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UMWA V. RANGER FUEL
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FMSHRC-WDC
May 13, 1988

LOCAL UNION 2333, DISTRICT 29,
UNITED MINE WORKERS OF
AMERICA (UMWA)

v. Docket No. WEVA 86-439-C

RANGER FUEL CORPORATION

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

DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"). The United Mine Workers of America ("UMWA") seeks compensation from Ranger Fuel Corporation ("Ranger") pursuant to the third sentence of section 111 of the Mine Act for an idling of miners following the issuance of an imminent danger withdrawal order.
1/ In denying the

1/ In relevant part, section 111 provides:

Entitlement of miners to full compensation

[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

parties' cross-motions for summary decision, Commission Administrative Law Judge Gary Melick held that Ranger's payment of a civil penalty proposed for a citation issued after the imminent danger withdrawal order was issued did not preclude Ranger from contesting in the compensation proceeding the violation itself or the causal relationship noted in the citation between the violation alleged therein and the withdrawal order. We granted the UMWA's petition for interlocutory review and stayed proceedings before the judge. For the reasons that follow, we conclude that Ranger's payment of the civil penalty extinguished its right to challenge the violation alleged in the citation, but we hold that Ranger may litigate in the compensation proceeding the issue of the causal relationship between the violation and the withdrawal order. Accordingly, we reverse in part, affirm in part, and remand for further proceedings.

Miners employed by Ranger at its Beckley No. 2 underground coal mine in West Virginia are represented by Local Union 2333, District 29, UMWA. 2/ At 11:30 a.m., on May 29, 1986, MSHA Inspector William Uhl issued to Ranger an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a), on the basis of his finding that an explosive mixture of methane gas in excess of 5% was present in

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. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] ..., section [104]..., or section [107] of this [Act], all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. ...

30 U.S.C. § 821 (sentence numbers added).

2/ Because there has been no evidentiary hearing as yet in this matter, the factual background set forth in the text is based on the parties' pleadings and briefs and on the relevant order and citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA").

the mine's 7 East Section located in the longwall area of the mine. (Methane becomes explosive at a 5% concentration. See, e.g., Monterey Coal Co., 7 FMSHRC 996, 1000-01 (July 1985).) Following issuance of the withdrawal order, Ranger withdrew all miners then underground. The mine was idled from 11:30 a.m., May 29, to 7:00 p.m., May 31, 1986, when the order was modified to permit the resumption of production in certain areas of the mine other than the 7 East Section.

On June 3, 1986, Inspector Uhl issued a citation to Ranger pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The citation asserted that it was "based on laboratory analysis of an air sample collected on May 29, 1986" and charged Ranger with a violation of 30 C.F.R. § 75.329 in that "[t]he bleeder system [had] failed to function adequately to carry away an explosive mixture of methane in the tail entries of the 7 East Longwall Section." 3/ The citation also stated: "The citation was a factor that contributed to the issuance of the imminent danger order" The next day, June 4, 1986, the section 107(a) withdrawal order and the section 104(a) citation were terminated following a determination by the inspector that the methane level in the mine was below the maximum permissible level as a result of Ranger's installation of ventilation controls.

Ranger did not contest the section 107(a) withdrawal order or the citation alleging the violation of section 75.329. Rather, after receiving MSHA's notice of a proposed civil penalty assessment of \$213 for the alleged violation, Ranger paid the penalty on August 29, 1986, without requesting a hearing. Ranger's payment of the penalty for the violation occurred 14 days after the UMWU had filed a section 111 complaint for compensation with the Commission and 10 days after Ranger

3/ Section 75.329, which restates section 303(z)(2) of the Mine Act, 30.S.C. § 863(z)(2), provides in pertinent part:

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas ... shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed

through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

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had been served with the complaint for compensation at its Beckley No. 2 Mine.

