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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
V.

COMPENSATION PROCEEDING
Docket No. WEVA 81-256-C
Ferrell No. 17 Mine

WESTMORELAND COAL COMPANY,
RESPONDENT

SECOND SUMMARY DECISION

Before: Judge Steffey

Counsel for United Mine Workers of America (UMWA) filed on August 10, 1984, a "Second Motion for Partial Summary Decision" in the above-entitled proceeding. Counsel for Westmoreland Coal Company filed on August 23, 1984, a pleading entitled "Westmoreland Opposition to UMWA Second Motion for Partial Summary Decision and Cross-Motion for Summary Decision." This decision grants Westmoreland's cross-motion for summary decision because the rulings herein deny the relief requested by UMWA.

Procedural History

The original complaint in this proceeding was filed on February 5, 1981, under section 111 (FOOTNOTE 1) of the Federal Mine

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Safety and Health Act of 1977. An amended complaint was filed on November 9, 1981. The amended complaint first requested that the miners at respondent'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) (FOOTNOTE 2) of the Act, even though that order did not allege a violation of any mandatory health or safety standard. Alternatively, the amended complaint requested 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) (FOOTNOTE 3) and 107(a), respectively.

I issued a summary decision on April 28, 1982, 4 FMSHRC 773, in which I held that the miners were entitled to compensation for the remainder of the shift on which the section 103(j) order was issued and for 4 hours of the next working shift irrespective of whether Westmoreland was obligated to pay the miners 4 hours of compensation under the provisions of the Wage Agreement. My decision denied UMWA's request for 1 week's compensation based on the section 107(a) order because the order did not allege a violation of a mandatory health or safety standard. I also denied UMWA's request that I retain jurisdiction of the case until MSHA had completed its investigation of the explosion which had occurred on November 7, 1980. 4 FMSHRC at 789-790.

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The Commission thereafter granted UMWA's petition for discretionary review and issued a decision on August 12, 1983, which held as follows:

For the reasons discussed above, [we] vacate his order dismissing without prejudice the Union's claim for a week's compensation. The case is remanded to the judge with instructions to hold the record open as to the Union's claim for a week's compensation. The parties are free to submit any appropriate motions or showings. If the Union fails to make appropriate showings upon the completion of MSHA's investigation, Westmoreland may file an application for a show cause order to determine if the claim should be dismissed. The judge's resolutions of the Union's other claims are final, since no review was taken as to those aspects of his decision.

5 FMSHRC at 1413.

Summary of Pertinent Facts

My first summary decision contained 18 stipulations of fact agreed upon by the parties. 4 FMSHRC at 774-775. Some of those stipulations are not particularly pertinent to the issues raised in the current motions for summary decision, but, since both UMWA's and Westmoreland's motions refer to some of the original stipulations, it is desirable that I repeat all of the stipulations for the convenience of the parties.

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.
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. 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. 668337 pursuant to section 103(j) of the Act. The order applied to all areas of the mine.

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7. Order No. 668337 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. 668338 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. 668338 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. 668337 and Order No. 668338 were modified to show the affected area of the mine was limited to the seals and the area inby such seals.

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16. Order Nos. 668337 and 668338, as modified, have not been terminated and remain in effect. [As hereinafter indicated, Order No. 668338 was terminated on November 15, 1983.]

17. Westmoreland has not contested the issuance of Order No. 668337 by initiating a proceeding under section 105(d) of the Act.

18. Westmoreland has not filed an Application for Review of Order No. 668338 under section 107(e) of the Act.

UMWA's motion relies upon certain events which have occurred since the parties agreed upon the 18 stipulations which are given above. I shall update the facts given in the parties' stipulations by adding some uncontested facts based on events which occurred after I issued my first summary decision in this proceeding on April 28, 1982.

19. As indicated in stipulation No. 10 above, the 2 South Section of the mine was sealed off. Production was allowed to continue in other areas of the mine, but the 2 South Section has not been reopened and it is doubtful if it ever will be reopened.

