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ISLAND CREEK COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ISLAND CREEK COAL COMPANY,
APPLICANT

Application for Review

v.

Docket No. WEVA 79-242-R
Citation No. 636033
June 4, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Donegan 10-A Mine

UNITED MINE WORKERS OF
AMERICA (UMWA),
RESPONDENT

ORDER DENYING FURTHER STAY AND
GRANTING APPLICANT'S MOTION FOR SUMMARY DECISION

I. Procedural Background

On June 28, 1979, Island Creek Coal Company (Applicant) filed an application for review in the above-captioned case pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act) stating, in part, as follows:

1. At 9:50 a.m. on June 4, 1979, George E. Wills, an authorized representative of the Secretary, issued a Citation pursuant to Section 104(a) of the Act at the Donegan 10-A Mine, alleging that Island Creek violated Section 103(f) of the Act for not paying an employee, one Wendell F. Seabolt, for his activities in accompanying a MSHA inspector, said George E. Wills, during a 103(i) spot inspection on May 7, 1979. The inspection conducted by Mr. Wills on May 7, 1979, was not a "physical inspection ... made pursuant to the provisions of subsection (a)" of Section 103 of the Act, and was, therefore, not a "regular" inspection of the subject mine under the Act. The Citation required payment of the employee no later than 2:00 p.m. on June 14, 1979, in order to terminate the Citation.

2. The inspector was informed that Island Creek did not agree with the issuance of the Citation or the fact that a violation of Section 103(f) of the Act had occurred,

especially in view of the March 8, 1979, decisions of Administrative Law Judge Lasher in Magma Copper Company, Docket No. Denv 78-533-M, and Kentland-Elkhorn Coal Corporation, Docket No. Pike 78-399. However, in order to comply with the inspector's order and to avoid the issuance of a withdrawal order, Island Creek issued a check in the amount allegedly owed to the employee and stated that the payment was being made under protest due to the fact that the inspector had erroneously interpreted the Act. The inspector then issued a Termination Notice at 9:53 a.m., three minutes after issuance of the Citation.

3. The inspector's issuance of the instant Citation was invalid, improper, illegal and in direct contravention of Judge Lasher's two decisions hereinabove cited. The operator is not required under Section 103(f) of the Act to compensate representatives of miners who accompany MSHA inspectors on so called "non-regular" inspections, such as a 103(i) spot inspection.

Answers were filed by the United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) on July 12, 1979, and July 23, 1979, respectively. On October 5, 1979, an order was issued granting the Applicant's motion to stay the proceedings pending the issuance of decisions by the Federal Mine Safety and Health Review Commission (Commission) in Magma Copper Company, Docket No. DENV 78-533-M, and Kentland-Elkhorn Coal Corporation, Docket No. PIKE 78-399. Decisions were issued by the Commission in Kentland-Elkhorn Coal Corporation, and Magma Copper Company, on November 30, 1979, and December 10, 1979, respectively. (FOOTNOTE 1) Additionally, on November 21, 1979, the Commission issued a decision in Helen Mining Company, 1 FMSHRC 1796, 1979 OSHD par. 24,045 (1979), holding that a mine operator is not required to pay a miners' representative for the time he spends accompanying a mine inspector during a "spot" inspection required by section 103(i) of the 1977 Mine Act.

The UMWA and MSHA filed motions for a further stay on January 25, 1980, and January 28, 1980, respectively. On February 4, 1980, the Applicant filed a motion for summary decision and a supporting affidavit. On February 27, 1980, an order was issued denying the motions for a further stay and according MSHA and the UMWA 15 days in which to file responses in opposition to the motion for summary decision. The subsequent filings by MSHA and the UMWA are set forth and discussed in the following section.

II. Requests for Reconsideration

MSHA and the UMWA filed documents styled "Response to Order Denying Continued Stay of Proceeding and Applicant's Motion for Summary Decision" on March 7, 1980, and March 12, 1980, respectively. Both MSHA and the

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UMWA move for reconsideration of the above-noted February 27, 1980, ruling and for the reissuance of a stay, setting forth similar reasons in support thereof. MSHA's reasons are set forth as follows:

For the reasons previously stated by both the Secretary and the United Mine Workers of America (UMWA), this proceeding should be stayed as requested and reconsideration of the ruling of February 27, 1980, is therefore requested.