The miners working the 8 a.m. to 4 p.m. shift at the time the mine was idled on May 29 were compensated by Ranger for the remainder of that shift. Those scheduled to work the following shift from 4 p.m. to midnight on May 29 were also compensated for that shift. The complaint filed by the UMWA on August 15, 1986, sought "one-week compensation" under the provisions of the third sentence of section 111 on behalf of those miners who had been previously scheduled to work on May 30 and 31, but were idled by the withdrawal order. (Under the third sentence of section 111, miners idled as a result of a section 104 or 107 withdrawal order issued "for a failure of the operator to comply with any mandatory health or safety standards" are entitled to compensation "for such time" as they are idled "or for one week, whichever is the lesser." See n.1 supra.)

Prior to a hearing on the compensation complaint, both parties filed motions for summary decision. In its motion for summary decision, the UMWA asserted that: (1) Ranger's payment of the civil penalty proposed in connection with the section 104(a) citation established that the charged violation of section 75.329 had occurred for purposes of any subsequent proceeding under the Mine Act; and (2) the inspector's notation on the citation that there was a causal relationship between the violation and the imminent danger should be regarded, by reason of Ranger's payment of the penalty, as establishing for compensation purposes the requisite nexus between the imminent danger order and an underlying violation of a mandatory standard. Thus, the UMWA argued that all the elements necessary to sustain a compensation claim under the third sentence of section 111 were established and the idled miners were entitled to compensation as a matter of law.

In opposition to the UMWA's motion for summary decision, Ranger asserted that there were numerous factual allegations in dispute, such as the identity of the individual miners who might be entitled to compensation. Arguing for summary decision in its favor, Ranger contended that the section 107(a) withdrawal order did not allege on its face a failure by the operator to comply with a mandatory health or safety standard as required by the third sentence of section 111. Ranger further argued that the citation alleging a violation of section 75.329 was invalid because the standard applies only to bleeders ventilating old abandoned areas developed before December 30, 1970, and not to areas developed after that date, which it asserted was the case here. Ranger also argued that it should not

be precluded in a compensation proceeding from contesting the validity of the citation or the violation alleged therein, even though it had paid the civil penalty proposed for the violation.

In denying both motions for summary decision, the judge found that the citation upon which the UMWA sought to establish a "causal nexus" with the imminent danger order was not contested by Ranger and that the proposed penalty had, in fact, been paid. Order Denying Motions for Summary Decision at 2 (May 14, 1987) ("Order"). However, the judge held that Ranger's payment of the civil penalty did not preclude Ranger "from

challenging either the validity of the citation (or the causal relation between the violation cited therein and the closure order at issue)" in this compensation proceeding. *Id.* He stated:

Section 111 of the Act expressly provides that the form of compensation sought herein can be awarded only "after all interested parties are given an opportunity for a public hearing." That right to a public hearing would indeed be hollow if the mine operator could not litigate the critical issue of whether the order that idled the miners was issued "for a failure of the operator to comply with any mandatory health or safety standard."

Id. The judge further determined that collateral estoppel did not preclude Ranger from contesting the validity of the citation because there had been no actual litigation with respect to the existence of the alleged violation. *Id.* Finally, the judge held that Ranger's argument that the withdrawal order must allege a violation of a mandatory standard on its face was contrary to the Commission's holding in *Loc. U. 1889, UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317 (September 1986), which stated that for purposes of entitlement to compensation it is not necessary for an idling order itself to allege a violation of a standard. Order at 2-3.

