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UMWA V. MONUMENT MINING
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FMSHRC-WDC
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LOCAL UNION NO. 5817,
DISTRICT 17, UNITED MINE
WORKERS OF AMERICA (UMWA)

v. Docket No. WEVA 85-21-C

MONUMENT MINING CORPORATION
and ISLAND CREEK COAL
COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY: Ford, Chairman; Backley, Doyle, and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)(the "Mine Act"). The question presented is whether the mine owner as well as its independent contractor may be held liable for a compensation claim under section 111 of the Mine Act, 30 U.S.C. $ 821, when the compensation claim arises from a violation of a mandatory safety standard committed solely by its independent contractor. Commission Administrative Law Judge George A. Koutras concluded that only the contractor could be held liable in this instance and dismissed the idled miners' compensation complaint against the mine owner. 7 FMSHRC 1519 (September 1985)(ALJ). For the reasons that follow, we affirm.

The parties waived a hearing and stipulated to the facts in this case. Island Creek Coal Company ("Island Creek") owns the No. 1 Surface Mine located in Holden, West Virginia. At the time the miners were ordered to be withdrawn from the mine, Monument

Mining Corporation ("Monument"), an independent contractor, was party to a five-year contract with Island Creek pursuant to which it was to operate the mine. Under the contract, Monument had "full and complete control of the work to be performed" at the mine. The miners were employees of Monument. Island Creek had no control over Monument's employees or its mining

operations, except as necessary to protect Island Creek's property and to ensure conformity with its mining plans. 1/

On August 1, 1984, two and one-half months before Monument unilaterally terminated its contract with Island Creek, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Monument an order of withdrawal, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. $ 814(d)(2), withdrawing the miners from the pit area of the No. 1 Surface Mine. The order alleged a violation of 30 C.F.R. $ 77.1303(j), a mandatory safety standard requiring special precautions when blasting is done at surface mining areas in close proximity to underground operations.

Monument performed and wholly controlled the blasting that resulted in the issuance of the withdrawal order. Island Creek had no involvement in the planning or execution of the blasting. Monument abated the violative condition in approximately 48 hours. As a result of the withdrawal order, the affected miners were idled from 6:45 a.m., August 2, 1984, until 5:30 a.m., August 4, 1984. Monument filed a notice of contest of the withdrawal order. Monument failed to participate in that proceeding, and its notice of contest was dismissed. Monument Mining Corp., 7 FMSHRC 232 (February 1985)(ALJ).

On October 30, 1984, Local Union No. 5817, District 17. of the United Mine Workers of America ("UMWA" or "Union"), filed a complaint against Monument seeking compensation, pursuant to section 111 of the Mine Act, on behalf of the miners idled by the withdrawal order. 2/

1/ Island Creek retained the right under the contract "of entering upon, examining and surveying [the] mine operations and inspecting, examining and verifying all books, accounts, statements, maps and plans of [Monument] for the purpose of ascertaining the coal taken from [the No. 1 Surface Mine, and] to determine the manner in which the mining operations of [Monument] are being conducted...."

2/ Section 111 states in part:

> [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

Monument failed to answer the UMWA's complaint or to respond to its interrogatories. On February 4, 1985, the judge issued a show cause order directing the parties to show why Monument should not be held in default and a summary decision in favor of the UMWA issued. Monument did not respond to the judge's order. Also, by this time Monument had ceased mining operations at the No. 1 Surface Mine.

Subsequent to the judge's show cause order, the UMWA learned that the No. 1 Surface Mine was owned by Island Creek. Based on this information, the Union moved to amend its complaint by adding Island Creek as a respondent. The motion was granted. By agreement of the UMWA and Island Creek, this proceeding was submitted to the judge on stipulations and briefs.

