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LOCAL UNION 1570, DIST. 31, (UMWA) V. EASTERN ASSOCIATED COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

LOCAL UNION 1570, DISTRICT 31, UNITED MINE WORKERS OF AMERICA (UMWA), COMPLAINANTS	COMPENSATION PROCEEDING Docket No. WEVA 88-227-C Federal No. 2 Mine
v.	
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Joyce A. Hanula, Legal Assistant, United Mine Workers of America, Washington, D.C., for the Complainants;
Eugene P. Schmittgens, Jr., Esq., Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a claim for compensation filed by the UMWA against the respondent pursuant to the third sentence of section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 821, seeking compensation for miners employed at the captioned mine who were idled for 3-1/2 shifts, from 8:00 p.m., on February 9, 1988, to midnight on February 10, 1988. The UMWA contends that the mine was idled as a direct result of two section 104(d)(2) orders issued at the mine by an MSHA inspector, and the respondent maintains that the mine was idled because of a legitimate business decision by mine management. A hearing was held in Morgantown, West Virginia, and the parties filed posthearing arguments in support of their respective positions. I have considered these arguments in the course of my adjudication of this matter.

Issues

The issues presented are (1) whether or not the orders in question were final orders within the meaning of the Act; (2) whether the mine or miners were idled by those orders; and (3) whether the miners are entitled to compensation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The members of Local Union 1570 are employed at Eastern's Federal No. 2 Mine.

2. The UMWA is the authorized representative of the members of the Local Union 1570.

3. The Federal No. 2 Mine is a mine whose operations and products affect interstate commerce.

4. On February 8, 1988, at 6:25 p.m., MSHA Inspector Michael G. Kalich issued Order No. 2943582 pursuant to Section 104(d)(2). Order No. 2943582 applied to the Federal No. 2 Mine. A copy of said order was attached and marked as Exhibit A to the joint stipulations of fact.

5. On February 10, 1988, at 12:00 noon, Order No. 2943582 was vacated. A copy of the document vacating said order was attached and marked as Exhibit B to the joint stipulation of fact.

6. On February 8, 1988, at 6:30 p.m., MSHA Inspector Michael G. Kalich issued Order No. 2943583 pursuant to Section 104(d)(2). Order No. 2943583 applied to the Federal No. 2 Mine. A copy of said order was attached and marked as Exhibit C to the joint stipulation of fact.

7. On February 10, 1988, at 12:00 p.m., Order No. 2943583 was modified. A copy of said modification was attached to the joint stipulation of fact and marked as Exhibit D.

8. Order No. 2943583 was terminated at 3:05 p.m., on February 10, 1988. A copy of said termination was attached to the joint stipulation of fact and marked as Exhibit E.

9. The above referenced orders restricted Eastern from operating the 14 Right 3 South Longwall section.

10. After the issuance of the above referenced orders, the Federal No. 2 Mine continued to operate 2-1/2 shifts.

11. The Federal No. 2 Mine was idle from 8:00 p.m., on February 9, to midnight February 10, 1988.

12. Miners returned to work on the 12:00 a.m. shift on February 11, 1988.

13. The names of the miners idled, their idle time, rate of pay, and alleged lost wages was attached to the joint stipulation of fact and marked as Exhibit F.

14. The aforementioned Order Nos. 2943582 and 2943583 were not contested under Section 105(d) of the Federal Mine Safety and Health Act of 1977.

15. It is the position of the UMWA that the Federal No. 2 Mine was idled as a direct result of the above referenced orders.

16. It is the position of Eastern that the mine was idled as the sole result of a business decision made by management at the Federal No. 2 Mine.

Complainant's Testimony and Evidence

MSHA Inspector Michael G. Kalich testified that he visited the mine on February 8, 1988, after being instructed to do so

by his field supervisor who had received a call that the respondent was operating its longwall section. Mr. Kalich stated that at the time of his inspection of the longwall section a previously filed petition for modification seeking relief from the requirements of mandatory safety standard 75.1002, was still pending for decision by MSHA. He confirmed that he issued section 104(d)(2) Order No. 2943582, on February 8, 1988, at 6:25 p.m., citing a violation of section 75.1002, and that he did so because of the respondent's failure to comply with one of the conditions of the petition, namely paragraph 7, which required the respondent to provide overtemperature protection for the high-voltage neutral grounding resistor used in the high-voltage circuit supplying the longwall power center (exhibit R-2, Petition for Modification filed December 1, 1987). Mr. Kalich issued the order because he found that the longwall power center was energized, that some amount of coal had been produced, and the overtemperature device required by paragraph 7 of the petition had not been installed (Tr. 6-8).

Mr. Kalich confirmed that he subsequently vacated Order No. 2943582 after being informed by his supervisor that he could not issue a violation based on a pending petition for modification which had not been granted. He also confirmed that he could not have issued the order citing a violation of section 75.1002 independent of the modification petition because the power center was outby the area, and the vacated order in question was based on paragraph 7 of the pending modification petition rather than on section 75.1002. He explained that he cited a violation of section 75.1002 "because that is what the petition is based on, relief of that standard," but he confirmed that the cited condition was not in violation of section 75.1002 (Tr. 9-11).

Mr. Kalich confirmed that he issued the second section 104(d)(2) Order No. 2943583, at 6:30 p.m., on February 8, 1988, on the longwall section citing a second violation of section 75.1002, because he found that the high voltage cables on the section were located inby the last open crosscut and were within 150 of the pillar workings. These conditions were independently in violation of the requirements of section 75.1002, and he based the order on that section rather than on paragraph 7 of the pending modification petition. Since he could not base the order on the petition, he simply included the language referencing the petition from the prior vacated order as part of the subsequent Order No. 2943583, by modifying it on February 10, 1988 (Tr. 8, 11-12; Exhibits C & D, stipulations). Mr. Kalich confirmed that the order was terminated on February 10, 1988, by another inspector who was regularly assigned to the mine (Tr. 12; Exhibit E, stipulations).

On cross-examination, Mr. Kalich stated that he never closed the mine or required that any miners be withdrawn, and that "I just required that the power center be de-energized" (Tr. 13). With regard to the cited overtemperature device mentioned in Order No. 2943582, he confirmed that "it was repaired after I issued the order," and a copy of the order reflects that it was terminated at 7:35 p.m. the same evening that it was issued (Tr. 13; Exhibit A, stipulations). He confirmed that with respect to both orders, he simply required the power to be deenergized, and that by doing this, no coal could be mined but that "they could do any kind of setup work they wanted to do" (Tr. 18). Although he did not remain at the mine after he issued the first order, he "heard that men were laid off" (Tr. 18).

Terry Osborne UMWA District #31, International Safety Representative, testified that he was familiar with the modification petition in question and that prior to its filing and the issuance of the orders by Inspector Kalich, representatives of the UMWA and mine management were meeting to discuss the conditions to be included in the petition for its approval. The last meeting was held on January 29, 1988, and as of that date, the UMWA had not agreed upon the terms for approval of the petition. When he learned from the local union president that the respondent intended to operate the longwall while the petition was still pending, he placed a call to MSHA and requested an investigation into the possibility of the long-wall being operated with high voltage at the face without the petition being granted. As a result of this call, MSHA inspectors were sent to the mine on the afternoon shift when the orders were issued. The petition was subsequently granted on February 10, 1988, 2 days after the orders were issued (Tr. 19-22).

