FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20004-1710

FEB 24 2016

UNITED STEELWORKERS, LOCAL NO. 5114, ON BEHALF OF MINERS	:	
	:	Docket No. WEST 2012-466-CM
v.	:	
HECLA LIMITED	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). At issue is a claim for compensation for miners under the fourth sentence of section 111 of the Act.[1] This is a matter of first impression.

United Steelworkers, Local No. 5114 ("United Steelworkers") brought the compensation claim in response to a failure by Hecla Limited to comply with an amendment to a section 103(k) order.[2] That failure caused miners to work underground during a period they should have been withdrawn. The Judge applied the statutory language to the amendment, and concluded that

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[1] The fourth sentence of section 111 states:

> 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section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular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.

[2] Section 103(k) states in relevant part that, "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the . . . mine." 30 U.S.C. § 813(k).

compensation was owed to 19 miners who, during the eight days between issuance of and compliance with the amendment, worked when they should have been withdrawn. 36 FMSHRC 3345 (Dec. 23, 2014) (ALJ); 37 FMSHRC 243 (Feb. 4, 2015) (ALJ). United Steelworkers contends that the statutory language applies to the entire section 103(k) order, and that compensation should be paid to the 218 miners idled by the order during the 19 months between issuance and termination of the order.

We conclude that the Judge correctly determined the compensation available under the fourth sentence of section 111.

I.

Factual Background

The relevant facts are undisputed. On November 16, 2011, a rock burst[3] occurred in the 54 Ramp and 5900 main haulage travelways of an underground lead, zinc and silver mine, the Lucky Friday Mine, owned by Hecla. The Department of Labor's Mine Safety and Health Administration ("MSHA") issued section 103(k) Order No. 8605614, requiring withdrawal of miners from the affected area. MSHA subsequently modified the order several times to allow limited activity in the affected area. Amendment 3, issued on November 30, 2011, required the installation of stress gauges in the 5900 main haulage drift.[4] Amendment 5, issued on December 6, 2011, in part required Hecla to monitor those stress gauges at the start and end of each shift, and to withdraw miners from the affected area in the event of detectable movement or cracking (i.e., geological stress) in the main haulage travelways.

On December 14, 2011, a second rock burst occurred in the 5900 pillar. Shortly after miners were withdrawn from the area, MSHA issued section 103(j) Order No. 8605622, which was then amended to a section 103(k) order. The order prohibited activity in all underground areas of the mine, including those addressed in Order No. 8605614. Order No. 8605622 was subsequently modified to allow access for repairs and abatement.

On December 21, 2011, MSHA issued a citation alleging that Hecla "worked in the face of" Order No. 8605614 by failing to perform the last stress gauge reading prior to the second rock burst. The citation notes that, if the reading had been taken, "it may have indicated high levels, which would have removed miners from the 2nd rock burst." 36 FMSHRC at 3350 n.10. The parties ultimately reached a settlement regarding this citation.

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[3] A "rock burst" is "[a] sudden and often violent breaking of a mass of rock from the walls of a tunnel, mine, or deep quarry, caused by failure of highly stressed rock and the rapid or instantaneous release of accumulated strain energy. It may result in closure of a mine opening, or projection of broken rock into it, accompanied by ground tremors, rockfalls, and air concussions." Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms*, 464 (2nd ed. 1997).

[4] A "drift" is "[a]n entry, generally on the slope of a hill, usually driven horizontally into a coal seam." *Id.* at 169.

MSHA terminated both section 103(k) orders on June 12, 2013, upon determining that all related cited conditions had been abated.

II.

Procedural History

In December 2011, Hecla contested the two section 103(k) orders. United Steelworkers filed its compensation claim the following month. The compensation claim noted that Hecla had been cited for working in violation of Order No. 8605614, and sought compensation for all miners idled by the order between its issuance and termination.

The issue in Hecla's contest proceeding was whether MSHA acted in an arbitrary or capricious manner by maintaining Order No. 8605614 after Order No. 8605622 was issued, given that the later order encompassed all underground areas of the mine. The Judge noted testimony from MSHA inspectors that, while elements of the earlier order had been superseded, dangerous conditions still remained in the affected area. The Judge concluded that MSHA's decision to "spotlight" a particularly dangerous area that still required work was not arbitrary or capricious. 36 FMSHRC 2749, 2754 (Oct. 29, 2014) (ALJ). Hecla had argued that, because the later order made it impossible to comply with the earlier order, Order No. 8605614 was superseded, mooted and/or terminated when Order No. 8605622 was issued. The Judge noted that such arguments would be relevant in the related compensation claim, but found that they were not determinative in the contest matter. *Id.* at 2753 n.8, 2754 n.10.

