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SOL (MSHA) v. ROYAL COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA, LOCAL UNION 6003, DISTRICT 29, COMPLAINANT	Complaint for Compensation
v.	Docket No. WEVA 80-664-C
ROYAL COAL COMPANY AND COWIN AND COMPANY, INC., RESPONDENTS	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding
	Docket No. WEVA 81-34
	A.C. No. 46-03294-03019
v.	Claremont Cleaning Plant
ROYAL COAL COMPANY, RESPONDENT	

DECISION

Appearances: James Swart, Esq., Beckley, West Virginia, for Complainant, United Mine Workers of America;
Robert S. Stubbs, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondents.
Catherine Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, Secretary of Labor;

Before: Judge Melick

On June 5, 1980, an inspector for the Mine Safety and Health Administration (MSHA) issued a combined order of withdrawal and citation to the Royal Coal Company (Royal) for the face area of an underground slope being sunk by employees of an independent contractor, Cowin and Company, Inc. (Cowin), at Royal's Claremont Cleaning Plant. The order of withdrawal was based upon the inspector's finding of an imminent danger under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the

"Act."(FOOTNOTE.1) The citation was issued under the provisions of section 104(a) of the Act.(FOOTNOTE.2) The order and citation alleged a violation of Royal's slope construction plan under the mandatory standard at 30 C.F.R. 77.1900-1. Neither the order nor the citation were contested under the provisions of section 107(e)(1) and 104(a) of the Act, respectively. Local Union 6003, District 29 of the United Mine Workers of America (UMWA), thereafter filed a complaint under section 111 of the Act against Royal and Cowin for compensation to miners idled by the order. That complaint was timely answered. On November 26, 1980, MSHA filed a proposal for assessment of civil penalty against Royal for the cited violation of the mandatory standard and Royal thereafter answered timely under the provisions of section 105(d) of the Act. The complaint for compensation and the civil penalty proceeding were thereafter consolidated under Commission Rule 12, 29 C.F.R. 2700.12, and hearings in the consolidated cases were held in Charleston, West Virginia, commencing February 2, 1981.

The general issues before me are: (1) whether Royal failed to comply with the mandatory standard cited in the order and citation at bar, and, if so, the appropriate civil penalty to be paid for the violation; and (2) the amount of compensation due to the miners idled by the order in question.

Royal and Cowin concede that the imminent danger order issued in this case on June 5, 1980, and terminated on June 18, 1980, was not contested under section 107(e)(1) of the Act and that it therefore had become final. Moreover, within the framework of the first part of section 111 of the

Act,(FOOTNOTE.3) Royal and Cowin concede that the miners idled on 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 and that the miners idled on the next working shift are entitled to 4 hours' compensation at their regular rate of pay. The dispute over compensation here at issue concerns the second part of section 111. That part reads as follows:

> If a coal or other mine or area of such mine is closed by an order issued under * * * 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 1 week, whichever is the lesser.

Motions by UMWA for Summary Decision

In motions for summary decision filed before and during hearing, the UMWA argued that the section 107(a) order and the section 104(a) citation became final upon the Respondents' failure to contest them under the provisions of sections 107(e)(1) and 105(d) of the Act, respectively. It further maintained that since the issues that could have been litigated in a contest of this order and citation incorporated all of the essential issues to be decided in a section 111 compensation proceeding those issues could not now be relitigated (presumably under the doctrines of res judicata and collateral estoppel). The UMWA argued that section 111 therefore mandated a summary decision, without the necessity of a hearing, that compensation be paid to the idled miners for a full week. The UMWA argued, alternatively, that even if the issue of whether the operator failed to comply with a mandatory standard survived the finality of the order and citation, once the Judge made a determination (in ruling on Respondents' motion for summary decision discussed, infra), that the order at bar properly alleged a failure to comply with the mandatory health or safety standard there were no further factual determinations to be made and a summary decision should in any event be rendered without a hearing. In other words,

the UMWA argues that since the order was "issued" for an alleged violation of a mandatory standard there was then no need for a hearing to determine whether or not there was, as a matter of fact, any violation of the mandatory standard.