We granted the UMWA's petition for interlocutory review and stayed proceedings before the judge. We also permitted the Secretary of Labor to file an amicus curiae brief. On review, Ranger and the UMWA essentially rely on the same arguments that they asserted before the judge. In brief, the UMWA argues that under the Commission's decisions in *Old Ben Coal Co.*, 7 FMSHRC 205 (February 1985), and *Westmoreland*, *supra*. Ranger's payment of the civil penalty prevents it from challenging in this proceeding either the violation of section 75.329 as alleged in the section 104(a) citation or the inspector's notation in that citation of a causal relationship, i.e., a "nexus," between the violation and the imminent danger withdrawal order. PDR 3-4. Ranger counters that it should be permitted to demonstrate in this compensation proceeding "that no violation in fact occurred" (R. Br. 22) and to litigate the question of nexus in addition to other issues regarding entitlement of individual miners to specific sums of compensation. R. Br. 6-7. The Secretary as amicus curiae submits that Ranger's payment of the civil penalty must be "deemed a final order of the Commission" by operation of section 105(a) of the Mine Act. S. Br. 6-8. 4/ The

4/ Section 105(a) provides in relevant part:

Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section [104] of this [Act], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail

Secretary further asserts that permitting Ranger to contest the citation in this proceeding would place miners and their representatives in the "disadvantaged litigation posture" of having to establish de novo the validity of a secretarial enforcement action. S. Br. 6, 12.

We first address the question of whether Ranger's payment of the civil penalty proposed for the violation of section 75.329 precludes it from contesting that violation in this compensation proceeding. Ranger contends that such a challenge would be limited in nature -- confined strictly to the purpose of defending itself against the section 111 compensation claim. If Ranger could establish that no violation occurred, then the UMWA would be unable to demonstrate the required nexus between a violation and issuance of the idling withdrawal order. We conclude, however, that Ranger's position cannot be reconciled with the statutory framework of sections 105 and 111 of the Mine Act and with decisions interpreting those provisions.

Section 105 of the Mine Act provides operators with two opportunities to contest and request a hearing concerning issuance of a section 104 citation. It is well-established that section 105(d) grants an operator the right to seek immediate review of an abated citation before the Secretary has proposed a civil penalty. *Energy Fuels Corp.*, 1 FMSHRC 299, 300-09 (May 1979); *Old Ben Coal Co.*, 7 FMSHRC 205, 207-08 (February 1985); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-21 (September 1987). 5/ After a civil penalty assessment is proposed, an operator has

of the civil penalty proposed to be assessed under section [110(a)] of this [Act] for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a) (emphasis added).

5/ Section 105(d) provides in relevant part:

Contest proceedings; hearing; findings of fact;
affirmance, modification, or vacation of citation,
order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator
of a coal or other mine notifies the Secretary that he
intends to contest the issuance or modification

another opportunity under section 105(a) to file a notice of contest of the proposed penalty. *Id.* Moreover, an immediate contest of a citation under section 105(d) is not a procedural prerequisite to initiating a contest under section 105(a) of the penalty assessment proposed for that citation, and in such a penalty contest the operator may challenge the penalty as well as the fact of violation. 30 U.S.C. § 815(a); *Quinland Coals*, *supra*, 9 FMSHRC at 1621.22.

If, however, an operator fails to contest a civil penalty proposed for a citation, section 105(a) expressly provides that both "the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(a); see also Senate Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*. at 622 (1978). Further, an operator's payment of a proposed civil penalty constitutes an admission of the underlying violation and precludes the operator from continuing a pending section 105(d) contest of the violation. *Old Ben*, *supra*, 7 FMSHRC at 209. "For purposes of the Act, paid penalties that have become final orders [pursuant to section 105(a)] reflect violations of the Act and the assertion of violation contained in the citation is regarded as true." *Id.* See also *Amax Lead Co. of Missouri*, 4 FMSHRC 975, 978-79 (June 1982) (payment of a penalty in settlement operates as a concession that "for purposes of any proceedings under the Mine Act, the violations [are] to be treated as if established.") Thus, the Act's enforcement provisions have consistently been interpreted to mean that once a civil penalty is paid or becomes a final order by operation of section 105(a), the assertion of violation contained in the citation cannot be contested in a subsequent proceeding under the Mine Act. In fact, the *Old Ben-Amax Lead* rationale has been expressly applied in the context of a compensation proceeding to foreclose challenges of violations for which penalties were paid. *Westmoreland*, *supra*, 8 FMSHRC

of an order issued under section [104] of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section [104] of this [Act], ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing

(in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance.

