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LOCAL UNION V. WESTMORELAND COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LOCAL UNION 1889, DISTRICT 17, UNITED MINE WORKERS OF AMERICA (UMWA), COMPLAINANT	Complaint for Compensation
	Docket No. WEVA 81-256-C
	Order No. 668337 103(j)
v.	November 7, 1980
WESTMORELAND COAL COMPANY, RESPONDENT	Order No. 668338 107(a)
	November 7, 1980
	Ferrell No. 17 Mine

SUMMARY DECISION

The original complaint in this proceeding was filed on February 5, 1981, under section 111 of the Federal Mine Safety and Health Act of 1977. An amended complaint was filed on November 9, 1981. The amended complaint first requests that the miners at Westmoreland's Ferrell No. 17 Mine be paid for 1 week of compensation under section 111 of the Act because of the issuance on November 7, 1980, of Order No. 668338 under section 107(a) of the Act, even though that order did not allege a violation of any mandatory health or safety standard. Alternatively, the amended complaint requests that the miners scheduled to work on both the day shift and the afternoon shift of November 7, 1980, be paid compensation because of the issuance on November 7, 1980, of Order Nos. 668337 and 668338 under sections 103(j) and 107(a), respectively. Finally, if both of the aforesaid requests are denied, the amended complaint requests that the miners scheduled to work on the day shift on November 7, 1980, be paid 4 hours of compensation because of the issuance on November 7, 1980, of Order No. 668337, irrespective of the fact that they have already been compensated for 4 hours of pay.

Westmoreland filed on May 1, 1981, a motion for summary decision pursuant to 29 C.F.R. 2700.64(a). Thereafter, I issued on June 12, 1981, an order providing for clarification in which I pointed out that applicable law required that a decision be issued denying UMWA's request for 1 week of compensation, but I noted in my order (p. 4) that the former Board of Mine Operations Appeals in its decision in Southern Ohio Coal Co., 4 IBMA 259 (1975), aff'd, District 6, UMWA v. Interior Board of Mine Operations Appeals, 526 F.2d 1260 (D.C. Cir. 1977), had held that although the miners in that case were not entitled to a week of compensation, it appeared that they might be entitled to compensation for the shift on which the order was issued and for 4 hours of the "next working shift". Therefore, I requested that the parties submit additional information with respect to whether the orders involved in this proceeding had been modified or terminated and whether UMWA was seeking compensation of less than 1 week, assuming that its request for 1 week would be denied in my contemplated order granting Westmoreland's motion for summary

decision.

Several additional pleadings were filed by UMWA and Westmoreland in response to my order of June 12, 1981. The additional pleadings raised issues as to which the parties' positions were somewhat unclear. Therefore, I issued on October 9, 1981, a procedural order which specifically requested the parties to stipulate the facts on which their arguments were based and also asked that the parties submit additional arguments in support of their positions. In response to my order of October 9, the parties submitted on February 5, 1982, some joint stipulations. Thereafter, UMWA on February 19, 1982, filed a motion for partial summary decision which Westmoreland answered on March 10, 1982, by filing a cross motion for summary decision. Finally, UMWA filed on April 6, 1982, a reply to Westmoreland's cross motion for summary decision.

Section 2700.64(b) of the Commission's rules provides that a summary decision should be rendered when the pleadings show that there are no genuine issues as to any material facts. Although Westmoreland and UMWA make some arguments which show a difference in interpretation of the attachments to UMWA's motion for partial summary decision, there are no disputed issues as to the facts upon which my rulings will be based. Therefore, I find that the parties have shown that a summary decision should be issued in this proceeding pursuant to section 2700.64(b) of the Commission's rules.

The joint stipulations, upon which my decision will be based, are set forth below:

1. The Ferrell No. 17 Mine is owned and operated by the Westmoreland Coal Company.

2. The Ferrell No. 17 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the Act).

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. At all times relevant herein, Westmoreland Coal Company, at its Ferrell No. 17 Mine, and Local Union 1889, UMWA, were bound by the terms of the National Bituminous Coal Wage Agreement of 1978 (the Contract). A copy of the Contract is submitted with these stipulations as Exhibit A.

5. In the early morning hours of November 7, 1980, an explosion occurred inside the Ferrell No. 17 Mine.

6. At 7:30 a.m. on November 7, 1980, MSHA Inspector Eddie White issued Withdrawal Order No. 0668337 pursuant to section 103(j) of the Act. The order applied to all areas of the mine.

7. Order No. 0668337 provided in full as follows:

> An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure,

smoke was encountered in the 2-South section. Five

> employees in the mine could not be accounted for. [The area or equipment involved is] the entire mine. The following persons are permitted to enter the mine: Federal coal mine inspectors, West Virginia Department of Mines coal mine inspectors, responsible company officials, and United Mine Workers of America miner's representatives.

8. At 8:00 a.m. on November 7, 1980, MSHA Inspector Eddie White issued Order No. 0668338 to the Westmoreland Coal Company pursuant to section 107(a) of the Act. The order applied to all areas of the mine.

9. Order No. 0668338 did not allege a violation of any mandatory health or safety standards. It stated that the following condition existed:

> All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

10. Subsequent to the issuance of the above withdrawal orders, the 2 South area of the mine was sealed off.

11. Miners who were working on the 12:01 to 8:00 a.m. shift on November 7, 1980, were withdrawn from the mine when Westmoreland management became aware that an explosion had occurred.

