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PEABODY COAL V. MSHA & UMWA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 14, 1979

PEABODY COAL COMPANY

v. Docket No. VINC 77-40

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

and

UNITED MINE WORKERS OF
AMERICA (UMWA)

LOCAL UNION NO. 1670, DISTRICT
12, UNITED MINE WORKERS OF Docket No. VINC 77-50
AMERICA

v.

PEABODY COAL COMPANY

DECISION

These proceedings arise under the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. $801 et seq. (1976)(amended 1977) ["the 1969 Act"]. They involve an application for review of a withdrawal order (VINC 77-40) issued under section 104(a) and an application for compensation (VINC 77-50) filed under section 110(a). Both applications relate to the withdrawal order and were consolidated by the administrative law judge.

The judge held that the withdrawal order was validly issued

and awarded compensation to 334 miners found to be idled by the order. The judge further ordered the payment of six percent interest "per month" from the date that the withdrawal order was issued to the date of his decision. The Commission granted Peabody's petition for discretionary review. For the reasons that follow, we affirm the judge's decision but modify his award of interest.

On Tuesday, November 23, 1976, Peabody discovered a "gob fire" 1/ at its River King Underground Mine No. 1. A Mining Enforcement and Safety Administration (MESA) inspector, who was present at the mine when the fire was detected, immediately issued a withdrawal order under section 103(f). 2/ The inspector ordered the withdrawal of miners, except those miners needed to remove equipment and to erect temporary seals. Later that day, a MESA supervisor arrived at the mine to monitor the fire.

The installation of temporary seals was completed on Wednesday, November 24th, and liquified carbon dioxide was pumped into the fire area to displace oxygen sustaining the fire. Because the next day was a holiday, Thanksgiving, the MESA supervisor decided to wait until Friday, November 26th, to test the atmosphere behind the temporary seals for carbon monoxide and oxygen.

On Friday, after additional carbon dioxide was pumped into the fire area, the MESA supervisor and inspector, together with Illinois State inspectors, took instrument readings and bottle samples of the air behind the temporary seals. Because the instrument readings showed that the carbon monoxide and the oxygen levels in the fire area were "still high", the inspection team decided to wait until Monday, November 29th, to conduct further tests of the atmosphere. In the meantime, the bottle samples were sent to the state laboratory for analysis.

Later on Friday, the MESA supervisor was notified of the laboratory results concerning the bottle samples. The supervisor stated that the results were "very close" to the instrument readings and that this indicated to him that the mine fire was more extensive than first believed. The supervisor then called the inspector and instructed him to proceed to the mine on Saturday to issue a withdrawal order under

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1/ A "gob fire" is defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968), as:

> a. Fire originating spontaneously from the heat of decomposing gob [i.e., the refuse or waste left in the mine] .... b. A fire occurring in a worked-out area, due to ignition of timber or broken coal left in the gob .... c. Fire caused by spontaneous heating of the coal itself, and which may be wholly or partly concealed ....

2/ Section 103(f) Provided in part:

> In the event of any accident occurring in a coal mine, an

authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine ....

section 104(a). 3/ The inspector went to the mine on Saturday but was unable to issue the order because at the time only a watchman was there. At sometime on Saturday, additional carbon dioxide was pumped into the fire area.

On Monday, November 29th, after receiving further instructions from his supervisor, the inspector returned to the mine and issued the section 104(a) withdrawal order at 7:10 a.m. In the order, the inspector described the alleged imminent danger as follows:

> A mine fire (gob) existed in.the area of rooms nos. 1 through 8 off of A entry No. 3 West, sub Main North. Management did detect the fire and voluntarily withdrew the men from the mine.

Because the miners had been withdrawn from the mine following the discovery of the fire on the previous Tuesday, no miners were working on the 12:01 a.m. to 8:00 a.m. shift when the section 104(a) order was issued. Eight miners reported for work, however, for the succeeding 8:01 a.m to 4:00 p.m. shift. In order to resolve a possible contractual dispute over reporting pay, Peabody permitted the eight miners to work the first four and one-half hours of their shift.

On Thursday, December 2nd, after completion of the permanent seals and of tests indicating that the concentrations of carbon monoxide and oxygen were within "acceptable limits", the section 104(a) withdrawal order was modified to permit mining operations in all unsealed areas of the mine.

On review Peabody advances several arguments as to why the judge erred in holding that the withdrawal order was validly issued. Peabody argues that the order is "fatally defective" because it failed to adequately describe the imminent danger in accordance with the requirements of section 104(e) of the 1969 Act. That section provided in part:

> Notices and orders ... shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger ... and, where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering.

3/ Section 104(a) provided:

> If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent

danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

Peabody's argument is without merit. On its face the order informs Peabody that a gob fire existed in a specified area of the mine. The order complied with section 104(e) and sufficiently apprised Peabody of the alleged imminent danger. We also note that Peabody has not suggested any additional information that the order, in its view, should have contained.

Peabody also argues that the judge erred in upholding the withdrawal order because the order lacked a "sufficient factual basis". Peabody asserts that the order, issued on Monday, November 29th, was based upon stale data obtained by MESA on Friday, November 26th. It asserts that neither the MESA supervisor nor the inspector was aware of the actual conditions that existed in the mine at the time that the section 104(a) order was issued. In this regard, Peabody states that the MESA representatives failed to take into account the fact that additional carbon dioxide was pumped into the fire area after the tests were conducted on Friday, November 26th.

We reject this argument. The MESA supervisor and the inspector testified that the conditions created by the mine fire constituted an imminent danger. The supervisor stated that an imminent danger exists anytime there is a fire in the mine, regardless of its size. With respect to the tests conducted on Friday, he stated that they confirmed the existence of a fire, as well as the fact that the fire was larger than originally believed. The supervisor also testified that the fire presented the danger of an explosion because both oxygen and an ignition source were present in the mine and only a fuel was needed. He testified that there were cavities in the mine roof in the area of the fire that could have contained pockets of such a fuel--methane--and that due to the inaccessibility of the fire area it was impossible to determine what concentrations of methane were present. He further testified that the temporary seals would not have withstood the force of an explosion "with any size at all", and that such an explosion would have disrupted the mine's ventilation system and introduced carbon monoxide into the mine. On the basis of these conditions, the supervisor concluded that an imminent danger existed and that it was not necessary for the inspector to have conducted additional tests for carbon monoxide and oxygen before issuing the withdrawal order. The inspector testified that in view of the area of the mine involved, he believed that the fire was still burning when the order was issued on Monday, November 29th. He further stated that, even if the fire was not burning at that time, it could reignite if the carbon dioxide were removed and oxygen reintroduced into the sealed area. It was the inspector's conclusion that an imminent danger existed as long as there was a fire behind the temporary

seals.

In view of this evidence, we cannot agree with Peabody that the withdrawal order was based on "stale information" and "speculation and conjecture". The circumstances known at the time that the withdrawal order was issued were more than sufficient to warrant the issuance of a section 104(a) withdrawal order.

Peabody also raises several arguments concerning the manner in which the order was issued. First, it asserts that the order is invalid because it was issued by the inspector, even though it was the inspector's supervisor who made the determination that an imminent danger existed. This argument is unpersuasive. Section 104(a) should not be read to require that the Secretarial representative who determines that an imminent danger exists be the same representative who issues the withdrawal order. Such a restrictive reading would unnecessarily frustrate the protection of miner safety and health. The facts of this case amply illustrate the weakness of this argument. Here, the MESA supervisor determined that an imminent danger existed, but the circumstances warranted that the inspector issue the order. At the time that the supervisor received the results of the lab analysis and instructed the inspector to issue the order, the inspector was about five to ten miles from the mine, while the supervisor was approximately seventy miles away. In any event, the inspector testified that he too believed that the mine fire constituted an imminent danger.

Second, Peabody argues that the order is invalid because it was not issued "forthwith" as required by section 104(a) and therefore is invalid. We disagree. The order was issued for an imminently dangerous condition believed to exist at the time when it was issued. The fact that the order was not issued at the time that the fire was initially discovered, or when the instrument readings showed the carbon monoxide and oxygen levels were high, does not render the order fatally defective. Therefore, we conclude that the order was timely issued.

Third, Peabody contends that in issuing the section 104(a) order the MESA representatives were motivated by a desire to aid the UMWA to obtain compensation for the miners, rather than by safety and health considerations. We reject this contention. The evidence does not establish any such motive. Rather, the evidence establishes that the order properly was issued upon a finding of an existing imminent danger.