20. Since MSHA could not complete its investigation of the cause of the explosion by actual examination of conditions in the 2 South area of the mine, an MSHA inspector in Arlington, Virginia, examined the statements given in December 1980 to MSHA's investigators shortly after the explosion occurred. On the basis of that examination, the inspector issued 13 withdrawal orders (Nos. 2002585 through 2002597) on July 15, 1982, pursuant to section 104(d)(2) of the Act. Westmoreland filed 13 notices of contest challenging the validity of the orders and those cases were assigned Docket Nos. WEVA 82-340-R through WEVA 82-352-R.

21. Subsequently, counsel for the Secretary of Labor filed two petitions for assessment of civil penalty in Docket Nos. WEVA 83-73 and WEVA 83-143 proposing a total of \$55,040 in civil penalties. The issues raised in the two civil penalty cases were consolidated with the issues raised in the 13 notices of contest.

22. In an order issued on May 4, 1983, in Docket Nos. WEVA 82-340-R, et al., I granted in part Westmoreland's motion for summary decision and vacated all 13 of the withdrawal orders as having been issued in error under section 104(d) of the Act. My order noted that the violations alleged in the 13 orders survived vacation of the orders so that the violations would have to be considered on their merits in the civil penalty cases. Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980).

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23. Thereafter the parties filed a motion for approval of settlement which I approved in a decision issued May 11, 1984, 6 FMSHRC 1267. Under the settlement agreement, Westmoreland paid reduced penalties totaling \$38,000 in lieu of the penalties totaling \$55,040 proposed by MSHA.

24. On November 15, 1983, MSHA issued a subsequent action sheet terminating Order No. 668338 issued under section 107(a) of the Act and described in stipulation No. 9 above. The termination sheet stated as follows:

The area in 2 South has been sealed in the 1 East Mains at a location 1 pillar outby the 2 South junction. A 103[(j)] order cover[s] the area original[ly] covered in the 107(a) order. Therefore the 107(a) order is terminated.

25. As indicated in stipulation No. 9 above, Order No. 668338 did not allege a violation of any mandatory health or safety standard. None of the 13 withdrawal orders citing violations on the basis of sworn testimony obtained by MSHA can be characterized as having alleged a violation as a part of section 107(a) Order No. 668338 because all of them were issued under section 104(d) (FOOTNOTE 4) of the Act which requires a finding that "the conditions created by such violation[s] do not cause imminent danger".

Consideration of Parties' Contentions

UMWA's Arguments that the Section 107(a) Order Should Be Interpreted To Allege a Failure by Westmoreland To Comply with a Mandatory Health or Safety Standard

The relief which UMWA is requesting in its second motion for summary decision is that the miners who were working on November 7, 1980, when the explosion occurred be given up to a week's compensation under the third sentence of section 111 of the Act which, as shown in footnote 1 above, provides in pertinent 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 . . . 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.

In order for the miners to be compensated for up to 1 week, they must be idled by an order issued under section 104 or section 107 "for a failure of the operator to comply with any mandatory health or safety standards". As indicated in stipulation No. 9 above, Order No. 668338, under which UMWA seeks to obtain 1 week of compensation, was issued under section 107(a) of the Act, but it did not cite a violation of "any mandatory health or safety standards".

UMWA's motion recognizes that it cannot recover up to a week's compensation under the third sentence of section 111 unless it can be shown that Order No. 668338 withdrew miners for a failure of Westmoreland to comply with a mandatory health or safety standard. UMWA also recognizes that the inspector did not cite a violation as a part of Order No. 668338 when he issued it, but UMWA argues that the 13 withdrawal orders, issued on the basis of the sworn statements given to MSHA's investigators, may be used for the purpose of showing that the imminent danger order was issued for a violation of a mandatory health or safety standard (finding No. 20 above). While it is true that several of those orders cite Westmoreland for violations which may have contributed to the explosion, particularly, Nos. 2002586 and 2002593 which allege violations of 30 C.F.R. 75.316 and 75.303, respectively, for failure to ventilate properly and inspect for methane accumulations, the fact remains that UMWA's right to compensation under section 111 is based entirely upon the enforcement actions of MSHA, and MSHA has never at any time modified section 107(a) Order No. 668338