12. The miners who were withdrawn from the mine during the 12:01 to 8:00 a.m. shift on November 7, 1980, were paid for their entire shift.

13. Exhibit B is a list of the miners who were scheduled to work the day shift (8:00 a.m. to 4:00 p.m.) on November 7, 1980. Exhibit B also identifies each such miner's daily wage rate and the amount of compensation received by such miner for the day shift on November 7, 1980. Each such miner received at least four hours of pay.

14. Westmoreland management did not contact any of the miners scheduled to work on the 8:00 a.m. to 4:00 p.m. shift (day shift) of November 7, 1980, in order to notify them not to report to work.

15. On December 10, 1980, Order No. 0668337 and Order No. 0668338 were modified to show the affected area of the mine was limited to the seals and the area inby such seals.

16. Orders Nos. 0668337 and 0668338, as modified, have not been terminated and remain in effect.

17. Westmoreland Coal Company has not contested the issuance of Order No. 0668337 by initiating a proceeding under section 105(d) of the Act.

18. Westmoreland Coal Company has not filed an Application for Review of Order No. 0668338 under section 107(e) of the Act.

The Issue of the Day-Shift Miners' Entitlement to 4 Additional Hours of Compensation

The first argument in UMWA's motion for partial (FOOTNOTE 1) summary decision is that the miners who were scheduled to work the day shift after Order No. 668337 was issued should receive 4 additional hours of compensation (Joint Stipulation No. 6, supra). UMWA bases its request for 4 hours of additional compensation on the fact that the miners who were scheduled to work the day shift following the issuance of Order No. 668337 received no notification that the Ferrell No. 17 Mine had been closed (Joint Stipulation No. 14, supra). Therefore, they reported for work as usual, but were turned away from the mine by State policemen (Exhibit No. 1 attached to UMWA's motion). Under the National Bituminous Coal Wage Agreement of 1978 (Exhibit A, Joint Stipulation No. 4, supra), Westmoreland was obligated to compensate the miners for 4 hours of pay because they had reported for work without having been given any notification that the mine was closed. (FOOTNOTE 2) Westmoreland

compensated the miners on the day shift with 4 hours of pay (Joint Stipulation No. 13, supra). UMWA says that the miners were entitled to the 4 hours of pay already received under the Wage Agreement and that they are entitled to an additional 4 hours of compensation under the second sentence of section 111 (FOOTNOTE 3) of the Act because they were the "next working shift" after Order No. 668337 was issued. UMWA argues that even though the miners have received 4 hours of compensation under the Wage Agreement, they would normally have worked an 8-hour shift if the mine had not been closed because of the issuance of Order No. 668337. UMWA argues that since the miners were idled by the order they should be paid for the remaining 4 hours of the "next working shift" as required by the second sentence of section 111.

Westmoreland's cross motion (p. 6) refers to UMWA's claim for 4 additional hours of pay as "startling" in view of the fact that section 111 expressly states that the miners on the "next working shift" are entitled to "not more than four hours of such shift". Westmoreland acknowledges that my decision in Local Union 1374, District 28, UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004 (1981), sustained UMWA's claim for 4 additional hours of compensation in circumstances nearly identical to those involved in this proceeding. Westmoreland seeks to distinguish my holding in the Pocahontas case by observing that the operator in that case had a period of 5 hours within which to notify the miners on the "next working shift" that the mine was closed, but failed to do so. Westmoreland also points out that the operator in the Pocahontas case kept the miners on the "next working shift" at the mine site for 1-1/2 hours before advising them that there would be no work for them on that shift. In such circumstances, Westmoreland concedes that there may have been some merit in my agreeing with UMWA's contentions in that case that the miners were not idle during the first part of their shift and should therefore receive extra compensation over and above the 4 hours of reporting pay to which they were entitled under the Wage Agreement (Cross Motion, p. 10).

Westmoreland's cross motion (p. 11) seeks to distinguish its situation from that of the operator in the Pocahontas case by emphasizing that Order No. 668337 was issued at 7:30 a.m., or only 1/2 hour before the midnight shift ended. Therefore, it is contended, Westmoreland's management did not have sufficient time, as the operator in the Pocahontas case did, within which to notify the miners not to report for work. Additionally, Westmoreland

emphasizes that it did not require the miners to remain at the mine for any length of time so that there are no facts in this proceeding which would support a finding that the miners were other than idle during the first part of their shift.

Westmoreland is correct in some of its observations about differences in the facts between this proceeding and those which occurred in the Pocahontas case, but I do not find the factual differences to be great enough to cause me to rule differently in this proceeding from the way I ruled in the Pocahontas case. As to the non-idle argument, it is a fact that the miners on the day shift reported to work as usual (Exhibit No. 1 attached to UMWA's Motion). When employees get into their vehicles and drive to work with the expectation of working 8 hours, they cannot be considered to be idle at that time. Undoubtedly, the miners obtained the "reporting pay" provision in the Wage Agreement after hard bargaining on the basis that it was unfair for them to expend time and money driving to work only to find that no work is available because the mine has been closed through no fault of the miners. The purpose of the "reporting pay" provision is to require operators to make "reasonable efforts" to notify the miners not to report for work (Footnote 2, supra).

