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LOCAL UNION (UMWA) ETC. V. FMV COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LOCAL UNION #6594, DISTRICT 17, UNITED MINE WORKERS OF AMERICA, ON BEHALF OF: WILLARD NEWSOME, KYLE CLINE, KEITH MCCOY, CHARLES R. STOVER, WALTER COOPER, ORVILLE NAPIER, JACK MATNEY, ROBERT FIELDS, ISAAC BRYANT, FRANK EVANS, ALVIN CHAPMAN, BRUCE COOLEY, GREGORY BOGGS, ANDREW MILLER, PHILLIP SPRINGER, BOBBY ROBINSON, EARL HALL, TENNIS CANTERBURY, GEORGE TILLER, LARRY LESTER, WILLIAM WORKMAN, KIRBY CISCO, MEARL FIELDS, PHILIP JONES, DANNY MAHON, KENNETH WHITED AND TABY COOLEY, APPLICANTS	Application for Compensation Docket No. HOPE 77-128 No. 1 Mine
v.	
FMV COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Peter Mitchell, Esq., United Mine Workers of America, Washington, D.C., for the Applicant

Before: Judge Cook

I. Procedural Background

On January 24, 1977, Local Union #6594, District 17, United Mine Workers of America (Applicant) filed an application for compensation in the above-captioned proceeding pursuant to section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (1969 Coal Act). The application was filed with the Office of Hearings and Appeals of the United States Department of the Interior and the proceeding was pending on the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act). Accordingly, the case is before the undersigned Administrative Law Judge of the Federal Mine Safety and Health Review Commission for decision. 30 U.S.C. 961 (1978). The remainder of the procedural history subsequent to the filing of the application for compensation is set forth below.

On February 18, 1977, the Applicant filed a photocopy of a post office return receipt indicating that service of the application for compensation had been made upon FMV Coal Corporation (Respondent). Additionally, on the same day, the Applicant filed a motion to permit late filing of interrogatories to the Respondent in conjunction with copies of the proposed interrogatories. This motion was granted by an order dated March 3, 1977.

On March 9, 1977, the Applicant moved for an order to show cause why judgment in default should not be entered. On March 11, 1977, the Respondent filed a motion to file a late answer but failed to submit an answer in conjunction with the motion. The Applicant filed a statement in opposition to the Respondent's motion on March 21, 1977. Additionally, on March 21, 1977, the Respondent filed a letter in response to the Applicant's March 9, 1977 motion stating its opposition to the entry of a default judgment.

On March 25, 1977, a notice of hearing was issued setting the matter for hearing on April 21, 1977, in addition to an order granting the Respondent's motion to file a late answer and denying the Applicant's motion for an order to show cause why judgment in default should not be entered. The Respondent was accorded 10 days in which to file its answer. The answer was subsequently filed on April 4, 1977.

Pursuant to a mutual agreement by counsel for the parties, an order was issued on April 15, 1977, cancelling the hearing scheduled for April 21, 1977. The order noted that a telephone conference would be conducted on May 9, 1977, to determine whether a hearing would be necessary and, if so, to agree upon the date thereof.

The May 9, 1977, telephone conference was conducted as scheduled. It was agreed that the Respondent would mail answers to the Applicant's interrogatories by May 13, 1977. It was also agreed that a telephone conference would be held on June 20, 1977, absent a request by the parties for an alternate date. This agreement was reflected in an order dated May 9, 1977. The answers to interrogatories were filed on May 16, 1977.

The June 20, 1977, telephone conference was conducted as scheduled during which counsel for the Applicant stated that he contemplated the filing of further interrogatories and a request for admissions. Counsel for the Applicant further stated that he would consider the filing of a motion for summary decision depending upon the response received to the interrogatories and request for admissions. Counsel for the parties agreed to participate in a telephone conference on July 15, 1977, to determine both the status of the case and whether a hearing would be necessary. These matters were reflected in an order dated June 20, 1977.