After the Judge issued his decision in the contest proceeding, the parties filed motions for partial summary decision in the compensation proceeding, regarding all elements of the claim except the final dollar amount. In its motion, United Steelworkers clarified that its claim was brought under the fourth sentence of section 111, and arose when the operator failed to take the stress gauge readings required by Order No. 8605614.

The Judge issued an order detailing the scope of compensation available under the fourth sentence claim. 36 FMSHRC at 3354. The Judge concluded that Amendment 5 issued on December 6, 2011 was the relevant "order" with a nexus to the compensation claim. He reasoned that MSHA issued the citation for the violation of the section 103(k) order for Hecla's failure to monitor the stress gauges, which amendment 5 required. *Id.* at 3350. Accordingly, he concluded that compensation began on December 6, 2011, when the amendment was issued, and ended on December 14, 2011, when Hecla could no longer comply with the monitoring requirement of the amendment due to the issuance of Order No. 8605622. *Id.* at 3351. The Judge held that 19 miners were entitled to compensation because they worked in the affected area between Hecla's failure to take the reading and the withdrawal of miners after the second rock burst, and because they were working underground when they would otherwise have been withdrawn if Hecla had taken the stress gauge reading. *Id.* at 3353. Based on the Judge's order and the parties' stipulations, a final decision was issued ordering a total payment of $13,150.48 to 19 miners. 37 FMSHRC at 245.

United Steelworkers filed a petition for discretionary review, which the Commission granted. In its petition, United Steelworkers claims the Judge erred by focusing on the amendment and limiting compensation to miners who worked between the triggering event

(the failure to comply with the requirement to monitor the stress gauges), and the second rock burst, rather than fully compensating all miners idled by Order No. 8605614.

III.

Disposition

Section 111 provides a "graduated scheme of increasing compensation commensurate with increasingly serious operator conduct." *Local Union 1261, District 22, UMWA v. Consolidation Coal Co.*, 11 FMSHRC 1609, 1613 (Sept. 1989), *aff'd*, 917 F.2d 42 (Oct. 1990). This scheme is both remedial and limited in nature, in order to balance the competing interests of miners and mine operators. The first two sentences provide compensation for time actually idled, not to exceed four hours, to all miners working a shift or scheduled to work the next shift when a section 103, 104 or 107 order is issued ("shift compensation"). The third sentence provides compensation, not to exceed one week, to miners actually idled by a section 104 or 107 order issued for a failure to comply with a mandatory standard. The fourth sentence provides that, "if an operator fails to comply with a withdrawal order issued under sections 103, 104, or 107, miners who otherwise would have been withdrawn are entitled to full compensation at their regular rates of pay, in addition to pay received for work performed after issuance of the order, until such time as the order is complied with, vacated, or terminated." *Id.* at 1612-13.

Pursuant to the statutory language, compensation under the fourth sentence of section 111 involves three elements: (1) a triggering event – a violation, failure or refusal to comply with a section 103, 104 or 107 order; (2) the entitlement – full compensation in addition to pay received for all miners who would have been withdrawn or prevented from entering as a result of the order; and (3) the period of compensation – beginning with the issuance of the order and ending when the order is complied with, vacated, or terminated.

In the context of a failure to withdraw miners in violation of a section 103(k) order, the fourth sentence of section 111 entitles miners who worked in the face of the order to double compensation, for the period between the issuance of the order and withdrawal (compliance) or legal re-entry (vacation or termination). Here, the triggering event was a failure to comply with an amendment to a 103(k) order's affirmative requirement to monitor stress gauges, rather than a direct violation of an order to withdraw. We find that the Judge properly determined the scope of compensation in this unusual circumstance, by focusing on the language, purpose, and unique elements of a fourth sentence compensation claim.

The first consideration is the determination of which order was violated when Hecla failed to monitor the stress gauges. The violation occurs "[w]henever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act. . . ." The parties disagree as to whether the "order" with which Hecla failed to comply was Order No. 8605614, or Amendment No. 8605614-05. As discussed below, the Judge properly concluded that the amendment is the relevant "order" for determining the scope of compensation.