It is undoubtedly true that Westmoreland did not have sufficient time in this instance to notify the miners on the day shift that no work would be available because Order No. 668337 was issued at 7:30 a.m. on the midnight shift which ended at 8:00 a.m., but that is one of the reasons for the miners' entitlement to receive 4 hours of reporting pay. No one at this time knows whether Westmoreland's management was at fault for the fact that an ignition occurred on November 7, 1980, but the miners who got up and reported for work at 8:00 a.m. can hardly be held to be at fault for an ignition which occurred during "the early morning hours of November 7, 1980" (Joint Stipulation No. 5, supra).

Westmoreland's cross motion (p. 12) also contends that upholding UMWA's claim for an additional 4 hours of compensation will result in having the Act interpreted differently at a mine where UMWA is the miners' representative from the way the Act will be interpreted at a non-union mine. There is no merit to that argument because the Act is being interpreted to provide exactly what its language states, that is, the miners on the "next working shift" following the shift on which a withdrawal order is issued will be entitled to receive 4 hours of pay for the time they are idled by the withdrawal order. While it is true that the miners at a mine where the Wage Agreement is in effect will receive 4 hours of "reporting pay" if they are not notified that the mine is closed, that is a pay obligation which Westmoreland knows it will have to meet any time it fails to notify miners not to report for work. I do not believe that the miners on the day shift should be deprived of "reporting pay" under the Wage Agreement just because they also happen to be entitled to 4 hours of compensation for the 4 hours they were idled by issuance of Order No. 668337.

Each of the parties in this proceeding has requested a

summary decision, but Westmoreland states on page 11 of its cross motion that "* * * many of

them did not even report for work that day". Exhibit No. 1 to UMWA's motion, on the other hand, states (Paragraph 6):

> There were a lot of cars being turned back by the police and it seemed to me that most people scheduled to work my shift had driven to work as usual. November 7 was payday and there are not usually too many people absent on payday.

This case would have been scheduled for hearing if the parties had not assured me that the case could be decided on the basis of stipulations. Therefore, my order will require Westmoreland to pay the miners on the day shift for 4 hours of compensation. My order is awarding pay under the second sentence of section 111 which does not depend on the question of whether the miners actually reported for work on the day shift on November 7, 1980. Westmoreland's cross motion (p. 11) contends that the 4 hours of pay which the miners have already received was a discharge of its obligation under both the Wage Agreement and section 111 of the Act. Westmoreland further states that the Commission has indicated that it will not intrude into and interpret contractual relationships between miners and operators, citing Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). The Commission, however, amplified its Youngstown holding in Eastern Associated Coal Corp., 3 FMSHRC 1175, 1179 (1981), to note that "* * * we are occasionally obliged to examine the parties' collective bargaining agreement which fixes pay rights".

I have examined the Wage Agreement, as the Commission did in the Eastern Associated case, solely to rule upon the arguments which have been presented to me. It is up to UMWA to enforce the provisions of its Wage Agreement. My decision simply holds that the miners are entitled to 4 hours of compensation under section 111 because they were idled by Order No. 668337 and that the payment by Westmoreland of 4 hours of compensation under section 111 does not prohibit the miners from claiming that they are also entitled to be paid 4 hours of "reporting pay" by virtue of the fact that they were not notified to stay at home on November 7, 1980, under Article IX, Section (c), of the Wage Agreement. In resolving their claim for payment under the Wage Agreement, the miners and Westmoreland will have to use their normal method of determining which employees are entitled to payment for having reported to work on the day shift on November 7, 1980.

The Issue of the Miners' Entitlement Under Section 107(a) Order No. 668338, Exclusive of Arguments as to 1 Week of Compensation

UMWA's motion for partial summary decision (pp. 6-8) contends that the miners who were scheduled to work the day shift on November 7, 1980, are also entitled to compensation under the first two sentences of section 111 of the Act because of the issuance of section 107(a) Order No. 668338 at 8 a.m. on November 7, 1980, notwithstanding the fact that the miners on the midnight shift had already been withdrawn from the mine because of the issuance at

7:30 a.m. of section 103(j) (FOOTNOTE 4) Order No. 668337 on November 7, 1980. In support of its compensation claims under the section 107(a) order, UMWA argues that it is a well-settled principle that miners are idled, for purposes of section 111, by the issuance of a section 107(a), or imminent-danger order, regardless of the fact that the miners may have been previously withdrawn from the mine. It is contended that the aforesaid principle has been applied regardless of whether the prior removal resulted from a voluntary action on the part of the operator or whether it resulted from a withdrawal order issued prior to the imminent-danger order. UMWA cites five cases in support of the foregoing argument, but I find that they do not really support its arguments.

The first case cited by UMWA is Clinchfield Coal Co., 1 IBMA 31 (1971). In that case the operator voluntarily withdrew its miners after an explosion had occurred. On the succeeding shift, an inspector issued an imminent-danger order under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act). The operator argued that since it had voluntarily withdrawn its miners before the withdrawal order was issued, the miners were not withdrawn by the order and that the compensation provisions of section 110(a) of the 1969 Act did not apply. The former Board of Mine Operations Appeals rejected the operator's argument and held that the purpose of a withdrawal order is not only to remove miners but also to insure that they remain withdrawn until the dangers have been eliminated. The Board said that "* * * [r]egardless of the sequence of events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104, and the miners are officially idled by such order" (1 IBMA at 41).