The Applicant's requests for admissions were filed on July 1, 1977, and the Respondent's reply was filed on July 15, 1977.

The July 15, 1977, telephone conference was held as scheduled. Counsel for the Applicant indicated that he was considering the filing of a motion

for summary decision. Accordingly, counsel for the parties were informed that no further telephone conferences would be held absent a specific request from either party, and that no further action would be taken by the undersigned Administrative Law Judge until either the receipt of such a request or the filing of a motion for summary decision or the filing of a request for a hearing.

Approximately 6 months elapsed during which no communications were received from the parties as to the status of the case. On January 17, 1978 and February 6, 1978, the undersigned Administrative Law Judge sent letters to counsel for the Applicant, with copies sent to the Respondent, requesting a written statement as to what further action the Applicant contemplated taking so that the disposition of the case could be expedited. On February 24, 1978, a communication was received from counsel for the Applicant stating both his reasons for the delay and that he would be filing a motion for summary decision. This motion was subsequently filed on April 14, 1978. On May 15, 1978, the motion was denied without prejudice to the right of the Applicant to renew a motion which would be properly documented.

On August 11, 1978, a letter was sent to counsel for the Applicant stating the necessity of taking action, either in the form of a motion for summary decision or a request for a hearing, in order to expeditiously bring the case to a conclusion. On September 1, 1978, counsel for the Applicant filed a letter which apprised the Judge that consultations with counsel for the Respondent had disclosed matters that could only be resolved at a hearing. Accordingly, a notice of hearing was issued on September 7, 1978, scheduling the case for hearing on the merits on November 21, 1978, in Charleston, West Virginia, contingent upon the Applicant's filing an amended application for compensation by October 16, 1978.

On October 17, 1978, the Applicant filed a motion for production of documents. On October 31, 1978, the Applicant filed a communication indicating that he was pursuing informal avenues to obtain the information sought by the motion for production of documents and suggested that a ruling on the motion be held in abeyance. Counsel further indicated that he would either withdraw or renew the motion upon completion of the informal steps previously undertaken. Additionally, counsel indicated that a postponement of the hearing would be needed by both parties.

On November 6, 1978, an order was issued continuing the hearing indefinitely and scheduling a telephone conference for November 22, 1978, which conference was held as scheduled. It was agreed that the following three steps would take place: First, the Applicant's attorney was to file an amended application for compensation after receiving certain information from the Respondent's attorney and from other sources. Second, the Respondent's attorney was to be accorded time to file an answer to the amended application. The attorney for the Respondent was to communicate with the attorney for the Applicant

within 2 weeks after receipt of the amended application to indicate whether he would stipulate that the Applicant could file a second motion for summary decision in spite of the fact that a notice

of hearing had already been issued. Third, the Applicant's attorney was to either file a motion for summary decision or request the Judge to set the matter for hearing. This agreement was reflected in an order issued on November 28, 1978.

A telephone conference was held on or around April 30, 1979, to determine the status of the case since no communication had been received from either party subsequent to the issuance of the November 28, 1978, order. The parties agreed to make arrangements for the receipt of certain information so that the Applicant's attorney could file an amended application by May 21, 1979. It was understood that the remaining two steps outlined in the November 28, 1978, order then would be executed as expeditiously as possible.

On May 11, 1979, the Applicant served interrogatories and a request for admissions on the Respondent. Copies were filed with the Judge on May 14, 1979.

As of June 25, 1979, 7 weeks following the above-noted telephone conference, the amended application had not been filed. Therefore, counsel for the Applicant was requested to apprise the Judge of the status of the amended application by July 5, 1979.

