

CCASE:

L. U.# 5899 (UMWA) v. TANSY MINING

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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LOCAL UNION NO. 5899,
UNITED MINE WORKERS
OF AMERICA (UMWA)

Complaint for Compensation

Docket No. KENT 79-223-C

ON BEHALF OF:

Tansy Beth No. 1 Mine

MICHAEL JOHNSON, JOE JOHNSON,
MOSES MAGGARD, JIMMY JOE GRAY,
CLARENCE OSBORNE, LEO JOHNSON,
JAMES TAYLOR, RICHARD GIBSON,
A. P. JAMES, J. D. REYNOLDS,
ALVIN SPEARS, HOMER BURKE,

APPLICANTS

v.

TANSY BETH MINING COMPANY,

RESPONDENT

SUMMARY DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America,
Washington, D.C., for the Applicants;
Phillip D. Damron, Esq., Prestonburg, Kentucky, for the
Respondent

Before: Judge Cook

This is a compensation proceeding arising under section 111
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
801 et seq. (Supp. III 1979) (1977 Mine Act). The Applicants
filed an application for compensation on July 16, 1979, and filed
an amendment thereto on January 8, 1980, (FN.1) seeking
compensation under that part of section 111 which provides that:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, 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, which shall be expedited in such cases, 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.

On October 25, 1979, the Applicants filed a motion for an order requiring the Respondent to show cause why a default should not be entered based upon the Respondent's failure to file an answer to the July 16, 1979, application for compensation. The requested order to show cause was issued by Chief Administrative Law Judge James A. Broderick on October 31, 1979, and the Respondent filed a response thereto on November 20, 1979, requesting a stay of the proceedings. The case was assigned to the undersigned Administrative Law Judge on November 26, 1979, with the request for a stay pending.

On December 18, 1979, an order was issued requiring the Applicants to file certain amendments to the application for compensation, (FN.2) requiring the Respondent to file a more specific request for a stay, and requiring the Respondent to file a proposed answer within 20 days after service of the amended application for compensation. The Applicants filed the amendment on January 8, 1980, and the Respondent filed an answer on January 30, 1980.

On February 27, 1980, an order was issued denying the Respondent's request for a stay because sufficient information to provide the basis for a stay had not been provided. That same day, a notice of hearing was issued scheduling the case for hearing on the merits on March 26, 1980, in Prestonburg, Kentucky. On March 18, 1980, the parties filed a joint motion for continuance. As grounds therefor, the parties stated an intent to enter into stipulations and thereafter to request that the case be decided on the basis of a motion for summary decision. On March 19, 1980, an order was issued granting a continuance until April 18, 1980, to permit the filing of a properly supported motion for summary decision.

On April 22, 1980, the Applicants filed a motion for summary decision accompanied by a motion to accept it for late filing. Joint stipulations of

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fact were filed on April 25, 1980. On June 18, 1980, an order was issued accepting a late filing of the motion for summary decision. However, the motion for summary decision was denied, and a notice of hearing was issued scheduling the case for hearing on the merits on July 15, 1980, in Pikeville, Kentucky.

On July 7, 1980, the Applicants filed a request for admissions, and a motion to continue the hearing pending resolution of the civil penalty proceeding in Docket No. KENT 80-104. The civil penalty proceeding encompassed the withdrawal order at issue in this case. The Applicants stated that should the civil penalty proceeding result in a determination that the Respondent did violate the cited mandatory safety standard, the parties should be able to resolve the compensation case without the need for a hearing. An order was issued on July 8, 1980, granting a continuance pending either resolution of the civil penalty proceeding or the scheduling of such civil penalty proceeding for hearing. On July 11, 1980, the Respondent filed answers to the request for admissions, and filed a motion joining the Applicants in their motion for continuance.

On October 14, 1980, a prehearing notice was issued noting that on August 27, 1980, an order was issued finding the Respondent in default in Docket No. KENT 80-104, imposing the proposed penalties as the final order of the Federal Mine Safety and Health Review Commission (Commission), and directing that such penalties be paid. The parties were accorded 30 days for the filing of any motions that they desired to file. It was noted that if no motions were filed within the 30-day time period, then the case would be scheduled for hearing.