On cross-examination, Mr. Osborne confirmed that in the course of the meetings with mine management with respect to the petition, the future of the mine was discussed, and mine management expressed the view that in the event the petition were not granted the mine would "suffer severe consequences" (Tr. 23). Mr. Osborne stated that mine management advised the union that if the petition were not granted the mine would be shut down and that "This mines will not operate unless the petition is granted and this longwall is running" (Tr. 24).

Mr. Osborne agreed that longwalls produce more coal more efficiently than continuous miners, and that unless coal is mined economically the mine will not make money. He also

agreed that the mine operator may decide which method of mining to use in its mine, and that layoffs occur in the mining industry for mines which do not make money (Tr. 25). He stated that the mine had in the past operated for years with a longwall without the necessity for filing a petition and without high voltage at the face of the longwall, and that "they did excellent" (Tr. 28).

Larry Knisell, president of the local union and member of the mine safety and health committee, testified that he was familiar with the modification petition in question and the orders issued by Inspector Kalich. He confirmed that he took part in the meetings with mine management with regard to the petition and that the local union did everything it could to "help it along," and he realized that management needed the high voltage at the longwall (Tr. 30).

Mr. Knisell stated that he learned that the longwall had been running on February 8, 1988, the day the order was issued. He confirmed that when the order was issued, the miners worked the rest of that day, and that on February 9, the four to twelve shift was idle for 4 hours, and that on February 10, "there was some work done in the mines." The 15 longwall development section was being "driven up one side to set the longwall on," and that coal was being produced on the 15 Right 3 South Section. He did not know whether any other sections were producing coal at this time (Tr. 32). He confirmed that it was common knowledge at the mine that if the petition were not ultimately approved there would be "serious economic consequences," and that he became aware of this sometime in January, 1988 (Tr. 32).

Respondent's Testimony and Evidence

General Mine Superintendent Mick Toth testified that the February 8, 1988, order issued by Inspector Kalich was of "no importance" because the reason for not operating the longwall was the fact that the petition for modification had not been granted. Mr. Toth confirmed that he was never told that the inspector had closed the mine or required the withdrawal of any miners at the longwall or any other section of the mine. He explained that meetings and discussions were held with union representatives, MSHA personnel, and mine management as early as 3-weeks prior to the granting of the petition, and he advised everyone concerned that "there would be some economic impact to the mines" if the petition were not granted (Tr. 43). Mr. Toth identified a copy of a memorandum dated January 13, 1988, addressed to the respondent's law department, which he sent at their request, making it aware of the economic impact

resulting from the unavailability of the longwall (Tr. 45-46; Exhibit R-1). He also identified a copy of a letter dated January 13, 1988, from the respondent's attorney to MSHA requesting expedited consideration of the modification petition, and advising MSHA of the adverse economic impact on the mine if the petition were not granted (Tr. 47; Exhibit R-2).

Mr. Toth stated that the mine is a profitable mine, and he confirmed that it produces coal on a longwall section and four belt and continuous miner sections. He explained the coal production figures, and confirmed that by February 3, 1988, all of the available coal on the longwall panel had been mined, and that no coal production took place on that longwall from February 3 to February 8, 1988 (Tr. 49-52). He produced copies of the mine production records for January and February, 1988, and confirmed that for the period January 29 to February 3, 1988, coal production on the longwall was reduced by 110,000 tons (Tr. 55; Exhibits R-3 and R-4).

Mr. Toth stated that during the period from February 3 to the afternoon shift on February 9, no miners were idled, and he confirmed that if the petition for modification had been granted prior to February 9, the mine would not have been closed (Tr. 56). He explained that the power was on the longwall section on February 8, in order to make the necessary startup "trim pass" adjustments in anticipation of the granting of the modification petition. Mr. Toth stated further that power was on the section a week earlier, and none of the union representatives or MSHA inspectors who were at the face objected. He confirmed that he had no intention of mining coal on the longwall until the petition was granted, and that the section 104(d)(2) orders had nothing to do with his decision to idle the mine on February 9 (Tr. 57-58).

On cross-examination, Mr. Toth confirmed that the modification petition was filed on December 1, 1987, and that the approval process is time consuming. In instances of previously filed petitions, "interim relief" was available to a mine operator pending final approval by MSHA, but this procedure is no longer available. Although he believed that the union did everything it could to support the petition, delays and disagreements with respect to the conditions upon which the petition could be approved were encountered (Tr. 60).

Mr. Toth confirmed that the longwall section in question was energized on February 4 or 5, and the cables were energized so that equipment could be moved. He stated that he made several calls to MSHA personnel and they informed him that if the petition had not been granted they could not advise him to

put the longwall into production, and apart from any "trim pass," no coal production was started on the longwall until final approval of the petition was received (Tr. 63-64). Mr. Toth also explained that the power was on so that the MSHA inspectors could check all electrical connections and startups to confirm that the conditions under which the petition were to be granted were being followed, and that this was taking place on or about February 4 (Tr. 67).

Mr. Toth explained that during the day shift on February 8, a "trim pass" was made on the longwall section, and this process included necessary adjustments to the shearing machine cable and chain. He stated that this process did not involve the normal production cutting and mining of the coal, and that the "trim" only cut away 2 inches of coal, rather than the usual 30 inch cut taken during normal production. The longwall shields were not advanced, there were no roof falls behind the shields, and there was no gob. The section was "active," the power was on, miners were working, and he believed that the belt was running to take out the trimmed coal (Tr. 73-74). Mr. Toth confirmed that all of the miners who were subsequently idled were working and involved in this process on February 8, and that the petition had not been approved as of that date. He stated that everyone at the mine was aware of the fact that the petition had not as yet been approved at that time (Tr. 79-80). Mr. Toth could not recall speaking with union president Knisell after the orders were issued (Tr. 81).

In response to a question as to why the miners were idled on February 9, Mr. Toth responded as follows (Tr. 81-82):

> The reason for the idlement on February 9th, you have to realize that throughout this whole period it was always getting right on the edge, yeah, we'll have it, or already been sent by FAX, the MSHA office, as soon as you get there in the morning, it'll be there at your mine.
>
> That had gone on for several days. I went along with that. I didn't want to idle any miners. I want to make every dime I can make and mine every ton of coal I can mine. But the fact was that on February 9th I just got completely fed up hearing all I was going to hear about being there in the next hour or two. It dealt -- there were some pretty big losses throughout this period.

> I felt from the period January 28th until the time they granted the petition which was the 10th of February, I just couldn't take no more losses. Economic factors, that was my sole reason for doing what I did, and it was something I didn't want to do, but had to do.