30 U.S.C. § 815(d).

at 1330; Loc. U. 2274, *UMWA v. Clinchfield Coal Co.*, 8 FMSHRC at 1310, 1314 (September 1986).

Here, Ranger did not avail itself of either of the two opportunities granted by the Mine Act to contest the allegation of violation made in the citation. Instead, it paid the civil penalty proposed for the violation. Under these circumstances, both the validity of the citation and the amount of the civil penalty are final under section 105(a) of the Act and not subject to review. Thus, Ranger is precluded in this proceeding from challenging the violation. 6/

In addition, we agree with the Secretary that allowing an operator to challenge in a compensation proceeding the fact of violation despite having paid the relevant civil penalty would improperly place miners and their representatives in a prosecutorial role. The Secretary, as enforcer and prosecutor of the Mine Act, is a party to a section 105 enforcement proceeding but not to a section 111 compensation proceeding. 30 U.S.C. §§ 815 & 821. See *Int'l U., UMWA v. FMSHRC*, 840 F.2d 77, 81-82 (D.C. Cir. 1988). If an operator were permitted to make the kind of challenge advocated by Ranger, miners and their representatives would be required to perform functions properly resting within the Secretary's domain in order to prove the underlying violation or the validity of the citation or order in which the allegation of violation was contained. Given the unified scheme of the Mine Act, we find unconvincing Ranger's assertion that it would not be inconsistent to allow it to challenge the fact of violation in a compensation proceeding even though it chose not to contest the allegation of violation in an enforcement proceeding. Accordingly, we reverse the judge's determination that Ranger should be

6/ Ranger cites *Secretary v. Kenny Richardson*, 3 FMSHRC 8 (January 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), in support of its contention that a final order pursuant to section 105(a) does not have preclusive effect in a subsequent proceeding under the Mine Act. Ranger's reliance on *Kenny Richardson* is misplaced. In that proceeding, the corporate agent, Richardson, had been cited pursuant to section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the identical predecessor provision to section 110(c) of the Mine Act, 30 U.S.C. § 820(c). The corporate operator also had been cited. In the separate proceeding against the operator, the operator had paid the proposed penalties without contesting the charges against it. At issue in the *Richardson* case was the Secretary's power to

pursue the corporate agent even though the corporate operator had paid the penalty and was not a party in the subsequent proceeding against the agent. The Commission held that despite the operator's payment of the penalty, the Secretary was not precluded from proving the operator's violation of the standard as an element of proof in the case against the agent and the agent was not barred from contesting the allegation that a violation had occurred. 3 FMSHRC at 10. Thus, Kenny Richardson concerned the effect of a final Commission order on the enforcement of the Act against a separate respondent, whereas the present proceeding concerns the effect of a final order on the same party that had paid the penalty, i.e., the operator.

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permitted in this proceeding to challenge the validity of the citation or the underlying violation.

We turn to consideration of whether Ranger's payment of the penalty also operated as an admission of a causal nexus between the violation and the imminent danger withdrawal order for purposes of determining entitlement to compensation under section 111. In *Eastern Associated Coal Corp.*, 3 FMSHRC 1175, 1178 (May 1981), the Commission discussed the concept of "nexus" in the compensation context in describing the causal relationships between the operation of withdrawal orders and idling of miners necessary to sustain various compensation awards. One-week compensation under the third sentence of section 111 is keyed to idlements resulting from section 104 or 107 withdrawal orders issued "for a failure of the operator to comply with any mandatory health or safety standards...." In *Westmoreland*, the Commission held that allegations of violation of mandatory standards contained in section 104(a) citations or section 104(d) citations or orders could provide the causal nexus with a previously issued section 107(a) imminent danger withdrawal order. 8 FMSHRC at 1329-30. Thus, under applicable precedent the section 104(a) citation in the present proceeding may be examined to determine whether a nexus existed between the violative condition and the section 107(a) withdrawal order.

There is a crucial distinction, however, between the issue of the fact of violation for enforcement purposes and the separate issue of causal nexus for compensation purposes. In *Westmoreland*, following application of the Old Ben principle that the operator's payment of penalties established the underlying violations, the Commission nevertheless remanded the matter for a determination of whether nexus existed:

Left unresolved, however, is the specific question of whether any of these charges of violation of mandatory standards in fact provide the necessary relationships to the section 107(a) order so as to initiate compensation under the third sentence of section 111.

Because the relationship or nexus between the violations of mandatory standards and the imminent danger order is the critical issue on which statutory entitlement to one-week compensation hinges, we remand ... for further proceedings.... If such a relationship is determined, the judge shall take appropriate action

to identify the affected miners and the amount of compensation due to each.

8 FMSHRC at 1330. 7/ Thus, the issue of causal nexus in a compensation

7/ Clinchfield, supra, also involved one uncontested section 104(d)(1) citation and three section 104(d)(1) orders for which penalties had been paid. The Commission concluded that the citation and

proceeding is independent of the allegation of violation and must be addressed separately in order to determine entitlement to one-week compensation under the third sentence of section 111.

The UMWA acknowledges that the issue of causal nexus is compensation-related but relies on Old Ben to argue that Ranger should have known "full well that findings in an uncontested citation are regarded as true for purposes of all subsequent proceedings under the Act..." PIR 4 (emphasis added). We do not agree. Old Ben states only that "[p]aid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true." 7 FMSHRC at 209 (emphasis added). Old Ben in no way involved the issue of whether causal nexus is admitted for purposes of section 111 when an operator pays the civil penalty associated with a citation containing a specific notation regarding nexus.

As we have emphasized, section 105 provides two opportunities for review by which an operator may contest citations and orders issued pursuant to section 104 and proposed penalty assessments for those orders and citations. Such contest proceedings include consideration by the administrative law judge of the statutory elements necessary to prove the alleged violation and to assess a penalty. A finding of "causal nexus" is not one such element. There is no statutory basis for the compensation-related issue of causal nexus to be addressed in a section 105 enforcement hearing. Had Ranger timely contested the citation, the judge in a section 105 proceeding would properly have reserved the nexus issue for consideration in the compensation proceeding. Whatever importance the inspector's notation of nexus on a citation may serve in the Secretary's enforcement of the Act, the subject of nexus between a withdrawal order and an underlying violation becomes relevant only in a section 111 compensation proceeding.

We therefore affirm the judge's conclusion that Ranger may contest the issue of the causal nexus between the violation and the section 107(a) withdrawal order in the compensation proceeding. Finally, we conclude in agreement with Ranger that issues remain to be tried in this proceeding regarding the entitlement of individual miners to specific sums of compensation. See Loc. U. 1889, etc., *UMWA v. Westmoreland Coal Co.*, 9 FMSHRC 1195, 1196 (July 1987).

orders could supply the required causal nexus and remanded the matter for a determination of whether the nexus existed. 8 FMSHRC at 1314. Likewise, in *Greenwich*, supra, the matter was remanded to afford the

parties the opportunity to litigate the question of nexus once the merits of the alleged violations were resolved. 8 FMSHRC at 1307.

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Accordingly, the judge's decision is reversed insofar as it held that Ranger may contest in this compensation proceeding the fact of violation or the validity of the citation for which it has paid the civil penalty. We affirm the judge's decision insofar as it permitted Ranger to litigate the issue of the causal nexus between the fact of violation and the section 107(a) withdrawal order. We dissolve the stay and remand this matter for further proceedings consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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