There is indeed no issue in this matter which needs to be tried. The Federal Mine Safety and Health Review Commission's decisions in Kentland-Elkhorn and Helen Mining are controlling, however, those cases are pending review as the record reflects. Granting Applicant's Motion for Summary Decision would prejudice the Secretary, whereas a renewed stay would allow the case to lie dormant pending the final resolution of the aforementioned cases and no parties will be prejudiced by such an action in this matter.

29 CFR 2700.64(b) provides that summary decision can be granted only when there is no genuine issue as to any material fact and the moving party is entitled to summary decision as a matter of law. True, there is no factual difference between the parties, but there is a serious difference as a matter of law which can only be settled by a final resolution of the proceedings now in D. C. Circuit Court concerning Kentland-Elkhorn (Nos. CA 79-2503 and CA 79-2536) and Helen Mining Company (Nos. CA 79-2518 and CA 79-2537). Until a final decision is rendered on these proceedings summary decision cannot be granted without doing violence to 29 CFR 2700.64(b).

WHEREFORE, the Secretary requests that the Motion for Summary Decision be held in abeyance and a stay reissued in this matter.

The UMWA also concedes that "no factual difference exists between the parties."

For the reasons set forth in the above-noted order of February 27, 1980, MSHA's and the UMWA's request that the motion for summary decision be held in abeyance and a stay reissued are DENIED.

III. Motion for Summary Decision

The Applicant's February 4, 1980, motion for summary decision states, in part, as follows:

1. That the central and controlling issue in the subject case is whether or not Applicant is required under the provisions of Section 103(f) of the Federal

Mine Safety and Health Act of 1977 (the "Act") to
compensate miner's

representatives for time spent accompanying federal inspectors during spot, electrical and ventilation impact inspections, which are not "regular inspections" of the mine conducted pursuant to Section 103(a) of the Act;

2. That MSHA issued the citation and/or order which are the subject of the above-styled proceeding as a result of Applicant's assertion that it was not required by Section 103(f) of the Act to compensate miner's representatives for time spent accompanying federal inspectors on "nonregular inspections" and its failure to take such action in compliance with the "interpretive bulletin" issued by MSHA, all as stated in the Application for Review filed by Applicant in the instant proceeding and the subject citation and/or order issued by MSHA;

3. That Applicant, after and as a direct result of issuance of the instant citation and/or order, made the payments mandated by MSHA's representative under protest and solely in order to avoid the issuance of further sanctions by MSHA, even though Applicant rejected MSHA's interpretation of the requirements of Section 103(f) of the Act and informed MSHA's representative of that position;

4. That MSHA's interpretation of the requirements of Section 103(f) of the Act which resulted in the issuance of the subject citation and/or order by MSHA's representative was and is invalid, illegal and contrary to the requirements of Section 103(f) of the Act, as determined by the Federal Mine Safety & Health Review Commission (the "Commission") in its decisions in *MSHA v. Helen Mining Company*, Docket No. PITT 79-11-P and *MSHA v. Kentland-Elkhorn Coal Corporation* Docket No. PIKE 78-399;

5. That Applicant, against its will and under protest, has been improperly and illegally required and forced by MSHA to pay \$37.04 in wages to miner's representatives directly as a result of MSHA's erroneous interpretation of the Act and the improper, invalid and illegal exercise of its onerous enforcement powers by the issuance of the instant citation and/or order;

6. That, based upon the pleadings, the subject citation and/or order and the affidavit of James Vilseck, which is attached hereto as Exhibit A and made a part hereof, there is no genuine issue as to any material fact in the instant proceeding; and Applicant is entitled, as a matter of law based upon the Commission's decisions in *Helen Mining* and *Kentland-Elkhorn* cited above, to a summary decision in this proceeding.

WHEREFORE, Applicant hereby moves that a summary decision be entered by the Commission granting the instant Application for Review, vacating ab initio and holding for naught the instant citation and/or order and awarding Applicant, as a setoff and credit against any future civil penalties which may be properly assessed by MSHA against Applicant in other administrative proceedings before the Commission, damages in the amount of \$37.04 being an amount equal to the wages which MSHA illegally forced Applicant to pay as a result of the unwarranted enforcement actions taken by MSHA.

Summary decision may be granted only if the entire record shows: "(1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. 2700.64(b), reported at 44 Fed. Reg. 38232 (1979) (Rules of Procedure of the Federal Mine Safety and Health Review Commission; effective date: July 30, 1979). For purposes of summary decision, the record consists of the pleadings, depositions, answers to interrogatories, admissions, and affidavits or other verified documents. 29 C.F.R. 2700.64(b) and (c), supra. Affidavits must be made on the affiant's personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. "Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated if not otherwise a matter of record." 29 C.F.R. 2700.64(c), supra.

No genuine issue as to any material fact exists. The subject citation alleges a violation of section 103(f) of the 1977 Mine Act based upon the Applicant's refusal to pay a representative of the miners for the time spent accompanying a Federal mine inspector during a "spot" inspection conducted pursuant to section 103(i) of the 1977 Mine Act.

The Commission's decision in Helen Mining Company, supra, is dispositive of the issue presented. The Applicant was not required to pay the representative of the miners for the time spent accompanying the inspector during the "spot" inspection. (FOOTNOTE 2) Accordingly, the Applicant is entitled to summary decision as a matter of law on this issue. An order will be issued granting the application for review and vacating the citation.

The Applicant requests additional relief in the form of a \$37.04 "set-off and credit against any future civil penalties which may be properly assessed by MSHA against Applicant in other administrative proceedings before the Commission." The Applicant cites no authority for the requested remedy, and, indeed, precedent dictates a result contrary to the one advanced by the Applicant.

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In North American Coal Corporation, 3 IBMA 93, 81 I.D. 204, 1973-1974 OSHD par. 17,658 (1974), the Commission's predecessor, the Interior Board of Mine Operations Appeals (Board), concluded "that a Judge may take into account the economic losses suffered by an operator as a consequence of a closure order, which is subsequently vacated, as a mitigating factor in assessing a penalty for a violation arising out of a condition or practice cited in such order." 3 IBMA at 119 (Footnotes omitted). However, the Board held "that there is no dollar-for-dollar offset permitted an operator against assessments in a penalty proceeding for economic losses sustained as a result of a vacated withdrawal order." 3 IBMA at 120 (Footnote omitted). The Board sought to impress upon operators the limited extent of its ruling by emphasizing that "economic losses resulting from vacated orders may be considered only with respect to assessments for violations arising from the conditions or practices cited in such order." 3 IBMA 121 (Emphasis in original). Therefore, it must be concluded that no authority exists for the award of monetary credits to be used as setoffs against future civil penalties. The requested additional relief will be denied.

Accordingly, IT IS ORDERED that the Applicant's motion for summary decision be, and hereby is GRANTED. IT IS THEREFORE ORDERED that the application for review be, and hereby is, GRANTED and Citation No. 636033 is herewith VACATED.

IT IS FURTHER ORDERED that the Applicant's request for a \$37.04 credit to be used as a setoff against future civil penalty assessments be, and hereby is, DENIED.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

Magma Copper Company, 1 FMSHRC 1948, 1979 OSHD par. 24,075 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1979 OSHD par. 24,071 (1979).

~FOOTNOTE 2

In Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1979 OSHD par. 24,071 (1979), the Commission held that a mine operator is not required to pay a miner's representative for the time he spends accompanying a mine inspector during a special electrical inspection of a mine. The Kentland-Elkhorn and Helen Mining decisions are founded on a common basic premise: The right to walkaround pay accorded a miners' representative under section 103(f) of the 1977 Mine Act is limited to the time spent accompanying a federal mine inspector during a "regular" inspection of the mine conducted pursuant to section 103(a).