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UMWA V. GREENWICH COLLIERIES
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FMSHRC-WDC
September 26, 1986

LOCAL UNION 1609. DISTRICT 2,
UNITED MINE WORKERS OF AMERICA

v.

Docket No. PENN 84-158-C

GREENWICH COLLIERIES, DIVISION
OF PENNSYLVANIA MINES
CORPORATION

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982), mirrors the issues raised in Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., Docket No. WEVA 81-256-C, decided this same date. At issue is whether miners idled following an underground explosion are entitled to one-week compensation under the provisions of the third sentence of section 111 of the Mine Act. 1/ Commission Administrative Law Judge George A. Koutras

1/ The first three sentences of section 111 of the Mine Act state:

[1] 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] of this [Act], 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. [2] 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.

[3] If a coal or other mine or area of such mine is closed by an order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to 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 (sentence numbers and emphasis added).

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dismissed the compensation claim of the United Mine Workers of America ("UMWA") on two grounds: (1) that the miners had been idled due to a section 103 order of withdrawal, not due to a subsequently issued section 107(a) imminent danger order of withdrawal; and (2) that the section 107(a) order failed to allege a violation of a mandatory standard. 6 FMSHRC 2465 (October 1984)(ALJ). For the reasons set forth in our decision in *Westmoreland*, supra, we reverse and remand.

The facts are not in dispute. An explosion occurred at about 5:00 a.m., February 16 1984, in the No. 1 underground coal mine of Greenwich Collieries (Greenwich") located in Indiana County, Pennsylvania. At 7:00 a.m. that same morning an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Gary Raisbough, issued a section 103(j) withdrawal order, which covered the entire mine. 2/ The section 103(j) order stated:

A methane ignition and/or explosion has occurred at approximately 5:00 a.m. in and around the active D-5 (037) working section. Three miners who were working in the D-3 section are not accounted for. The following persons are permitted to enter or remain in the mine for the purpose of rescue operations: State and MSHA officials, company officials and UMWA personnel who are necessary to conduct the rescue operations.

2/ Section 103(j) of the Mine Act states:

Accident notifications rescue and recovery activities

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j)(emphasis added). Orders issued pursuant to section 103(j) or section 103(k) of the Mine Act, 30 U.S.C. § 813(k),

are commonly known as "control orders" since they are the means by which the Secretary may assume initial control of a mine in the event of an accident in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

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At 10:15 a.m. that morning MSHA Inspector Michael Bondo issued a section 107(a) imminent danger withdrawal order, which also covered the entire mine. 3/ The section 107(a) order provided:

An underground mine explosion has occurred in this mine. This order is issued to assure the safety of any persons in the mine until an examination is made to determine if the entire mine is safe.

At 2:00 p.m. that afternoon the section 103(j) control order was modified to a section 103(k) control order. 4/

As a result of the mine explosion, three miners were killed and several others were injured. The section 107(a) order was not terminated until April 30, 1984. On February 25, 1984, while the mine was

3/ Section 107(a) of the Mine Act provides:

Procedures to counteract dangerous conditions

(a) Withdrawal order

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) of this [Act], 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] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

4/ Section 103(k) of the Mine Act states:

In the event of any accident occurring in a coal or

other 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 or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

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still closed, MSHA commenced the underground phase of its examination into the causes of the explosion. On March 20, 1984, MSHA also conducted in the mine a "saturation" inspection, which resulted in the issuance of 59 orders of withdrawal to Greenwich pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). In May 1984, the UMWA filed two complaints with the Commission seeking one-week compensation for the miners' idlement: in Docket No. PENN 84-158-C, the case now pending on review, the UMWA based its claim on the section 107(a) imminent danger order; in Docket No. PENN 84-159-C, the claim was premised on the later section 104(d) orders of withdrawal. The complaints were assigned to and consolidated for hearing by Judge Koutras.

On October 18, 1984! Judge Koutras issued a summary decision dismissing both of the UMWA's compensation complaints. With respect to Docket No. PENN 84-159-C, he concluded that the UMWA could not show, as a necessary prerequisite to one-week compensation under section 111, that the miners had been idled "due to" the section 104(d) orders because the miners were idled already by the previous section 103 and section 107 orders. 6 FMSHRC at 2476-77. Concerning Docket No. PENN 84-158-C, the judge stated, "[T]he condition precedent for the awarding of a week's compensation in these circumstances is that the mine is idled by the issuance of a § 107(a) order which cites a violation." 6 FMSHRC at 2477. He found that the mine was closed by and the miners idled due to the section 103 order, not the subsequently issued section 107(a) imminent danger order, and noted that the latter order did not cite a violation of a standard on its face. 6 FMSHRC at 2477-78. The judge also denied the UMWA's request that he retain jurisdiction of the complaint pending the outcome of MSHA's investigation into the causes of the mine explosion. 6 FMSHRC at 2478. Based on these findings, the judge dismissed the complaint.

Subsequently, the UMWA petitioned for review only as to Docket No. PENN 84-158-C. The Commission directed review and heard consolidated oral argument in this matter and two other compensation cases decided this date, Westmoreland, supra. and Loc. U. 2274, Dist. 28, UMWA v. Clinchfield Coal Co., Docket No. VA 83-55-C.

While this matter was pending on review, MSHA's investigation into the causes of the explosion continued. In view of our disposition of this proceeding, it is necessary to note briefly certain procedural developments relevant to MSHA's investigation. Between March 27 and April 27, 1984, MSHA had obtained from 66 persons sworn statements concerning the possible causes of the explosion.

