

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 18, 2002

UNITED MINE WORKERS OF AMERICA,	:	COMPENSATION PROCEEDING
LOCAL 2368, DISTRICT 20,	:	
on behalf of miners,	:	Docket No. SE 2002-22-C
Applicant	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	No. 5 Mine
Respondent	:	Mine ID 01-01322

DECISION

Appearances: Darryl Dewberry, United Mine Workers of America, District 20, Birmingham, Alabama, and Joyce A. Hanula, Esq., United Mine Workers of America, Fairfax, Virginia (on the brief), on behalf of the Applicant;
David M. Smith, Esq. and William M. Campbell, Esq., Maynard, Cooper & Gale, P.C. Birmingham, Alabama, and Harold D. Rice, Esq. Jim Walter Resources, Inc., Brookwood, Alabama, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon an Application for Compensation filed by the United Mine Workers of America, Local 2368, District 20 (UMWA), pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994), the “Act” seeking compensation from Jim Walter Resources Inc. (JWR) for miners it represents who were idled following several explosions at JWR’s No. 5 Mine on September 23, 2001.¹

It is undisputed that on September 23, 2001, at approximately 5:30 p.m., a portion of the roof in the No. 4 section at JWR’s No. 5 Mine fell, followed by an explosion. At approximately 6:15 p.m., there was a second explosion and all miners who had not already been told to do so were told to evacuate the mine. Thirteen miners died and a number of others suffered injuries as a result of the explosions. At approximately 6:05 p.m. on that date a JWR employee contacted Department of Labor, Mine Safety and Health Administration (MSHA) field supervisor, Charles Terry Langley, and informed him of the first explosion. Mr. Langley then called the mine and

¹ Section 111 of the Act provides in relevant part that if a mine or area of a mine is “closed by an order issued under Section 103 . . . [and] 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.”

spoke with Harry House, a salaried JWR employee, who confirmed that there had been an ignition or explosion on either the No. 4 or the No. 6 section of the mine. Around 7 p.m., JWR mine officials decided to close the mine and, beginning around 7:30 p.m., JWR employee Rodney McMinn began notifying miners on later shifts that the mine was closed and not to report for work.

A team of MSHA inspectors arrived at the mine around 7:15 p.m. and, at 8:15 p.m., MSHA inspector Edward Nicholson issued Order No. 767687 pursuant to Section 103(k) of the Act.² The order stated that “a non-fatal, injury explosion has occurred on the No. 4 section, this being issued to protect the miners until and [*sic*] investigation is completed.” The order was initially limited to the No. 4 section but was modified at 8:58 p.m., extending it to the entire No. 5 mine. The order was terminated on June 11, 2002.

In this case the UMWA seeks, pursuant to Section 111 of the Act, four hours of compensation for the miners who were scheduled to work underground on the “owl” shift (11 p.m., September 23, 2001, to 7 a.m., September 24, 2001). JWR argues that the miners are not entitled to “Section 111” compensation based on the Commission’s decision in *Local Union 1261, District 22, UMWA v. Consolidation Coal Company*, 11 FMSHRC 1609 (September 1989) *aff’d*, 917 F.2d, 42 (D.C. Cir. 1990). As noted, Section 111 of the Act provides that if a mine or area of a mine is “closed by an order issued under Section 103 . . . [and] 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.” In the *Local Union 1261* case the Commission held, however, that since the mine operator in that case had voluntarily withdrawn all miners for their safety before the issuance of the withdrawal order and since the operator advised miners on later shifts that the mine was “idle until further notice” none of those for whom compensation was claimed were on “the next working shift.” The Commission accordingly held that the miners in that case were not entitled to compensation.

The rationale for this holding was stated by the Commission therein as follows:

Here, the record shows immediate action on the part of a mine operator to remove all afternoon shift employees from the mine because of rising gas levels - - clearly a threat to the health and safety of the miners. The wisdom of this action

² Section 103(k) of the Act provides as follows:

In 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 ensure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return to the areas of such mine to normal.

was attested by the action of MSHA inspectors who, after being summoned by the operator, issued a control order on the following morning, officially closing the mine and thereby confirming the evacuation order issued during the previous evening by the mine operator. Thus, apart from the fact that no miners were present in the mine when the MSHA closure order was issued, it is apparent that the safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the Mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspector arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here.

The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the Senate Committee setting forth the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible inhibition of the inspector in the issuance of closure orders." Leg. Hist. At 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners. Here, however, the operator unilaterally and voluntarily withdrew its own miners and notified all shifts that the mine would be closed until further notice. Obviously, under such circumstances, no inhibitions would have attached to the inspector's enforcement actions taken twelve hours later when the mine was empty. The need to insulate the inspector from any purported miner animus had by then evaporated.

The UMWA notes, however, that the Commission, in *Local Union 1261*, also observed that the case did not involve an attempt to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by the Secretary and suggested a different result if that were the case. *Local Union 1261*, 1614 n.6. The issue before me then is whether the owl shift was cancelled and the mine closed down in this case for the safety of the miners before the issuance of the withdrawal order or whether the closure of the mine on the owl shift was only an attempt to avoid "Section 111" liability by closing the mine in anticipation of withdrawal action by the Secretary. Based on the uncontradicted and credible testimony of mine manager Jesse Cooley, it is abundantly clear that his decision around 7 p.m. on September 23, 2001, to close the mine and notify all miners on subsequent shifts that the mine would be closed until further notice, was based only upon consideration for the safety of the miners.

