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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 10, 1979

UNITED MINE WORKERS OF Docket No. HOPE 76-16

AMERICA (UMWA), Appeal No. IBMA 76-101

Applicant-Respondent

v.

WESTMORELAND COAL COMPANY,

Respondent-Appellant

DECISION

This appeal from an administrative law judge's decision was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. Section 301, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961.

At issue is an application for compensation filed by the United Mine Workers of America (UMWA), as authorized representative of the affected miners, pursuant to § 110(a) of the Federal Coal Mine Health and Safety Act of 1969. 1/ In the decision from which this appeal was taken, Administrative Law Judge Franklin P. Michels concluded that the miners involved were entitled to compensation under § 110(a) 2/ of Act."

1/ 30 U.S.C. § 801 et seq., as amended, hereafter "the 2/ Section 110(a) of the Act provides:

"If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners

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the Act. for the reasons that follow, the judge's decision is affirmed.

The claim for compensation arises as a result of the issuance of a withdrawal order under § 104(a) of the Act. The withdrawal order issued at 4:00 p.m. on June 11, 1975. It is not disputed that the miners working during the shift in which the withdrawal order issued are entitled to compensation and the entitlement of these miners is not an issue on appeal. 3/ Rather, the dispute on review concerns whether the miners on the shift that followed are entitled to compensation. 4/

fn. 2/ (cont'd)

working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period for which 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" (emphasis added).

3/ At the hearing the parties stipulated to the dismissal of the compensation claim for miners idled during the shift in which the withdrawal order issued subject to Westmoreland's payment to those miners of stipulated amounts. The judge ordered payment of the stipulated amounts and no issue concerning this payment is raised on appeal.

4/ In its answer to the application for compensation, Westmoreland denied that the withdrawal order idled any persons on the shift that followed and stated that "mine management" had decided to "idle the mine on that shift." Subsequently however, the parties stipulated to the identity of the miners on this shift who were idled and the amounts to be paid to these miners if the issues regarding the time of the termination of the withdrawal order are resolved in their favor. Joint Exhibit B; Tr. 2.

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Section 110(a) of the Act provides that if a \$ 104 withdrawal 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 . . . for the period they are idled, but for not more than four hours of such shift." Thus, in determining whether miners are entitled to compensation under this provision, the time at which the withdrawal order was terminated must first be determined.

At the hearing in the instant case, the time of the termination of the withdrawal order was disputed by the parties. The Order of Termination was entered into evidence as Joint Exhibit D. The Order of Termination specified 11:00 p.m. as the time of its issuance. The dispute between the parties centered on the significance of the time noted on the Order of Termination. The UMWA contends that the 11:00 p.m. notation referred to the time at which the Secretary's inspector determined that the dangerous condition no longer existed and orally authorized the resumption of operations. Westmoreland contends that the notation referred to the time at which the termination order was signed by the inspector after he exited from the mine and arrived at Westmoreland's office, and, therefore, that the inspector's earlier underground, oral termination of the withdrawal order necessarily occurred before 11:00 p.m.

The conflicting evidence of the parties on this issue is summarized adequately in the judge's decision. After

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reviewing all of the evidence and drawing reasonable inferences therefrom, Judge Michels concluded that a preponderance of the evidence establishes that the withdrawal order was terminated at 11:00 p.m. This factual conclusion is supported by substantial evidence and we will not disturb it on review.

Therefore, we affirm Judge Michaels' conclusion that the withdrawal order at issue was terminated at 11:00 p.m. on June 11, 1975. Westmoreland contends that the conclusion is based on hearsay. If the hearsay claim is to the testimony of the inspector, it cannot be sustained. The inspector was present at the hearing and available for cross examination. The fact that he may have refreshed his recollection from his notes is immaterial.

Having concluded that the withdrawal order was terminated at 11:00 p.m., it remains to be determined whether the order was terminated "prior to the next working shift." Based on the evidence of record, Judge Michels concluded that the "next working shift" started at 11:00 p.m. Therefore, he concluded that since the withdrawal order was terminated at 11:00 p.m., it had not been terminated prior to the next working shift. On the facts of the present case, we agree with the judge's conclusion that the subject termination order, issued at 11:00 p.m., did not issue "prior to" Westmoreland's "next working shift." We find it unnecessary

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to our decision in this case, however, to address the broader question of what constitutes the beginning of a "shift" as that term is used in § 110(a) of the Act.

Accordingly, the decision of the administrative law judge is affirmed.

Jerome R. Waldie, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner