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SOL (MSHA) V. HOMESTAKE MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 80-140-M
v.	A/C No. 39-00055-05022 W
HOMESTAKE MINING COMPANY, RESPONDENT	MINE: Homestake
UNITED STEELWORKERS OF AMERICA, LOCAL UNION 7044, DISTRICT 33, COMPLAINANT	COMPLAINT FOR COMPENSATION DOCKET NO. CENT 80-198-CM
v.	MD 79-107 Through 125
HOMESTAKE MINING COMPANY, RESPONDENT	MINE: Homestake

DECISION

Appearances:
Robert J. Lesnick Esq.
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United States Department of Labor
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Denver, Colorado 80294,
For the Petitioner

Robert A. Amundson Esq.
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For the Respondent

Mr. Harry P. Tuggle
Safety & Health Representative United Steelworkers of America
Five Gateway Center
Pittsburgh, Pennsylvania 15222

Before: Judge Virgil E. Vail

JURISDICTION AND PROCEDURAL HISTORY

On June 21, 1979, an inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) issued an order of withdrawal for the

Ross shaft area from the collar to the 4500 foot level of the Homestake Mine of the Homestake Mining Company (hereinafter Homestake). The order of withdrawal was issued pursuant to section 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(k) (hereinafter the Act), based upon the inspector being told by Homestake officials that there was smoke in the Ross shaft area.

On August 22, 1979, a special inspection was conducted by MSHA at the Homestake Mine and citation No. 329655 was issued to Homestake pursuant to section 104(a) of the Act (30 U.S.C. 814) alleging that Homestake had worked miners in the Ross shaft area in violation of the 103(k) withdrawal order issued on June 21, 1979. On February 6, 1980, Local Union No. 7044, District 33, of the United Steelworkers of America (hereinafter USWA) filed a complaint for compensation under section 111 of the Act (30 U.S.C. 821) for its members who are employees of Homestake. On February 19, 1980, MSHA filed a proposal for assessment of a civil penalty pursuant to section 105 and 110 of the Act (30 U.S.C. 815 and 820). On March 20, 1980, Homestake filed an answer to MSHA's proposal for assessment of a penalty. On October 30, 1980, Homestake filed a motion for summary decision alleging that USWA's complaint for compensation was untimely filed and an answer denying miners were required to work in areas of the mine covered by the 103(k) order. On November 28, 1980, an Order was issued denying respondent's motion for summary decision based upon a showing by USWA of good cause for its delay in this matter.

These two cases were consolidated pursuant to Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. 2700.12 and a hearing was held in Lead, South Dakota. All three parties filed post hearing briefs.

ISSUES

1. Whether Homestake, having previously failed to seek administrative review of 103(k) order issued by MSHA is now foreclosed from contesting validity of the order in a 104(a) penalty proceeding and a section 111 compensation proceeding.

2. Whether Homestake worked miners in violation of a 103(k) order on June 21, 1979, as charged by MSHA and, if so, the amount of the civil penalty which should be assessed?

3. Whether Homestake employees were forced to work in areas of the mine in violation of the 103(k) order and, if so, whether they are entitled to compensation under section 111 of the Act and, if so, the amount of compensation which they are entitled to receive?

4. Whether Homestake employees who reported for work on June 21, 1979 at 6:00 a.m. and were subsequently released from duty at 11:00 a.m. as a result of the 103(k) withdrawal order are entitled to compensation under

section 111 of the Act in addition to the four hours show-up pay provided for in Article 5, Section C(1) of the collective bargaining agreement between Homestake and employees.

APPLICABLE LAW

Section 103(k) of the Act, 30 U.S.C. 813(k) (Supp. 111, 1979), 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 insure 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 affected areas of such mine to normal.

30 C.F.R. 50.2(h) defines an "accident" as pertinent herein as follows:

> (6) An unplanned mine fire not extinguished within 30 minutes of discovery.

Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a) (Supp. III, 1979), provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 821, (Supp. III, 1979), provides in part 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 regular 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. . . . Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

STIPULATIONS

Homestake and the Secretary stipulated the following:

1. Homestake is the operator of the Homestake Mine.

2. Homestake is subject to the jurisdiction of the Federal Mine Safety and Health Act.

3. The Administrative Law Judge has jurisdiction over this proceeding.

4. Homestake is a large gold mine operator.

5. Homestake's ability to continue in business after imposition of a reasonable civil penalty is not at issue.

6. The citation at issue was properly served on Homestake.

7. Homestake exhibited good faith in abating the contested citation or order.

8. Homestake's history of previous violations will be reflected by MSHA's computer print-out of past violations subject to review and concurrence by counsel for Homestake.

9. USWA and Homestake stipulated to the identity of the miners, hourly wage rates, and work assignments relative to the 103(k) order issued on June 21, 1979 as set forth in Appendix "A" attached hereto and incorporated herein.

SUMMARY OF THE EVIDENCE

Homestake is a large gold mine located in Lead, South Dakota, the deepest level being 8000 feet underground. The mine has three distinct ventilation systems including three air intake and two exhaust shafts. The Ross and Yates shafts, located approximately one-half mile apart and descending parallel from the surface collar to the 4550 foot level are the two main access, hoisting, and ventilation shafts.