In his decision, the judge found that Island Creek "was in no way responsible for the violative conditions which gave rise to the withdrawal order idling the miners." 7 FMSHRC at 1531. The judge held that liability for compensating the idled miners attached to Monument, the independent contractor responsible for the violation, and he dismissed the UMWA's complaint against Island Creek. Id. The judge relied on Commission precedent to the effect that, in appropriate circumstances, an independent contractor may be held solely liable for the violations it commits. 7 FMSHRC at 1530.31. Finding Monument in default, the judge concluded, "While it is unfortunate that Monument is no longer in business, I find no basis for the UMWA's attempts to hold Island Creek liable for the payment of these claims." 7 FMSHRC at 1531. Accordingly, the judge ordered Monument to pay the compensation claims filed against it by the UMWA. Id. The Commission granted the UMWA's petition for discretionary review, and we subsequently heard oral argument in this matter.

On review the UMWA argues that because a mine owner may be held liable for the violative actions of its independent contractor, it also may be held responsible for remedying those actions, including paying compensation to miners idled as a result of a withdrawal order even though the mine owner had no connection with the independent mining operator. Arguing for joint and several liability in this case, the Union candidly states, "[T]he purposes of the Act were best achieved when the UMWA sought relief from the operator who had the deepest pocket...." We disagree. The plain meaning of section 111 of the Mine

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> 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 added).

Act, as well as the overall purpose of the Act, establish that the "operator" responsible for the conditions or violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners.

Section 111 of the Mine Act entitles miners idled by certain withdrawal orders to compensation "by the operator." The third sentence of section 111 links compensation to an idling withdrawal order issued "for a failure of the operator to comply with any mandatory health or safety standards." Consistent with our holdings in Local Union No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1178 (May 1981) and Local Union 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317, 1324 (September 1986), we adhere to the principle that determinations of compensation under section 111 must focus upon the conduct of the operator responsible for the conditions of the mine. We find no statutory basis upon which section 111 compensation should be distinguished from the liability for the underlying health and safety violation.

Moreover, section 2(c) of the Mine Act, 30 U.S.C. $ 801(c), embodies congressional policy "to prevent death and serious physical harm" from occurring in the nation's mines. This legislative purpose is best effectuated if the operator responsible for a violation is also held responsible for any compensation claim of its employees arising from such violation. Thus, the result we reach here today furthers the Act's policy by reinforcing that the independent contractor must make every effort to create and maintain a hazard-free mine environment, and insures that he will not be able to avoid the remedial or compensation consequences of citations and orders by shifting them to the mine owner.

In the instant case Monument alone was cited for the underlying violation. The UMWA has stipulated that Monument was solely responsible for performing and controlling the blasting practices that led to the issuance of the withdrawal order. The judge determined that the Secretary properly charged Monument with the underlying violation. He considered and applied the relevant case law regarding independent contractor/owner liability and properly concluded that Monument alone was responsible for the underlying violation giving rise to the subject withdrawal order.

Accordingly, the judge's decision that Monument alone is liable for the idled miners' section 111 compensation claim is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lastowka, dissenting:

The Commission and the courts often have been called upon to address issues concerning a mine operator's liability for violations of the Mine Act committed by independent contractors. The present case, however, presents for the first time a question concerning a mine operator's liability for compensation of miners prevented from working as a result of a violation committed by its contractor. In my opinion my colleagues reach an erroneous conclusion on the novel and important issue presented. For the reasons that follow, I respectfully dissent from their affirmance of the administrative law judge's decision. In my opinion, the judge's decision should be reversed and the case remanded for further proceedings.

In section 111 of the Mine Act, 30 U.S.C. $ 821, Congress mandated that certain limited compensation be paid by mine operators to miners idled from working due to withdrawal orders issued by MSHA inspectors because of unsafe conditions at the mine. Section 111's grant of compensation to miners is but one component of the Mine Act's comprehensive regulatory scheme for achieving safe working conditions in the nation's mines. As such, section 111 must be interpreted in harmony with the other provisions of the Act with which it is interwoven. Rather than harmonizing the interpretation of the various statutory provisions to determine the outcome of the present case, the practical effect of the majority decision is to relegate the statute to a role subservient to a private contractual arrangement structured by the mine operator.

The starting point for resolving the issue before us must be the recognition of the well settled principle that as a matter of law under the Mine Act an operator of a mine is liable, regardless of fault, for violations of the Act committed by independent contractors hired by it. This principle has been stated repeatedly and clearly. Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981); Cyprus Industrial Minerals Co. v. FMSHRC. 664 F.2d 1116 (9th Cir. 1981); Old Ben Coal Co., 1 FMSHRC 1480 (October 1979); aff'd. No. 79-2367, D.C. Cir. (December 9, 1980); Phillips Uranium Corp., 4 FMSHRC 549 (April 1982); Calvin Black Enterprises, 7 FMSHRC 1151 (August 1985). See also Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535 (D.C. Cir. 1986). Cf. Bituminous Coal Operators' Assoc., 547 F.2d 240 (4th Cir. 1977); Republic Steel Corp., 1 FMSHRC 5 (April 1979) (identical holdings under predecessor 1969 Coal Act). Although the majority decision purports to be guided by the decisions in.Old Ben, Phillips Uranium and Calvin Black, it ignores the primary and clear holding in those cases concerning the Act's liability without fault

structure. Instead, it focuses on the separate discussion in those decisions addressing a very distinct issue, i.e., the scope of Commission review of the Secretary of Labor's actions in initiating

enforcement against mine operators for their contractors' violations. */ That issue, however, is not before us.

The underlying history in the present case reflects appropriate enforcement action by the Secretary. Monument Mining was operating a surface mine pursuant to a mining contract with Island Creek. Insofar as the operation of the surface mine is concerned, it is indisputable that: Monument was Island Creek's contractor; Monument was an "operator" of the mine within the meaning of section 3(d) of the Act, 30 U.S.C. $ 802(d); and, importantly, Island Creek also was an "operator" of the mine within the meaning of section 3(d). In the course of its mining activities Monument engaged in blasting in a manner that an MSHA inspector determined to be hazardous. The inspector took enforcement action directly against Monument by issuing a closure order to Monument. Because Monument was the operator to whom the order was issued, it logically was the operator in the position to contest before the Commission the validity of the order pursuant to section 105(d), 30 U.S.C. $ 815(d), and it did so. In the meantime, a separate claim for compensation under section 111 of the Mine Act was filed with the Commission on behalf of the miners who had been idled by the issuance of the withdrawal order. This claim for compensation logically and appropriately named Monument as respondent.

Up to this point the enforcement of the Act and the litigation thereunder was proceeding in the normal fashion. At this juncture, however, the litigation took an unusual and unexpected turn: Monument unilaterally ceased operations and went out of business. This action by Monument naturally affected the litigation before the Commission. In the litigation initiated by Monument to challenge the Secretary's withdrawal order, Monument defaulted. In the separate compensation proceeding initiated by the miners, however, the miners responded to the turn of events by seeking to add Island Creek as a respondent in its capacity as operator of the No. 1 surface mine. The majority precludes the attempt by the miners to add Island Creek as a respondent in the compensation proceeding. The reasons offered for doing so are not convincing.

My colleagues first state that "the 'operator' responsible for the conditions or violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners." Slip op. at 4.

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*/ As to that issue it has been consistently recognized in the cited cases, and I agree, that secretarial enforcement solely against mine

operators for violations committed by their independent contractors, to the exclusion of the contractors themselves, is an inefficient manner of achieving the Act's purposes and runs counter to the clear intent of Congress to have contractors directly subjected to the Act's requirements. Rather direct enforcement against contractors who create hazardous conditions, whose employees are exposed to the hazards, and who are in the best position to immediately secure abatement is the most efficient and effective enforcement course. In fact, subsequent to Old Ben the Secretary adopted a regulatory approach of enforcement directly against contractors that create and control violative conditions, while expressly reserving for use in appropriate circumstances his clear legal authority to also pursue enforcement against mine operators for their contractors' violations. 45 Fed. Reg. 44,494 (1980).

The case law set forth above makes clear, however, that an operator who contracts out work at a mine site is jointly and severally responsible and liable for violations of the Mine Act committed by its contractor. E.g., Harman Mining Corp., 671 F.2d at 797; Old Ben, 1 FMSHRC at 1483. The majority further states that it "adhere[s] to the principle that determinations of compensation under section 111 must focus upon the conduct of the operator responsible for the conditions of the mine." Slip op. at 4. The cited case law makes clear, however, that a mine operator such as Island Creek is responsible for conditions at its mine regardless of whether it contracts out work at the mine. E.g., Cyprus Industrial Minerals Co., 664 F.2d at 1119-20 citing Republic Steel Corp., 1 FMSHRC 5, 11 (April 1979). Finally, the majority states that the administrative law judge "considered and applied the relevant case law regarding independent contractor/owner liability and properly concluded that Monument.alone was responsible for the underlying violation giving rise to the subject withdrawal order." Slip op. at 4 (emphasis added). As stated, however, the relevant case law in fact places joint and several liability for the underlying violation on Island Creek. Simply stated, the majority appears to mistakenly assume that there is only one "operator" of a mine. The law is clear that where a contractor performs work for a mine operator the contractor and the mine operator are both "operators" of the mine within the meaning of the Act. Therefore, to the extent that the majority's holding is based on the belief that under the Mine Act Island Creek is not liable or responsible for the violation of the Mine Act committed by its contractor it is fundamentally flawed.

Given the fact that Island Creek is an operator of the No. 1 Surface Mine and given the resulting conclusion that as a matter of law it is responsible for violations of the Mine Act committed by its contractors at the mine, it accordingly has a residual liability under section 111 for compensation due miners as a result of the violation of the Act. Section 111 contains no special definition of the term "operator" limiting its application exclusively to independent contractors in situations where the mine operator chooses to employ contractors to undertake mining activities. Therefore, the same general principle of joint and several liability previously discussed applies equally in the section 111 compensation context. The Commission recently has eschewed a narrow, purpose-defeating interpretation of section 111. E.g., Local Union 1889, District 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317, 1323-24 (September 1986). A similar approach is required here.

To the extent that the majority's conclusion may be influenced

by an underlying concern for a perceived "'unfairness" in adding Island Creek as a respondent at the present stage of the proceedings, those concerns should be allayed by the record and certainly could be accommodated in a remand to the judge. The contract between Island Creek and Monument reveals that Island Creek, as principal, carefully protected its interests in structuring the terms of its contractual mining arrangement with Monument. Exhibit A. For example, the contract provides that:

> Contractor shall be solely responsible for and shall fully indemnify and forever defend Owner from and against any and all liability for any

> citation or any withdrawal order issued pursuant to the Federal Mine Safety & Health Act of 1977, as the same may be amended or superceded, and any state health and safety laws, and their respective regulations and standards, relating to the operations and work performed under this agreement. Contractor shall be solely responsible for abatement of the alleged violation or danger and shall be solely liable for any civil or criminal penalty assessed pursuant to and as a result of said citation or order, whether assessed against Contractor or Owner. In the event any such penalty is assessed against and paid by Owner, Contractor shall promptly reimburse Owner for said penalties, and Owner may deduct and withhold from the payments due to contractor under this agreement an amount sufficient to cover any penalties which are assessed against Owner, and the costs, including reasonable attorney's fees, for defending any actions brought to assess and collect said penalties.

Exhibit A, Article 13. Furthermore, the contract required the giving of 90 days notice prior to termination of the contract by either party (Article 9) and also required Monument to deposit $40,000.00 with Island Creek in an escrow account. Exhibit A, Article 21. Thus, any monetary damages suffered by Island Creek as a result of its legal liability for its contractor's violations of the Mine Act were anticipated and provided for. To the extent that Island Creek might be considered procedurally harmed by Monument's default prior to a hearing on the merits of its challenge to the validity of the withdrawal order giving rise to the compensation claim, the Commission certainly possesses the discretion in these circumstances to direct the administrative law judge to broaden the scope of the compensation hearing to entertain any available substantive challenges to the validity of the underlying withdrawal order that would affect an award of compensation under section 111.

For these reasons, I dissent from the affirmance of the administrative law judge's decision. I would reverse and remand for further proceedings.

James A. Lastowka, Commissioner

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