

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 20 1984

LOCAL UNION 2274 : COMPENSATION PROCEEDING
DISTRICT 28, UNITED MINE- :
WORKERS OF AMERICA, : Docket No. VA 83-55-C
Complainant :
v. : McClure No. 1 Mine
: :
CLINCHFIELD COAL COMPANY, :
Respondent :

RULING ON MOTION FOR SUMMARY JUDGEMENT

Before: Judge Moore

In ruling on a Motion for Summary Decision it is appropriate to view the facts in the light most unfavorable to the moving party. Assumptions I make for the purpose of ruling on this Motion, are therefore not binding regarding any other case that may arise due to the explosion of the McClure No. 1 Mine on June 21, 1983. I am assuming for example that the safety standard violations which MSHA says existed prior to the explosion, did in fact exist and did lead to the explosion which killed seven miners.

In this action United Mine Workers is seeking one week's compensation for each of the miners idled by the explosion and subsequent orders issued by MSHA. Section 111 of the Federal Mine Safety and Health Act of 1977 provides in part 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.

Viewed in the light most favorable to the United Mine Workers of America, the events following the explosion

were as follows. At 3:42 A.M. on June 22, 1983, an MSHA inspector issued a withdrawal order pursuant to section 103(k) of the Act. At 2:00 P.M. on the same day he issued an imminent danger order pursuant to section 107(a) of the Act. Neither order alleged or referred to a violation of a health or safety standard.

MSHA's comprehensive underground investigation lasted from June 25, 1983 to August 12, 1983, and various interviews were conducted in July and August of that year. According to the accident report, which is not a part of the record in this case but which I nevertheless have, the transcripts of all **testimony taken** were released to the general public on September 9, 1983. I can not find anything in that accident report, however, that indicates when it was published. -In any event it was not until March of 1984 that MSHA issued a section 104(d) citation and four section 104(d) orders all alleging violations of safety standards that led to the explosion. It is noted that the citation bears the number 2352610 but each of the four orders refers to it as number 2352601. I assume that was a clerical error. The original section 107(a) imminent danger order was not modified.

On December 16, 1983, I denied Clinchfield's original motion for summary decision (I referred to it as a motion to dismiss) relying for the most part on the Commission's decision in United-Mine Workers of America v. Westmoreland Coal Company,⁵ FMSHRC, 1406 (August 1983). At that time MSHA had not released its accident report and the posture of the case was thus very similar to the situation before the Commission in the Westmoreland case. The Commission remanded the Westmoreland case to Judge Steffey with directions that he retain it on his docket until MSHA had completed its investigation and taken whatever action it deemed necessary. The Commission expressed no opinion as to whether MSHA could legally amend the section 107(a) order to allege a violation or whether such an amendment would entitle the miners to the week's compensation involved. It said these questions should be **first resolved** by the judge after the investigation.

As I have stated previously, the MSHA investigation report is not a part of the official record in this case. It is, however, an official public document of the United States Department of Labor and as such it is entitled to "official notice" status and under the summary decision criteria statements therein detrimental to Clinchfield could be "officially noticed". I am including a copy of that

report with the material forwarded to the Commission in this case for whatever use it wishes to make of the report.

After the parties had rebriefed the issues, I asked the Solicitor if it wished to express a view. The Solicitor did write a letter in which it agreed with the United Mine Workers' arguments and stated,

"as the instant 107(a) order was terminated by the time the accident report was issued, no thought was given to issuing a modification of the terminated order to tie it formally to the 104(d) orders issued with the report;"

I would have thought that after the Commission's Westmoreland decision and my ruling herein of December 16, 1983, that some thought would have been given to the question of modification. Clinchfield has moved to strike the Solicitor's letter **bút** inasmuch as I invited the Solicitor's views I can hardly strike his compliance with my request.

The issue before me in this case presents a very close question. I sympathize with the arguments of the United Mine Workers of America and the Solicitor, but I believe that the law is to the contrary. The mine was closed because an inspector thought an imminent danger existed 'not because he thought there was "a failure of the operator to comply with any mandatory health or safety standards." The fact that the explosion that led to the order was actually, in accordance with my assumptions, caused by the violations does not affect the fact that the inspector did not issue the order "for a failure of the operator to comply with . . . safety standards".'

The Motion is GRANTED and the case is DISMISSED.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

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