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to allege a violation of any mandatory health or safety standard. Moreover, as indicated in finding No. 25 above, all citations of violations made by MSHA on the basis of its investigation of the explosion were issued in the form of 13 unwarrantable-failure section 104(d) orders which require an express finding that "the conditions created by such violation[s] do not cause imminent danger." The fact that MSHA terminated Order No. 668338 on November 15, 1983, without ever modifying the order in any way to indicate that the order had been issued for failure of Westmoreland to comply with any mandatory health or safety standard, as indicated in finding Nos. 24 and 25 above, precludes me from accepting UMWA's argument that I should rely upon the fact that 13 withdrawal orders were issued to make a finding that the imminent-danger order was actually issued for failure of Westmoreland to comply with a mandatory health or safety standard.

It is true, as UMWA argues, that MSHA probably did not know when the imminent-danger order was issued on November 7, 1980, that Westmoreland had violated various mandatory health and safety standards. It is also true that MSHA had the authority under section 107(a) to issue citations as a part of the order or in conjunction with the order. I have had several cases before me in which the inspector did cite a violation under section 104(a) as a part of his imminent-danger order. I also have had cases in which the inspector issued separate citations at the time he issued an imminent-danger order, but in such cases, the inspectors' citations stated that they were being issued as a part of an imminent-danger order, or in conjunction with an imminent-danger order.

It is additionally true, as UMWA argues, that the Act is intended to be liberally construed so as to provide the miners with all the relief they are entitled to receive under the Act, but UMWA has not cited any legislative history which persuades me that Congress intended for one of the Commission's judges to modify an imminent-danger order so as to allege one or more violations which were not observed or cited by an MSHA inspector in conjunction with that order.

Westmoreland's cross motion (pp. 10-11) for summary decision contains a paragraph which cogently argues that the Commission has ruled against agreement with the type of arguments made by UMWA in this proceeding:

The Commission has made it abundantly clear that it will not usurp Congress's function by legislating new remedies into the Act. It has done so, moreover, in precisely the context which this case involves--an attempt by the UMWA to question MSHA's enforcement discretion and substitute itself as a private prosecutor by urging the Commission to make

findings or take actions which are reserved to MSHA. *UMWA v. Secretary of Labor, MSHA*, 5 FMSHRC 1519 (1983) (Act does not permit UMWA to challenge MSHA's decision to vacate a withdrawal order); *UMWA v. Secretary of Labor, MSHA*, 5 FMSHRC 807 (1983), *aff'd*, 2 MSHA (BNA) 1137 (D.C.Cir.1983) (Act does not permit UMWA to assert that a citation should have been an order of withdrawal); *UMWA, Local 1197 v. Bethlehem Mines Corp.*, 5 FMSHRC 2093 (ALJ 1983) (Act does not permit UMWA to enforce mandatory dust control standards through discrimination complaint). These cases are consistent with the long-established principle that only MSHA has the authority to make findings of violations. E.g., *Freeman Coal Mining Corp.*, 2 IBMA 197 (1973), *aff'd*, 504 F.2d 741 (7th Cir.1974).

UMWA's motion (p. 7) refers to the fact that two of Westmoreland's supervisory personnel were indicted and convicted for several violations of the Act in connection with the explosion which occurred on November 7, 1980. I do not see how those convictions change any of the provisions of section 111. Miners cannot recover compensation under section 111 unless MSHA issues certain enumerated types of orders. UMWA concedes in its motion (p. 21, n. 15) that the Act gives the miners limited compensation. The third sentence of section 111 permits UMWA to recover up to a week of compensation only when a 104 or 107 order is issued for failure of an operator to comply with a mandatory health or safety standard. MSHA did not issue 107(a) Order No. 668338 for a failure of Westmoreland to comply with a mandatory health or safety standard. MSHA had a period of over 3 years within which to modify the order to cite a violation of a mandatory health or safety standard before the order was terminated, but MSHA did not do so.