In this proceeding, the miners were "officially idled" by the issuance of the 103(j) order at 7:30 a.m. and the provisions of section 111 began to apply at 7:30 a.m. when the 103(j) order was issued. The miners on the day shift were, therefore, the "next working shift" under the second sentence of section 111 and were entitled to 4 hours of compensation for the period they were idled by the 103(j) order.

UMWA also cites Consolidation Coal Co., 1 MSHC (BNA) 1668 (1978), in which Judge Broderick held that miners were entitled to 4 hours of compensation on the "next working shift" even though the operator had voluntarily withdrawn the miners before an imminent-danger order was issued. UMWA's

motion cites another Consolidation case, 1 MSHC (BNA) 1674 (1978), in which Judge Fauver also held that the miners on the "next working shift" were entitled to 4 hours of pay despite the fact that the operator had voluntarily withdrawn the miners before the withdrawal order was issued. Neither of the Consolidation cases supports UMWA's claim in this proceeding because the miners in this proceeding were withdrawn by a 103(j) order which was still outstanding when the "next working shift" was scheduled to work.

UMWA next cites Valley Camp Coal Co., 6 IBMA 1 (1976), in support of its argument that the miners on the day shift are entitled to 8 hours and the miners on the "next working shift" are entitled to 4 hours as a result of the issuance of the 107(a) order at 8 a.m. In the Valley Camp case, a mine fatality occurred about 7:30 a.m. on January 10, 1975, and the miners withdrew from the mine under their Wage Agreement. An inspector issued a section 103(f) order on January 10, 1975, at 11:15 a.m. On the same day, between 12:30 p.m. and 1:30 p.m., the inspector issued three withdrawal orders under section 104(c)(2) of the 1969 Act. Valley Camp argued that the 103(f) order had idled the miners and that the other three orders had no effect. The former Board held that the sequence of issuance of the orders was not important because, for purposes of interpreting section 110(a) of the 1969 Act, "[t]he essence is the effective date of the issuance of the section 104 order of withdrawal" (6 IBMA at 6). The Board then stated that (6 IBMA at 7):

> * * * Idlement for purposes of section 110(a) began on January 10, 1975, when the first 104(c) order was issued, and continued beyond January 14, 1975, when the 103(f) order was terminated, until January 15, 1975, the date of the termination of the three 104(c) orders of withdrawal.

The former Board's holdings in the Valley Camp case completely refute UMWA's contentions as to payment of compensation under the imminent-danger order issued in this proceeding. It should be noted that the compensation provisions of section 110(a) of the 1969 Act differ from the compensation provisions of section 111 of the 1977 Act in that withdrawal orders issued under section 103 of the 1969 Act did not trigger the compensation provisions of section 110(a) of the 1969 Act, whereas withdrawal orders issued under section 103 of the 1977 Act do trigger the compensation provisions of section 111 of the 1977 Act. Consequently, if the facts involved in the Valley Camp case had occurred after the 1977 Act became effective, the 103(f) order would have been the order which officially idled the miners and that would have been the order under which they would have received compensation for the balance of the day shift and for 4 hours of the "next working shift".

Since the 104(c) orders in the Valley Camp case were issued during the same shift as the 103(f) order, the miners' compensation rights under the first two sentences of section 111 of the 1977 Act would be the same as they were under the 1969

Act, but the former Board's holding that the "essence of the applicability of" of the compensation provisions "is the effective date

of the issuance of the" first order which triggers the compensation provisions, when applied to the facts in this proceeding, would require that the miners working on the midnight-to-8-a.m. shift be paid for the balance of their shift and that the miners on the "next working shift", or day shift, be paid for the period they were idled, not exceeding 4 hours (disregarding the "reporting pay" provisions of the Wage Agreement).

It should also be noted that since the miners in the Valley Camp case withdrew voluntarily under the Wage Agreement after the occurrence of a fatality, the miners would, under the Commission's holding in Eastern Associated Coal Corp., 3 FMSHRC 1175 (1981), be entitled to no compensation whatsoever under the first two sentences of section 111 of the Act. In short, the Valley Camp case does not support any of UMWA's arguments in this proceeding.

Finally, UMWA relies on the Commission's decision in Peabody Coal Co., 1 FMSHRC 1785 (1979), which also dealt with issues raised under the 1969 Act. In the Peabody case, the inspector issued a 103(f) order which withdrew miners before an imminent-danger order was issued several days later. The Commission affirmed a judge's decision which had awarded the miners compensation for the balance of the shift during which the imminent-danger order was issued and for 4 hours of the "next working shift". Here again, if the facts involved in the Peabody case had arisen under the 1977 Act, the miners would have been paid for the balance of the shift on which the section 103(f) order was issued and for 4 hours of the "next working shift". In view of the differences between the 1969 Act and the 1977 Act, none of the cases cited by UMWA really support its argument that the miners on the day shift are entitled to be paid for the balance of their shift (8 hours) because the imminent-danger order was issued at 8:00 a.m. at the beginning of the day shift while the 103(j) order issued on the preceding shift was still in effect.

UMWA's motion (p. 7) also argues that the validity of the imminent-danger order has not been challenged in any review proceeding under section 107(e) of the Act (Joint Stipulation No. 18, supra). UMWA cites Itmann Coal Co., 1 FMSHRC 1573 (1979), in which Judge Kennedy held as follows (1 FMSHRC at 1578):

> The premises considered, I must conclude that the section 107(a) order No. 0660641 was not defective merely because it was issued in an area and on equipment already covered by a section 103(k) control order.

I fail to see the significance that the imminent-danger order's validity has to do with the merits of UMWA's contentions with respect to the imminent-danger order here at issue insofar as the first two sentences of section 111 are concerned. UMWA's argument is that the miners on the day shift are entitled to 8 hours of pay, or "the balance of such shift" and that the miners on the

afternoon, or "next working shift", are entitled to 4 hours of pay. UMWA's argument is based on the first two sentences of section 111

(Footnote 3, page 5, supra). The first sentence specifically provides that the provisions of the first two sentences apply "* * * regardless of the result of any review of such order". Therefore, even if Order No. 668338 were to be found to be invalid in a review proceeding instituted under section 107(e) of the Act, the miners would, nevertheless, be entitled to the compensation provided for by the first two sentences of section 111.

UMWA's motion for partial summary decision and its reply to Westmoreland's cross motion for summary decision never address the crucial question raised by its contentions as to imminent-danger Order No. 668338. That question is whether the miners may continually reinvoke the compensation provisions of the first two sentences of section 111 each time a new withdrawal order has been issued while the order which originally withdrew the miners is still in effect. The cases which UMWA cites and which have been discussed above arose under the 1969 Act which did not trigger the compensation provisions of section 110(a) of the 1969 Act when withdrawal orders were issued under section 103. As I have already shown, those cases are inapplicable to an interpretation of section 111 which is triggered by a withdrawal order issued under section 103.

It is a fact that the miners were withdrawn in this proceeding when the inspector issued the first withdrawal order under section 103(j). The section 103(j) order has never been terminated and the miners received all the compensation to which they are entitled under section 111 because the miners on the midnight-to-8-a.m. shift received payment for the balance of their shift and the miners on day shift, or "next working shift" received 4 hours of compensation (or will receive 4 hours under this decision). As the Commission pointed out in its Eastern Associated decision, supra, 3 FMSHRC at 1177, if "* * * Congress [had] intended section 111 to create a source of independent pay or damages, it would not have so limited the compensation to only a portion of pay". I find that once the inspector issued his 103(j) Order No. 668337 at 7:30 a.m. on November 7, 1980, the compensation provisions of section 111 were triggered and that the miners are not entitled to any pay under the first two sentences of section 111 other than the pay for the balance of the midnight shift on which the 103(j) order was written and for 4 hours of the "next working shift", subject to whatever UMWA may be able to obtain additionally under Article IX of its Wage Agreement.

In UMWA's reply (p. 2) to Westmoreland's cross motion for summary decision, UMWA cites legislative history to the effect that when Congress added section 103 orders to those orders which trigger the compensation provisions of section 111, it was stated that the amendment was intended to be "a remedial provision which also furnishes added incentive for the operator to comply with the law". UMWA's reply (p. 3) argues further that Westmoreland's attempt to escape any liability for payment under the imminent-danger order makes the amendment of section 111 to provide compensation for orders issued under section 103 a

restrictive interpretation of section 111 which was not intended by Congress. UMWA again cites the Valley Camp case, supra, for the proposition that miners are considered to be idled by each order and

that each order has to be terminated or modified before the miners may return to work.

I have already shown that the Valley Camp case does not support UMWA's arguments because the former Board held in that case that the first 104(c) order triggered the compensation provisions of section 110(a). Since that case was decided under the 1969 Act which did not provide for compensation to be paid for the 103(f) order which preceded the issuance of the 104(c) orders, the Valley Camp decision is inapplicable for interpreting section 111 of the 1977 Act which does provide for compensation to be paid when orders are issued under section 103 of the Act.

It is obvious that UMWA benefits by the amendment of section 111 to add section 103 orders to those which trigger the compensation provisions of the Act. In all circumstances in which an inspector issues a section 103 order, the miners get paid for the balance of the shift on which the 103 order is issued and for 4 hours of the "next working shift" if the order remains in effect for more than one working shift. The fact that the 1977 Act provides for compensation to be paid under section 103 orders is an "added incentive for the operator to comply with the law", just as Congress intended, but that "added incentive" is not a sufficient reason to hold that every time an additional order is issued, the provisions of section 111 may be reinvoked just as if the section 103 order had never been issued in the first instance.

UMWA's reply (p. 4) to Westmoreland's cross motion also argues that there was a "nexus "between the underlying reasons for the idlement and pay loss and the reasons for the order"' which the Commission held to be necessary for invoking the pay provisions of section 111 in its decision in the Eastern Associated case, supra, 3 FMSHRC at 1178. The Commission's decision in the Eastern Associated case denied a compensation claim because there was not a nexus between the miners' withdrawal under their Wage Agreement and the issuance of an order under section 103(k) of the Act. Although the nexus existed between the issuance of the imminent-danger order involved in this proceeding and the reason for the miners' withdrawal with respect to the imminent-danger order, that nexus also existed with respect to the preceding section 103 order which withdrew the miners in the first instance. The occurrence of more than one nexus with respect to two withdrawal orders does not, however, twice trigger the compensation provisions of the first two sentences of section 111 with respect to a single mine closing.

I have not specifically referred in this portion of my decision to the well-reasoned arguments advanced by Westmoreland in its cross motion (pp. 12-19) in opposition to UMWA's request for additional compensation under the first two sentences of section 111 with respect to imminent-danger Order No. 668338, but my decision reflects that I am in agreement with most of Westmoreland's arguments. I do not believe that I should further extend this lengthy discussion just to summarize arguments with

which I am in general agreement.

The Issue of UMWA's Claim for 1 Week of Compensation

UMWA's motion for partial summary decision (pp. 9-11) seeks to have the

miners compensated under the third sentence of section 111 (FOOTNOTE 5) for 1 week of pay because of the issuance on November 7, 1980, of imminent-danger Order No. 668338. Before the miners can seek 1 week of pay when a mine is closed by an imminent-danger order, the order must cite the operator for failure to comply with a mandatory health or safety standard. Inasmuch as imminent-danger Order No. 668338, here involved, does not cite Westmoreland for failure to comply with any mandatory health or safety standard (Joint Stipulation No. 9, supra), the obvious conclusion is that the miners cannot claim compensation for 1 week of pay under section 111 of the Act.

UMWA, nevertheless, requests that it be permitted to introduce evidence at a hearing, based on MSHA's investigation of the ignition which occurred on November 7, 1980, to show that the ignition was the result of Westmoreland's failure to comply with one or more mandatory health or safety standards. UMWA contends that MSHA's investigation will eventually result in the citing of Westmoreland for one or more violations, but UMWA explains that completion of MSHA's investigation has been delayed by the complicated nature of the explosion which resulted in the sealing of the 2 South Mains. UMWA's motion is accompanied by Exhibit No. 3 which is a letter from an MSHA official who states that Westmoreland does not plan to recover the 2 South Mains until about July 1983. Because of MSHA's inability to complete the underground portion of its investigation prior to July 1983, the MSHA official states that MSHA "* * * has determined that appropriate action under the Federal Mine Safety and Health Act of 1977 will go forward on the preliminary record [of its investigation]".

Imminent-danger Order No. 668338 has never been terminated (Joint Stipulation No. 16, supra), and UMWA argues that, before it is terminated, it will be modified by MSHA to allege a failure of Westmoreland to comply with one or more mandatory health and safety standards. In such circumstances, UMWA argues that it should be permitted to introduce evidence now to prove that MSHA's investigation of the ignition will eventually show that the imminent-danger order is coupled with an allegation that Westmoreland has failed to comply with a mandatory health or safety standard. UMWA contends that failure to allow it to prove Westmoreland's violations prevents the miners from being paid for at least a week of the time during which they were idled because of issuance of the imminent-danger order.

In support of its argument that it be permitted to introduce evidence about the conditions surrounding the issuance of the imminent-danger order,

UMWA cites Judge Melick's decision in Royal Coal Co., 3 FMSHRC 1738 (1981), in which Judge Melick ruled that evidence pertaining to whether a violation had occurred could be introduced in that proceeding. UMWA argues that if it is permissible for the operator to present evidence in a compensation case as to whether a violation had occurred, UMWA should be permitted to introduce evidence in this compensation case to show that a violation has occurred.

The Royal Coal case does not support UMWA's arguments for a number of reasons. First, the judge in the Royal Coal case had consolidated the compensation case with a civil penalty proceeding in which MSHA was seeking assessment of a penalty for the violation cited in the inspector's imminent-danger order. The judge could hardly prevent the operator and MSHA from presenting evidence with respect to whether a violation had occurred since that is the primary fact which must be proven by MSHA in a civil penalty case before a civil penalty may be imposed. Additionally, the violation had been cited by an MSHA inspector and he was present at the hearing to testify in support of the violation which he had alleged in his order.

In this proceeding, the inspector has not yet cited Westmoreland for any violation. Although UMWA argues that permitting it to introduce evidence, based on MSHA's investigation of the ignition, will not be substituting UMWA for MSHA in the enforcement of the Act, there could be no other result if I were to permit UMWA to introduce evidence to show that Westmoreland should be cited for one or more violations of the mandatory health and safety standards. Moreover, even if I were to permit UMWA to introduce such evidence, there is no way that such evidence could be used under the provisions of section 111 to require Westmoreland to compensate its miners for 1 week of pay because of the issuance of imminent-danger Order No. 668338.

The basis for the foregoing conclusion is that the third sentence of section 111 provides that the week of compensation can be awarded only after "such order is final". Inasmuch as Order No. 668338 is still in effect, it cannot become a "final" order until MSHA has terminated it after finding that the imminent danger no longer exists. Therefore, if a hearing were held and UMWA were to prove that Westmoreland ought to be cited for a violation of one or more mandatory health or safety standards, Westmoreland could not be ordered to pay a week's compensation until the order has become final. Consequently, UMWA's contention that it should not have to wait to obtain a week's compensation until MSHA has completed an evaluation of its investigation of the ignition is a futile complaint which no one can grant because section 111 simply does not provide for miners to be compensated for 1 week's pay until the order has become final.

As Westmoreland points out in its cross motion for summary decision (p. 23), the former Board of Mine Operations Appeals held in three cases (Clinchfield Coal Co., 1 IBMA 33 (1971),

Southern Ohio Coal Co., 4 IBMA 259 (1975), aff'd, District 6, UMWA v. Interior Board of Mine Operations Appeals, 526 F.2d 1260 (D.C. Cir. 1977), and Consolidation Coal Co., 8 IMBA 1 (1977)), that miners could not enlarge their right to compensation under section 110(a)

of the 1969 Act by introducing evidence to alter the statutory basis on which the orders were originally issued by the inspectors who wrote them. Specifically, the former Board held in those three cases that UMWA could not be allowed to prove at a hearing that the imminent-danger orders in those cases were the result of an operator's unwarrantable failure to comply with mandatory health and safety standards.

The only difference between the cases decided by the former Board and the instant case is that the third sentence of section 111 of the 1977 Act no longer requires, as the 1969 Act did, that an operator be cited for an unwarrantable failure before the miners idled by an unwarrantable-failure order could be awarded up to 1 week of compensation. Section 111 of the 1977 Act has been broadened to permit recovery of up to 1 week of compensation if any order issued under either section 104 or section 107 cites a violation of a mandatory health or safety standard. UMWA's motion for partial summary decision (p. 11) argues that the equities require an exception to be made as to the requirement that an inspector's order cite a violation of a mandatory health or safety standard as a prerequisite for recovery of 1 week of compensation if, as alleged in this proceeding, the hazardous conditions existing at the time the imminent-danger order was issued prevent the inspector from making the necessary investigation to determine whether the imminent danger was caused by the oeprator's violation of a mandatory health or safety standard.

In addition to the obvious legal barriers discussed above which require denial of UMWA's complaint for a week of compensation, there are many practical reasons for refusing to permit UMWA to present evidence of the type it seeks permission to introduce in this proceeding. In the first place, Order No. 668338 is still in effect as to the 2 South Mains. In other cases, I have known inspectors to modify their orders to cite violations which were not known to exist at the time the orders were first issued. When MSHA's evaluation of the preliminary investigative record, which includes the testimony of 70 individuals (Exhibit No. 3 attached to UMWA's motion), has been completed, the inspector may modify Order No. 668338 to cite a violation of a mandatory health or safety standard. If Order No. 668338 is eventually modified to cite a violation, UMWA's claim for a week of compensation may then be considered. (FOOTNOTE 6)

A second practical reason for denying UMWA's request that it be allowed to prove that Order No. 668338 ought to have cited one or more violations, is that both sections 104(a) and 107(a) provide for inspectors to issue citations and imminent-danger orders, respectively, regardless of whether they are engaged in inspections or investigations. If the inspectors' investigation of the ignition in this proceeding should disclose that some or all of any violations they may observe during their investigation are unrelated to the cause of the ignition, they would write the violations as ordinary citations under section 104(a) of the Act. If the inspectors should determine that any violations they observe contributed to the cause of the ignition, they would then modify Order No. 668338 to cite the violation or violations as a part of the imminent-danger order. Consequently, it is not necessarily true, as UMWA alleges, that Order No. 668338 will eventually be modified to allege that the miners were withdrawn by an order which charged Westmoreland with failure to comply with a mandatory health or safety standard.

A third practical consideration for not permitting UMWA to introduce evidence to prove that Order No. 668338 should have cited one or more violations is that MSHA would eventually have to propose a civil penalty for such violation. (FOOTNOTE 7) MSHA's civil penalty program is influenced by such matters as whether a given violation is associated with occurrence of one or more fatalities, as was the case in this proceeding. If the inspectors cite violations during the investigation of the ignition, but allege them in ordinary citations, the Assessment Office will be unlikely to propose civil penalties for such violations as large as it would propose if those same violations had been cited as a cause of the ignition and associated fatalities. Moreover, permitting UMWA to introduce evidence to prove that imminent-danger Order No. 668338 should have cited violations could result in a judge finding violations different from those which the inspectors may eventually allege.

Request for Reservation of Decision as to 1 Week of Compensation

UMWA's motion for partial summary decision (p. 11) asks, if I deny UMWA's request for permission to introduce evidence to prove that imminent-danger Order No. 668338 should have cited a violation of a mandatory health or safety standard, that I reserve a final decision on UMWA's request for 1 week of compensation until such time as MSHA has completed its evaluation of

its investigation of the cause of the ignition and has terminated imminent-danger Order No. 668338 with or without modifying it to allege a violation of a mandatory health or safety standard.

There are many legal and practical reasons for denying UMWA's request for reserving my decision on the issue of the miner's request for 1 week of compensation. First, even UMWA is requesting that I rule upon MSHA's requests for compensation under the first two sentences of section 111. When my decision on UMWA's requests under the first two sentences of section 111 is ready to be issued, the decision must be forwarded to the Commission for issuance by the Commission's executive director. The Commission has already reversed me once for assuming that I could issue a decision which failed to dispose of all pending issues (Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (1980)).

Additionally, section 113(d)(2)(C) of the Act requires that when a decision is ready for issuance, the judge will forward to the Commission all of the record which is before him at the time he decides to issue the decision so that, if a petition for discretionary review is thereafter filed with respect to the decision, the Commission will have before it the complete record which was before the judge when he rendered his decision. In short, the Commission and I cannot simultaneously have jurisdiction over the record or subject matter in a given proceeding.

Finally, as I have already observed, there is nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify outstanding imminent-danger Order No. 668338 to allege one or more violations of the mandatory health and safety standards by Westmoreland. For the foregoing reasons, UMWA's request for deferral or reservation of my decision with respect to any compensation which the miners may eventually be entitled to receive under the third sentence of section 111 must be denied.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) UMWA's motion for partial summary decision filed February 19, 1982, is denied insofar as it seeks any compensation under section 111 of the Act with respect to imminent-danger Order No. 668338, including UMWA's request that it be permitted to introduce evidence to prove that Order No. 668338 should have cited one or more violations of the mandatory health or safety standards by Westmoreland.

