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MSHA V. ROCHESTER AND PITTSBURGH COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 21, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PENN 88-194-R

ROCHESTER AND PITTSBURGH
COAL CORPORATION

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

DECISION

BY THE COMMISSION:

At issue in this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), is whether Rochester and Pittsburgh Coal Corporation ("R&P") violated 30 C.F.R. $ 90.103(a) by failing to compensate a Part 90 miner at not less than the regular rate of pay received by that miner immediately before his exercise of the Part 90 option. 1/ Commission Administrative Law Judge William Fauver held that R&P violated the standard and, based on the parties' stipulation that the Secretary's petition for civil penalty be adjudicated in the contest proceeding, the judge imposed a penalty of $78.00. 10 FMSHRC 1313 (September 1988)(ALJ). For the reasons that follow, we affirm Judge Fauver's decision.

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1/ Section 90.103(a) essentially restates section 203(b)(3) of the Mine Act, 30 U.S.C. $ 843(b)(3), and provides:

> The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by

that miner immediately before exercising the option under $ 90.3 (Part 90 option; notice of eligibility; exercise of option).

At the time of the events at issue, Leonard Edwards had been employed at the Greenwich Colliery No. 2 South Mine, an underground coal mine operated by R&P, for over 15 years. In August 1979, while working as a longwall shear operator, Edwards was informed by the Department of Labor's Mine Safety and Health Administration ("MSHA") that a chest X-ray taken on January 23, 1979, indicated that he had "enough pneumoconiosis" to render him eligible under the Mine Act for transfer to a less dusty area of the mine. Exh. G-1. 2/ Edwards testified that he showed the letter to his section foreman, who requested a copy for R&P's files. Later in 1979, he began work on the cross-belt at the same rate of pay he had received as a longwall shear operator. He worked at this latter task until April 1985, when, as the result of a work force reduction and realignment, he was scheduled to be transferred to the North Mine as a shear operator. Not wishing to transfer, Edwards was allowed to remain at the No. 2 South Mine, and was reclassified as a general laborer with a reduction in rate of pay from $14.41 to $13.31 per hour. He then gave a copy of the MSHA letter of August 1979 to John Bobenage, mine superintendent, who authorized that his rate of pay be restored to $14.41 per hour, effective April 15, 1985. Exh. OX-2, Tr. 12.

About March 1, 1988, when possible further employee realignment was rumored, Edwards sent to MSHA his "Exercise of Option to Transfer" form. 3/ The form bears Edwards' signature and a partly obliterated date of 4-12-85. Edwards testified that he had signed and dated the

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2/ Section 90.3(a), which essentially restates section 203(b)(2) of the Mine Act, 30 U.S.C. $ 843(b)(2), states:

> Any miner employed at an underground coal mine or at a surface work area of an underground coal mine who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis based on a chest X-ray, read and classified in the manner prescribed by the Secretary of Health and Human Services, or based on other medical examinations shall be afforded the option to work in an area of a mine where the average concentration of respirable dust@in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air. Each of these miners shall be notified in writing of eligibility to exercise the option.

3/ Section 90.3(d) states in relevant part:

The option to work in a low dust area of the mine may be exercised for the first time by any [eligible] miner ... by signing and dating the Exercise of Option Form and mailing the form to the Chief, Division of Health, Coal Mine Safety and Health....

form in April 1985 but had decided not to send it to MSHA. He subsequently scratched over that date when he actually mailed the form in March 1988. He testified that on Monday, March 14, 1988, he informed Bill Garay, an R&P foreman, that he was invoking his Part 90 rights. On that same date, R&P also received MSHA's notification, dated March 10, 1988, of Edwards' exercise of option. R&P informed MSHA by letter of March 18 that Edwards, as a Part 90 miner, would be assigned "outby the face area" and would be sampled for respirable dust as required. Exh. OX-4, G-6. Edwards' regular rate of pay was reduced from $15.81 to $14.75 per hour effective March 16, 1988. Exh. OX-3.