Both Cowin and Royal admit that the section 107(a) imminent danger order had become final and do not seek review of the order. They argue, however, that the essential question under section 111 of whether that order was issued for a "failure of the operator to comply with any mandatory health or safety standards" nevertheless survived the finality of the order. The UMWA counters this argument by claiming that the issue under section 111 of whether the operator failed to comply with a mandatory standard is identical to an essential issue that could have been litigated in a contest of the validity of the section 104(a) citation. The UMWA argument continues that since the Respondents failed to contest that citation within 30 days of its issuance under section 105(d), that citation and the issues that could have been raised in a contest of that citation became final and were not subject to relitigation (again presumbably under the doctrines of res judicata and collateral estoppel) in the compensation case before me.

The UMWA arguments fail, however, on several grounds. Even assuming, arguendo, that the failure to timely contest the 104(a) citation could serve to bar the subsequent litigation in a section 111 compensation case of an issue that might properly have been determined in that proceeding, it is undisputed that in this case the 104(a) citation was in fact timely challenged under the provisions of section 105(a) of the Act, i.e., within 30 days of notification to the operator of a proposed civil penalty. It is immaterial that the operator did not also contest the citation within 30 days of its receipt under the provisions of section 105(d) of the Act. In either case, the validity of the citation is properly at issue. Energy Fuels Corporation v. Secretary, 1 FMSHRC 299 (1979). Moreover, since the issue of whether the operator has "failed to comply with any mandatory health or safety standard," is not a necessary issue to the determination of the validity of a section 107(a) imminent danger withdrawal order, footnote 1, supra, it is apparent that there has in fact been no prior determination of that issue.

In any event, I conclude that the litigation in this compensation case of the issue of whether the operator has "failed to comply with any mandatory health or safety standard" would not be barred by the doctrines of res judicata or collateral estoppel even if both the 107(a) order and the 104(a) citation had become final for failing to timely contest them under applicable procedural or jurisdictional rules. Under res judicata, only a final judgment on the merits bars further claims by the parties or their privies on the same cause of action. Allen v. McCurry, 445 U.S. 958 (1980). A judgment on the merits is one based on the legal rights and liabilities of the parties as distinguished from mere matters of practice, procedure, jurisdiction or form. Fairmont Aluminum Company v. Commissioner, 222 F.2d 622 (4th Cir. 1955), cert. den., 350 U.S. 838, reh.

den., 352 U.S.

913. Similarly, collateral estoppel bars relitigation only of issues actually decided in prior litigation. Montana v. United States, 440 U.S. 147 (1979). Since there had not been in any case a prior judgment on the merits of the order and citation at bar, the issues that could have been raised in previous litigation of those documents are not barred from consideration in this compensation case under section 111.

In addition, in enacting section 111 of the Act, Congress provided specific guarantees that compensation may be awarded only "after all interested parties are given an opportunity for a public hearing." In order to comport with these statutory requirements, it is clear that that opportunity for a public hearing must be renewed after the claim for compensation is filed when the finality of the order and the question of whether that order was issued for a failure of the operator to comply with a mandatory standard has not been previously determined or when one of the respondents in the compensation case has not previously had such an opportunity. In all other cases, the opportunity for a hearing must nevertheless be granted at least insofar as other issues in the compensation claim remain unresolved. In order for that right to a public hearing to have any meaning, it is also clear that all material issues may be litigated at that hearing including the issue of whether, as a factual matter, the order was issued for a failure to comply with a mandatory standard.

Under Commission Rule 64(b), a summary decision may be granted "only if the entire record, including the pleadings, depositions, 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). Since genuine issues of material fact remained for determination in the compensation proceeding under section 111, the UMWA motions for summary decision were, and are, properly denied.

Motions by Respondents for Summary Decision and Dismissal

In motions for summary decision and dismissal filed by the Respondents, it was argued that the citation incorporated in the order at bar should have been dismissed because it failed to charge any specific violation. Respondents argued, alternatively, that even if a violation of the slope plan was properly set forth, the slope plan itself was too ambiguous to be enforceable.

The mandatory standard here cited, to wit, 30 C.F.R. 77.1900-1, requires that the operator adopt and comply with a slope- or shaft-sinking plan approved by the MSHA Coal Mine Health and Safety District Manager. It is here alleged that the operator failed in two ways to comply with its approved slope plan. The first violation is alleged as follows:

> The slope face has entered a caved area of an abandoned coal mine and the ribs (sides) of the slope are loose and overhanging. The slope roof is broken and unconsolidated

shale and resin-grouted rods (6 feet long) are sole means of

> support. This is not an adequate system due to the conditions encountered.

The second violation is alleged as follows:

> The width of the slope was 18 feet instead of the required 10; however, the exact width could not be determined due to area being caved on both sides.

In a bench decision, the motions were denied as to the first allegation but granted as to the second. I found in that decision that the latter allegations indeed did not relate to any requirement of the slope plan that was in effect at the time of the purported violation and accordingly that the citation did not charge any violation in this regard. The slope plan as initially approved by MSHA on October 3, 1979, included a series of engineering drawings depicting the development of the slope tunnel. The width of the tunnel is variously shown to be 9-1/2 and 10 feet. As part of that approved plan, however, Royal also had submitted the following exclusion:

> The possibility of intersecting an abandoned mine exists at the 2,000-foot level; however, data is incomplete on the mine and as soon as it is formulated, the plans of penetration will be submitted. The plan will be submitted for approval and approval received before the slope reaches the 2,030-foot level.

I conclude from that language that the operator's plan as approved by MSHA on October 3, was not intended by either party to govern the area of intersection with the suspected abandoned mine at the 2,000-foot level. I find that in approving the plan as submitted on October 1, 1979, MSHA agreed to that specific exclusion.(FOOTNOTE.4) According to the evidence before me, no subsequent modification to the slope plan regarding the width of the slope was ever made. Thus there was no requirement in effect on the date of the violation alleged herein that the slope widths not exceed 10 feet upon intersecting the abandoned mine. Accordingly, I cannot find that the first part of the order at bar was issued for any failure of the operator to have complied with the cited mandatory standard. The bench decision granting a corresponding partial summary decision is therefore reaffirmed. The citation is also correspondingly vacated in part.

However, inasmuch as subsequent modifications to the slope plan applicable to the slope intersection with the abandoned mine were submitted and

approved with respect to roof control, I find that there was indeed a specific roof control standard existing at the time of the alleged violation. The original slope plan as approved by MSHA on October 3, 1979, provided as follows: "In the event broken roof is encountered straps, wire mesh, rolled steel sets, liner plate and grout or shot crete will be used to support the roof and ribs." A slope plan modification was later submitted by the Respondents on May 9, 1980, to govern procedures to be followed in sinking the slope through the abandoned mine workings. That modification, approved by MSHA on May 13, 1980, included the following provisions: "Our contractor plans to continue his normal support pattern. However, they have available on site steel liner plates and steel ribs which can be used if support conditions warrant." Another modification was submitted on May 30, 1980, and approved by MSHA on June 2, 1980. That modification included the following language: "In areas where rock conditions dictate, a 10 GA. Armco tunnel liner plate will be used and will be encased with grout to form a solid support structure."

In spite of these acknowledged provisions of the slope plan, Respondents nevertheless contend that they did not receive the requisite notice of the alleged violation. Although the legal basis for their motion has not been articulated, it is clear that notices of violations charged under the Act and its implementing regulations must comport with constitutional, statutory and regulatory requirements. Ultimately, the notice must meet the fundamental requirements of due process of law under the Fifth Amendment to the United States Constitution. Constitutional due process does not, however, require any specific form or content for pleadings as long as the parties are given adequate notice. S. S. Kresge Company v. NLRB, 416 F.2d 1225 (6th Cir. 1969); NLRB v. United Aircraft Corp., 490 F.2d 1105 (2nd Cir. 1973). Section 104(a) of the Act requires that "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." Additional general requirements for notice are set forth in the Federal Mine Safety and Health Review Commission Rules of Procedure, 29 C.F.R. 2700.53, which are virtually identical to provisions of the Administrative Procedure Act. 5 U.S.C. 554(b).(FOOTNOTE.5

I observe that in meeting the statutory requirements for notice, it is not necessary to describe the nature of the violation in any particular format so long as it is described with "particularity." The description must, however, afford notice sufficient to enable the operator to be properly advised so that corrections may be made to insure safety and to allow adequate preparations for any potential hearing on the matter. MSHA v. Jim

Walter Resources, Inc., and Cowin and Co., 1 FMSHRC 1827 (1979). The Respondents here have not claimed any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor have they shown that they were deprived of notice sufficient to enable them to defend at hearing. Accordingly, I find no basis for their claims of insufficient notice and their motions in that regard are therefore denied.

Respondents also argue, in the alternative, that even assuming they received adequate notice of the alleged violation, the relevant provisions of the slope plan were nevertheless too ambiguous to be enforceable. Inasmuch as the slope plan at issue was drafted by the operator and the language used in the plan was, accordingly, selected by the operator, I find this claim to be somewhat inconsistent. In any event, under the circumstances of this case, I find that the operator had actual knowledge that the roof here cited was indeed in such a condition that it warranted the use of the special roof control measures called for in its own slope plan. In this regard, Respondents have conceded that they indeed had advanced into the old mine at least 12 to 15 feet and that they had continued to "muck out" loose coal and rock from that area even though the left rib showed signs of caving. Indeed, Cowin's general superintendent, Edward Stamper, essentially admitted that the roof conditions he found when he arrived at the face were in fact so dangerous that he ordered the miners to stop work and withdraw from the area. Stamper later admitted that the rock conditions were so bad in this area that even a 10-gauge Armco tunnel liner plate was insufficient for roof control. Under these circumstances, I am convinced that management knew that roof bolting was not providing adequate roof support. Where there is actual knowledge that a cited practice is hazardous and a violation of the cited standard, the problem of fair notice does not exist. Cape and Vineyard Division of New Bedford Gas & Light Co. v. OSHRC, 512 F.2d 1148 at 1152 (1st Cir. 1975).

Under the circumstances, Respondents' motions for summary decision and dismissal are denied as to the alleged violation of its slope plan concerning roof control.

The Alleged Roof Control Violation

For the reasons that follow, I conclude that the requirements in the slope plan for roof control where the slope construction entered the abandoned mine workings, were indeed violated. In this regard, I accept the credible testimony of MSHA inspector Birkie Allen which, in many essential respects, is undisputed. Allen testified that on June 5, 1980, he was asked to inspect the slope construction project. Arriving at the working face, he saw conditions which led him to immediately issue an imminent danger order. Slope construction had progressed about 20 feet into the abandoned mine and the face was actually in a caved area. The roof was badly broken at the face and the adjacent ribs were loose and overhanging. There was a particularly dangerous area of about 15 feet in which the only roof support was from resin-grouted rods. The ribs were so

"soft" in this area that the "mucker" operator was removing the coal without the necessity of blasting. When Allen arrived, men were continuing to work beneath the dangerous roof installing

roof bolts and "mucking" in the area. Allen suspected that the abandoned mine had been entered on the previous 4 to 12 shift because of the amount of work that had progressed into the intersection. The "mucker" operator corroborated those suspicions and conceded that they had indeed intersected the mine on the previous evening shift. According to Allen, the rib and roof conditions presented an extreme hazard to the six men working in the area because of the complete lack of support from the ribs. He pointed out that while the roof bolting provided a solid beam for the roof, without accompanying vertical support from solid ribs, the roof would only fall as a larger slab. Allen testified that Edward Stamper, Cowin's general superintendent, agreed at the time that an imminent danger indeed existed.

It was Allen's opinion that the operator was chargeable with gross negligence because the men continued to work in this obviously dangerous area without proper roof support. He pointed out that a proper preshift examination which was required to have been made 90 minutes before the beginning of the shift, should have alerted the operator to those conditions. A steel plate liner was subsequently erected in the cited area and the citation and order were abated on June 18, 1980.

Cowin's general superintendent, Edward Stamper, corroborated Allen's testimony in essential respects. He admitted that the slope had in fact entered the old mine workings early in the morning of the 5th during the "owl" shift and that work continued 12 to 15 feet into the intersection by the time he arrived. When he arrived at the face, he found the conditions so bad that he ordered the men to stop work and withdraw from the area. He based this decision on the fact that the left rib showed signs of caving on the top left side. He admitted that no one should have been working in the old works, yet the "mucker" operator, as well as others, had been indeed working in this area. Significantly, Stamper also conceded that the rock conditions were so bad in the intersection that even a 10-gauge Armco tunnel liner was not sufficient for roof support.

Under these circumstances, I have no difficulty in concluding that the provisions of the slope plan, requiring more than roof bolting where roof conditions dictate, were violated. Since this condition constitutes a violation of the mandatory standard, the citation is accordingly affirmed. It also follows that since the operator did fail to comply with the cited mandatory standard, the withdrawal order was also issued at least in part for that noncompliance. Under the circumstances, all of the miners who were idled as a result of that order must be fully compensated by the operator for their lost time at their regular rate of pay for the lesser of 1 week or their actual lost time. Since the miners here were actually idled by the order from June 5 to June 18 they are entitled to pay for the time idled for 1 week or 7 calendar days.

Amount of Compensation

The purpose of section 111 is to provide limited

compensation solely for regular pay lost because of the issuance of an order designated in that

section. UMWA v. Eastern Associated Coal Corporation, 3 FMSHRC 1175 (1981). The miners are entitled to compensation only if they are actually "idled by" such an order. It is not a source of independent pay or damages. UMWA, supra at p. 1176. Accordingly, miners continuing to perform work for the cited operator have not been "idled" by the withdrawal order and are not entitled to additional or duplicate compensation for such work that occurs during the authorized 1-week period. See UMWA v. Youngstown Mines Corporation, 1 FMSHRC 990 (1979). Similarly, the miners are not entitled to compensation for being "idled" on a Saturday and/or Sunday falling within that 1 week, 7-day, calendar period if indeed they did not customarily work on Saturdays and/or Sundays and there is no evidence to suggest that they would have worked on either or both of those days but for the issuance of the withdrawal order.

Respondents contend that the amount of compensation paid should also be offset by any unemployment compensation received by the idled miners. In N.L.R.B. v. Gullet Gin Company, Inc., 340 U.S. 361, 364 (1951), the Supreme Court upheld the N.L.R.B. decision refusing to deduct unemployment compensation benefits from an award of back pay. The Court concluded that since no consideration had been given, nor should have been given, to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received. The Court followed an earlier decision in which it held that state unemployment compensation benefits were not "earnings" to be deducted from back pay. See N.L.R.B. v. Marshall Field & Company, 318 U.S. 253, 255 (1943). Several Commission judges have followed this rationale in denying an unemployment compensation benefit offset from back pay awards under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969 and section 105(c) of the 1977 Act, respectively. Wilson and Rummel v. Laurel Shaft Construction Company, Inc., 2 FMSHRC 2623 (1980), Bradley v. Belva Coal Company, 3 FMSHRC 921 (1981), and Neal v. W. B. Coal Company, 3 FMSHRC 443 (1981). The same rationale applies as well to compensation awards under section 111 of the Act. Accordingly, I conclude that unemployment compensation benefits are not "earnings" to be deducted from an award of compensatory back pay under section 111 of the Act.

The UMWA claims that the miners are entitled to 12-percent interest on the compensation owed. I find, however, that in accordance with the Commission decision in Peabody Coal Company v. Secretary et al., 1 FMSHRC 1785 (1979), they are entitled to interest at the rate of 6 percent per annum from the date the lost wages would ordinarily have been paid to the date the compensation is actually paid.

Attorney's Fees

The UMWA also requests an award of attorney's fees incurred in obtaining compensation in this case. There is no authority for the award of attorney's fees in compensation cases under section 111 of the Act. The general rule is that the right to

recover such costs does not exist except by virtue of statutory authority. Aleyeska Pipeline Service Company v. The Wilderness

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Society et al., 421 U.S. 420 (1975). The exception to that general rule for a prevailing plaintiff who acts as a "private attorney general" vindicating important statutory rights of all citizens, is inapplicable to the case at bar. Accordingly, the request herein for attorney's fees must be denied. Accord, Local Union No. 5899, UMWA v. Tansy Beth Mining Company, 2 FMSHRC 466 (1981).

