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TOLBERT WHITT V. ITMANN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| TOLBERT WHITT, CHARLIE ROSS, JOHN WALL, JOHN MCGRAW, ROSS BUCKLAND AND WILLIE JOHNSON, | Complaints of Discrimination Docket No. WEVA 80-321-D Itmann No. 1 Mine |
| COMPLAINANTS | |

v.

ITMANN COAL COMPANY,
RESPONDENT

DECISION AND ORDER

In response to the order to show cause issued September 19, 1980, counsel for complainants Wall, Rose and McGraw contend that because it was "the clear intent of the stipulation of settlement to secure the status quo, the subject complainants are obviously due an amount from respondent equal to the amount" of unemployment compensation denied them by the state of West Virginia. For the reasons set forth in the order to show cause, I do not agree.

Counsel also claims that the finding that employment benefits "is not a payment normally paid by respondent" is erroneous because the normal procedure is for respondent to pay such benefits "through the mechanism of rates paid to the unemployment compensation fund." I do not agree that because the normal procedure for funding payments is through the mechanism of premiums paid to the state unemployment compensation department liability for the payment of such claims falls on the employer as a normal or expected incident of a change in an employee's status from that of discharged to that of laid-off after a state's denial of such claims. This Commission obviously has no jurisdiction to reopen and set aside the state's determination. As counsel for Itmann points out "The issue of whether certain of the complainants are entitled to unemployment benefits is, under West Virginia law, an issue between the Workmen's Compensation Commission and those complainants claiming such benefits. If the Workmen's Compensation Commission determines that unemployment compensation benefits are due, such benefits will be paid by the Workmen's Compensation Fund, not Itmann. Alternatively, if the Commission determines that unemployment benefits should not be paid, complainants have the legal right to appeal such determination under West Virginia law." But unless and until the state's determination is set aside by a court of competent jurisdiction, that determination is res judicata as between the parties and entitled to full faith and credit by the Commission.

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Finally, on September 11, 1980, Mr. Brown Payne, counsel for complainants, admitted there was "no negotiation" during the settlement discussions over his present claim. This was confirmed by counsel for Itmann. Despite this, counsel for complainants stoutly maintain that while they pursue their claim against the state they want this judge to reform the stipulation of settlement to include a liability on Itmann's part never bargained for.

In other words, it is counsel's position that whether or not the stipulation of settlement either expressly or by fair implication includes a claim for unemployment compensation against Itmann, it should nevertheless be so interpreted. While I have no doubt that it was counsel's secret intent to provide for such liability, I cannot in good conscience find that counsel for Itmann was privy to that intent. It may be that counsel for complainants made a bad bargain. But under the jurisdiction reserved to the Commission by the stipulation of settlement, I am not in a position to rectify it.

Accordingly, it is ORDERED that as supplemented by this opinion the interpretation of the stipulation of settlement as set forth in the order of September 19, 1980, be, and hereby is, CONFIRMED and ADOPTED as the trial judge's final disposition in this matter.

It is FURTHER ORDERED that subject to counsel's compliance with the terms of paragraph 3 of the stipulation of settlement the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge