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MSHA (JERRY ALESHIRE) V. WESTMORELAND COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 15, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of JERRY DALE ALESHIRE, et al.

v. Docket No. WEVA 84-344-D

WESTMORELAND COAL COMPANY

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

DECISION

BY THE COMMISSION:

This is a discrimination proceeding brought under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982| {the "Mine Act") by the Secretary of Labor ("Secretary") on behalf of Jerry Dale Aleshire and six other miners (the "complainants"). 1/ The issue presented is whether individuals who obtain safety training while on layoff, on their own time and at their own expense, are entitled to be compensated for their time and

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1/ Section 105(c) provides in pertinent part:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because ... of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or

others of any statutory right afforded by this [Act.]

30 U.S.C. $ 815.

reimbursed for their expenses by the operator after being rehired.

The Secretary contends that Westmoreland Coal Company ("Westmoreland") violated section 115 of the Mine Act by refusing to compensate complainants for the time spent in obtaining the training and by refusing to reimburse them for out-of"pocket costs incurred. 2/ Commission Administrative Law Judge James Broderick concluded that laid-off individuals are not "miners" entitled to the training rights of section 115 of the Act, and, therefore, that the complainants are not entitled to compensation or reimbursement from Westmoreland for the time and expense of such training. 10 FMSHRC 653 (May 1988)(ALJ). For the reasons that follow, we affirm the judge's decision.

The facts are not in dispute. On December 17, 1982, the seven complainants were laid off from their surface mining jobs at Westmoreland's Ferrell Mine Complex in Boone County, West Virginia. All of the complainants had been employed at the mine in surface positions for three or more years prior to December 17, 1982. Each had previously worked underground prior to working on the surface but, because of the length of time they had worked as surface miners, six of the seven needed MSHA-approved underground new miner training before they could

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2/ Section 115 of the Mine Act, 30 U.S.C. $ 815, requires mine operators to establish a health and safety training program for every "miner," which term is defined in section 3(g) of the Act, 30 U.S.C. $ 802(g), as "any individual working in a coal or other mine." Under section 115(a) "new miners ... shall receive no less than 40 hours of training if they are to work underground." 30 U.S.C. $ 815(a). In addition, section 115(b), 30 U.S.C. $ 815(b), provides:

> Any health and safety training provided under subsection (a) ... shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

The Secretary has promulgated training and retraining regulations implementing the requirements of section 115. 30 C.F.R.

Part 48. 30 C.F.R. $ 48.2(c) defines a "new miner" as "a person who is not an experienced miner." 30 C.F.R. $ 48.2(b) in part defines an "experienced miner" as "a person who is employed as an underground miner on the effective date of these rules, or a person who has had at least 12 months experience working in an underground mine during the preceding 3 years ..." The regulations describe the requisite training for each type of miner. A new miner working underground may not assume his or her duties until receiving 40 hours of training. 30 C.F.R. $ 48.5(a). The regulations do not refer to laid-off miners or to applicants for underground mine employment.

again work underground. Because the seventh was an experienced underground miner on October 13, 1978, when 30 C.F.R. Part 48 became effective, he did not need new miner training to work underground again.

After the complainants were laid off, at least one of them attended a union meeting where a representative of Westmoreland stated that laid off miners might improve their chances for recall if they were to obtain underground new miner training at their own expense while they were laid off. In May and June 1983, the complainants obtained the training at the Boone County Career and Technical Center. The complainants' training was paid for by the Boone County Board of Education except for two of the complainants, each of whom claims to have paid $20.

At the time the complainants were trained, Westmoreland and the United Mine Workers of America (UMWA) were parties to the National Bituminous Coal Wage Agreement of 1981 (the "Agreement"). Under terms of the Agreement, miners were to be recalled to work in order of seniority -- seniority being defined in the Agreement as "length of service and the ability to step into and perform the work of the job at the time the job is awarded." Stip. 7. The complainants were recalled to work in underground positions on October 21, 1983. They would not have been recalled had they not obtained the underground new miner training. After they were rehired, they sought reimbursement from Westmoreland for the cost of the training and compensation for their time.

When Westmoreland refused to compensate or reimburse them, the complainants filed a complaint with the Secretary's Mine Safety and Health Administration ("MSHA") alleging that Westmoreland had discriminated against them in violation of section 105(c) of the Act by not providing the training and not compensating them for the time and expense of obtaining it themselves. Subsequently, the Secretary filed a complaint of discrimination on the complainants' behalf with the Commission, making the same allegations and requesting that Westmoreland be ordered to compensate the complainants for the time they had spent in obtaining the training and to reimburse those of the complainants who had incurred costs. The Secretary also requested that Westmoreland be required to pay interest to the complainants and be assessed a civil penalty for violating section 105(c).

Both the Secretary and Westmoreland moved for summary decision. Because 115 requires operators to provide training to "miners" and to pay "miners" at their normal rates of compensation

while taking such training, the judge focused first upon the question of whether or not the complainants were "miners" when they obtained the training. The judge noted that the Commission had concluded in Emery Mining Corp., 5 FMSHRC 1391, 1396-97 (August 1983), rev'd sub nom. Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155 (lOth Cir. 1986), that an operator may not refuse to compensate new miners for training undertaken on their own but relied on by the operator to satisfy MSHA training requirements. He further noted, however, that the United States Court of Appeals for the Tenth Circuit reversed the Commission, holding that such individuals were not "miners" at the time they undertook their prehire training and

thus were not covered by section 115's requirement for operator paid training.

The judge further observed that, prior to the Tenth Circuit's decision in Emery, the Commission in Peabody Coal Company, 7 FMSHRC 1357 (September 1985) and Jim Walter Resources, 7 FMSHRC 1348 (September 1985), aff'd sub nom. Brock v. PeabodY Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), held that: (1) an operator's policy requiring laid-off miners to obtain statutorily-mandated new miner training on their own prior to rehire does not violate section 115 of the Act because laid-off individuals are not "miners" protected under section 115 until they are rehired; and (2) an operator who relies on the prehire training of those whom it rehires to satisfy its statutory training obligations with respect to "new miners" is required by section 115 of the Act to reimburse the rehired miners for the expenses of their training. 10 FMSHRC at 657. The judge noted that the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's determination in PeabodY and Jim Walter that the laid-off individuals were not "miners" entitled to training under section 115 of the Act, even though they might have been contractually entitled to reemployment under a collective bargaining agreement. The judge also noted that the compensation aspect of the issue now before us was not before the court for resolution. ld. 3/

The judge concluded that nothing required him to go beyond the Mine Act and its legislative history to determine whether individuals recalled from layoff are entitled to compensation for section 115 training. He held that individuals on layoff are not "miners" for whom an operator is required to provide health and safety training, nor are they entitled to compensation for the time and reimbursement for the expense of training taken on their own. 10 FMSHRC at 658.

We granted the Secretary's petition for discretionary review. The Secretary asserts that the judge erred in concluding that the complainants were not entitled to compensation for the time and reimbursement for the expenses of their training and she argues that the Commission's decisions in Peabody and Jim Walter resolve the issue. Westmoreland responds that the rationale of the Tenth Circuit's decision in Emery applies to miners rehired from layoff as well as to newly hired miners. We agree with Westmoreland.

Section 115 grants training rights to "new miners" and "miners." As noted, the Commission has held that because job applicants and individuals on layoff who obtain training prior to

hire are not "miners," as defined by section 3(g) of the Act, they have no statutory right to training. Emery, 5 FMSHRC at 1395-96; Peabody, 7 FMSHRC at 1363; Jim Walter, 7 FMSHRC at 1354. This holding has been upheld by the courts. Emery, 783 F.2d at 158-159; Peabody, 822 F.2d at 1148-1149.

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3/ In Peabody the operator compensated the rehired miners for the training they obtained on their own. In Jim Walter, the operator did not appeal the Commission's compensation order. See Brock v. Peabody Coal Co., supra, 822 F.2d at 1136 n.3.

As the judge noted, the Tenth Circuit rejected the Commission's conclusion that an operator who relies upon the prehire training of newly hired miners to satisfy its statutory training obligations must reimburse the miners for their training expenses. In deciding whether newly hired miners are entitled to compensation, the Tenth Circuit found their status at the time they were trained to be conclusive. If they are not "miners" when they take the training they are not entitled to compensation from the operator: "[n]othing in the Act or the legislative history suggests that a new employee must be paid wages and expenses for the time spent in a course he voluntarily took prior to the time he was employed." Emery, 783 F.2d at 159.

The Secretary would have us distinguish the Tenth Circuit's decision in Emery on the basis that the complainants in this case, unlike the newly hired miners in Emery, have had "an established relationship with Westmoreland" through their contractual recall rights under the Agreement. Sec. Pet. for Discretionary Review at 6. The Commission has previously rejected similar arguments. The Commission stated in Peabody and Jim Walter that the Mine Act is a health and safety statute, not an employment statute. 7 FMSHRC at 1364; 7 FMSHRC at 1354. As the D.C. Circuit stated, "[w]e certainly cannot infer from the Act that Congress intended privately-bargained contracts to determine who is and who is not entitled to receive section 115 training.... [I]t would be peculiar in the extreme for us to import a contractual criterion to determine who is entitled to training when the Congress has explicitly considered the question and decreed a statutory criterion." Peabody, 822 F.2d at 1148. The court added that "an individual is not a 'miner' who can claim a training right under section 115(a) unless he or she is employed in a mine." Peabody, 822 F.2d at 1149 (footnote omitted). We therefore find no persuasive basis upon which to distinguish this case from the Tenth Circuit's decision in Emery and in the absence of contrary judicial precedent we will follow that decision.

Accordingly, we hold that because the claimants were not "miners" under the Act at the time they undertook training, they were not granted training rights by section 115 and were not entitled to be compensated by Westmoreland for such training. We therefore affirm the decision of the judge.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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