Mr. Toth stated that the four continuous miner sections which were in operation on February 8, accounted for approximately 25 percent of the mine production, and that he had full crews working that day. Only one of these developing sections was working on February 10, and the only miners working on this day were those who he believed were necessary to start up the longwall in order to bring the other miners back to work. The longwall started into production on February 11 (Tr. 86-87).

Frank Peduti, Respondent's chief maintenance supervisor, testified that he is responsible for all mine electrical activities. He confirmed that he was at the 14 Right Longwall section on February 8, 1988, making certain adjustments in preparation "to set up the new longwall section" (Tr. 111). He discussed the modification petition with Inspector Kalich, and whether or not an additional overtemperature device had been installed in the load center. Mr. Peduti stated that "I had the part in hand" and that it took 15 minutes to install it (Tr. 112).

On cross-examination, Mr. Peduti stated that at the time he spoke with the inspector and installed the overtemperature device, as well as before going underground that day, he did not "assume one way or the other" that the modification petition had not as yet been granted (Tr. 113).

Mick Toth was recalled and explained that the drop in coal production after the modification petition was granted, as shown by his production records, was due to the fact that after mining for 100 feet with the longwall startup, rock displacement was encountered, and throughout the end of February and the first 2 weeks of March "we encountered some difficult problems on that particular longwall panel" (Tr. 120). He reiterated that the order issued by Inspector Kalich had nothing to do with his decision to idle the mine, and he explained that he was aggravated and frustrated over the promises and assurances that the modification petition approval was imminent, and when it did not materialize "I just couldn't wait no longer. I got myself where I had no longwall production. I was in some big losses and I had no other

choice but to do what I did. That order had nothing to do with that" (Tr. 121, 124). Mr. Toth further explained as follows at (Tr. 121-125):

> Q. Could you have used these men on anything else?
>
> A. Not and make money.
>
> Q. Could you have used them on anything else? What do you mean "not make money?" Couldn't you have used them on the other section, the continuous mining section?
>
> A. No-- Yeah, I could have used them. I could have. I've got 580 people at that coal mine and what justified that employment of 580 people is the amount of tons and amount of profit to be made. If those profits and tons aren't made, there's a reasoning for that. The reasoning for that period of time was the lack of the granted Petition for Modification that had been filed for.
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> * * * * * * *
>
> A. There were other people that worked in the mine. Like I say, there were other people that worked throughout that period that the mine was idled on a development section. We had a crucial situation at that coal mine on our developments keeping up with retrieve. And the development that I had great concerns about was one immediately outby the longwall.
>
> * * * * * * *
>
> Q. I'm not going to put myself in the position to cross-examine you, but this next question. What better way of getting someone's attention to shut the whole mine down? I mean, if I were the superintendent and being frustrated, I'd say, well, the heck with it, I'm just going to shut her down and let's see if we can't get some action on that petition. Is that what happened?
>
> A. That's basically what happened. We had no petition and we just -- what we didn't need,

> you know -- I can't employ 500 people if I don't have any work for them. I worked what I could and I worked areas I thought were crucial to the future of that coal mine. What I didn't work I didn't need or I'd have worked them.

Complainant's Arguments

In its posthearing brief, the UMWA asserts that since the respondent did not contest the section 104(d)(2) Order No. 2943583, issued by Inspector Kalich at 6:30 p.m., on February 8, 1988, it waived its right to challenge the order pursuant to section 105(d) of the Act, and that in the circumstances, the order has become final. Since the third sentence of section 111 of the Act provides that compensation is due after an order upon which it is based is "final," the UMWA states that the next critical issue to be resolved is whether a nexus existed between the order and the miners being idled. Local Union 781, District 17, UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175 (May 1981); Local Union 1889, District 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317 (September 1986) and Local Union 2333, District 29, UMWA v. Ranger Fuel Corp., 10 FMSHRC 612 (May 1988).

The UMWA asserts that the order in question restricted the longwall section from operating until the pending petition for modification was granted, and that this in turn forced the respondent to idle the entire mine because it would not be economically feasible to operate it at a reduced productivity level. Under these circumstances, the UMWA concludes that a "nexus" existed between the issuance of the order and the idlement of the miners. In support of its position, the UMWA maintains that the evidence presented clearly demonstrates that the mine would have continued to work through the period of idlement "but for" the issuance of the order. The UMWA asserts that the evidence shows that the respondent was "fed up" with MSHA's delay in acting on the petition for modification and that Mine Superintendent Mick Toth believed that the economic situation required him to start up the high-voltage longwall, even though he did not have the necessary modification from the requirements of 30 C.F.R. 75.1002. The UMWA concludes that it is evident that the respondent intended to mine coal without the necessary modification and would have continued to do so had the inspector not issued the withdrawal order.

Citing the Commission's decisions in Local Union 5869, District 18, UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (August 1979), Local Union 3453, District 17, UMWA v. Kanawha

Coal Co., 1 FMSHRC 1315 (September 1979), and Local Union 1670, District 12, UMWA v. Peabody Coal Co., 1 FMSHRC 1785 (November 1979), the UMWA argues that the fact that the mine continued to work two and one-half shifts after the order was issued does not preclude the miners from receiving compensation because the order was still outstanding when the miners were idled. Citing the Local Union 5869, District 17, UMWA v. Youngstown Mines Corp., case, the UMWA points out that a withdrawal order was issued on the afternoon shift and miners on that shift were withdrawn from production work and detailed to work abating the violation. Every miner who worked on the afternoon shift was paid for the entire shift, but the evening shift employees who were also assigned to abatement work worked only 4 hours and were then sent home. The evening shift employees were paid for the first 4 hours they worked but not for the remaining 4 hours of the shift. In response to a compensation claim filed seeking compensation for the 4 hours of the evening shift that did not work, the Commission granted them compensation for the 4 hours and stated as follows at 1 FMSHRC 992:

> [A]t the time the miners were sent home the withdrawal order was still outstanding. But for the withdrawal order, the miners would have worked and received compensation for the final hours of their shift.

Respondent's Arguments

In its posthearing brief, the respondent concedes that it did not contest the order in question within the required 30 days. However, citing Secretary of Labor v. Quinland Coals, Inc., 9 FMSHRC 1614, 1620 (September 1987), the respondent points out that while it has the opportunity to contest the validity of the order at the civil penalty phase, MSHA has indicated there has been no civil penalty assessment proposed for the violation cited in the order, and that no assessment will be made. Further, citing Local Union 1810 v. Nacco Mining Company, 9 FMSHRC 1349 (August 1987), holding that a mine operator's rights under section 105(d) of the Act must be either exhausted or waived before the Commission may order compensation pursuant to section 111, the respondent suggests that it has not been given its full rights to contest the order and that the Commission does not yet have jurisdiction in this case. In the alternative, respondent points out that since MSHA has indicated that it would not be issuing a civil penalty assessment in this matter, and in light of the approval of its petition for modification, it appears that the order in question has been de facto vacated. If this is the case, respondent

further suggests that the Commission may proceed to decide this case.

