orders by the Secretary. Therefore, within the framework of Commission precedent, supported by the U.S. Court of Appeals for the D.C. Circuit, I conclude that the Applicant herein cannot prevail. Clearly, none of the subject miners were "working during the shift" within the scope of this legal interpretation and there is insufficient evidence to conclude that Consol withdrew the subject miners in anticipation of withdrawal action by the Secretary. The UMWA=s reliance upon the earlier Commission decision in *Peabody Coal Company*, 1 FMSHRC 1785 (1979) and the dissenting Commissioners in *Local Union 1261*, is also misplaced. Indeed, the U. S. Court of Appeals for the D.C. Circuit agreed with the dissenting commissioners in *Local Union 1261*, that the majority had departed from the reasoning and result of *Peabody Coal Company*, 1 FMSHRC 1785 (1979), and had, therefore, effectively overruled that decision. In the earlier *Peabody* case, the Commission had expressedly rejected the operator=s argument that the Act provides first sentence compensation only for miners actually at work when a withdrawal order issues. *Local Union* 1261, 917 F.2d at 46-47.

ORDER

Compensation Proceeding Docket No. WEVA 98-10-C is DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

Richard Eddy, United Mine Workers of America (UMWA), District 31, 310 Gaston Avenue, Fairmont, WV 26554 (Certified Mail)

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

\mca