At the start of a working shift and preparatory to going underground, miners walk to and assemble in the "ramp" which is an area constructed of concrete and steel located approximately 20 feet below the surface collar.

The first working level located 100 feet below the surface collar of the Ross and Yates shafts is a haulage-way called a tramway. Ore is hoisted up the shafts and dumped in crushers and bins located in the tramway to be later hauled along the tramway to the mill. The tramway runs partly underground and partly above ground with a portion covered by a snowshed for protection from the weather. The tramway is open at both ends to the atmosphere and is not dependent upon the ventilation systems served by the Yates and Ross shafts. Doors are installed at the entrances to the shafts to prevent intake of air from the ventilation system to enter the tramway or air from the tramway to enter the shaft. The tramway runs approximately 300 yards underground at the 100 foot level from the Ross shaft to the first open portal or open surface area and connects with the tramway from the Yates shaft and continues on to the mill which is located above ground.

On June 21, 1979, at 6:00 a.m., miners being lowered in the Ross shaft to commence working the day shift reported the smell of wood smoke from the 2000 foot to the 4500 foot level. Sam Grover, acting safety director for Homestake, was notified of the smoke and called Earl Phelps of the safety department at approximately 6:10 a.m. to go underground to investigate. Phelps rode the man-cage down the Ross shaft checking for "bad air" with a Drager tester. Phelps testified that CO (carbon monoxide) was not detected in the shaft until he reached the 2150 foot level where he got out of the man-cage and conducted several tests. A level of CO at the 2150 foot level

at 6:25 a.m. was tested at 90 parts per million. Larry Isaac, a miner who had been lowered before Phelps, reported that the smell of wood smoke was stronger on the 2600 foot level than it was on the 2150 foot level. Phelps reported this information to Sam Grover and it was decided not to lower any more miners and that those miners who had previously been lowered would be taken out of the mine. Phelps continued on to the 2600 foot level and tested for CO finding 90 parts of CO per million at that level but further testing at the 4800 and 5000 foot levels revealed only traces of CO. Phelps continued checking areas until 9:30 a.m. at which time he returned to the surface. The miners who had been lowered earlier were all removed from underground by 7:30 a.m.

Ray Smith, mine superintendent, was in the ramp area of the Ross shaft at 6:10 a.m. when the report of the smell of wood smoke in the shaft was received and remained in that area until 10:30 a.m. Smith testified that he had several conversations with the miners assembled in the ramp area to keep them informed as to the results of the investigation into the cause of the smoke. At 7:00 a.m. an announcement was made by authority of Ray Smith, to the miners assembled in the Ross shaft ramp area that any miner who chose to could go home and would receive four hours show-up pay as provided in the Union's contract with Homestake. It was also announced that management thought the mine would be cleared of smoke during the day-shift and that the miners would be allowed to go to their regular working places. A few miners left at this time and some left later on in the morning, the exact number being unknown.

At approximately 9:15 a.m., the remaining miners were told to report to their bosses for reassignment to other jobs. Three bosses were selected for clean-up in the tramway area and three for clean-up around the headframe and the miners remaining in the ramp area were assigned to these bosses. It took approximately 15 to 30 minutes to assemble the miners and take them to their respective job assignments. At 11:00 a.m., the miners from the Ross shaft area who were not allowed to work at their regularly assigned locations and duties were released to go home. This was the end of the four hour show-up period.

At 7:30 a.m., on June 21, 1979, Dallas Tinnel, president of local union 7044 of USWA at Homestake telephoned the MSHA office in Rapid City, South Dakota to report high levels of CO and smoke in the Ross shaft of the Homestake Mine. At 8:10 a.m. on the same day, Sam Grover telephoned MSHA's office and made a similar report. At 10:00 a.m., MSHA inspectors William Donley, Wayne Lundstrom, Guy Carstens and Jeram Sprague arrived at the mine to investigate the reported incident.

A meeting between MSHA inspectors and members of Homestake's management was held in the map room of the mine office at which time a discussion occurred as to what Homestake's management had determined was the cause of the CO and smoke in the Ross shaft area. Management stated that there were concentrations of CO from the 2150 foot level to the 4500 foot level of the Ross shaft and that a sizeable VCR (vertical crater retreat) blast had been set off at the 4243 D stope, 9 ledge 4700 level at the end of the night shift at approximately 3:30 a.m. on June 21, 1979. Homestake's management was of the opinion that the wooden spacers used in the VCR blast had ignited and was the source of the wood smoke smell which the miners on the day shift encountered as they were lowered in the shaft and that this "bad air" was being exhausted outside through the ventilation system. Inspector Donley asked of management if they had positively determined that the VCR blast was the cause of the CO and smoke. Members of management stated that they could not be certain but they were reasonably certain that there was not a fire in the mine.

At 10:12 a.m., following the above discussion and upon an order from supervising inspector Donley, inspector Lundstrom issued 103(k) order No. 329637 (FOOTNOTE- 1) which states as follows:

> High concentration of CO in Ross shaft from collar to 4500' level. All persons except Company officials, MSHA personnel and Union representatives are not allowed in the area until an investigation has been made to determine the concentration of CO and other gases.