With regard to the merits of the compensation claim, the respondent maintains that the idled miners are not entitled to compensation pursuant to section 111 of the Act because they were not idled by the order in question and the evidence fails to establish any nexus between the issuance of the order and the idlement and closure of the mine some two and one-half shifts after it was issued. Respondent points out that the UMWA has conceded that if the mine had been idled on January 29, 1988, until the modification petition was ultimately granted on February 11, 1988, there would be no case (Tr. 76-77), and that presumably, the local union membership would then have been without recourse for approximately 2 weeks of lost wages. Respondent suggests that the union would have the Commission "punish" the respondent for keeping its membership working through significant economic losses notwithstanding the fact that section 111 of the Act was not designed for this purpose.

In support of its position, the respondent asserts that in the absence of a nexus between a designated withdrawal order and the miners' idlement and loss of pay, or between the underlying reasons for the idlement and pay loss and the reason for the order, compensation pursuant to section 111 of the Act is not available. Respondent argues that section 111 is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside of their control. Quoting from Local Union No. 781 v. Eastern Associated Coal Corp., supra, respondent states that "mere occurrence, alone of withdrawal or idlement and issuance of an order does not, by itself, justify compensation," and that miners are considered to be idled by a withdrawal order whenever the order prevents them from working, Local Union 3454 v. Kanawha Coal, supra.

The respondent maintains that the overwhelming evidence in this case clearly shows that the cause of the idlement of the miners was due to the severe economic losses suffered by the mine from January 28, until February 9, 1988, and that as early as January 13, 1988, mine superintendent Toth advised the respondent's legal counsel that it would not be economically feasible to operate the mine at reduced productivity without the longwall, and that drastic workforce reductions would be inevitable. At approximately the same time, representatives of the UMWA union local and international were advised of the possibility of layoffs without the approval of

the modification petition. Since this occurred approximately 1 months before the mine was idled, the respondent concludes that the idlement of the mine was contemplated well in advance of the issuance of the order, and that the evidence shows a consistent approach by the respondent to the economic realities it faced.

Respondent states that the evidence establishes that mine management attempted to keep the mine open, and that when the operational longwall was mined out some 2 weeks before the order was issued, management opted to extend the panel some 300 feet so that the mine would not have to be idled. Although this action by management resulted in a 50 percent reduction of production capacity, and ended on February 3, 1988, when the coal could no longer be mined safely, the mine still remained open for approximately 1 week even with no longwall production.

Respondent points out that when the order was issued on February 8, 1988, the mine remained opened, and Inspector Kalich testified that he was neither withdrawing miners from the mine, nor was he withdrawing them from the 14 Rt. 3 South Longwall section. Contrary to the UMWA's contention that the order caused the mine to be idled, respondent maintains that the evidence shows that only a few miners assigned to the long-wall section ever were idled, and that the obvious implication is that even after the mine was closed the workers at the affected section were never idled, and that the order did not prevent the miners from working.

The respondent views the UMWA's assertion that the sole reason for the idlement of the mine was the order issued by Inspector Kalich, as implausible in that "it would be a quantum leap in logic to presume" that the information communicated to the union by mine management relative to the economic implications of the failure to obtain the modification petition was somehow created by management to "jack with the union." If anything, the respondent concludes that management took a consistent approach to keep the mine open and to keep the union local's membership working. Since the UMWA has acknowledged the respondent's authority to close a mine if it is not profitable, respondent concludes that this authority presumably also applies to a section of the mine as well. Since the logical implication of the evidence is that the order did not require the mine to be closed, respondent maintains that other factors were involved, namely the economic conditions expressed in its January 13, 1988, correspondence, as well as the meetings held with UMWA members.

Applying the Commission's observations in Local Union No. 781 v. Eastern Associated Coal Corp., supra, that it would "examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the limited and purely compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself," Id at pg. 1178, the respondent concludes that it is clear that the "safety" aspects of the Act, as well as section 111's mandate to pay compensation, are not at issue in this case because the order clearly never required the miners to be withdrawn and the alleged "safety" violation was remedied by shutting down the power.

Respondent concludes that the UMWA's evidence simply establishes that an order was issued, and, at some point, the mine was idled. Given the fact that the UMWA has conceded that if the mine were shut down on January 28, there would be no case, and assuming the mine were idled on February 3 or 8, or even the 9th, and no order had been issued, "then too there would be no case," respondent suggests that it would appear that the UMWA has conceded the central issue in this case, i.e., the mine without the modification petition could not operate profitably, and thus the order did not cause it to be idled. Since the respondent is under no obligation to continue to operate a mine which loses money, respondent believes that the UMWA's assertion that everyone at the mine should have been kept on, even though production was down some 75 percent, is contrary to the testimony of its witnesses and contrary to accepted practices in not only the coal industry, but in business in general, and must be rejected.

The respondent asserts that even if the implication that the decision to idle the mine was made to spur MSHA to act on the petition, there still would be no right to compensation because it may only be awarded when a miner is idled due to the issuance of a withdrawal order. Absent a nexus between the idlement and the order, there can be no compensation. Even assuming arguendo that the mine was idled to force MSHA to act on the petition for modification, respondent concludes that the order did not factor into the idlement decision. Even though mine management may have caused its economic concerns to become a self-fulfilling prophesy, the order would not be a factor which caused the mine to close. Respondent maintains that this case reflects a consistent approach on its part to keep the mine open, and that it communicated to all persons involved the economic consequences which would follow if the modification petition were not granted. When production declined, management kept its employees on, and even kept

them on after longwall production stopped even though it had no obligation to do so. Respondent concludes that mine management alone idled the mine after it determined that the losses were too great to continue to operate.

Findings and Conclusions

Section 111 of the Act is intended to provide limited compensation to miners who lose pay because of a withdrawal order. The first two sentences of section 111 state as follows:

> 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, 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 rates of pay for the period they are idled, but for not more than the balance of such shift. 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.

The compensation claims filed in this proceeding arise under the third sentence of section 111, which states as follows:

> [I]f a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title 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. (Emphasis added).

The fourth sentence of section 111, provides as follows:

> [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, 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.

The evidence in this case establishes that the first section 104(d)(2) Order No. 2943582, was issued by Inspector Kalich at 6:25 p.m., on February 8, 1988, and the "area" affected by this order was the "14th Right 3 South Longwall Power Center." The order cited an alleged violation of mandatory safety standard 30 C.F.R. 75.1002, and on its face stated that it was issued because of the respondent's failure to comply with one of the conditions stated in its then pending petition for modification, namely, item No. 7, which required overtemperature protection for a high-voltage neutral grounding resistor used in connection with a high-voltage circuit supplying the longwall power center. The cited condition was abated by the installation of the overtemperature device in question, and the order was terminated at 7:30 p.m., the same day it was issued. The order was subsequently vacated by Mr. Kalich on February 10, 1988, after his supervisor informed him that he could not support a violation based on the respondent's alleged failure to comply with one of the conditions associated with its then pending petition to modify the requirements of section 75.1002. Mr. Kalich confirmed this fact, and he also confirmed that he could not support a violation of section 75.1002, independent of the modification petition, and that the cited condition was not in violation of that standard.