The Commission has held that there must be a causal nexus between the compensation sought and the designated order. *Local Union 781, District 17, UMWA v. Eastern Associated*

Coal Corp., 3 FMSHRC 1175, 1178 (May 1981) (finding that miners idled while a section 103(k) order was in place were not entitled to compensation, because they were idled pursuant to a collective bargaining agreement rather than the order); *see also Local Union 1889, District 17, UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1321-22 (Sept. 1986).

This causal nexus must do more than simply link the order to some form of lost pay. It must connect the order to the specific type of compensation provided by the sentence of section 111 under which compensation is sought. Shift compensation is only available to miners who were working or scheduled to work, but were withdrawn because the relevant order was issued. *Consolidation Coal*, 11 FMSHRC at 1616. Third sentence compensation similarly 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.'" *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 10 FMSHRC 612, 620 (May 1988). Fourth sentence compensation, therefore, must also be "keyed" to the specific circumstances addressed therein; the relevant order must be connected to the violation, failure or refusal to comply which resulted in miners working when they should have been withdrawn.

The parties agree that this fourth sentence compensation claim arose due to Hecla's failure to monitor stress gauges, and that if the stress gauges had been monitored at the proper time, miners would likely have been withdrawn due to detectable ground movement that could pose a danger to miners.[5] The requirement to monitor stress gauges was created when Amendment 5 was issued, so it was a failure to comply with that requirement which resulted in miners continuing to work when they should have been withdrawn. Amendment 5 has the causal nexus to the circumstances entitling miners to compensation under the fourth sentence of section 111.

We reject United Steelworkers' argument that the amendment cannot be an "order" because it is not an independent issuance and does not require withdrawal. We have previously held that a modification can support a compensation claim. *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1236-37 (July 1989). Moreover, Amendment 5 does require the withdrawal of miners when high levels of geological stress are detected. Each sentence of section 111 provides for compensation in specific circumstances, and "order" must be interpreted consistently with that purpose.

The second consideration under the fourth sentence is determining the miners entitled to compensation. In this respect, the fourth sentence provides ". . . 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

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[5] The failure to comply and its effect are documented in Citation No. 8565565. We note that while the relevant failure to comply was contained in a citation in this instance, a formal MSHA enforcement action is not necessary to establish a fourth sentence compensation claim. It is the violation, failure or refusal to comply with an element of a section 103, 104 or 107 order which gives rise to the claim. That triggering event may be established through an MSHA enforcement action or by other evidence of the operator's failure or refusal to comply with the order.

regular rates of pay, in addition to pay received for work performed after such order was issued . . . ."

The Judge correctly found that compensation was available to those miners who worked in the affected area after Hecla failed to monitor the stress gauges. The fourth sentence provides compensation to miners who would have been withdrawn if the order had been complied with, but instead performed work. 30 U.S.C. § 821 (miners who "would have been withdrawn . . . as a result of such order" are entitled to additional compensation beyond "pay received for work performed"). In other words, it compensates those miners who would not have been working but for the violation, failure or refusal to comply. If Hecla had complied by taking the required reading, miners working in the area very likely would have been withdrawn at that time. Instead, Hecla failed to take the reading, and the miners working in the area were not withdrawn until the second rock burst occurred. The Judge correctly limited compensation to those 19 miners who worked in the area, and thus were exposed to the hazard of another rock burst, when they should otherwise have been withdrawn pursuant to Amendment 5.

United Steelworkers argues that fourth sentence compensation also extends to all 218 miners idled as a result of Order No. 8605614 issued on November 16, 2011. Such an interpretation is not consistent with the fourth sentence, which provides for compensation where there has been a failure to comply with a withdrawal order (or, under the circumstances of this case, where there has been a failure to comply with an order and compliance would have resulted in withdrawing miners), and miners have been paid for work performed. The text provides compensation for miners who *were working* when they would otherwise have been withdrawn. *See Consolidation Coal*, 11 FMSHRC at 1613. This is consistent with the legislative history, which states that "where an operator failed to withdraw miners after the issuance of a withdrawal order, the miners *who worked despite the order* were entitled to their compensation for such work, and the compensation they would have been entitled to under this section if they had in fact been withdrawn." S. Conf. Rep. No. 95-461, at 59 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1337 (1978) (emphasis added). Moreover, the first three sentences of section 111 already provide compensation to miners actually idled by a withdrawal order.[6] Providing (potentially quite extensive) idlement compensation through the fourth sentence is inconsistent with the structure of section 111.

The third and final consideration under the fourth sentence is the period of compensation. In relevant part, the sentence provides compensation ". . . for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated . . . ."