On October 22, 1980, the Applicants filed a renewal of request for summary decision. The certificate of service indicates that a copy of such filing was served on the Respondent on October 21, 1980.

The time periods set forth at 29 C.F.R. 2700.8(b) and 2700.10(b) (1979), elapsed, and no statement in opposition thereto was filed by the Respondent. Accordingly, on November 13, 1980, an order was issued requiring the Respondent to set forth adequate reasons, in writing, on or before December 3, 1980, as to: (1) why it failed to file a statement in opposition to the Applicants' renewal of request for summary decision within the time periods set forth at 29 C.F.R. 2700.8(b) and 2700.10(b) (1979); and (2) why its failure to file a statement in opposition to the Applicants' renewal of request for summary decision should not be deemed an admission of the Applicants' contentions, as set forth therein, entitling them to the relief requested. The official case file contains a certified mail receipt indicating that counsel for the Respondent received the order on or around November 18, 1980. Additionally, a copy of the order was sent by certified mail, return receipt requested, to Mr. Claude Hall at the address set forth in the distribution list. The copy addressed to Mr. Hall was returned to the undersigned by the U.S. Post Office bearing the notation "unclaimed." The Respondent did not respond to the order.

The Commission's Rules of Procedure provide that "[w]hen a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal." 29 C.F.R. 2700.63(a) (1979). Accordingly, on January 8, 1981, an order was issued requiring the Respondent to show cause, in writing, on or before January 28, 1981, as to why summary decision should not be entered in the Applicants' favor and as to why the following should not be entered as the findings of fact and conclusions of law in this case:

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.
2. Respondent operates the No. 1 Mine.
3. The products or operations of Respondent's No. 1 Mine affect interstate commerce.
4. Respondent and its No. 1 Mine have been subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act), at all times relevant to this proceeding.
5. Respondent is an operator for purposes of section 111 of the 1977 Mine Act.
6. Inspector Jerry W. Sosbee was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.
7. At 8:27 p.m. on Thursday, June 14, 1979, Inspector Jerry W. Sosbee issued Withdrawal Order No. 707632 to Respondent at its No. 1 Mine.
8. Withdrawal Order No. 707632 was issued pursuant to the provisions of section 104(d)(1) of the 1977 Mine Act.
9. Withdrawal Order No. 707632 cites Respondent for a violation of mandatory safety standard 30 C.F.R. 75.200 which occurred at its No. 1 Mine. The withdrawal order describes the cited "condition or practice" as follows:

The supports inby the portal approximately the roof support inby the portal approximately 500 feet is not supported adequately. The 6 X 8 steel beams are twisted and bent and the header legs are broke. The foreman and all personnel travel under these conditions to the 0020 section. This is the haulageway from the 0020 section.
10. Respondent did not initiate a proceeding pursuant to section 105(d) of the 1977 Mine Act, within 30 days of its receipt of Withdrawal Order No. 707632, to contest the validity of such withdrawal order's issuance.

11. The "condition or practice" cited in Withdrawal Order No. 707632 existed at Respondent's No. 1 Mine as alleged in such withdrawal order, and constituted a violation of mandatory safety standard 30 C.F.R. 75.200.

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12. Withdrawal Order No. 707632 was not modified or terminated until Monday, June 18, 1979, at 12:35 p.m.

13. During all periods of time relevant to this proceeding, Respondent regularly operated two daily production shifts at its No. 1 Mine. These shifts are commonly referred to as the day shift and the evening shift.

14. Miners scheduled to work the day shift at Respondent's No. 1 Mine worked from 7:30 a.m. to 3:30 p.m.

15. Miners scheduled to work the evening shift at Respondent's No. 1 Mine worked from 3:30 p.m. to 11:30 p.m.

16. The following miners, who were scheduled to work the 3:30 p.m. to 11:30 p.m. shift (evening shift) on June 15, 1979, at the Respondent's No. 1 Mine, were idled for their entire 8-hour shift as a direct result of Withdrawal Order No. 707632:

Michael Johnson
Joe Johnson
Moses Maggard
Jimmy Joe Gray
Clarence Osborne

17. If the miners identified in Paragraph No. 16 had worked during the shift referred to in Paragraph No. 16, they would have earned the amounts of money listed below:

Michael Johnson	\$ 77.28
Joe Johnson	74.34
Moses Maggard	72.74
Jimmy Joe Gray	72.74
Clarence Osborne	72.74

18. The following miners, who were scheduled to work the 7:30 a.m. to 3:30 p.m. shift (day shift) on June 18, 1979, at Respondent's No. 1 Mine, were idled for their entire 8-hour shift as a direct result of Withdrawal Order No. 707632:

Leo Johnson
James Taylor
Richard Gibson
A. P. James
J. D. Reynolds
Alvin Spears
Homer Burke

19. If the miners identified in Paragraph No. 18 had worked during the shift referred to in Paragraph No. 18, they would have earned the amounts of money listed as follows:

Leo Johnson	\$ 78.92
James Taylor	78.92
Richard Gibson	78.92
A. P. James	72.74

J. D. Reynolds	72.74
Alvin Spears	78.92
Homer Burke	78.92

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20. As a result of being idled as a direct result of Withdrawal Order No. 707632, the various Applicants are entitled to an award of compensation in the respective amounts set forth in Paragraphs 17 and 19.

21. Each Applicant is also entitled to interest at the rate of 6 percent per annum on the amount of compensation awarded in this proceeding commencing on the day following the day each amount was due in June of 1979, and ending on the date when the compensation is paid.

The official case file contains a certified mail receipt indicating that counsel for the Respondent received the January 8, 1981, order to show cause on January 12, 1981. The copy of such order sent to Mr. Hall by certified mail, return receipt requested, was returned to the undersigned by the U.S. Post Office bearing the notation "out of business." To date, the Respondent has not responded to the January 8, 1981, order to show cause.

Summary decision may be granted "only if the entire record, including the pleadings, despositions, answers to interrogatories, admissions, and affidavits 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) (1979). In view of the Respondent's failure to file a response to the orders dated November 13, 1980, and January 8, 1981, I conclude that the Respondent has admitted the contentions set forth by the Applicants in their October 22, 1980, renewal of request for summary decision entitling them to the relief requested, and that summary decision should be entered in the Applicants' favor. The matters set forth in paragraph Nos. 1 through 21 of the January 8, 1981, order to show cause will be entered as the findings of fact and conclusions of law in this case.

The July 16, 1979, application for compensation requested an award of attorney's fees incurred in obtaining compensation in this case. Section 105(c)(3) of the 1977 Mine Act expressly permits the successful applicant in a discharge, discrimination or interference proceeding to recover costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred for, or in connection with, the institution and prosecution of such proceeding. Section 111 of the 1977 Mine Act accords no such right to the successful applicant in a compensation case. Accordingly, the Applicants' request must be denied. Accord, Local Union 9856, District 15, United Mine Workers of America v. CF & I Steel Corporation, Docket No. DENV

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73-111 (October 4, 1973) (construing the parallel provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970)). (FN.3)

ORDER

Accordingly, IT IS ORDERED that the Applicants' renewal of request for summary decision be, and hereby is, GRANTED, and that summary decision be, and hereby is, ENTERED in the Applicants' favor.

IT IS FURTHER ORDERED that the matters set forth in paragraph Nos. 1 through 21 of the January 8, 1981, order to show cause be, and hereby are, ENTERED as the findings of fact and conclusions of law in this case.

IT IS FURTHER ORDERED that the Respondent pay compensation to the individual miners 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 June of 1979, and ending on the date when the compensation is paid:

Name	Date of Idlement	Compensation Award
Michael Johnson	June 15, 1979	\$ 77.28
Joe Johnson	June 15, 1979	74.34
Moses Maggard	June 15, 1979	72.74
Jimmy Joe Gray	June 15, 1979	72.74
Clarence Osborne	June 15, 1979	72.74
Leo Johnson	June 18, 1979	78.92
James Taylor	June 18, 1979	78.92
Richard Gibson	June 18, 1979	78.92