For these reasons, we affirm the judge's conclusion that the withdrawal order was validly issued. We now turn to the issues raised concerning the judge's award of compensation.

The judge granted the UMWA's application for compensation. He awarded one hour of compensation to the miners who were scheduled to work the 12:01 a.m. to 8:00 a.m. shift on the day that the section 104(a) withdrawal order was issued and four hours of compensation to the miners who were scheduled to work the succeeding 8:01 a.m. to 4:00 p.m. shift. The eight miners who worked the first four and one-half hours of the succeeding shift were awarded three and one-half hours of compensation. For the following reasons, we affirm the judge's conclusion that the miners were entitled to compensation under section 110(a) of the 1969 Act. 4/

Peabody argues that the judge erred in awarding one hour of compensation to the miners who were scheduled to work the 12:01 a.m. to 8:00 a.m. shift, contending that section 110(a) expressly limits the awarding of compensation to miners who are "working during the shift" when a withdrawal order is issued. In the present case, as a result of their previous withdrawal, no miners were in fact working when the order was issued. Therefore, Peabody submits the miners are not entitled to compensation. We disagree. The miners normally scheduled to work the 12:01 a.m. to 8:00 a.m. shift were idled within the meaning of section 110(a) for the last hour of their shift by the section 104(a) withdrawal order. After the section 104(a) withdrawal order was issued, the miners were prevented from working the balance of their shift by that order, even though a section 103(f) order was concurrently in effect. Therefore, the miners are entitled to compensation under section 110(a). See Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (1976); Clinchfield Coal Co., 1 IBMA 33 (1971).

4/ Section 110(a) provided in part:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, 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 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.they are idled,but for not more than four hours of such shift.

Peabody also argues that the judge erred in awarding four hours compensation to miners normally scheduled to work the succeeding 8:01 a.m. to 4:00 p.m. shift because the miners were notified several days beforehand not to report for work. For the reasons stated above, we also reject this argument. When the section 104(a) order was issued, the miners normally scheduled to work the next shift were idled by that order and are entitled to four hours compensation under section 110(a).

With respect to the eight miners who worked the first four and one-half hours of the 8:01 a.m. to 4:00 p.m. shift, Peabody argues that the judge erred in awarding three and one-half hours of compensation. Peabody submits that miners on the shift after a withdrawal order is issued are entitled to be compensated only for the first four hours of the shift. Because these miners worked and were paid for the first four and one-half hours of the shift, Peabody contends that they were not idled by the order and are not entitled to compensation. We rejected a similar argument in Local Union 5869, District 17,UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (1979). In Youngstown, we observed that section 110(a) does not limit the award of compensation to only the first four hours of the succeeding shift, and held that miners who worked for the first four hours of their shift were entitled to compensation for the final four hours because the withdrawal order was still outstanding at the time that the miners were sent home. See also Local Union No. 3453, District 17, UMWA v. Kanawha Coal Co., No. HOPE 77-193 (September 4, 1979), petition for reconsideration denied, September 25, 1979. Therefore, we reject Peabody's argument and hold that the judge was correct in awarding the eight miners three and one-half hours of compensation.

Peabody further contends that the judge erred in awarding compensation because the UMWA failed to affirmatively show that all of the miners to whom compensation is due elected the UMWA to proceed on their behalf. We find no such requirement in either the 1969 Act or the procedural rules under which the application for compensation was filed. 5/ Furthermore, as it is undisputed that the UMWA was the authorized representative" of the miners at the mine, to require the affirmative showing suggested by Peabody would be to place an additional procedural impediment to the filing of an application for compensation and frustrate the remedial purpose of section 110(a).

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5/ 43 CFR $4.560 et seq. (1977).

Finally, the judge properly determined that interest is awardable under section 110(a) of the 1969 Act. Youngstown Mines Corp., supra. We modify the judge's decision, however, and award interest at a rate of six percent per year from the date compensation was due to the date payment is made. Peabody's argument that the UMWA's failure to specifically request interest until its post-hearing brief was filed renders the interest award improper is rejected. In its application for compensation the UMWA requested "such other relief as may be deemed just and proper." Also, this objection was not raised before the judge even though the UMWA requested interest on November 28, 1977, and the judge's decision was not issued until March 1, 1978. Furthermore, to deny interest would be to award the miners less than the full compensation mandated by section 110(a).

As modified, the judge's decision is affirmed.