Amendment 5 is the relevant "order" for calculating compensation. United Steelworkers asserts that the commencement date for compensation should be the date of the original order, November 16. We have held, however, that Hecla violated Amendment 5 issued on December 6. Consequently, the compensation period is properly considered to have begun when the

[6] Hecla has represented to the Commission that miners actually idled by Order No. 8605614 were entitled to, and received, the proper shift compensation.

amendment was issued on December 6, 2011.[7] While the date of compliance is less obvious, we confirm the Judge's determination that the compensation period ended at approximately 9:00 p.m. on December 14, 2011.

Compliance takes different forms in different contexts: for example, an operator may have to complete abatement, fulfill an affirmative requirement, and/or withdraw miners. The context here is a failure to comply, resulting in miners working when they should have been withdrawn. The simplest way to resolve a failure to comply is to resume compliance. Following this logic, the Judge reasoned that Hecla complied (or rather, ended its state of non-compliance) at 9:00 p.m. on December 14, 2011, when all miners were withdrawn from the affected area and when underground activity was prohibited by section 103(j) Order No. 8605622 so that the requirement to monitor stress gauges fell away.

United Steelworkers contends that the Judge's finding as to the date of compliance was precluded by his holding in the contest proceeding, and is not supported by the record. We find that both arguments rely on an assumption that Amendment 5 is not the relevant "order" for compensation purposes. Accordingly, we reject them.

United Steelworkers claims that in the contest matter the Judge effectively affirmed MSHA's determination that Order No. 8605614 was not fully abated until June 12, 2013, and therefore cannot conclude in the compensation matter that compliance occurred on December 14, 2011.[8] The issue in the contest proceeding was whether the Secretary acted in an arbitrary or capricious manner by maintaining Order No. 8605614 in its entirety after December 14, 2011. The Judge did not (nor did he have any reason to) address compliance with Amendment 5 specifically. He was free to do so in the compensation proceeding. *See Ranger Fuel Corp.*, 10 FMSHRC at 620-21 (finding that a Judge could address causal nexus arguments in a compensation claim related to an uncontested citation, because the Judge would not have addressed the issue in an enforcement proceeding); *cf. Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997) (noting that *res judicata* is inapplicable where the claims involved are not identical). A finding that Order No. 8605614 was not terminated until June 12, 2013 does not preclude a finding that the relevant amendment was complied with, for compensation purposes, on December 14, 2011.

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[7] Obviously, if Hecla had violated some other aspect of the relevant order, the commencement date could be different. For example, if Hecla failed to withdraw miners working in dangerous conditions and such failure was viewed as non-compliance with Order No. 8605614's requirement to ensure safety by withdrawing miners, the beginning date for compensation could be November 16, 2011. However, the parties agree that the "failure to comply" which triggered this claim was the failure to take stress gauge readings as required by the Amendment 5, not a failure to ensure miner safety as required by the order.

[8] United Steelworkers also argues that the Judge was precluded from adopting Hecla's argument that Order No. 8605622 superseded, mooted or terminated the earlier order, because the Judge had already rejected those defenses in the contest matter. However, the Judge specifically noted that the defenses were non-determinative in the contest matter, and might be relevant to the compensation claim. 36 FMSHRC at 2753 n.8, 2754 n.10.

United Steelworkers argues that, as a factual matter, compliance was not achieved on December 14, 2011, because Hecla continued to work to abate conditions associated with Order No. 8605614 after that date. It is undisputed that all steps necessary for full compliance for the order *as a whole* was not fully achieved by December 14, 2011. However, it is also clear that the violation relevant to this compensation proceeding – the requirement to monitor stress gauges in Amendment 5 – fell away on December 14, 2011, when Order No. 8605622 prohibited all underground activity. As discussed above, the date of compliance is not based solely on the impossibility of continuing to monitor stress gauges, but also on the withdrawal of the 19 miners.

IV.

Conclusion

The fourth sentence of section 111 is intended to provide double compensation to miners who actually worked when, if not for the violation, failure or refusal to comply which triggered the compensation claim, they would otherwise have been withdrawn or prevented from entering the affected area. Consistent with this purpose, the Judge properly focused on Amendment 5 as the "order" with the appropriate nexus to the compensation claim, and limited compensation to those miners who, during the period between issuance of, and compliance with, the amendment, worked when they would otherwise have been withdrawn due to hazardous conditions caused by Hecla's failure to monitor the stress gauges. Accordingly, we affirm the Judge's decision.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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