Following further discussions with management, Donley instructed Lundstrom to insert the word "area" after the words "Ross shaft" in the order and told them he would exclude the Ross shaft itself from the 103(k) order so that the shaft could be used to lower men and materials if it was necessary to fight a fire. Donley further explained to management that areas below the 4500 foot level of the Ross shaft and all of the Yates shaft were not to be included in the order based upon information from management that there was no evidence of CO or smoke in those areas. The tramway was never discussed at this meeting.

After the 103(k) order was issued, the MSHA inspectors, miners and management representatives went underground and inspected the various levels of the Ross shaft from the 4100 to 4850 foot levels taking various readings for air contaminants. Based upon this inspection, the 103(k) order was terminated at 1:45 p.m. on June 21, 1979. A meeting was held at the mine on the following day, June 22, 1979, between MSHA inspectors and Homestake's management to discuss the procedures followed by Homestake the day before.

On August 21, 1979, Donley received a telephone call from Tinnel requesting MSHA investigate complaints of miners that they were forced to work on June 21, 1979 in violation of the 103(k) order. Donley and Lundstrom met with Tinnel and several miners that day and on the following day, August 22, 1979, Citation No. 329655 was issued to Homestake alleging a violation of section 104(a) of the Act and alleging as follows:

> On June 21, 1979, Homestake officials worked approximately 30 men in violation of a 103(k) order number 329637 issued 10:12 hours June 21, 1979. (FOOTNOTE- 2)

This citation was terminated immediately as the condition complained of no longer existed.

DISCUSSION

The first issue to be addressed is whether Homestake, having previously failed to seek administrative review of the 103(k) order issued on June 21, 1979, is now precluded from contesting the validity of the order in the subsequent 104(a) citation and section 111 compensation proceedings?

All of the parties herein contend, and I must concur, that there is no specific provision, either in the Act or the Commission's Rules of Procedure, 29 C.F.R. Part 2700, setting forth what procedures should be followed in contesting a 103(k) order, be it administrative or otherwise. Other sections of the Act do specifically provide for administrative review. Under section 105, 30 U.S.C. 815(d), an operator may contest a citation or order issued pursuant to section 104 of the Act and orders issued under section 107 of the Act before the Federal Mine Safety and Health Review Commission (hereinfater the Commission), pursuant to the language of section 107 itself. (FOOTNOTE- 3)

Homestake argues that the reason there is no mention in the Commissions Rules of a procedure for review of a 103(k) order is that such an order does not entail or contemplate the issuance of a citation or proposal for a penalty. I reject this argument as there are more than a few cases reported up to the present time in which both the 103(k) order and either a citation or compensation proceeding followed. Harman Mining Corporation v. Secretary of Labor, ÄÄÄF. 2d ÄÄÄ (4th Cir. 1981)(Unpublished), Secretary of Labor v. Miller Mining Co., Inc., Docket No. WEST 81-267-M, (August 1982), Secretary of Labor v. B & N Construction, Inc., Docket No. WEST 80-226 and 260-M (1981).

The Secretary argues that Homestake failed to raise this issue in its July 3, 1980 prehearing statement and should not be allowed to raise it at this time. He also contends that Homestake is precluded from raising the validity of the order in a 104(a) proceeding having failed to do so prior to its issuance and cites as its authority therefore C F & I Steel Corporation v. Morton, 516 F. 2d 868, 871-872 (10th Cir. 1975).

USWA argues that Homestake was required to raise the validity of the 103(k) order within 30 days of its issuance for the reason that the Commission Rules provides time frames of 30 days to contest other orders. It suggests that although such references do not specify such 30 days for a 103(k) order, a time frame should be no more or less than those established for all other orders under the Act.

I reject all of these arguments as there appears to be no doubt that the operator has a right to administrative appeal of a 103(k) order. In the case of American Coal Company v. United States Department of Labor, 639 F. 2d 659, (Tenth Cir. 1981), the Court considered the fact that there was no provision within the Act for administrative review of the 103(k) order but concluded such a right existed and stated as follows:

> We do not believe, however, that merely because 30 U.S.C. 813(k) makes no specific references to administrative review, such omission means that there is no administrative review. A reading of the entire Act, coupled with its legislative history leads us to conclude that the action taken . . . under 30 U.S.C. 813(k)(section 103(k)) was subject, first to administrative review, with final action by the Review Commission to then be subject to judicial review in the appropriate Court of Appeals under 30 U.S.C. 816.

The Commission in the case of Secretary of Labor v. Eastern Associated Coal Company, Docket No. HOPE 75-699 (1980), considered the right to appeal an order issued under section 103(f) of the Coal Act of 1969, 30 U.S.C. 801 et seq. (1976)(Amended 1977), which is the statutory predecessor to section 103(k) of the 1977 Act. The Commission concluded that there was no

express provision precluding a review of such order and agreed with the Board of Mine Operators conclusion that the Interior Secretary had established an administrative adjudication system for review of 103(f) orders and further concluded that the Commission succeeded to the Interior Secretary's powers to adjudicate the cases under consideration relating to this section.