With regard to the second section 104(d)(2) Order No. 2943583, issued by Inspector Kalich, the evidence establishes that it was issued at 6:30 p.m. on February 8, 1988, 5 minutes after the first one, and the "area" affected by this order was "the 2400 volt power circuits of the 14 Rt. 3 South Longwall." Inspector Kalich again cited an alleged violation of section 75.1002, and he confirmed that he issued the violation because he found some energized 2400 high voltage cables located inby the last open crosscut and within 150 feet of the

pillar workings. Although the order issued by Mr. Kalich makes reference to the outstanding modification petition, and Mr. Kalich later incorporated the language of the first order as part of the second one when he subsequently modified it on February 10, he confirmed that he based his second order on an alleged violation of section 75.1002, which prohibits locating high voltage cables inby the last open crosscut and less than 150 feet from pillar workings, rather than on the pending modification petition. The second order was subsequently terminated at 3:05 p.m., February 10, 1988, by another inspector who was regularly assigned to the mine. The justification for terminating the order simply states that "the petition for modification of the application of 30 C.F.R. 75.1002 is granted, for the 14 Right through 17 Right, 3 South Longwall Panels only."

Inspector Kalich confirmed that the effect of both orders was to de-energize the power from the longwall power center, and with the power down, no coal could be mined on the long-wall. He also confirmed that the miners could continue to work on "setup work," but he did not remain at the mine and simply "heard that men were laid off." Mr. Kalich conceded that he did not order any area of the mine closed, and that he never required the withdrawal of any miners. Mine Superintendent Toth confirmed that he was never advised that Mr. Kalich had closed the mine or ordered the withdrawal of any miners. The parties stipulated that the two orders restricted the respondent from operating the 14 Right 3 South Longwall panel, but that the rest of the mine continued to operate for 2-1/2 shifts and all of the affected miners were kept working without interruption performing longwall maintenance work and working on the other continuous mining sections after the orders were issued, until the mine was idled by Mr. Toth at 8:00 p.m., on February 9, 1988. The mine remained idle until midnight February 10, 1988, when the miners returned to work for the shift beginning at 12:00 a.m., February 11, 1988. The claimed compensation is for the 3-1/2 shifts which were idled by Mr. Toth.

The Finality Issue

Unlike the first two sentences of section 111 of the Act, which entitles idled miners to compensation for lost wages resulting from an order regardless of any review of the idling order, the third sentence of section 111 contains two conditions which must be met before compensation attaches. The first condition requires a showing that the order was issued because of the mine operator's failure to comply with a mandatory health or safety standard, and the second condition

limits the availability of any compensation to an order which has become final after an "opportunity for a public hearing."

The parties have stipulated that the respondent did not avail itself of its right pursuant to section 105(d) of the Act to contest the orders issued by Inspector Kalich. Addressing itself to the second order issued by Mr. Kalich (No. 2943583), the UMWA maintains that since the respondent did not contest the order within 30 days of its issuance, it has waived its right to further challenge it, and the order has become final. Since it is final, the UMWA concludes that jurisdiction attaches, compensation is due, and that the next critical issue to be resolved is whether or not a nexus existed between the order and the miners who were idled. (I take note of the fact that the UMWA's posthearing arguments are limited only to the second order issued by Mr. Kalich).

The respondent's posthearing arguments are also limited to the second order issued by Inspector Kalich. Conceding that it did not contest this order within the required 30 days, respondent maintains that since it had not exhausted its right to a review of the order in a civil penalty proceeding pursuant to the Commission's Quinland Coals, Inc., decision, the order is not final and jurisdiction to consider the compensation claims is lacking. Alternatively, given the fact that its petition for modification of the cited section 75.1002 has now been granted, and the fact that MSHA will not initiate a civil penalty proceeding, respondent suggests that the order has been de facto vacated, and that the Commission may proceed to decide this matter.

The section 104(d)(2) unwarrantable failure orders issued by the inspector in this case alleged violations of mandatory safety standard 30 C.F.R. 75.1002. Pursuant to the third sentence of section 111, miners idled as a result of an order issued for the unwarrantable failure of an operator to comply with any mandatory health or safety standard are entitled to compensation for such time as they are idled, or for 1 week, whichever is the lesser, and jurisdiction to hear and decide such claims attaches after the order has become final. Commission review of such an order is governed by the procedures found in section 105 of the Act, and the Commission Rules, and not by section 111.

Section 105 of the Act provides an operator with two opportunities to contest an order issued pursuant to section 104, and to request a hearing concerning any alleged violation which prompted the issuance of the order. Subsection (d) of section 105 affords an operator with an opportunity to

immediately contest an order within 30 days of its receipt. Subsection (a) of section 105 allows the operator to initiate a contest with respect to any civil penalty proposal filed by MSHA for the alleged violation stated in the order, and this may be done within 30 days of MSHA's notification of the proposed civil penalty assessment. In the Quinland Coals, Inc. case, supra, 9 FMSHRC at 1621-22, the Commission held that an operator may challenge the fact of violation and any special findings made in a section 104 order regardless of whether it availed itself of the opportunity to contest the order in which the allegation of violation is contained. See also: Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, 10 FMSHRC 612, 618 (May 1988).

The Ranger Fuel case involved a compensation claim filed by the union pursuant to the third sentence of section 111 of the Act. The Commission held that in a compensation proceeding, an operator may not challenge the validity of a violation after it has paid the civil penalty assessment because it would improperly place the miners and their representatives in a prosecutorial role to prove the violation, and would require them to perform functions properly resting within MSHA's domain, 10 FMSHRC, at pg. 619. The Commission went on to state that the issue of causal nexus in a compensation case is independent of the allegation of a violation and must be determined separately in order to determine entitlement to compensation under the third sentence of section 111. It concluded that an operator may litigate in a compensation proceeding the issue of the causal relationship between the order and the idlement of miners, but not the fact of violation.

The parties have stipulated that the respondent did not contest the orders pursuant to the available review procedures found in section 105(d) of the Act, and the Commission's Rules. Insofar as its available rights under section 105(d) are concerned, I agree with the UMWA's assertion that the respondent has waived its rights under this section, and to this extent, the orders are final. With regard to the respondent's contest rights in a civil penalty proceeding pursuant to section 105(a) of the Act, I recognize the fact that it has not yet had an opportunity to avail itself of an opportunity to challenge the orders in any civil penalty proceeding pursuant to the Commission's decision in Quinland Coals, supra. However, on the facts of this case, it does not appear that the respondent will ever have an opportunity to challenge the orders in any civil penalty proceeding because no such proceeding will be initiated by MSHA. The UMWA's counsel confirmed that she was informed by MSHA's district office that MSHA does not intend to file any civil penalty proposal with respect to

Order No. 2943583, because of the fact that the modification petition which was pending at the time the order was issued was subsequently granted (Tr. 101). Since MSHA was not a party to this proceeding, no further information or explanation was forthcoming with respect to MSHA's apparent reluctance or refusal to initiate a civil penalty proceeding with respect to the order and the alleged violation.