As UMWA argues (motion, p. 17), it may be preferable, from the miners' viewpoint, to interpret section 111 so as to permit them to recover up to a week's compensation when there is extrinsic evidence showing that an imminent-danger order ought to have cited a violation of a mandatory health or safety standard, but Congress did not write the third sentence of section 111 to permit that interpretation to be given to that sentence. Therefore, I do not believe that section 111 can be interpreted to provide UMWA with the relief which it seeks in this proceeding.

Westmoreland's Contention that No Miners Were Idled by Section 107(a) Order No. 668338

Westmoreland's cross motion for summary decision correctly argues that my first summary decision issued in this proceeding held that the miners were idled by the section 103(j) order issued at 7:30 a.m. on the midnight-to-8 a.m. shift. The miners

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working on the shift during which the 103(j) order was issued were paid for that entire shift and the miners on the next working shift were awarded 4 hours of pay for the time they were idled by the section 103(j) order which was still in effect. 4 FMSHRC at 783.

The section 107(a) order on which UMWA bases its present claim for 1 week of compensation was not issued until 8 a.m. on November 7, 1980, and did not idle any miners because the miners had already been idled by the 103(j) order. That 103(j) order not only withdrew miners on the midnight shift on November 7, 1980, but has kept the miners withdrawn from the 2 South area up to and including the present time. Stipulation Nos. 6 through 9 and finding No. 23 above. Moreover, as indicated in finding No. 24 above, the outstanding effectiveness of the 103(j) order served as the basis for MSHA's termination of the 107(a) order which has never been modified to allege a violation of any mandatory health or safety standard.

Westmoreland correctly notes that my ruling, to the effect that the miners are entitled to compensation only under the section 103(j) order, was not contested by UMWA when its petition for discretionary review of my first summary decision was granted by the Commission. The Commission's decision remanding this case with directions for me to consider UMWA's claims under the third sentence of section 111 specifically stated that my decision was final as to all issues except UMWA's claim for 1 week of compensation under the section 107(a) order. 5 FMSHRC at 1413.

Westmoreland's cross motion for summary decision (p. 5) correctly concludes that since UMWA has not and cannot establish the first requirement of the third sentence of section 111, namely, that miners be withdrawn and idled by section 107(a) Order No. 668338, that UMWA's second motion for summary decision must be denied for that reason alone, regardless of the issues which have already been discussed and decided in favor of Westmoreland.

Conclusions

As pointed out above, UMWA's second motion for summary decision must be denied for its failure to show that any miners were withdrawn or idled by section 107(a) Order No. 668338. No miners were withdrawn under section 107(a) Order No. 668338 because 103(j) Order No. 668337 was still in effect when the miners reported for work on the next working shift. The 107(a) order has been terminated, but the 103(j) order is still in effect and miners are still prohibited from entering the 2 South area by the outstanding 103(j) order. Therefore, UMWA cannot satisfy the first prerequisite under the third sentence of section 111 which requires a showing that miners were withdrawn and idled by the 107(a) order. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1176-1179 (1981).

Assuming that UMWA could show that miners were withdrawn by the section 107(a) order, MSHA has terminated the 107(a) order without modifying it in any way to reflect that the imminent danger occurred because of Westmoreland's failure to comply with any mandatory health and safety standards. Although MSHA's investigation resulted in the issuance of 13 withdrawal orders pursuant to section 104(d) of the Act, citing alleged violations of the mandatory health and safety standards, those orders cannot be said to allege violations as part of an imminent-danger order because they could not have been issued in the first instance without a finding that the violations cited in the orders did not cause an imminent danger.

For the reasons given above, I find that UMWA has failed to establish any basis for the grant of its second motion for summary decision. The same reasons support the grant of Westmoreland's cross motion for summary decision.

WHEREFORE, it is ordered:

(A) UMWA's second motion for summary decision is denied and the claim for up to 1 week of compensation under section 107(a) Order No. 668338 is denied.

(B) Westmoreland's cross motion for summary decision is granted and this proceeding is terminated.

Richard C. Steffey
Administrative Law Judge

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~FOOTNOTE ONE

1 The first three sentences of section 111 provide 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. 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_TWO

2 Section 107(a) provides 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_THREE

3 Section 103(j) provides 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_FOUR

4 The pertinent part of section 104(d) provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [Emphasis supplied.]