That Homestake has a right to contest the validity of the 103(k) order issued on June 21 1979, appears clear from the decisions in the American Coal and Eastern cases. However, neither case addressed the question of when such an appeal must be commenced or whether its validity would be precluded from being raised in a subsequent case involving a 104 citation or a compensation proceeding. The Secretary cites the Court's decision in CF&I Steel Corporation v. Morton, 516 F. 2d 868, 871-872 (10th Cir. 1975), as authority for his argument against Homestake raising the issue. This case arose under the 1969 Coal Act and is distinguishable from the present case in that the withdrawal order in the CF&I case was issued under section 104(a) of the Act and provision is made under the Act requiring that administrative review of such order must be obtained under provisions of section 815 prior to the expiration of 30 days of the issuance or modification of such order. I find that there is a distinguishing feature between 103(k) orders and those contemplated under section 104 and 107 of the Act. The 107 order is issued in the event of an imminent danger occurring in the mine which may or may not give rise to a subsequent citation and proposal for a penalty against the operator. Usually a citation is included as part of the basis for issuing orders under section 104 and 107 of the Act. In those cases involving accidents, section 103(k) provides for the issuance of orders " . . . as appropriate to insure the safety of any person in the coal or other mine . . . ." (emphasis added). The issuance of citations as a result of such an occurrence, if such arises, usually would come later. The Commission in the Eastern case in footnote No. 6 stated as follows:

> . . . the philosophy of review of both the 1969 and 1977 Acts is that operators are to comply with administrative orders first and litigate their merits later . . . .

This philosophy is most appropriate when applied to those situations involving accidents in the mines. It follows that an operator should not be expected to file for an administrative review of the order until he has been notified that the Secretary believes that a violation occurred in connection with the accident which gave rise to the order. Prior to the notice or issuance of a citation, the operator would not likely have cause for requesting a review and only after such notice or issuance of a citation and anticipation of a proposal for a penalty does the validity of the order become material. Also, the very same evidence involved in the

validity of the order may be material to consideration of the citation although the basis for the issuance of the order is sacrosanct. I therefore conclude that Homestake had the right to have the validity of the 103(k) order reviewed in the present 104(a) citation and compensation proceeding. I also find that the general denial in the respondent's answer raises this issue. All the parties at the hearing and in subsequent post-hearing briefs were given ample opportunity to present evidence on this matter and argue the law and facts as pertinent therein.

Having concluded that Homestake has the right to administrative review of the 103(k) order in this case, the next question is whether or not such order was valid.

Homestake argues that the 103(k) order was vague and indefinite and that it was erroneously issued because there was neither an "accident" or an "unplanned fire" as contemplated in the Act.

I reject Homestake's arguments and find that there was a valid basis for issuing the 103(k) withdrawal order on June 21, 1979. The pertinent portion of 103(k) of the Act provides that in the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine. (30 C.F.R. 813(k). It is apparent that this section is broad enough to permit the closing of any section of or the whole mine upon the occurrence of an accident, if under the circumstances it is deemed appropriate. The Secretary's regulations at 30 C.F.R. Part 50 provides several definitions of an accident. The one applicable here is section 50.2(h)(6) which states in part as follows:

> Accident means,
> . . . .
> An unplanned mine fire not extinguished within 30 minutes of discovery.

Homestake contends that the evidence of record does not establish that there was an accident on June 21, 1979 within the meaning of the Act and that the "bad air" detected in the mine was a result of the VCR blast which was planned and set off at the end of the night shift. On the other hand, the Secretary contends that there was an accident which warranted the inspector issuing the order of withdrawal. He relies on the fact that the inspectors upon arriving at the mine over 6 hours after the VCR blast were informed by Homestake management that they had found high concentrations of CO in the amount of 90 parts per million on the 2150 level and that they were not certain as to the cause although they believed it was a result of the VCR blast.

A reasonable assessment of the facts known by Homestake at 6:30 a.m. prompted management to withdraw the miners from the Ross shaft that morning. Further, as late as 10:00 a.m. when the inspectors arrived,

Homestake management had not made a positive determination as to the cause of the CO and smell of wood smoke in the shaft. Based on these facts, it is reasonable for the inspectors to believe there were grounds to issue the 103(k) order for the health and safety of the miners. If subsequent investigation revealed that the condition causing the CO and smoke in the shaft had abated, this would not make the original decision wrong. However, the facts support the conclusion that the results achieved by Homestake with their VCR blast were unplanned and that it was not correctly determined within 30 minutes of the blast that a fire did not exist. The evidence established that thousands of board feet of pine spacers were used in the blast and this could have caused the wood smell and CO in the shaft. It is clear to me that section 103(k) of the Act clearly authorized the inspectors to issue the order of withdrawal on June 21, 1979. The plain language of this provision of the Act and related regulations authorizes respresentatives of the Secretary to issue such orders as they deem necessary to protect the health and safety of the miners. As the conditions existed at the time of the inspectors arrival at the mine, a prudent reading of the potential perils warranted the action taken in issuing the order and conducting the subsequent inspection of the affected area. Until the inspectors could be assured there was no further danger to the miners from a fire or CO, the issuance of the 103(k) order was valid and proper.