On March 29, 1985, MSHA issued Greenwich five section 104(d)(1) withdrawal orders citing violations of 30 C.F.R. §§ 75.301, 75.303(a), 75.316 and 75.322, mandatory safety standards dealing with ventilation and preshift examination requirements. Each order noted: "This [cited] condition was observed during the investigation of a multiple fatal mine explosion ... on February 16, 1984." The orders were terminated on the day that they were issued. Greenwich contested the five orders and proceedings before the Commission ensued. Docket Nos. PENN 85-188-R through PENN 85-192-R & PENN 86-33.

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Subsequently, in connection with the present compensation proceeding, the UMWA transmitted to the Commission copies of the five section 104(d)(1) withdrawal orders, and requested a remand of the compensation proceeding to the judge to allow him to rule as to whether the allegations of violation contained in the section 104(d)(1) orders established the required nexus between the section 107(a) imminent danger order and underlying violations of mandatory standards. By order dated June 12, 1985, the Commission denied the motion for remand, observing that the judge had already "rejected the contention that subsequently issued 104 orders may serve as a basis for an award of compensation under the circumstances presented in this case."

On September 6, 1985, the Secretary issued his final Report of Investigation regarding the explosion. In essence, the report concluded that the explosion was caused by a dangerous accumulation of methane ignited by electrical arcing. The report also listed as "conditions and practices ... contribut[ing] to the explosion" the five violations cited in the section 104(d)(1) orders issued in March 1985. MSHA, U.S. Dept. of Labor, Report of Investigation, Underground Coal Mine Explosion, Greenwich Collieries No. 1 Mine, etc. 68-69 (1985). The Commission permitted the UMWA to submit a supplemental brief in the present compensation proceeding discussing the report's impact, if any, on the issues presented.

Meanwhile, Greenwich's separate contest of the five section 104(d) withdrawal orders had been assigned for hearing by Commission Administrative Law Judge Roy J. Maurer. On July 14, 1986, Judge Maurer issued an order granting Greenwich partial summary judgment. 8 FMSHRC 1105 (July 1986)(ALJ). The judge vacated the section 104(d)(1) orders "because they were not issued based on a finding by an MSHA inspector of an existing violation observed or detected during an inspection, but rather are based on an investigation of pre-existing, terminated violations...." 8 FMSHRC at 1107. The judge modified the orders to section 104(a) citations, 30 U.S.C. § 814(a), holding that "under the totality of the circumstances" they had been issued "with reasonable promptness" as required under that provision. 8 FMSHRC at 1107. The judge indicated that further proceedings on these modified citations would commence. On August 22, 1986, however, we granted petitions for interlocutory review filed by the Secretary and the UMWA and stayed further proceedings before Judge Maurer. The issues presented on interlocutory review concern only the judge's determination that the orders were not properly issued under section 104(d)(1).

In Westmoreland, issued this same date, we have addressed thoroughly the proper interpretation of section 111. The material issues presented here are identical to the issues addressed and resolved in Westmoreland and, accordingly, the rationale of the latter decision is controlling.

For the reasons stated in Westmoreland, slip op. at 7-11, the issuance of the initial section 103 control order did not preclude, for safety or compensation purposes, the subsequent issuance of the section 107 imminent danger order. The orders had concurrent operation and effect. For purposes of the third sentence of section 111, the mine was

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closed by and the miners were idled due to the subsequent section 107(a) order, and that order may operate as a valid prerequisite to the UMWA's one-week compensation claim. We reverse the judge's findings to the contrary.

For the reasons stated in *Westmoreland*, slip op. at 11-12, we also reverse the judge's determination that in order to trigger entitlement to one-week compensation a section 107(a) order must itself allege a violation of a mandatory standard. As we concluded in *Westmoreland*, although an imminent danger order may allege or be modified later to allege a violation, allegations of violation subsequently cited by MSHA in section 104 citations or orders, once admitted or found, also may supply the necessary nexus between the imminent danger order and an underlying violation of a mandatory standard. *Westmoreland*, slip op. at 13-14.

As discussed above, MSHA issued and Greenwich has contested five section 104(d)(1) orders alleging violations that, allegedly, contributed to the methane ignition and explosion. Docket Nos. PENN 85-188-k, etc. As noted, the presiding judge in that separate matter vacated those orders on procedural grounds and modified them to section 104(a) citations. The validity of the orders -- but not any allegation of violation contained in them -- is now pending before us in a separate proceeding on interlocutory review. In the present case, the UMWA contends that these alleged violations supply the required nexus with the imminent danger order for purposes of one-week compensation under the third sentence of section 111.

We held in *Westmoreland* that the precise form in which MSHA alleges a violation is not controlling for compensation purposes. *Westmoreland*, slip op. at 11-14. Therefore, the resolution of the procedural issue presented to the Commission on interlocutory review in Docket Nos. PENN 85-188-R, etc., will not directly affect the UMWA's claim in this compensation proceeding that the violations provide the required nexus. The UMWA's assertion of nexus, however, could be affected by the ultimate resolution of the merits of the violations themselves in Docket Nos. PENN 85-188-R, etc.

Thus, this compensation proceeding is remanded to Judge Koutras with instructions to hold the UMWA's complaint in abeyance pending final administrative resolution of the merits of the alleged violations in Docket Nos. PENN 85-188-R, etc. Cf. *Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co.*, 5 FMSHRC 1406, 1410-13 (August 1983). Upon final disposition with respect to the merits of the alleged violations, Judge Koutras shall then afford the parties

the opportunity to litigate the question of the nexus, if any, between any violations and the issuance of the section 107(a) imminent danger order.

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For the foregoing reasons, the judge's decision is reversed and this matter is remanded for further proceedings consistent with this opinion. 5/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Chairman Ford did not participate in the consideration or disposition of this matter.

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