Acting on a complaint by Edwards, MSHA issued a section 104(a) citation to R&P on April 21, 1988, alleging a violation of 30 C.F.R. $ 90.103(a) for reducing the regular rate of pay received by Edwards immediately before exercise of his Part 90 option. Exh. G-4. R&P contested the citation, and a hearing was held before Judge Fauver on June 7, 1988.

John Bobenage, superintendent of the No. 2 Mine during 1985, testified that his restoration of Edwards' higher rate of pay in April 1985 was based on Edwards' assertion, confirmed by his supervisor, that he was a Part 90 miner. Tr. 46-52. Donald Marino, manager of labor relations for R&P, testified that he was not aware until early March 1988 (but prior to receiving MSHA's notice of Edwards' Part 90 status) that Edwards was not a Part 90 miner. Marino further stated that Edwards had been mistakenly overpaid at a higher rate since April 1985, based on R&P's "false assumptions" as to Edwards' Part 90 status. Tr. 56.74.

Michael Kaschak, responsible for R&P's respirable dust sampling of Part 90 miners at the Greenwich mines, stated that he had been aware since 1985 that Edwards was not a Part 90 miner. He testified that he had not discussed the matter with R&P officials until March 6 and 7, 1988, when he informed William Garay, mine foreman, and Richard Endler, mine superintendent since July 1987, that Edwards was not a Part 90 miner. Tr. 92. Garay testified that he had questioned Edwards' rate of pay in January 1987. Tr. 109. Endler testified that, following discussions with R&P management officials, he concluded, on March 10 or 11, 1988, that, since Edwards was not a Part 90 miner, his rate of pay for the preceding three years was a mistake and should be reduced. He signed the pay rate change authorization form on March 16, 1988. Tr. 115-17, Exh. OX-3.

In his decision, Judge Fauver found that in April 1985, when Edwards produced a copy of the 1979 MSHA letter, R&P restored his pay cut since "[b]oth Edwards and mine management apparently assumed that Edwards was a Part 90 miner in April 1985." 10 FMSHRC at 1314. He further determined

that Edwards' pay-rate cut on March 15, 1988, occurred after he had exercised his Part 90 transfer option and after R&P had been notified by both Edwards and MSHA of that exercise of option. Id. Citing Matala v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir. 1981), and Mullins v. Andrus, 664 F.2d 297, 305 310 (D.C. Cir. 1980), the judge held that the "regular rate of pay, as used in Part 90, is the rate that the miner was actually and regularly being

paid immediately before the exercise of the Part 90 option, and not the rate to which he had a right, or "should have been" receiving. 10 FMSHRC at 1316. Accordingly, he concluded that when a miner becomes a Part 90 miner, the operator may not go back several years from that date to change the miner's rate of pay to one the operator decides the miner "should have been" receiving immediately before he became a Part 90 miner. To permit such retroactive changes, the judge concluded, "would have a chilling effect on the exercise of Part 90 rights." 10 FMSHRC at 1316. In the instant case, since R&P received MSHA's notice of Edwards' Part 90 status on March 14, 1988, the judge determined that R&P violated section 90.103(a) by reducing his regular rate of pay on March 15, 1988. 10 FMSHRC at 1317.

On review, R&P argues that by falsely claiming Part 90 status in April 1985, Edwards attempted to abuse the intent of the Mine Act and, under a "bad faith" exception recognized by the court in Mullins, supra, is not entitled to the regular rate of pay received by him immediately prior to transfer. Alternatively, lacking a showing of bad faith, R&P argues that it is entitled to correct Edwards' regular rate of pay because it resulted from a mistake. 4/ We disagree.

The Secretary contends that the record fails to show bad faith on Edwards' part. The Secretary asserts that, absent such a showing, the miner is entitled, upon transfer, to the same rate of pay as he actually and regularly received prior to transfer. She further asserts that her interpretation is consistent with section 203(b)(3) of the Act, the underlying purpose of Part 90, and the interpretation of those provisions by the courts. Sec's br. at pp. 7, 8.

