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JOHN BUSHNELL (MSHA) V. CANNELTON INDUSTRIES  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
August 21, 1989

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION, on behalf of  
JOHN W. BUSHNELL

v. Docket No. WEVA 85-273-D

CANNELTON INDUSTRIES, INC.

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

ORDER

BY THE COMMISSION:

This discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act" or "Act"), is before us on remand from an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing our prior decision in this matter. Secretary of Labor on behalf of John W. Bushnell v. Cannelton Indus., Inc., 867 F.2d 1432 (1989), rev'g, 10 FMSHRC 152 (February 1988). At issue is the scope of the pay protection afforded miners with evidence of pneumoconiosis (Black Lung disease) by relevant provisions of the Mine Act and the Secretary of Labor's regulations at 30 C.F.R. Part 90.

The discrimination complaint filed by the Secretary of Labor on John W. Bushnell's behalf in this matter alleged that Cannelton Industries Inc. ("Cannelton") discriminated against Bushnell, a "Part 90 miner," in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1), when, after a job transfer occurring as part of a company-wide work force reduction and realignment, he was paid at a rate lower than the rate he was receiving immediately prior to his transfer. The transfer at issue occurred several years after Bushnell's initial transfer without

loss of pay to a low-dust job pursuant to 30 C.F.R. Part 90. Commission Administrative Law Judge William Fauver determined that Cannelton unlawfully discriminated against Bushnell when it failed to compensate him after his second transfer at the same rate of pay that he had received prior to that transfer. 8 FMSHRC 1607 (October 1986)(ALJ). In essence, Judge Fauver concluded that the Part 90 pay protection provision set forth at 30 C.F.R. 90.103(b) applies whenever

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a Part 90 miner is transferred and is not limited only to transfers as a result of exposure to respirable dust. 8 FMSHRC at 1608-09. The judge awarded Bushnell back pay of \$161.14 plus interest on that sum to be "computed in accordance with the Commission's rulings concerning interest" and assessed Cannelton a civil penalty of \$25. 8 FMSHRC at 1609-10. We granted Cannelton's petition for discretionary review, which was limited to the sole issue of the judge's construction of the pay protection afforded to Part 90 miners by the Secretary's regulations.

In our prior decision, we disagreed with the judge. We concluded that both the general pay protection provisions of section 101(a)(7) of the Mine Act, 30 U.S.C. 811(a)(7), and the regulations set forth in Part 90 applied only to exposure-related transfers, not to all transfers. 10 FMSHRC at 155-59. Finding that Bushnell was transferred as part of a bona fide, non-discriminatory work force reduction and realignment, we held that the immediate pay protection right enjoyed by Bushnell when he was initially transferred to a low-dust position did not obtain on the occasion of his later, nonexposure-related transfer. 10 FMSHRC at 159. In this regard, we stated that "the pay protection provisions of the Mine Act and the Part 90 regulations do not grant Part 90 miners a vested pay entitlement that insulates them against all negative business and economic contingencies affecting their employers." 10 FMSHRC at 154-55 (emphasis in original). Accordingly, we reversed the judge's decision, dismissed Bushnell's discrimination complaint, and vacated the backpay award and civil penalty.

The Secretary appealed our decision, and the Court, reversing our decision, stated:

We hold that the Commission failed to extend the appropriate deference to the Secretary's interpretation of her own regulations and of the Mine act. The Commission erred insofar as it held that section 90.103(b) protects the Part 90 miner's wage only upon dust-related transfers and that a contrary interpretation would violate the Mine Act. Accordingly, we reverse the Commission's decision and remand this case to the Commission with directions to adopt the ALJ's decision in favor of Bushnell.

867 F.2d at 1439.

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Accordingly, the judge's decision and assessment of civil penalty are reinstated. Cannelton is directed to pay Bushnell the back pay awarded by the judge, with interest calculated in accordance with the formula set forth at 54 Fed. Reg. 2226 (January 19, 1989). See Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988).

L. Clair Nelson, Commissioner

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