On July 6, 1979, the Applicant filed a document styled "Amended Application for Compensation and to Show Cause Why Default Judgment Should Not Be Entered." On August 13, 1979, an order was issued addressing issues relating to the Applicant's May 14, 1979, and July 6, 1979, filings and setting forth a schedule stating, in part, as follows:

> On May 14, 1979, the Applicant filed copies of interrogatories to Respondent and a request for admissions along with a certificate of service stating that copies of such documents had been mailed on May 11, 1979, to the Secretary-Treasurer of the FMV Coal Corporation as well as the Office of the Solicitor of the Department of Labor. However, the certificate of service did not show that it was mailed to the Respondent's attorney.
>
> On July 6, 1979, the Applicants filed an amended Application for Compensation and a request that an order be issued to the Respondent to show cause why judgement in default should not be entered in Local Union 6594's favor, on the application as amended, since the Respondent had not replied to either the interrogatories or the requests for admissions. The certificate of service attached to such document states that copies were mailed to the attorney for the Respondent as well as other persons. No response to such amended application or request for order to show cause has been received from the Respondent and the time permitted for response to such motions has expired. In addition, it has now been

somewhat over 30 days since the amended Application for Compensation was served and no answer to that amendment has been filed by the Respondent.

In view of the regulations relating to discovery, it is not considered that an order to show cause for default judgment is proper at this stage of the proceedings. However, in view of the facts contained in the record, it is considered good cause has been shown for the completion of discovery procedures beyond the time limitations set forth in the regulations applicable to these proceedings.

Accordingly, IT IS ORDERED that the Respondent reply to such interrogatories and requests for admissions referred to above by August 31, 1979.(FOOTNOTE 1) As relates to the amendment to the application, such amendment is accepted as partial fulfillment of the directions contained in my order of May 15, 1978, which pointed out that the applicable regulations required the application to set forth the total amount of compensation claimed as well as the period for which such compensation is claimed. However, the period of the claim as set forth in paragraph 4 of the amended application filed July 6, 1979, is not sufficiently definite. Therefore, after the interrogatories have been answered, a further amendment to such application will be necessary to definitely set forth the specific days for which compensation is claimed.

Accordingly, the Applicant will have until September 20, 1979, for the filing of such amendment to the application.

Thereafter the Respondent will have until October 20, 1979, to answer the application as amended.

Thereafter the hearing in this matter will commence at 9:30 a.m., October 30, 1979, unless agreement has been reached by the parties as to the right of the Applicants to file a motion for summary decision if such is in order at that time.

Footnote No. 1, supra stated that: "In view of the fact that the certificate of service relating to such documents did not show service upon the Respondent's attorney a copy of each of these two documents is attached as Appendix A."

On October 1, 1979, an order of continuance was issued stating the following:

The hearing in the above-captioned case is now set for October 30, 1979. In the order setting such hearing, the date was premised upon the occurrence of two steps which had

to occur prior to the hearing. They were the filing of an amended application which would specifically set forth the dates for which compensation is claimed by each of the miners involved, and thereafter the passage of 30 days after service of such amended application upon the respondent, during which the respondent could answer such amended application.

Since the above referred to amendment to such application has not been served or filed, the time schedule will not permit the commencement of the hearing on October 30, 1979.

In view of the fact that the Respondent did not respond to the interrogatories and requests for admissions served by the Applicant, a telephone conference was arranged by the undersigned Administrative Law Judge with the attorneys for the Applicant and the Respondent on September 24, 1979. During such telephone conference the attorney for the Respondent stated that the Respondent no longer desired that an attorney represent it because of financial problems. The result is that the Respondent's attorney apparently will not be filing answers to said interrogatories and requests for admissions. During such conference the Administrative Law Judge stated that the procedures for the subpoena of Respondent's officers for the purpose of a deposition could be carried out by the Applicant's attorney if such was necessary for the purpose of serving and filing an amended application.

The attorney for the Applicant stated that some action would be forthcoming, as to an amended application, in the near future as to the service of an amended application.

Accordingly the hearing in this case is CONTINUED INDEFINITELY pending the filing of the amended application and the passage of 30 days for answer thereto by the Respondent.

As soon as action is taken by the Applicant as to such amended application, an order will be issued setting the matter for hearing.

On October 25, 1979, the Applicant filed a document styled "Supplemental Application for Compensation." The Respondent failed to file answers to either the July 6, 1979, amended application for compensation or the October 25, 1979, supplemental application.

An amended notice of hearing was issued on November 8, 1979, scheduling the case for hearing on the merits on December 18, 1979, in Logan, West Virginia. Subsequent thereto, the Applicant requested that the hearing be changed to a date in January, 1980. Amended notices of hearing were issued on November 27, 1979, and January 15, 1980, scheduling the case for

hearing on the merits to commence at 10 a.m., January 30, 1980, in Bluefield, West Virginia. Additionally, on January 15, 1980, a prehearing order was issued advising the parties that a 5 day transcript would be ordered and that the time for filing any proposed findings of fact, conclusions of law or briefs would expire 10 days after each party ordering a copy of the transcript received its copy from the reporter.

The hearing was conducted as scheduled. The Applicant was represented by counsel. No one appeared to represent the Respondent (Tr. 5-6).(FOOTNOTE 1)

During the course of the hearing, the Applicant moved to amend the caption to reflect the names of all miner-claimants and also moved to amend the supplemental application for compensation to conform with the proof. Both motions were granted (Tr. 49, 51-56).

The Applicant also moved for the entry of a default (Tr. 9, 58). However, in view of the decision in Rushton Mining Company v. Morton, 520 F.2d 716 (3rd Cir. 1975), discussed infra, it is deemed inappropriate to dispose of this case by way of a default.

The Applicant filed proposed findings of fact and conclusions of law on February 19, 1980. No posthearing filings were made by the Respondent.

Additionally, on February 19, 1980, the Applicant filed proof that on October 24, 1979, a copy of the October 25, 19789, Supplemental Application for Compensation was served on both Mr. T. I. Varney, the Respondent's Secretary-Treasurer, and John M. Richardson, Esq., the Respondent's then counsel of record.

II. Witness and Exhibits

(A) Witness

The Applicant called as its witness Richard C. Cooper, a safety inspector for the United Mine Workers of America.

(B) Exhibits

The Applicant introduced the following exhibits into evidence:

A-1 is the affidavit of Fred T. Casteel, Subdistrict Manager in the Madison, West Virginia Subdistrict Office of the Mine Safety and Health Administration.

A-2 is the affidavit of Helen O. Mockabee, Chief of the Docket Section of the Federal Mine Safety and Health Review Commission.

A-3 is a copy of Order No. 1 GRB, December 13, 1976, 30 C.F.R. 75.1101-5.

A-4 is a copy of Order No. 2 GRB, December 13, 1976, 30 C.F.R. 75.1103-4(a).

A-5 is a copy of Order No. 3 GRB, December 13, 1976, 30 C.F.R. 75.1100-2(b).

A-6 is a copy of Order No. 4 GRB, December 13, 1976, 30 C.F.R. 75.200.

III. Issues

(1) Whether the miner-claimants are entitled to compensation under that portion of section 110(a) of the 1969 Coal Act which provides as follows:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, 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 on such compensation 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.

(2) If the miner-claimants are entitled to compensation under the above-noted provision of section 110(a), then what is the amount of compensation due each miner-claimant?

IV. Opinion and Findings of Fact

On December 13, 1976, George Bowman, an authorized representative of the Secretary of the Interior, issued to the Respondent the following orders of withdrawal at the Respondent's No. 1 Mine: 1 GRB, December 13, 1976, 30 C.F.R. 75.1101-5; 2 GRB, December 13, 1976, 30 C.F.R. 75.1103-4(a); 3 GRB, December 13, 1976, 30 C.F.R. 75.1100-2(b); and 4 GRB, December 13, 1976, 30 C.F.R. 75.200. The first three orders were issued at 9:45 a.m. and

the remaining order was issued at 10:30 a.m. All four orders were issued pursuant to section 104(c)(1) of the 1969 Coal Act (FOOTNOTE 2) alleging violations of the above-noted mandatory safety standards caused by an unwarrantable failure on the Respondent's part to comply with the respective standards. (Exhs. A-1, A-3, A-4, A-5, A-6; Applicant's Requests for Admissions, Nos. 6, 7, 8, 9, 13, 14, 15, 16, filed July 1, 1977, and Respondent's Reply thereto, filed July 15, 1977). No modifications were issued as relates to any of the four orders and the four orders remained in full force and effect until their termination in March, 1977 (Exh. A-1). The records of the Federal Mine Safety and Health Review Commission were searched, and failed to show that the Applications for Review were filed by the Respondent as relates to the four orders (Exh. A-2).

The Respondent's No. 1 Mine had one coal producing section during December, 1976, and each of the four orders of withdrawal effectively idled the entire mine from the moment of their issuance. (See, Applicant's Requests for Admissions, No. 2, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977; Application for Compensation, Paragraph No. XII, filed January 24, 1977 and Respondent's Answer, Paragraph XII, filed April 4, 1977).

Between December 1, 1976, and December 10, 1976, the Respondent operated two daily production shifts at the No. 1 Mine, the 7 a.m. to 3 p.m. shift and the 3 p.m. to 11 p.m. shift. (See Applicant's Requests for Admissions, No. 3, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977.) There were no non-production shifts. (See, Applicant's Interrogatories to Respondent, No. 6, filed February 18, 1977 and Respondent's Answers thereto, filed May 16, 1977).

The Respondent's No. 1 Mine is a bituminous coal mine whose operations or products affect interstate commerce. (See, Applicant's Requests for Admissions, No. 1, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977).

The Applicant seeks one week's compensation on behalf of 27 miners idled by the above-noted orders of withdrawal. Compensation is sought under that portion of section 110(a) of the 1969 Coal Act, which provides that:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who an idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation 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.

As noted by the Court in Rushton Mining Company v. Morton, 520 F.2d 716, 720 (3rd Cir. 1975), compensation under this portion of section 110(a) is explicitly predicated on the order's being held valid after a hearing.(FOOTNOTE 3)

Bearing these principles in mined it must be concluded that the Applicant's prima facie case in the instant proceeding consists of three basic elements: First, the existence of the underlying 104(c)(1) notice of violation must be established. Second, it must be established that one or more of the 104(c)(1) orders was served on the operator or his agent, and that the condition or practice set forth in such order or orders constituted a violation of the cited mandatory safety standard caused by an unwarrantable failure on the Respondent's part to comply with such standard. See generally, Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975). Finally, the Applicant must establish the amount of compensation due each miner idled by such order or orders of withdrawal.

In Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1977-1978, OSHD par. 21,676 (1977), the Interior Board of Mine Operations Appeals (Board) set forth the governing test for unwarrantable failure. The Board held that a violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." 7 IBMA 295-296.

At the outset, it is found that the Applicant has made a prima facie showing of the existence of the underlying 104(c)(1) notice of violation. Each of the four subject orders makes reference to the notice. (Exhs. A-3, A-4, A-5, A-6). Furthermore, it is significant to note that Paragraph IX of the application for compensation, filed on January 24, 1977, alleged, in part, that "[n]o known Orders to date have modified or terminated Unwarrantable Failure Withdrawal Order Nos. 1 GRB, 2 GRB, 3 GRB or 4 GRB." Paragraph No. IX of the Respondent's answer, filed on April 4, 1977, states that "[t]he Respondent denies Paragraph IX and states that all orders and notices that were issued have been abated as of March 29, 1977." (Emphasis added). This statement in the Respondent's answer seems to imply that the underlying 104(c)(1) notice was issued, and, when read in conjunction with the statements contained in the subject orders, confirms a prima facie showing of its existence.

In view of the times for issuance of the four withdrawal orders, if any, one of the orders were found valid a basis for 1 week's compensation would be established.

Certain questions arise as to the validity of some of the orders, however, there is no question as to the adequacy of a prima facie case concerning the validity of Order No. 3 GRB, December 13, 1975, 30 C.F.R. 1100-2(b).

Accordingly, we will discuss that order.

Order No. 3 GRB, December 13, 1976, 30 C.F.R. 1100-2(b), states that "[o]nly one (1) outlet valve was installed in the water line that [paralleled] the Nos. 1, 2 and 3 belt conveyors for a distance of about 1,650 feet and fittings suitable for connection was not provided at the one outlet valve. This condition was observed after a fire was extinguished at the No. 3 belt conveyor drive." (Exh. A-5). Mandatory safety standard 30 C.F.R. 75.1100-2(b), provides as follows:

> (b) Belt conveyors. In all coal mines, waterlines shall be installed parallel to the entire length of belt conveyors and shall be equipped with firehose outlets with valves at 300-foot intervals along each belt conveyor and at tailpieces. At least 500 feet of firehose and fittings suitable for connection with each belt conveyor waterline system shall be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

The waterline in question should have been equipped with outlets with valves at 300-foot intervals along each belt conveyor and at the tailpieces. However, the cited waterline was provided with only one outlet valve for a distance of approximately 1,650 feet. In light of the nature of the condition, the Respondent should have known of its existence. Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. 75.1100-2(b), existed, and that such violation was caused by an unwarrantable failure on the Respondent's part to comply with the mandatory safety standard. The order of withdrawal was valid within the meaning of section 110(a) of the 1969 Coal Act.

In view of the foregoing, it is found that miners idled by the issuance of Order No. 3 GRB, December 13, 1976, 30 C.F.R. 75.1100-2(b) are entitled to one week's compensation at their regular rate of pay under section 110(a) of the 1969 Coal.(FOOTNOTE 4) The idled miners and the amount of compensation to which each miner is entitled are identified as follows:

NAME	HOURLY WAGE	December, 1976 13	14	15	16	17	20	TOTAL
Keith McCoy	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Walter Cooper	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Taby Cooley	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Gregory Boggs	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Jack Matney	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Danny Mahon (FOOTNOTE 5)	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
George Tiller	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Charles Stover	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Larry Lester	8.145	65.16	65.16	65.16	65.16	65.16		325.80
William Workman	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Orville Napier	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Kirby Cisco	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Andrew Miller	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Mearl Fields	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Robert Fields	7.74	61.92	61.92	61.92	61.92	61.92		309.60

Phillip Springer	7.74	61.92	61.92	61.92	61.92	61.92	309.60
Bobby Robinson (FOOTNOTE 6)	7.59	60.72	60.72	60.72	60.72	60.72	303.60

December		13	14	15	20	21	22	
Frank Evans	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Kyle Cline	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Alvin Chapamn	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Kenneth Whited	8.145	42.76	65.16	65.16	65.16	65.16	22.40	325.80
Earl Hall	8.145	65.16	65.16	65.16	65.16	65.16		325.80

December		13	14	15	16	20	21	
Willard Newsome	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Tennis Canterbury	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80

December		13	20	21	22	23	24	
Bruce Cooley	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Phillip Jones	8.145	65.16	65.16	65.16	65.16	65.16		325.80

December		14	15	16	17	20		
Isaac Bryant	7.59	60.72	60.72	60.72	60.72	60.72		303.60

(See, Applicant's Interrogatories to Respondent, Nos. 8 and 9, filed February 18, 1977 and Applicant's Responses thereto, filed May 16, 1977).

Interest computed at the rate of 6 percent per annum will be awarded covering the periods from the dates of idlement, commencing December 14, 1976, to the date upon which the compensation is paid. Local Union 5869 v. Youngstown Mines, 1 FMSHRC 990, 1979 OSHD par. 23,803 (1979).