The term "regular rate of pay," as used in section 203(b)(3) of the Mine Act and in section 90.103(a) (n.1 supra), has been clearly defined by the District of Columbia and Fourth Circuit Courts of Appeals. Mullins defines that term as "the rate at which the transferring miner was actually and regularly compensated when the transfer occurred, irrespective of job classification." 664 F.2d 297. See also, Matala, supra, 647 F.2d at 429.

R&P first contends that these decisions do not control because Edwards abused the intent of the Act in falsely claiming Part 90 status. R&P notes that Mullins recognizes an exception to the Mine Act's pay rate maintenance protection in cases of bad faith, "when a miner attempts to abuse the intent of the Act...." 664 F.2d at 310 n. 113.

The express intent of the relevant sections of the Mine Act and the Part 90 regulations is to afford the option of transfer to a less dusty area of the mine, at no less than the regular rate of pay received immediately before the transfer, to any miner who shows evidence of the

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4/ R&P also argues that Edwards had subsequent X-rays in 1983 or 1984 and in 1988, the results of which are unknown to the operator and which might indicate that the initial X-ray was misread or that his condition has improved. We agree with the Secretary that this argument is entirely speculative, lacking any evidence of record to support it.

development of pneumoconiosis. The record demonstrates that, in August 1979, Edwards had been informed by MSHA that he had a sufficient degree of pneumoconiosis to be eligible for Part 90 rights and needed only to send in the exercise of option form to MSHA. Why, after signing and dating the form in 1985, Edwards did not send it to MSHA@ or why the mine superintendent personally approved Edwards' status as a Part 90 miner based solely on the MSHA letter of eligibility, is not explained in the record. We agree that had Edwards falsely claimed Part 90 medical eligibility, the "bad faith" exception carved out in Mullins might well apply. However, the evidence of record indicates that, at most, this is a case of technical non-compliance with Part 90 procedures rather than abuse of the intent of the Act, or bad faith, on Edwards' part. We believe the record supports the judge's conclusion that Edwards' pay restoration in April 1985 resulted from a mistaken assumption by both parties that Edwards was a Part 90 miner.

We next address R&P's argument that it should be allowed to correct a Part 90 miner's rate of pay that was calculated erroneously. The Secretary contends that this case does not involve the correction of a clerical error but represents an attempt to decrease Edwards' pay rate only after he had exercised his option. In our view, this case is distinguished from that of a newly discovered, recently occurring inadvertent clerical error. Edwards had been compensated at the rate of pay, now questioned, for almost three years prior to March 1988. His restoration to that rate of pay had previously been questioned but then personally approved, in April 1985, by the mine superintendent. The person responsible for R&P's Part 90 sampling program had known since 1985 that Edwards was not a Part 90 miner, and Edwards' supervisor had questioned his pay status as early as January 1987. R&P, therefore, was in the position to correct this situation at any time during the three- year period prior to March 1988.

Instead, by reducing Edwards' rate of pay only after he had exercised his part 90 option, R&P finds itself diametrically opposite the consistent judicial and Secretarial interpretation of the pay-rate protection provisions of the Mine Act and Part 90. Recently, the D.C. Circuit has reaffirmed a liberal view of the transfer and pay rate protections of the Mine Act and Part 90 in Secretary v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989). In its decision, the court emphasized that the Secretary's interpretation of the Mine Act is entitled to deference, stating:

> Confronting diverse readings of the statutory text, we are obliged to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable.

867 F.2d at 1437.

In the instant case, we find the Secretary's interpretation of section 90.103(a) reasonable, and consistent with the judicial precedent set out in Mullins and Matala, supra. Accordingly, we hold that substantial evidence supports the conclusion that R&P violated 30 C.F.R. $ 90.103(a) when it reduced the regular rate of pay being received by

Edwards immediately prior to the exercise of his Part 90 option.

For the foregoing reasons, the judge's decision is affirmed.

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