With regard to the first order (No. 2943582), the record reflects that it was terminated within an hour of its issuance, and subsequently vacated. The inspector candidly conceded that the conditions cited in the order, including an alleged violation of mandatory standard 30 C.F.R. 75.1002, could not be supported, and that no violation existed, notwithstanding the respondent's immediate abatement of the cited condition. Since the order was obviously invalid, and no violation ever existed, one can reasonably conclude that no civil penalty assessment will be forthcoming, and the respondent would have no reason to challenge it further. Further, given the fact that the mine continued to operate for 2-1/2 shifts after the order was issued, and since the order was immediately terminated, it did not exist and was no longer in effect at the time the miners were idled.

With respect to the second order (No. 2943583), the inspector confirmed that he issued it because he believed that the cited conditions constituted a violation of mandatory standard 30 C.F.R. 75.1002, independent of any reference to the pending modification petition. Although the record reflects that the order was subsequently terminated on February 10, 1988, upon approval of the modification petition, it was still outstanding and in effect when the miners were idled, and there is no evidence that MSHA has ever vacated it. The respondent's suggestion that the approval of the modification petition has resulted in a de facto vacation of the order is rejected. If the respondent believed that this was the case, it was incumbent on the respondent to present credible and probative evidence or facts to support such a conclusion, and none were forthcoming during the course of the hearing. I find nothing in the record to support any conclusion that MSHA ever vacated the order or made any finding that no violation ever existed. Although an MSHA inspector terminated the order, and "justified" it by a reference to the fact that the modification petition had been granted, he was not the same inspector who issued the order and violation, and the issuing inspector's credible testimony that a violation had occurred and that he cited a violation of section 75.1002 independently of the modification petition stands unrebutted. I take note of the respondent's further suggestion that assuming the order

were de facto vacated, the Commission could proceed to adjudicate the compensation claim.

The respondent's reliance on the Quinland Coals decision as the basis for its argument that the Commission lacks jurisdiction to decide the compensation claim because it has not been afforded its full rights to contest the order in any civil penalty proceeding IS REJECTED. In my view, the Quinland Coals decision simply expanded the appeal rights afforded a mine operator to challenge the validity of special findings made by an inspector in a contested order. The Commission rejected a restrictive interpretation of the review provisions of section 105 of the Act, and concluded that since a special finding was a critical consideration in evaluating the nature of an alleged violation and its impact upon the appropriate civil penalty to be assessed, an operator should have an opportunity to seek review of an order in any subsequent civil penalty proceeding pursuant to section 105(a) of the Act, notwithstanding the fact that it failed to seek review pursuant to section 105(d). The focus of the Commission's decision in Quinland Coals was on the interrelationship between a contest proceeding and a civil penalty proceeding, and not on section 111 of the Act.

On the facts of this case, I believe it would be unjust to deny the miners an opportunity to have their compensation claims adjudicated because of MSHA's reluctance to initiate a civil penalty proceeding which may afford the respondent a forum to litigate the validity of the order or the fact of violation. The respondent's liability for the compensation claims are to be adjudicated pursuant to the remedial purposes of section 111, and not the punitive enforcement statutory and regulatory schemes connected with the issuance of citations, orders, and civil penalty assessments. Further, the fact that a withdrawal order is subsequently vacated does not deprive miners of their right to compensation, CF&I Steel Corp. v. Morton, 516 F.2d 868 (10th Cir. 1975).

Section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. Local Union 1889, District 17, UMWA v. Westmoreland Coal Company, 8 FMSHRC 1317 (September 1986). In a recently decided compensation case before the United States Court of Appeals for the District of Columbia Circuit, International Union, UMWA v. FMSHRC, 840 F.2d 77, 82 (D.C. Cir. 1988), the court observed that the legislative history of section 111 makes it clear that its purpose was to make miners whole for wages lost due to a closure order or for wages lost through no fault of their own. The court pointed out that section 111 was not intended to be a part of the Act's civil penalty assessment scheme, and

that the statutory language accords the Secretary (MSHA) no role in determining section 111 liability. The court further concluded that section 111 is self-executing, and that once a section 104(d)(2) order based on a violation of a mandatory health or safety standard is issued and causes the miners to be idled, the miners have a right to seek compensation, and that such a right may be vindicated through recourse to the Commission.

In this case, the issuance of the unwarrantable failure orders came about through no fault of the miners. Both orders were issued because of the conduct of the respondent in energizing the longwall section and exposing the area to certain conditions which the inspector believed were in violation of mandatory section 75.1200 and/or contrary to the modification petition which had not been granted at the time of the inspection which prompted the action taken by the inspector. Further, MSHA's inaction in failing to initiate a civil penalty proceeding likewise came about through no fault of the miners.

On the facts of this case, and in light of the foregoing findings and conclusions, I conclude and find that for purposes of the instant section 111 proceeding, the orders in question have become final, and that I have jurisdiction to adjudicate the compensation claims.

The Nexus Issue

The prerequisites for entitlement to compensation for section 104 orders which result in the idling of miners are found in section 111 of the Act, and the conditions precedent for the awarding of compensation is that the mine is idled by the issuance of an order which cites a violation. In short, section 111 of the Act creates a graduated scheme of compensation ranging from the limited shift compensation described in the first two sentences, to the more generous 1-week compensation provided by the third sentence, all of which are dependent on the mine operator's conduct relating to the conditions in the mine. Shift compensation is awardable for an idlement attributable to an order issued under section 104 of the Act, and up to 1-weeks's compensation is available if the idlement is attributable to a section 104(d)(2) order issued for an unwarrantable failure by the operator to comply with a cited mandatory standard, Westmoreland Coal Company, supra, 9 FMSHRC 1325.

In order to establish its claim to compensation, the UMWA must establish that a nexus existed between the orders and the

idling of the miners. As stated by the Commission in Local Union No. 781, District 17, UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1178:

> [S]ection 111 compensation is awardable only if there is a nexus between a designated withdrawal order and the miners' idlement and loss of pay, or between the underlying reasons for the idlement and pay loss and the reasons for the order. Mere occurrence alone of withdrawal or idlement and issuance of an order does not, by itself, justify compensation . . . . Where an order precedes and plainly causes a withdrawal leading to loss of pay, compensation ordinarily will be awarded; conversely, . . . where the order has nothing to do with the withdrawal . . . compensation will not be awarded. However, withdrawal situations can arise involving more complicated sequences of events or concurrent operation of causative factors. In resolving the latter class of cases, we think it wiser to develop the nexus rule on a case-by-case basis. In such cases, we will examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the limited and purely compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself. (Emphasis added).

It is well-settled that the voluntary closure of a mine by an operator, and the withdrawal of miners prior to the issuance of an order does not preclude the miners from receiving compensation based on the order. UMWA, District 31 v. Clinchfield Coal Company, 1 MSHC 1010 (1971); Mine Workers, Local 2244 v. Consolidation Coal Company, 1 MSHC 1674 (1978); Mine Workers, Local 1993 v. Consolidation Coal Company, 1 MSHC 1668 (1978).

In the Clinchfield Coal Company case, supra, in rejecting the operator's contention that its voluntary closure of the mine prior to the issuance of the closure order preempted the order, the former Interior Board of Mine Operations Appeals noted that a withdrawal order is more extensive in scope than a voluntary withdrawal of miners by the operator, in that it prohibits reentry until the Secretary determines that the danger no longer exists, and the mine or particular section thereof is officially closed upon the issuance of an order,

and the effected miners are officially idled by such an order. See also: Mine Workers, Local 1993 v. Consolidation Coal Company, supra, where Judge Broderick followed the Clinchfield Coal Company decision in concluding that the mine operator's voluntary closure of the mine in advance of the issuance of the order was strongly motivated by the increasing probability that a closure order would be issued. The instant case presents a unique situation in that the orders issued by the inspector did not directly order any withdrawal of miners or the closing of the mine, and the miners continued to work for 2-1/2 shifts after the orders were issued until the mine superintendent subsequently closed the mine.

Order No. 2943582

Inspector Kalich issued Order No. 2943582, at 6:25 p.m., on February 8, and terminated it at 7:35 p.m. that same day after the respondent installed a ground check circuit overtemperature device. The inspector subsequently vacated the order on February 10, on the instructions of his supervisor who advised him that he could not support a violation based on a pending modification petition. During the course of the hearing, the UMWA's representative asserted that the inspector "messed up" when he issued the order (Tr. 102).

While it is true that a subsequently vacated order may not deny miners their right to claim compensation, in this instance the mine continued to operate for two and one-half shifts after the order was terminated, all of the miners continued to work, and no one was ordered to be withdrawn or idled. Further, the inspector conceded that the cited condition did not constitute a violation of the cited mandatory safety standard, section 75.1002, and any possible hazard to which the miners assigned to the longwall panel may have been exposed was effectively eliminated when the respondent took immediate action to install the overtemperature device as required by the inspector. In addition, at the time of the subsequent idlement of the entire mine by the mine superintendent on February 9, the order was no longer in effect or in existence. Under all of these circumstances, I cannot conclude that any nexus has been established between Order No. 2943582, and the idlement of the miners on February 9, 1988.

Order No. 2943583

Section 111 of the Act provides for compensation for miners when a mine or mine area is closed by a section 104

order. The evidence in this case establishes that the inspector did not order the closure of the entire mine or the longwall area of the mine, nor did he order the withdrawal of any miners. The parties have stipulated that the mine continued to operate for 2-1/2 shifts after the order was issued until it was idled by superintendent Toth on February 9. Superintendent Toth's unrebutted and credible testimony establishes that notwithstanding the unavailability of power on the longwall panel, all miners assigned to the longwall were kept working, and the UMWA agreed that all mine shifts continued to work without interruption for 2-1/2 shifts after the order issued, and that the miners assigned to the longwall continued doing "dead work" (Tr. 92).

During the course of oral argument on the record, the UMWA's representative asserted that as a result of Inspector Kalich's order, some miners were idled from work (Tr. 33). When asked to identify these miners, she confirmed that they were the miners listed on "Exhibit F" to the prehearing Joint Stipulation of facts which were filed and received on October 11, 1988, "which we've all agreed to" (Tr. 34). The list contains the names of 432 individuals assigned to work in the plant and the mine from February 9, through February 10, 1988. Eleven (11) of those listed were assigned to the longwall on February 9, 1988 (Tr. 88). Having reviewed the stipulation, and contrary to any inference by the UMWA's representative that the parties stipulated that the miners listed were idled by the order, my conclusion is that the parties stipulated that these miners were idled from 8:00 p.m., on February 9, 1988 to midnight February 10, 1988, as a result of Mr. Toth's decision to idle the mine, rather than the order issued by the inspector.

Superintendent Toth testified that the mine is equipped to operate one longwall installation, and four belt and continuous miner sections, and that in order to maintain its profitability, 12,000 to 14,000 tons of coal a day must be produced (Tr. 49). He confirmed that by January 28, 1988, one longwall panel had been completed and ready for production, but that no coal could be produced because the pending modification petition had not as yet been approved. However, work continued, and extra manpower was used to extend the panel an additional 300 feet in anticipation of the approval of the petition (Tr. 51). He confirmed that during this time, production levels were at "50 percent efficiency," and that on February 3, in view of safety considerations, further coal production ceased on the longwall, and from February 3 to February 9, when he idled the mine, there was no further longwall production (Tr. 52). Referring to his longwall coal production records,

Mr. Toth confirmed that from January 29 to February 3, coal production was reduced by 70,000 tons a day, and that from February 3, until February 9, production was reduced by 40,000 tons a day (Tr. 55). He also confirmed that the four continuous miner sections accounted for 25 percent of total coal production (Tr. 86).

Mr. Toth confirmed that from February 3, until the afternoon shift of February 9, no miners were idled, and "preparation and setup" work continued on the longwall, as well as in all of the other available developments (Tr. 56). He confirmed that those longwall miners who were subsequently idled by his decision to idle the mine were involved in the "set-up and adjustment work" which was going on (Tr. 80). Mr. Toth explained that the high voltage power was on the longwall panel in question on February 8, in order to make necessary adjustments to the power cables and "trim passes" in anticipation of starting up the longwall once the petition was granted, but that he had no intention of starting any coal production on the panel without the petition being granted (Tr. 57-58; 62). Mr. Toth also confirmed that the power was also on the longwall panel on February 4 and 5, even though the modification petition was still pending, and he explained that it was on while MSHA inspectors were present evaluating the modification petition (Tr. 65-66).

The petition of modification in question was filed to permit the respondent to use high voltage power on the longwall panel. When the order was issued, the petition had not been granted, and the use of high voltage power was not permitted. Inspector Kalich testified that while this was true, he issued the order because he believed the use of high voltage cables on the longwall was a violation of mandatory safety standard section 75.1002, independent of the then pending petition. The merits of the alleged violation were not litigated in this compensation proceeding, and the parties differ as to whether or not the cited conditions constituted a violation of section 75.1002 (Tr. 103, 106-107). The UMWA takes the position that the failure by the respondent to timely contest the alleged violation constitutes a tacit admission of a violation. This contention is rejected. I find no basis for such a conclusion, and given the Commission's decision in the Quinland Coals, Inc., case, supra, I believe that the respondent's belief that it could still litigate the merits of the alleged violation in any subsequently filed civil penalty proceeding, notwithstanding its failure to timely contest the violation, is reasonable and plausible.

Aside from the merits of the alleged violation, and from a safety point of view, the decision by the respondent to introduce high voltage on the longwall without approval by MSHA, exposed the miners assigned to the longwall to a potential hazard. Indeed, the inspector who issued the order believed that the use of high voltage cables on the longwall was contrary to mandatory safety standard 75.1200, and he concluded that the alleged violation was "significant and substantial" and presented a reasonable likelihood of an injury.

