

CCASE:

LOCAL UNION 1609, DISTRICT 2 UNITED MINE
WORKERS OF AMERICA, V. GREENWICH COLLIERIES

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

LOCAL UNION 1609, DISTRICT 2
UNITED MINE WORKERS OF
AMERICA,
COMPLAINANT

COMPENSATION PROCEEDING

Docket No: PENN 85-91-C

v.

Greenwich No. 1 Mine

GREENWICH COLLIERIES,
RESPONDENT

DECISION

Before: Judge Moore

On February 22, 1985, Respondent Greenwich Collieries filed a Motion for Summary Decision. On March 8, 1985, the United Mine Workers of America filed a Motion to Stay the Proceedings and a Memoranda in Support Thereof and in Opposition to the Motion for Summary Decision.

I DENY the Motion to Stay. While the Commission has cases before it that might govern the outcome of this case, I have no idea when the Commission might decide these cases and in some cases, for one reason or another, the Commission does not rule on all the issues presented to it. Also, in a recent decision, Secretary of Labor v. Youghioghene and Ohio Coal Company, the Commission, on the behest of MSHA vacated the citation and dismissed the case without ruling on an issue which is pertinent to the instant case.(Footnote.1) I think it is my job to make my ruling on the issues as I see them and the Commission can either affirm or reverse.

On November 7, 1984 at 11:00 A.M. the inspector issued an imminent danger order when he learned that "a concentration of methane in excess of 5% has been found by a certified employee of this company in the immediate return of the A4-71 active working section". At 3:30 that afternoon, he issued a citation under Section 104(a) of the Act alleging a violation of 30 C.F.R. 75.316-2(i). This latter section is not a

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mandatory standard but is a criterion to be used by district managers in approving a ventilation system. The miners idled by the 107 imminent danger order then sought compensation pursuant to 111 of the Act. That section requires, regardless of the validity of the order, "full compensation by the operator at the 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 the regular rates of pay for the period they are idled, but for not more than four hours of such shift." The company admits that it owes the compensation described above.

The section goes on to say that if the mine or an area thereof is closed by a 104 or 107 order, "for a failure of the operator to comply with any mandatory health or safety standards . . . [compensation shall be] for such time as the miners are idled by such closing, or for one week, whichever is the lesser." It is this "long term" compensation that is at issue in this case. In order to get long-term compensation the closure order issued for a violation must be valid. At the outset the question is: was the order issued for a violation of a mandatory standard? I hold that it was not. Under 301(c)(2) of the miscellaneous provisions of the Federal Mine Safety and Health Amendments Act of 1977, we are bound by the rulings of the Interior Board of Mine Operations Appeals until told otherwise by the Commission or a Court. The Board's holdings were succinctly summarized by Judge Broderick in *Secretary of Labor v. Youghioghene and Ohio Coal Company*, FMSHRC 1581, 1584, September 19, 1983). He said:

In a case under the 1969 Coal Act, the Board of Mine Operations Appeals held that a finding of methane in excess of six percent six feet from the working face did not in itself establish a violation of section 303(h)(2) of the Coal Act (this statutory provision is identical to 30 C.F.R. 75.308. *Eastern Associated Coal Corporation*, 1 IBMA 233 (1972). The holding was reaffirmed in *Mid-Continent Coal and Coke Company*, 1 IBMA 250 (1972) where the Board said: "Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation." IBMA at 253. In 1977, the Board held that a 5 percent methane accumulation in the face did not establish a violation of 30 C.F.R. 75.301 (requiring ventilation of active workings with

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air of sufficient volume and velocity to dilute, render harmless and carry away explosive gasses). "The Board is of the opinion that it would be patently inconsistent administration to hold that an excessive methane accumulation constitutes a violation under 30 C.F.R. 75.301 when the provisions of 30 C.F.R. 75.308 provide for specific actions to be taken when such an excessive accumulation is discovered. " Mid- continent coal and Coke Company, 8 IBMA, 204, 212, (1977).

I see no essential difference between the case at bar and the cases before the Board of Mine Operations Appeals. Four and one half hours after issuing the order, the inspector issued a citation which he said was a part of the order. I have never seen this type of procedure before, but in any event a citation can not close a mine nor idle workers, and it did not allege a violation of a mandatory standard. The criteria are for the guidance of MSHA district managers, not standards that can be violated by mine operators. The Board of Mine Operations Appeals has so held. The Valley Camp Coal Company, 3 IBMA 176, 181, (1974). And, as stated, we are bound by these decisions until they are reversed.

I hold that the miners were not idled by an order issued "for a failure of the operator to comply with any mandatory health or safety standards . . ." The Motion for Summary Decision is GRANTED in favor of Greenwich Collieries insofar as long term compensation is concerned and that portion of the complaint is DISMISSED. Inasmuch as Greenwich admits it owes the short term compensation, it is ORDERED to pay that compensation within 30 days, with interest figured in accordance with the Commission's decision in Secretary Ex Rel Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983). Footnote 15 of that decision is attached.

Charles C. Moore, Jr.
Administrative Law Judge

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Footnotes start here:-

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1 The issue was whether a concentration of more than 1% methane constituted a violation. The Secretary's trial staff thought so but its appellant staff did not. The Commission decided not to rule on the issue in such a nonadversary situation.

Attachment

15 The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and

offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	\$1,000
Second quarter (beginning April 1, 1983)	\$1,000
Third quarter (beginning July 1, 1983)	\$1,000
Total net back pay	\$3,000

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;

11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:

\$1,000 net back pay x 91 accrued days of interest
(last day of first quarter plus the entire second quarter) x .0004444 = \$40.44

Plus,

(b) At 11% interest for entire third quarter through the date of payment:

\$1,000 net back pay x 105 accrued days of interest
(the third quarter plus 15 days) x .0003055 = \$32.07

(c) Total interest award on first quarter:

\$40.44 + \$32.07 = \$72.51

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter

\$1,000 x 1 accrued day of interest x .0004444 = \$.44

Plus,

(b) At 11% interest for the entire third quarter through date of payment:

\$1,000 x 105 accrued days of interest x .0003055 = \$32.07

(c) Total = \$.44 + \$32.07 = \$32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:

\$1,000 x 16 accrued days of interest x .0003055 = \$4.88 total

(4) Total Interest Award:

\$72.51 + 32.51 + 4.88 = \$109.90

This amount is added to the total amount of back pay (\$3,000), for a total back pay award of \$3,109.90.