The next question to be considered in these two cases is whether Homestake worked miners on June 21, 1979 in violation of the 103(k) order. To resolve this issue, a determination must be made as to the scope of the area of the mine intended to be covered by such withdrawal order.

Homestake argues that the order was vague and indefinite as to the area of the mine that MSHA inspectors intended to have miners withdrawn from. A review of the evidence shows that the order was issued at 10:12 a.m. in the map room of the mine office. Charles Tesh, mine production superintendent testified that he was present and had a discussion with the inspectors when the order was written and it initially stated that the area to be closed was "The Ross shaft." Tesh told the inspectors that this created many problems, including being unable to make ambulance runs from the 4500 foot level to the surface which might be necessary as the other areas of the mine were operating. Also, Tesh argued that if the shaft was totally shut down Homestake would be unable to bring materials into the mine. Further, that the Ross shaft was a fresh air intake system and there were no contaminants in the shaft itself. He testified that the inspectors then offered to modify the order by inserting the word "area" after the word shaft which would allow Homestake to continue to use the hoist. Homestake agreed to this and the order was so modified. Tesh testified that from this discussion, he understood that once the inspector inserted "area" into the 103(k) order, that the Ross shaft itself was not closed and only the area between the 2150 and the 4550 was closed. He recalled no discussion regarding the tramway, although he knew men were working there. Allen S. Winters, general mine manager, was

present at this meeting and

testified that following the issuance of the order, he explained to Ray Smith that it covered the Ross shaft down to the 4500 foot level and from the outer stations where they T off to the various drifts.

The Secretary contends that the order as written was clear as to its meaning by reason of common usage of the terms in the body of the order and rejects the arguments of Homestake that the order was vague.

A careful review of all of the testimony convinces me that the members of Homestake's management and inspectors fully discussed the areas intended to be covered by the order at the meeting in the map room of the mine office and resolved whatever differences they had or anticipated from such closure at that time. All of the witnesses agreed that the tramway was not discussed at this time. Inspector Donley was familiar with the various areas of the mine as his testimony was that he had started inspecting the Homestake mine in 1972. Also, various members of Homestake's management testified that they knew men were working in the tramway when the order was issued and did not discuss the consequences of this in relationship to the scope of the order.

In view of the above, either the parties to the discussion of the area to be covered by the order at the time of its issuance did not consider the tramway a part of the Ross shaft or did not consider that area to be potentially hazardous to the health and safety of the miners working there. The tramway by description, as deduced from the evidence of record, is, distinguishable from the drifts that connect with the Ross shaft at the various levels. It is located 100 feet under the collar and runs approximately 300 yards underground in the area of the Ross shaft. However, the tramway runs both underground and on the surface and also connects with the Yates shaft. Its source of air supply is independent of the Ross shaft which receives its air from the outside through its portals. Winter described the tramway as a tunnel that begins on the north side of the mountain and travels through to the south side with doors that are kept closed at the Ross shaft so that fresh air from the outside does not enter the shaft from the tramway. He stated that traditionally he did not consider the tramway a part of the mine.

Based upon the above testimony and all of the other evidence of record I find that the tramway as located and utilized in the Homestake mine was not understood to be covered by the order as issued on June 21, 1979 and it was not a violation of the 103(k) order to work miners therein. I am persuaded by the evidence that it was not just a mistake that the tramway was not discussed at the meeting in the mine office when the order was issued but rather was not a concern to the parties at that time. Further, there is no evidence that any danger existed to the miners in the tramway area from the CO or smoke in the Ross shaft. Therefore, I find Homestake did not violate the 103(k) order when it continued to work the tramway crew after the order was issued or assigned miners to clean-up in the tramway area June 12, 1979.

Citation No. 329655 is hereby vacated.

The remaining question to be decided is whether the Homestake employees who showed up for work on June 21, 1979 at 6:00 a.m. and were subsequently released at 11:00 a.m. are entitled to compensation under section 111 of the Act for the balance of their shift in addition to the four hours show-up pay provided for in their collective bargining agreement.

A review of the evidence shows that the facts are not in dispute as to this issue. On June 21, 1979, at approximately 6:00 a.m. the miners assigned to work in the Ross shaft area arrived at the ramp area to prepare to go to their designated work areas. Due to the smell of wood smoke and CO in the Ross Shaft, the miners who had been lowered were removed and the remaining miners were not allowed to enter the mine. After an investigation of the cause of the CO in the shaft, Homestake made a determination that the miners would be assigned to other work duties until 11:00 a.m. and then sent home. Homestake paid the miners four hours of show-up pay in accordance with the provision of their collective bargaining agreement with the USWA.

Charles Tesh testified that the miners in the ramp area that morning were kept advised of the progress being made by Homestake in investigating the "bad air" in the shaft and that a decision was made by management and announced by Tesh to the miners at 8:53 a.m. that they would be assigned to crews for work in the tramway and headframe areas and would be sent home at 11:00 a.m. The evidence further shows that the miners were assigned to the work crews and arrived at their various assigned areas around 10:00 a.m. or shortly thereafter. The 103(k) order was issued at 10:12 a.m.

A careful review of section 111 of the Act and prior decisions of the Commission support the position of the USWA herein. The first sentence of section 111 of the Act reads 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 regular rates of pay for the period they are idled but for not more than the balance of such shift. * * * (Emphasis added).

The purpose of the above section is to provide limited compensation solely for regular pay lost because of the issuance of an order designated in that section.

Homestake argues that it had informed the miners prior to the time the order was issued that concentrations of gas in the affected area of the mine had exhausted and they could go back to work. However, the miners

were uncomfortable about the situation and did not want to go to work in that area of the mine. Homestake then made the decision between 8:30 a.m. and 9:00 a.m. not to have the miners return to the affected area but to pay the miners 4 hours show-up pay. Homestake argues that the decision in UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175 (May 11, 1981) applies. I find a distinction exists between the situation in the present case and that which occurred in Eastern, supra, wherein the miners had withdrawn from the mine prior to the issuance of an order to observe a memorial period which the union had contracted for. In the case involved here, the Homestake miners were idled by the same condition which led to the issuance of the order, i.e., the smoke and CO in the shaft on June 21, 1979. There was therefore, a clear "nexus between the underlying reasons for the idlement and pay loss and the reason for the order". Id at 1178. The reason for the issuance of the withdrawal order was the existence of the "exigent or emergency conditions" created by the conditions in the Ross shaft portion of the mine. Id. at 1178.

Homestake also argues that the miners were not idled by the order, but rather a mutual decision was made between management and the miners to not return to production prior to the issuance of the order. They cite Royal Coal and Cowin and Company, Inc., 2 FMSHRC 1738, (July 7, 1981) and contend that this supports their position that miners are entitled to compensation only if they are "idled by" such an order and that in the instant case, the miners were not idled by the order as they were assigned to other areas of the mine and working therein when the order was issued.

The argument above misses the mark in that the claim herein for compensation does not cover the period when the miners were working at the tramway and head frame. It is for the balance of the shift after the miners had put in their four hours and were sent home. The decision in the Royal Coal case, supra. supports the USWA argument. The decision states:

> Royal and Cowin concede that the miners idled in the shift in which the order was issued are entitled to full compensation for the balance of that shift at their regular rate of pay . . . The dispute over compensation here at issue concerns the second part of section 111. * * *

The claim in the instant case is similar to the facts in the case of UMWA v. Old Ben Coal Company, 3 FMSHRC 2793, (December 7, 1981) where a fire occurred at approximately 7:30 a.m. in the "A" shaft and miners were immediately withdrawn. At 8:15 a.m. an inspector for MSHA issued a 103(k) withdrawal order. At 12:45 p.m. the order was modified to allow rehabilitation of the area and to resume normal operations. The afternoon shift worked their full shift for that day but the morning shift was paid

four hours reporting pay pursuant to the USWA contract. The operator in above case raised the same arguments as Homestake does in this case and the Judge found such arguments without merit and stated as follows:

> In the legislative history accompanying section 111 Congress made clear " . . . miners should not lose pay because of the operator's violation, or because of an imminent danger which was totally outside their control." (Emphasis added). S. Rep. No. 95-181, 95th Cong. 1st Sess. 46-47 (1977), in Legislative History of the Federal Mine Safety and Health Act of 1977, at 634-635. * * *

Homestake's argument that they voluntarily withdrew the miners before the 103(k) order was issued, and therefore the miners were not withdrawn by the order and should not have compensation under section 111 is rejected. In Clinchfield Coal Co., 1 IBMA 31 (1971), the former Board of Mine Operators Appeals rejected a similar argument and said that

> . . . [r]egardless of the sequence of the events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to 104, and the miners are officially idled by such order.

In this proceeding, the miners were working at other jobs when the 103(k) order was issued at 10:12 a.m., but they were officially idled by the order when they were sent home at 11:00 a.m. Those 117 miners listed in Item 4, page 2, 3 and 4 of the stipulation entered into between Homestake and USWA are entitled to full compensation for the balance of their shift at their regular rate of pay, which pay is in addition to the show-up pay they received for the first four hours.

The USWA failed to request interest in either their petition for compensation, or at the hearing, or in their briefs. However, the Commission considered this situation in Peabody Coal Company v. Secretary of Labor and UMWA, 1 FMSHRC 1785 (November 14, 1979) and stated as follows:

> Furthermore, to deny interest would be to award the miners less than the full compensation mandated by section 110(a).

Although the Peabody case, supra, concerned the 1969 Act, the application of this provision is the same as section 111 in this instance. In that case the Commission awarded interest at the rate of six percent per year from the date compensation was due to the date payment was made. However, I find it more reasonable at this time to award interest at the rate of 12 percent per year from the date compensation was due to the date payment is made. This is in accordance with the "make whole" policy of the Act to

award interest on the sums due miners from the date of idlement to the date of payment. UMWA v. Youngstown Mines, 1 FMSHRC 990 (August 14, 1979); UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004, 2013 (August 27, 1981); Johnny Howard v. Martin Marietta Corp., 3 FMSHRC 1876 (July 31, 1981); UMWA v. Old Ben Coal Company, 3 FMSHRC 2793 (December 7, 1981). The decision that 12 percent interest, rather than 6 percent awarded in Peabody is based upon a realistic view that the rate of interest has risen to new levels within the past year and even at that rate is below the rate of interest in most commercial transactions.