(B) UMWA's motion for partial summary decision is denied insofar as it requested me to defer or reserve my decision with respect to UMWA's alleged right to compensation for 1 week of pay under the third sentence of section 111 because of the issuance of imminent-danger Order No. 668338.

(C) UMWA's motion for partial summary decision is granted

to the extent that it seeks 4 hours of compensation for the miners who were scheduled to work the day shift on November 7, 1980, following the issuance

of Order No. 668337 on the preceding midnight-to-8:00-a.m. shift under section 103(j) of the Act.

(D) The grant of 4 hours of compensation in paragraph (C) above is made with the express understanding that payment by Westmoreland of 4 hours of compensation under the second sentence of section 111 does not preclude the miners from any compensation they may be due under Article IX, Section (c), of the National Bituminous Coal Wage Agreement of 1978.

(E) The grant of 4 hours of compensation in paragraph (C) above should be made with payment of interest at 12 percent per annum from November 7, 1980, to the date of payment for the reasons given in my decision in Beatrice Pocahontas Co., 3 FMSHRC 2004 (1981) at 2013, provided that the parties do not ultimately agree that the 4 hours of compensation already paid because of the issuance of Order No. 668337 was paid under section 111 instead of under Article IX of the Wage Agreement. If the parties agree that the additional compensation is due under the Wage Agreement, the question of payment of interest is to be determined by the parties under applicable labor law instead of pursuant to any directions by me in this proceeding.

(F) The miners to whom additional compensation is due under either section 111 or under the Wage Agreement are those who are listed in Exhibit B of Joint Stipulation No. 13, supra.

(G) Westmoreland's cross motion for summary decision filed March 10, 1982, is granted to the extent that it sought denial of UMWA's request for compensation under imminent-danger Order No. 668338 and denied insofar as it opposed UMWA's request for additional compensation which has been granted in paragraph (C) above.

(H) UMWA's amended complaint filed on November 9, 1981, is denied except with respect to the last prayer in the complaint which is granted in paragraph (C) above.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

1 The reason that UMWA's motion requests "partial" summary decision is that UMWA is contending that the miners are entitled to a week of compensation under section 107(a) Order No. 668338, but that order did not allege that Westmoreland had violated any mandatory health or safety standard, the latter allegation being a prerequisite under section 111 of the Act for the miners' entitlement to 1 week of compensation. Order No. 668338 has never been terminated and it is UMWA's position that, before the order is terminated, the inspector who wrote it will modify the order to cite one or more violations of the mandatory health or

safety standards. Until the inspector does modify the order to cite one or more violations, UMWA asks that I permit it to introduce evidence to show that the order should have cited a violation so that the miners may receive 1 week of compensation without further delay. If I deny UMWA's request to introduce evidence, UMWA, in the alternative, requests that I rule on the issues which are now ripe for decision and that I retain jurisdiction over the subject matter in this proceeding until such time as MSHA has completed its evaluation of its investigation of the ignition which occurred on the day the imminent-danger order was issued (Exhibit No. 3 attached to UMWA's motion).

~FOOTNOTE_TWO

2 Article IX, Section (c), page 39, of the contract reads as follows:

Unless notified not to report, when an Employee reports for work at his usual starting time, he shall be entitled to four (4) hours' pay whether or not the operation works the full four hours, but after the first four (4) hours, the Employee shall be paid for every hour thereafter by the hour, for each hour's work or fractional part thereof. If, for any reason, the regular routine work cannot be furnished, the Employer may assign the Employee to other than the regular work. Reporting pay shall not be applicable to any portion of the four hours not worked by the Employee due to his refusal to perform assigned work. Notification of Employees not to report means reasonable efforts by management to communicate with the Employee.

~FOOTNOTE_THREE

3 The first two sentences of section 111 of the Act read as follows:

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. 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 four hours of such shift. * * *

~FOOTNOTE_FOUR

4 Section 103(j) reads as follows:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall

take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

~FOOTNOTE_FIVE
5 The first two sentences of section 111 of the Act are quoted in footnote 3, page 5, supra. The third sentence of section 111 reads as follows:

* * * 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. * * *

~FOOTNOTE_SIX
6 I do not agree with the argument in footnote 10, page 22, of Westmoreland's cross motion to the effect that the third sentence of section 111 requires the week's compensation to be paid on the basis of the order as issued. The third sentence of section 111 simply requires that an order be issued under either section 104 or section 107 citing an operator for failure to comply with a mandatory health or safety standard. If the miners are idled for a week or more by such an order, the miners are entitled to claim 1 week's compensation. Both Westmoreland and UMWA are entitled to seek review of modifications of orders. Those applications or complaints may be filed within the same time limits which exist with respect to the original orders. Westmoreland cites no case and no provision in the Act which would bar UMWA from filing a complaint for compensation if the inspector eventually modifies Order No. 668338 to cite a violation of a mandatory health or safety standard. Sections 105(d) and 107(e)(1) of the Act specifically provide for the review of modifications of orders by both UMWA and an operator. Section 111 does not bar a complaint for compensation based on a modification of an order. In fact, as already observed, the week of compensation cannot be ordered to be paid until the order has become "final".

~FOOTNOTE_SEVEN
7 As noted above, the judge in the Royal Coal case, supra, cited in UMWA's motion for partial summary decision (p. 9), consolidated the civil penalty proceeding with the compensation case.