On September 23, 2001, Cooley was mine manager of the No. 5 mine and had been for a total of about 8 years. He had 35 years experience in the mining industry and 29 years of that experience was in a supervisory capacity for JWR. Cooley retired in March 2002. Cooley testified, without contradiction, that he was the person who made the decision around 7 p.m. on September 23, 2001, to withdraw all miners (except for the properly equipped and trained rescue teams) and to close the underground area of the mine. At that time he also made the decision to cancel the 11 p.m. to 7 a.m. owl shift. He instructed other mine officials to see that the underground owl shift miners were notified not to report to work. Beginning around 7:30 p.m. miners scheduled to work on subsequent shifts were notified that the mine would be closed until further notice.

Cooley testified that, after he learned of the explosion on his cell phone around 5:45 p.m., he immediately reported to the mine. He arrived around 6:30 p.m. Survivors were then still exiting the mine and were being taken to ambulances. They had bruises and abrasions and appeared to be in shock. He was able to confirm that there indeed had been an explosion in the No. 4 and/or No. 6 sections destroying stoppings and other ventilation controls to such an extent that mining could not, in any event, safely be continued. Fan chart readings confirmed that the ventilation controls had been destroyed. Around this time he learned of the second explosion and that 13 miners were unaccounted for. Cooley also learned that all of the carbon monoxide (CO) monitors had been destroyed in the Nos. 4 and 6 sections and that other CO monitors in the mine showed such high levels of the gas that only specially equipped and trained rescue team members could enter the mine.³ Based on reports from some of the exiting survivors, Cooley also believed that a fire was continuing to burn in the mine. Cooley was also told by other observers that, at the time of the second explosion, a fireball and smoke came out of the No. 59 intake shaft. Based on this information, Cooley determined that the underground mine could only be entered by properly equipped and trained mine rescue personnel. Accordingly the underground mine was closed to all but such persons. Cooley also determined around 7 p.m. on September 23, that it would be unsafe to allow the owl shift miners to proceed underground and that such shift would therefore have to be canceled. He accordingly directed that the owl shift miners be telephoned and told not to report to work. Cooley also credibly testified that at no time before he made these decisions did it ever “cross his mind” to close down the owl shift to avoid paying compensation or because a withdrawal order might be issued by MSHA.

David Thrasher, then deputy mine manager, corroborated Cooley regarding the conditions extant before Cooley announced his decision to shut down the owl shift. He recalls that there were reports of flames coming out of the shaft and that major ventilation controls had been damaged. Thrasher further testified that at no time before Cooley made the decision to shut down the owl shift was there any discussion with Cooley about the possibility of a “K-order” or about compensation for the owl shift miners.

³ Administrative notice may be taken that carbon monoxide is a colorless, odorless, very toxic gas which is formed during fires and explosions. See *Dictionary of Mining, Mineral, and Related Terms*, Second Edition, American Geological Institute, 1997.

Within this framework of credible and uncontradicted evidence it is clear that mine manager Cooley decided, around 7 p.m. on September 23, 2001, to withdraw the underground miners on the evening shift and to shut down the owl shift based on the safety of the miners and without consideration that, by closing down the owl shift, he might very well avoid payment of "Section 111" compensation to those miners. Therefore, and in accordance with the *Local 1261* decision, the owl shift miners are not entitled to Section 111 compensation. This finding is entirely consistent with the rationale cited in *Local 1261* and previously quoted herein.

In reaching the conclusions herein, I have not disregarded the UMWA's argument that JWR management, including Mr. Cooley, were aware that it was MSHA's practice at this mine to issue "Section 103(k)" control orders following mine ignitions. The suggestion is that Cooley therefore would have anticipated the issuance of a 103(k) order and therefore shut down the owl shift, not for safety reasons, but only to avoid paying Section 111 compensation. In light of Cooley's credible and uncontradicted testimony and the overwhelming evidence that, following two mine explosions, the destruction of ventilation controls, the presence of high levels of toxic carbon monoxide gas, the fact that the 13 underground miners were still missing, and evidence of fire continuing to burn in the mine, I find little difficulty in concluding that Cooley's decision was indeed dictated by the recognition that it would clearly have been unsafe to allow the owl shift miners to proceed underground.

The UMWA also attempts to distinguish *Local 1261* by arguing that JWR's closure of the No. 5 Mine was not "voluntary" at all but rather that JWR had "no option" but to cease coal production once the explosions occurred. The UMWA misconstrues *Local 1261* however, in that the critical distinction in that case was whether the decision to close the mine was made by the mine operator on his own for the safety of miners before any withdrawal order compelled such closure.

The UMWA also argues that the instant case is distinguishable because the explosions and injuries had already occurred. This argument fails however to account for the continuing hazardous conditions and the fact that additional injuries and fatalities would likely have occurred if the mine were not closed. In addition, the likelihood, or even certainty that a 103(k) control order would be issued following the two explosions only makes the Commission's rationale in *Local 1261* even more persuasive. The more dangerous the mine conditions, the more persuasive is the rationale for prompt withdrawal action by the mine operator.

Under all the circumstances this application for compensation must be denied.

ORDER

Docket No. SE 2002-22-C is hereby dismissed.

Gary Melick
Administrative Law Judge

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