CONCLUSIONS OF LAW

Based upon the entire record in these two cases, and consistent with the findings embodied in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Homestake, having previously failed to seek administrative review of the 103(k) order, is permitted to contest the validity of the order in a 104(a) penalty proceeding and a section 111 compensation proceeding filed as a result of such order.

(3) Homestake did not violate the 103(k) order by working miners in the tramway for the reason that it was not within the scope of the order.

(4) The 117 miners identified in section 4, pages 2, 3, and 4 of the stipulation entered into between USWA and Homestake (Addendum A) are entitled to full compensation at their regular rate of pay for the balance of such shift in addition to the show up pay they received for the first four hours.

(5) In addition to the above, the 117 miners are entitled to interest on the balance of pay they are due at the rate of 12 percent from the date the compensation was due to the date payment is made.

ORDER

WHEREFORE, for the reasons herein before given, it is ordered:

(A) That Citation No. 329655 issued on August 22, 1979 is hereby vacated.

(B) The complaint for compensation filed on February 6, 1980, is granted, only in part, as it pertains to those 117 miners listed in section 4, pages 2, 3, and 4 of the stipulation (Addendum A), and Homestake is

ordered to pay the 117 miners listed therein, within 40 days from the date of this decision, full compensation at said miners regular rate of pay for the period described as the balance of such shift. The compensation shall be paid with interest at 12 percent per annum from June 21, 1979, to the date of payment.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

1 Exhibit P-1.

~FOOTNOTE_TWO

2 Exhibit 2

~FOOTNOTE_THREE

3 30 U.S.C. 2700.20 of Commission rules states as follows:

. . . (a) Section 105(d) of the Act, 30 U.S.C. 815(d), provides, in part: If within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104 . . . the Commission shall afford an opportunity for a hearing . . . .

30 U.S.C. 2700.21 Commission's Rules provides as follows:

. . . (a) When to file an application for review of an order of withdrawal issued under section 107 of the Act, 30 U.S.C. 817, . . . shall be filed within 30 days of receipt by the applicant of the order sought reviewed . . . .

Addendum "A"

STIPULATION

The undersigned representatives of the above captioned parties, pursuant to a stipulation entered on the record at the close of the hearing held in the above captioned matter, hereby submit the following written stipulation for the Court's consideration:

1. The following employees of Respondent did work their full and normally assigned shift on June 21, 1979, as the "normal tramway crew" in Homestake Mine, with the tramway being shown on exhibits which were entered at the time of hearing. These employees reported to work at the Yates Shaft work area and are as follows:

Miners Submitting Complaint For Compensation	Hourly Wage Rate June 21, 1979
James Vitel	$ 7.55
Linda Washburn	$ 7.55
Robert Ford	$ 7.55
Gary Rath	$ 7.55

2. It is further agreed that the exact amount of time that the above named employees were in fact performing their work duties in the allegedly affected area of the 103 Closure Order, which is the subject of this litigation, cannot be exactly calculated, nor has any testimony been submitted on the part of the Petitioner setting forth the exact amount of time these employees were in the allegedly affected area while performing their duties on June 21, 1979, during their normal eight-hour shift.

3. It is further stipulated by the parties that the employees listed below were in fact assigned clean-up duties in the "Ross Tramway Area" of the Homestake Mine on June 21, 1979, between the hours of 10:12 a.m. and 11:00 a.m. of that day, and were employees whose normal work area was the "Ross Shaft", who had shown up for work on June 21, 1979, and were paid for a total of four hours of work that day. These employees and rates of pay for that day are as follows:

Miners Submitting Complaint For Compensation	Hourly Wage Rage June 21, 1979
Paul Sterk	$ 7.55
David Holmes	$ 7.55
Roger Meyer	$ 7.55
Don Mayhugh	$ 7.45
Barry Martin	$ 7.55
Leo Lipp	$ 7.55
Donald Hiltebridle, Jr.	$ 7.55
Herbert Burnett	$ 7.55
Kenneth Rowan	$ 7.07
Charles Dorothy	$ 7.55
Leroy Bertsch	$ 7.55
Adam Lewis	$ 7.45
Harold Covell	$ 7.55
Homer Watson	$ 7.55
Bernard Zastrow	$ 7.55
Richard Weise	$ 7.55
Terry Allerdings	$ 7.55
David Fredericksen	$ 7.55
Fred Raubach	$ 7.55

4. It is further specifically agreed by the parties that the employees and miners listed below were paid four hours "show-up" pay, per contract agreement for June 21, 1979, and were released from their jobs at 11:00 a.m. on June 21, 1979. The following are the names and rates of pay of these employees and miners for that date:

Miners Submitting Complaint For Compensation	Hourly Wage Rate June 21, 1979
Bob L. Perry	$ 6.01
James R. Richard	$ 7.07
Jerome A. Wallin	$ 7.07
Broderick E. Stevens	$ 6.70
Ken Britigan	$ 6.70
William J. Cooper	$ 7.33
Donald S. Sanders	$ 7.55
Darwin R. Aldinger	$ 7.55
Gary J. Bown	$ 7.45
Gerald A. Clement	$ 7.07
Claude E. Crane	$ 7.45

Anthony Desimone, II	$ 6.70
Duane Dillman	$ 7.45
Leonard O. Dittus	$ 7.55
Jerome G. Feterl	$ 7.55
Leonard Feterl	$ 7.55
Janet M. Fonder	$ 7.45
Charles G. Geffre	$ 7.45
Lennie R. Grove	$ 7.07
Hilmur E. Hanson	$ 7.45
Ron R. Hayes	$ 7.07
Donald J. Hendrickson	$ 7.45
Stephen A. Kilmer	$ 7.07
Katherine L. Kimball	$ 7.07
Richard R. Kleinheksel	$ 7.55
Don J. Kleinheksel	$ 6.70
Arlen D. Kline	$ 7.26
Robert J. Kruske	$ 7.55
Herbert L. Burnett	$ 7.55
Richard Cottrill	$ 7.45
Thomas E. Jones	$ 7.55
Barry E. Martin	$ 7.55
Donald E. Mayhugh	$ 7.45
Roger D. Meyer	$ 7.55
Paul V. Sterk	$ 7.55
Paul Strecker	$ 7.55
David L. Sykes	$ 7.33
Wesley A. Schaffer	$ 7.55
Ricky D. Allen	$ 7.55
Charles Culver	$ 7.55
Keith M. Ehnes	$ 7.55
Lowell D. Labau	$ 7.55
Jimmy D. Snow	$ 7.55
James J. Grosek	$ 7.55
Raymond S. Grosek	$ 7.55
Daryle J. Poling	$ 7.55
Terry J. Wermers	$ 7.55
Mark J. Geffre	$ 7.45
Norman E. Stuen	$ 7.45
George J. Huck	$ 7.55
Ralph Huck, Jr.	$ 7.55
Michael R. Isaak	$ 7.55
John P. Kraft	$ 7.55
Kenneth E. Prue	$ 7.55
Gerald L. Rempfer	$ 7.55
Dennis D. Shumacher	$ 7.55
Jerry L. Barton	$ 7.55
Russell L. Burton	$ 7.55
Javier Barrios	$ 7.55
Blain M. Brown	$ 7.33
Robert L. Carl	$ 7.55
Charles B. Donner	$ 7.55
Donald J. Gifford	$ 7.55
Albert Grantz	$ 7.55
Raymond F. Hertel	$ 7.55

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Ralph L. Long	$ 7.55
Robert G. Murray	$ 7.55
Larry D. Ostwald	$ 7.55
Joseph J. Shinabarger	$ 7.55
Clarence W. Young	$ 7.55
Vernon W. Fisher	$ 7.55
Richard A. Goetz	$ 7.55
Palmer E. Carlson	$ 7.55
Terry R. Allerdings	$ 7.55
Leroy E. Bertsch	$ 7.55
Barry J. Brierly	$ 7.18
Harold G. Covell	$ 7.55
Charles G. Dorothy	$ 7.55
David D. Frederickson	$ 7.55
Roger G. Hanson	$ 7.55
Donald L. Heltibridle	$ 7.55
Adam S. Lewis	$ 7.45
Leo J. Lipp	$ 7.55
Fredrick L. Rauback	$ 7.55
Homer W. Watson	$ 7.55
Richard W. Weisz	$ 7.55
Bernard F. Zastrow	$ 7.55
Timothy P. Dillman	$ 7.55
Cecil Holman	$ 7.55
David J. Holmes	$ 7.55
Everett A. Johnson	$ 7.55
Michael A. Kilmer	$ 7.55
Donald R. King	$ 7.55
Rick J. Tinnell	$ 7.45
Bruce A. Tracy	$ 7.55
Joe B. Sterna	$ 7.55
Robert C. Steeves	$ 7.55
Julius E. Adam	$ 7.45
Henry J. Bowers	$ 7.33
Leonard R. Bowling	$ 7.55
Jimmy R. Dower	$ 7.45
George T. Gross	$ 7.55
William A. Hall	$ 7.45
John B. Perkovich, Jr.	$ 7.45
Robert W. Raines	$ 7.45
Dale L. Rear	$ 7.45
James F. Richards	$ 7.45
Kenneth J. Rowan	$ 7.07
Leo Silvernagel	$ 7.55
Donald D. Spry	$ 7.55
Ramon N. Sterry	$ 7.45
Deborah M. Wood	$ 6.70
Alfred H. Brinkman	$ 6.70
Laverne Caldwell	$ 7.55
Oren Knightlinger	$ 7.55
Edgar Mutchler	$ 7.55
Charles Wuitschich	$ 7.55

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HOMESTAKE MINING COMPANY	UNITED STEELWORKERS OF AMERICA
Respondent	Petitioner
By	By
Robert A. Amundson	Dallas Tinnell, President
Date 9-1-81	Date 9/1/81