The parties do not dispute the fact that while the order did not directly require the withdrawal of any miners or the closure of the longwall area of the mine, it did result in the shut down of the 2400 volt power circuits supplying power to the longwall area. In the absence of available power, normal longwall production could not continue, and miners normally assigned to their normal longwall production duties could not continue performing those duties and were assigned "dead work." Any attempt by the respondent to continue full production on the longwall with use of high voltage power in defiance of the order would have placed the respondent at risk to pay the increased compensation to the affected miners working in the longwall area as provided for in the fourth sentence of Section 111. Thus, the net effect of the order was to curtail further coal production in the longwall area. Under all of these circumstances, including the fact that the order was still in effect and had not been terminated or vacated at the time superintendent Toth decided to idle the entire mine on February 9, I conclude and find that a causal relationship did exist between the order and the idling of the longwall area, and that the proximate and primary cause of the idling of that area was the order issued by the inspector.

I conclude and find that the evidence in this case establishes a reasonable nexus between the order and the idling of the longwall area, notwithstanding the respondent's "economic considerations" arguments to the contrary. Accordingly, I further conclude and find that the miners normally assigned full production work duties on the 14 Right 3 South Longwall Section, and who would have continued performing these duties but for the issuance of the order in question, are entitled to be compensated for the time the longwall area was idle from 8:00 p.m. on February 9, to midnight February 10, 1988.

With regard to the mine areas other than the longwall, while it is true that the order affecting the longwall was still outstanding and in effect when superintendent Toth

decided to idle the entire mine on February 9, the facts establish, and the UMWA concedes, that the continuous mining sections continued to operate for 2-1/2 shifts after the order was issued. Miners continued to work in these areas, and coal production continued, albeit at reduced efficiency, but still unaffected by the order. Unlike the longwall area, where coal production was substantially reduced because of the unavail-ability of high voltage power which came about as a result of the order, the continuing mining sections continued to operate for 2-1/2 shifts, and no miners were idled.

With regard to any safety connection between the order and the remaining mine areas other than the longwall, the evidence establishes that any potential hazards to miners through exposure to the cited high voltage cables was limited to the longwall area, and I find no evidence to support any conclusion that any of the miners who continued to work in these other mine areas were at risk or exposed to any potential hazard because of the alleged violation which prompted the inspector to issue the order on the longwall.

Although I have concluded that the order issued on the longwall was safety related, and that a reasonable nexus has been established between the order and the idling of the longwall area of the mine, I cannot reach the same conclusion with respect to the remaining mine areas which were unaffected by the order. On the facts of this case, I conclude that the respondent has made a credible, plausible, and reasonable showing with respect to the adverse economic impact on the mine which resulted from its failure to gain timely approval of its modification petition.

The evidence in this case establishes that the adverse economic impact on the continued viable operation of the mine as a result of the respondent's failure to obtain timely approval of its longwall modification petition was clearly communicated to the union well in advance of the issuance of the order, and it came to fruition at a time when the respondent was attempting to continue mining by extending the longwall in anticipation of MSHA's approval of the petition, which the respondent believed was imminent, and at a time when there was little or no ongoing production on the longwall, even before the order was issued.

While it is true that the respondent precipitated the issuance of the order by advancing high voltage cables into the longwall area, given the remedial nature of section 111 of the Act, and the fact that no miners working in areas other than the longwall were exposed to any hazard as a result of

the alleged violation, and notwithstanding the fact that the order was still in effect at the time Mr. Toth decided to idle the entire mine on February 9, I conclude and find that the order was incidental to, and not the immediate cause of the idling of the rest of the mine by Mr. Toth. To the contrary, I conclude and find that Mr. Toth's decision to idle the mine was primarily the result of his managerial decision that he could not continue to economically operate the mine, and his obvious frustration and aggravation over the failure to gain timely approval of the then pending modification petition.

The respondent's credible evidence clearly supports its contention that for a period of approximately 1-month prior to the issuance of the order on February 8, and Mr. Toth's decision of February 9, to idle the entire mine, representatives of the UMWA were on notice by the respondent that drastic workforce reductions were inevitable in the event the pending modification petition was not timely approved by MSHA. Respondent's credible evidence also establishes that at the time the longwall panel in question was mined out approximately 2 weeks before the order was issued, coal production on the longwall showed a marked decrease. The reasons for this was the fact that all of the longwall coal had been mined up that point, and the respondent had not as yet had approval from MSHA to introduce high voltage on the panel which would have allowed it to continue mining at a high production capacity. Notwithstanding these factors, the respondent decided to extend the panel an additional 300 feet in anticipation of the approval of its petition, and miners were kept working at reduced productivity levels until superintendent Toth decided that he could no longer justify operating the mine with a full employment complement in the face of decreased production and the lack of high voltage capability on the longwall.

Under all of the aforementioned circumstances, I cannot conclude that a reasonable nexus existed between the issuance of the order and Mr. Toth's decision to idle the entire mine. Accordingly, I further conclude and find that those miners assigned to and working in mine areas other than the longwall area are not entitled to any compensation as a result of Mr. Toth's idlement of the mine.

ORDER

In view of the forgoing findings and conclusions, IT IS ORDERED THAT:

1. The affected miners assigned to the 14 Right 3 South Longwall Section of the mine as of February 9, 1988, as shown

in Exhibit "F" to the Joint Stipulation of Facts filed by the parties in this proceeding, are entitled to compensation at their regular rates of pay for wages lost during the idlement of the mine, from 8:00 p.m. on February 9, 1988 to midnight February 10, 1988, with interest computed from February 9, 1988, until the date payment is made, and to this extent the compensation claims filed in this proceeding ARE GRANTED.

All interest due with respect to the claims which have been allowed shall be calculated in accordance with the Commission's decision in Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), as modified by Local Union 2274, District 28, UMWA v. Clinchfield Coal Company, 10 FMSHRC 1493 (November 1988). See: 54 Fed. Reg. 2226-2227, January 19, 1989.

2. All other miners working in areas other than the 14 Right 3 South Longwall Section of the mine during the aforementioned idlement period of the mine are not entitled to compensation, and to this extent, the compensation claims filed in this proceeding ARE DENIED.

3. Within twenty (20) days of the date of this decision, and without prejudice to the right of the parties to seek further review of this decision, the parties shall confer in an effort to stipulate to the amounts of compensation and interest due the aforementioned longwall miners, and within ten (10) days thereafter, the parties shall file their joint stipulation or agreement in this regard with me so that a supplemental decision and final order may be entered.

4. The UMWA's request for payment of attorney's fees IS DENIED. Section 111 of the Act does not provide for an award of attorney's fees and costs in compensation proceedings. See: Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Company, 10 FMSHRC 1493, 1499 (November 1988), and the cases cited therein.

5. This decision shall not be made final until the parties have submitted their joint stipulation and agreement, and a supplemental decision and final order is issued.

George A. Koutras
Administrative Law Judge