Penalty

In determining the amount of a civil penalty assessment, section 110(i) requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

The Royal Coal Company is small in size but appears to have a rather significant history of violations. There were 207 paid violations attributed to Royal over the 2-year period prior to the issuance of the citation at bar. I find that Royal was negligent in failing to maintain proper control of the slope construction even though the immediate control of the work was under the direction of Cowin, an independent contractor. It was Royal that submitted the slope construction plan for MSHA's approval and the evidence shows that Cowin officials maintained close contact with Royal's engineering staff, particularly with respect to the area of intersection with the abandoned mine. I also find that the hazard presented by the inadequately supported roof and ribs was serious and indeed presented an imminent danger of serious injuries and death to the several miners working in that area. There is no disagreement that abatement was appropriately made and that the imposition of any penalty would not affect the operator's ability to continue in business. Within this framework, and considering that I am also finding Royal liable for significant compensation in the associated case, I find that a penalty of $500 is appropriate.

ORDER

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Respondents are hereby ORDERED to pay to the miners designated below, within 30 days of the date of this decision, the designated amounts6 plus interest at the rate of (FOOTNOTE.6) percent per annum from the date the wages would ordinarily have been paid to the date they are actually paid:

DAY SHIFT

Employee	Hourly Rate	6/5	6/6	6/10	6/11	6/12	Total
Powell Lane	$10.73	$42.92	$85.84	$0.00	$85.84	$42.92	$257.52
Delbert Harper	10.17	40.68	81.36	30.51	81.36	40.68	274.59
Ralph Blevins	10.17	40.68	81.36	30.51	81.36	40.68	274.59
Jackie Lane	10.17	40.68	81.36	30.51	81.36	40.68	274.59
Nick Wuchevich, Jr.	10.73	37.56	85.84	26.83	85.84	42.92	236.07

EVENING SHIFT

Employee	Hourly Rate	6/5	6/6	6/10	6/11	6/12	Total
Terry Gilkerson	$10.71	$85.68	$85.68	$85.68	$85.68		$342.72
George Kessler	10.71	85.68	85.68	85.68	85.68		342.72
Carlos Bailey	10.37	82.96	82.96	82.96	82.96		331.84
Robert Hodge	10.37	82.96	82.96	82.96	82.96		331.84
Charles Ellis	10.37	82.96	82.96	82.96	82.96		331.84
James Butterworth	10.37	82.96	82.96	82.96	82.96		331.84
Johnny Daniels	10.37	82.96	82.96	82.96	82.96		331.84

"OWL" SHIFT

Employee	Hourly Rate	6/6	6/9	6/11	6/12		Total
James Cabe	$10.81	$86.48	$86.48	$86.48	$86.48		$345.92
Harry Miller	10.81	86.48	86.48	86.48	86.48		345.92
Jackie Miller	10.47	83.76	83.76	83.76	83.76		335.04
Okey Tolliver	10.47	83.76	83.76	83.76	83.76		335.04
Don McMillion	10.47	83.76	83.76	83.76	83.76		335.04
Ken Pishner	10.47	83.76	83.76	83.76	83.76		335.04
						Total	$5,704.00

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Royal Coal Company is hereby ORDERED to pay a civil penalty of $500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

Section 107(a) of the Act reads as follows:

"If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a

citation under section 104 or the proposing of a penalty under section 110."

~FOOTNOTE_TWO

Section 104(a) of the Act reads in part 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."

~FOOTNOTE_THREE

Section 111 of the Act provides in relevant part as follows:

"If a coal or other mine or area of such mine is closed by an order issued under * * * 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 4 hours of such shift."

~FOOTNOTE_FOUR

This conclusion is further supported in that neither party could reasonably have expected that a 10-foot slope could have been maintained through the abandoned mine. While there may very well have been a violation for Royal to have proceeded without an approved plan in this regard beyond the 2,030-foot level, no such violation has been charged here. The question of whether such a violation occurred is therefore not before me.

~FOOTNOTE_FIVE

Commission Rule 29 C.F.R. 2700.53 reads as follows:

"Except in expedited proceedings, written notice of the time, place, nature of the hearing, the legal authority under which the hearing is to be held, and the matters of fact and law asserted shall be given to all parties at least 20 days before the date set for hearing."

~FOOTNOTE_SIX

These accuracy of which was stipulated at hearing. I observe that June 7, 1980, was a Saturday and June 8, a Sunday. It was also proffered at hearing, without disagreement, that the miners had worked 1 day during this 7-day period, presumably June 9 on the day and evening shifts and June 10 on the "owl" shift.