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

LOCAL UNION 2250, DISTRICT 12, UNITED MINE WORKERS OF AMERICA (UMWA), COMPLAINANT	Complaint for Compensation
	Docket No. LAKE 82-1-C
	Mine No. 25
v.	
OLD BEN COAL COMPANY, RESPONDENT	

DECISION

This matter came on for oral argument on the parties' cross motions for summary disposition on December 2, 1981, in Falls Church, Virginia. Based on an independent evaluation and de novo review of the circumstances I find there is no need for an evidentiary hearing; that there is no genuine issue as to any material fact; and that as a matter of law the Union is entitled to recover on behalf of the seventy-four claimant miners short-term compensation claimed under section 111 of the Act, 30 U.S.C. 821.

The facts which give rise to this claim are undisputed. On Saturday, August 1, 1981, at approximately 7:30 a.m. a fire occurred in the "A" shaft at the No. 25 mine. The miners were immediately withdrawn from the mine, and management began efforts to extinguish the fire. When the Federal inspector, Jessie Melvin, arrived at the mine sometime after 8:15 a.m., he issued a 103(k) withdrawal Order No. 1117966 requiring that only persons necessary to investigate the fire scene and conduct an air examination of the immediate vacinity should enter the mine. At 12:45 p.m. the order was modified to allow rehabilitation of the accident area and to resume normal operations at the mine. The afternoon shift (4 p.m. - 12 a.m.) worked their full shift that day. The morning shift was paid four hours reporting pay pursuant to the UMWA contract.

The union claims that under Section 111 of the Act the miners are entitled to compensation for an additional four hours pay for the balance of the shift. (FOOTNOTE.1) The operator has raised as a defense the

claim that where the miners were immediately withdrawn from the mine before the 103(k) order was written it is not in accord with the policy of the Act to award compensation.(FOOTNOTE.2)

In the legislative history accompanying section 111 Congress made clear that "... miners should not lose pay because of the operator's violation, or because of an imminent danger which was totally outside their control." (Emphasis added). S. Rep. No. 95-181, 95th Cong. 1st Sess. 46-47 (1977), in Legislative History of the Federal Mine Safety and Health Act of 1977, at 634-635. This case presents a situation in which an order was written to facilitate an investigation of an imminent danger outside the miners control. The prior Interior Board of Mine Operations Appeals, the Commission and its judges have consistently awarded compensation in cases where the miners had been withdrawn prior to the issuance of an order. Peabody Coal Co. v. Mine Workers, 1 FMSHRC 1785 (November 14, 1979); UMWA v. Consolidation Coal Co., 1 MSHC 1668 (1978); UMWA v. Consolidation Coal Co., 1 MSHC 1674 (1978); UMWA v. Clinchfield Coal Co., 1 IBMA 33 (May 4, 1971); Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (January 28, 1976).

Unlike UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175 (May 11, 1981), where the miners had withdrawn prior to the issuance of an order in observation of a contractual memorial period, the miners here were idled by the same condition which led to the issuance of the order, i.e., the mine fire in shaft A on August 1, 1981. There was, therefore, a clear "nexus between the underlying reasons for the idlement and pay loss and the reasons for the order". Id. at 1178. I conclude that the existence of the "exigent or emergency conditions" created by the mine fire was the proximate and effective occasion for issuance of the closure order. Id. at 1178.

While the order was modified to permit operations to clear the mine of smoke and to conduct the necessary preshift operations at 12:45, the record shows these actions were not accomplished until just after 4:00 p.m. The period of idlement that was occasioned by the condition that caused the order to issue was not terminated until that time. For this reason, the miners are entitled to be compensated for an additional four hours, the balance of their shift.

It is in accord with the "make whole" policy of the Act to award interest on the sums due the miners from the date of the idlement until the date of payment. UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (August 14, 1979); UMWA v. Kanawha Coal Co., 1 FMSHRC 1299 (September 4, 1979); Peabody Coal v. UMWA, 1 FMSHRC 1785 (November 1979). I find, therefore, that the requested rate of interest, 12%, is reasonable. UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004, 2013 (August 27, 1981); Johnny Howard v. Martin-Marietta Corp., 3 FMSHRC 1876 (July 31, 1981).

The Union's request for an award of attorney fees is without merit. The statute, of course, does not provide for an award of attorney fees in compensation cases. UMW v. Tansy Beth Mining Company, 3 FMSHRC 466, 471 (February 19, 1981); UMW v. Royal Coal Company, 3 FMSHRC 1738, 1747-48 (July 7, 1981). The Union seeks to bring itself within the exception to the American Rule. That exception permits an award of attorney fees in the absence of statutory authority where a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Roadway Express v. Piper, 447 U.S. 752 (1980).

While the operator's denial of total liability in this matter may be viewed as unwarranted, if not frivolous, in view of the extensive case law, it must be remembered that it was not until November 18, 1981, that the Union filed an Amended Complaint deleting its claim for compensation for the evening shift which might also be viewed as vexatious. Furthermore, the Union had the burden of proof and, as the record shows, it was, with an assist from the trial judge, able to discover the facts necessary to sustain that burden with a minimum of time, trouble, and expense. The operator's resistance to the Union's interrogatories while obviously very annoying to Union counsel was justified to the extent the interrogatories covered a subject matter later found to be without the scope of the Union's claim. The record discloses nothing more than that the operator, while somewhat intransigent in the face of the Union's interrogatories, furnished the information necessary to resolve the factual issues promptly and in good faith in response to the trial judge's pretrial order. This disclosure mooted the Union's motion to compel answers and enabled the Union to file its cross motion for summary judgment.

While the hostility between counsel that emanates from the record is regrettable, it seems a necessary byproduct of the industry's generally poor labor relations.(FOOTNOTE.3) In any event, the law does not recognize the ordinary and necessary costs of litigation, however unwarranted and vexatious they may appear to the parties, as grounds for an award of costs or attorney fees. As Justice Powell noted in Roadway Express:

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> Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. Cf. Dickens, Bleak House 205 (1948). A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for discovery ... The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law. 447 U.S. at 757, n. 4.

The same problems plague the administrative process, as I have so often pointed out. The problem is what sanctions may be imposed on lawyers who abuse the administrative process and unreasonably protract administrative proceedings. In Roadway Express, the Supreme Court held that under Rule 37(b) of the F.R.C.P., which, I believe, apply to Commission proceedings, "both parties and counsel may be held personally liable for expenses "including attorney's fees,' caused by the failure to comply with discovery orders." 447 U.S. at 763. The Court also held that the courts, and presumably administrative adjudicative agencies, have, after notice and an opportunity for hearing, inherent power to levy sanctions against litigants and counsel who "willfully abuse judicial processes." 447 U.S. 766.

The record here fails to show that either party was put to any added expense to prove facts that the other should have admitted or that there was any willful abuse of the administrative process. Only the usual "sloth, inattention and desire to seize tactical advantage" that characterizes our vaunted adversary system.

Accordingly, complainant's Motion for Summary Decision is GRANTED. It is ORDERED that the operator forthwith pay the sums agreed upon to the individuals listed in the Appendix attached hereto plus 12% interest from August 1, 1981 to the date of payment, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

Sec. 111 reads in part, "If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or 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 ..." This order was issued under Section 103(k) of the Act.

~FOOTNOTE_TWO

At oral argument, counsel for the operator suggested

voluntary withdrawal of the miners on the midnight shift be treated as the effective time of idlement for the purposes of statutory entitlement and that the four hours reporting pay for which the next shift was paid be considered as payment for the four hours to which the "next working shift" would be entitled under the second sentence of section 111. This afterthought contention is obviously without merit under the uncontested facts of this case, and would not affect the right of recovery of the morning shift for four hours compensation in any event. See, Local 1374, UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004 (August 27, 1981); Local 5869, UMWA, v. Youngstown Mines Corp., 1 FMSHRC 990 (August 15, 1979).

~FOOTNOTE_THREE

One would hope that professionals would eschew use of some of the pettifogging tactics observed, such as respondent's denial of receipt of the order at issue because counsel for the Union had inadvertently misstated the proper number.

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APPENDIX A