The Applicant seeks an award of costs and attorneys fees based upon the "Respondent's flagrant refusal to respond to the process and jurisdiction of this Court" (Applicant's Proposed Findings of Fact and Conclusions of Law, pg. 9). Section 110(b)(3) of the 1969 Coal Act expressly permits the successful applicant in a discrimination proceeding to recover reasonable costs and reasonable attorney's fees. Section 110(a) accords no such right to the successful applicant in a compensation case. Accordingly, the Applicant's request must be denied. Accord, Local Union 9856, District 15, United Mine Workers of America v. CF&I Steel Corporation, Docket No. DENV 73-111 (October 4, 1973).

V. Conclusions of Law

1. The parties have been subject to the provisions of the 1969 Coal Act and the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of and parties to this proceeding.

3. Order No. 3 GRB, December 13, 1976, 30 C.F.R. 75.1100-2(b) is valid within the meaning of section 110(a) of the 1969 Coal Act. Such order remained in full force and effect until terminated in March, 1977, and the Respondent never sought administrative review of such order.

4. All oral determinations made at the hearing granting various motions are affirmed.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

The Applicant filed proposed findings of fact and conclusions of law. Such submission, insofar as it can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

The Respondent is ORDERED to pay compensation to the individual miners as set forth below, with interest computed at the rate of 6 percent per annum for the period commencing on the day following the day each amount was due in December of 1976, and ending on the date when the compensation is paid:

NAME	HOURLY WAGE	December, 1976 13	14	15	16	17	20	TOTAL
Keith McCoy	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Walter Cooper	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Taby Cooley	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Gregory Boggs	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Jack Matney	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Danny Mahon	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
George Tiller	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Charles Stover	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Larry Lester	8.145	65.16	65.16	65.16	65.16	65.16		325.80
William Workman	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Orville Napier	7.74	61.92	61.92	61.92	61.92	61.92		309.60

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Kirby Cisco	7.74	61.92	61.92	61.92	61.92	61.92	309.60
Andrew Miller	7.74	61.92	61.92	61.92	61.92	61.92	309.60
Mearl Fields	8.145	65.16	65.16	65.16	65.16	65.16	325.80
Robert Fields	7.74	61.92	61.92	61.92	61.92	61.92	309.60
Phillip Springer	7.74	61.92	61.92	61.92	61.92	61.92	309.60
Bobby Robinson	7.59	60.72	60.72	60.72	60.72	60.72	303.60

December		13	14	15	20	21	22	
Frank Evans	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Kyle Cline	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Alvin Chapamn	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Kenneth Whited	8.145	42.76	65.16	65.1	65.16	65.16	22.40	325.80
Earl Hall	8.145	65.16	65.16	65.16	65.16	65.16		325.80

December		13	14	15	16	20	21	
Willard Newsome	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Tennis Canterbury	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80

December		13	20	21	22	23	24	
Bruce Cooley	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Phillip Jones	8.145	65.16	65.16	65.16	65.16	65.16		325.80

December		14	15	16	17	20		
Isaac Bryant	7.59	60.72	60.72	60.72	60.72	60.72		303.60

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

It should be noted that the Respondent was represented by counsel during the prehearing stage of the proceeding. On November 9, 1979, counsel for the Respondent filed a motion for permission to withdraw his appearance. In spite of repeated requests, no certificate of service was filed prior to the hearing showing service of the motion on the Applicant. The motion was granted on the record after counsel for the Applciant acknowledged receipt of a copy of the motion and after counsel stated that he had no objection to the granting of the motion (Tr. 6-8).

~FOOTNOTE 2

Section 104(c)(1) of the 1969 Coal Act provides:

"(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to

the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE 3

The pertinent portions of the Court's analysis of the compensation provisions of the 1969 Coal Act are set forth as follows:

"Reading 820(a) in its entirety, one sees that clause [1] concerns withdrawal orders issued under 814(a) or (b); clause [2] concerns withdrawal orders which the inspector has certified, under 814(c)(1), to be caused by "an unwarrantable failure of [the] operator to comply with ... mandatory health or safety standards;" and clause [3] concerns situations in which the operator "violates or fails or refuses to comply with any order issued under" 814. Compensation of idled miners varies with the three situations covered by the three clauses. Miners idled by 814(a) and (b) withdrawal orders are entitled under clause [1] to compensation for the balance of the shift during which the withdrawal order was issued, and half of the next shift, if that shift also was idled. Where there has been a 814(c)(1) certification, clause [2] provides the basis for giving the idled miners full compensation up to one week, but only after a hearing and after the withdrawal order has become "final." If the operator fails to comply with the withdrawal order, clause [3] gives the miners double compensation for the time during which they should have been idled, through the point at which the withdrawal order is "complied with, vacated, or terminated."

"We believe that it is clear that in drafting 820(a) Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, that in clause [2] Congress intended to compensate miners only where the order is ultimately upheld, but that in clauses [1] and [3] Congress intended to compensate miners even where the order is ultimately vacated. Any other reading of the section would be inconsistent with the section's overall design, since it would ignore the fact that clause [2] explicitly predicates compensation on the order's being held valid after a hearing, whereas clauses [1] and [3] have no such requirement. 520 F.2d at 719-720.

~FOOTNOTE 4

It is found that the dates and hours the miners would have worked during the one week period following the issuance of the order are as set forth in the supplemental application for compensation as amended to conform with the proof. (See, Tr. 49-56 and references cited therein). These time periods are set forth for the individual miner-claimants as follows:

"(A) Keith McCoy, Water Cooper, Taby Cooley, Gregory Boggs, Jack Matney and Danny Mahon were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of their shift on December 14, 15, 16, and 17, 1976, and from 7:00 a.m. until 9:45 a.m. on December 20, 1976.

"(B) George Tiller, Charles Stover, Larry Lester, William Workman, Orgille Napier, Kirby Cisco, Andrew Miller, Mearl Fields, Robert Fields, Philip Springer and Bobby Robinson were idled for all of the second shift on December 13, 14, 15, 16, and 17, 1976.

"(C) Frank Evans, Kyle Cline, Alvin Chapman and Kenneth Whited were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of their shift on December 14, 15, 20, and 21, 1976, and from 7:00 a.m. until 9:45 a.m. on December 22, 1976.

"(D) Earl Hall was idled for all of the second shift on December 13, 14, 15, 60, and 21, 1976.

"(E) Willard Newsome and Tennis Canterbury were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of the first shift on December 14, 15, 16 and 20, 1976, and from 7:00 a.m. to 9:45 a.m. on December 21, 1976.

"(F) Bruce Cooley was idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of the first shift on December 20, 21, 22, and 23, 1976, and from 7:00 a.m. until 9:45 a.m. on December 24, 1976.

"(G) Philip Jones was idled for the second shift on December 13, 20, 21, 22, and 23, 1976.

"(H) Isaac Bryant was idled for all of the first shift on December 14, 15, 16, 17, and 20, 1976."

~FOOTNOTE 5

The may 16, 1977 answers to interrogatory Nos. 8 and 9 contain information as relates to all miner-claimants except Danny Mahon. The Respondent expressly admitted that Danny Mahon was a regular day shift miner at the No. 1 Mine. (Application for Compensation, paragraph XIII filed January 24, 1977, and Answer thereto filed April 4, 1977). Additionally, the Respondent is deemed to have admitted the averment that Mr. Mahon's hourly wage was 7.59 per hour, as set forth in the Supplemental Application for Compensation, due to the Respondent's failure to file an answer to said pleading denying the allegation. See 29 C.F.R. 2700.1(b), reported at 44 Fed. Reg. 38227 (1979), Rules 8(d) and 15(a), of the Federal Rules of Civil Procedure.

~FOOTNOTE 6

The May 16, 1977, answers to interrogatory Nos. 8 and 9 list Bobby Robinson's hourly wage as $7.74. Since the Applicant has sought one week's compensation for Mr. Robinson at the rate of 7.59 per hour, the award will be based on the hourly wage rate of $7.59.