

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 5, 2002

UMWA, LOCAL 2368,	:	COMPENSATION PROCEEDING
DISTRICT 20, on behalf of miners,	:	
Applicant	:	Docket No. SE 2002-22-C
v.	:	
	:	
JIM WALTER RESOURCES INC.,	:	No. 5 Mine
Respondent	:	Mine ID 01-01322

ORDER DENYING MOTION FOR SUMMARY DECISION

This case is before me upon a Complaint for Compensation filed by the United Mine Workers of America Local 2368, District 20 (UMWA), pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994), the “Act,” seeking compensation from Jim Walter Resources, Inc. (JWR) for miners idled following several explosions at JWR’s No. 5 Mine on September 23, 2001.¹

It is undisputed that on September 23, 2001, at approximately 5:30 p.m., a portion of the roof in the No. 4 section at JWR’s No. 5 Mine fell, followed by an explosion resulting in injuries. At approximately 6:15 p.m., a second, larger explosion occurred and all miners who had not already been told to do so were told to evacuate the mine. It is also undisputed that at around 6:05 p.m. on September 23, 2001, a mine employee notified Department of Labor, Mine Safety and Health Administration (MSHA) field supervisor Charles Terry Langley of the explosion at the No. 5 mine. Langley then called the mine and spoke with Harry House, a salaried JWR employee, who confirmed the explosion. Subsequently four MSHA inspectors traveled to the mine. Upon arriving at the mine around 7:15 p.m., they spoke to Dale Byram, another JWR salaried employee, and the mine rescue team. They then proceeded to the mine office.

¹ The Complaint herein is deemed amended to conform with the now undisputed evidence that Order No. 767687 was issued at 8:15 p.m. (not at 4:15 p.m. as alleged in the Complaint) and that the Union is now claiming compensation only for miners who were scheduled to work the 11 p.m. to 7 a.m. “owl shift” on September 23 and 24, 2001, in the amount of four hours regular pay (rather than the 12:01 a.m. to 8:00 a.m. shift on September 24, 2001). Finally, it appears that miners working the 4 p.m. to midnight shift on September 23, 2001, were in fact paid, therefore compensation sought in the Complaint for these miners is not at issue. See FED.R.CIV.P. 15(b), applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b).

By 7 p.m., mine manager Jesse Cooley and other JWR management decided to close the mine and notify all miners on subsequent shifts that the mine would be closed until further notice. Beginning at 7:30 p.m., JWR officials notified miners scheduled to work on subsequent shifts that the mine would be closed until further notice. At 8:15 p.m., MSHA Inspector Edward Nicholson, issued Order No. 7676787, pursuant to Section 103(k) of the Act.² The order stated that “a non-fatal, injury explosion has occurred on the No. 4 Section, this being issued to protect the miners, until and [sic] investigation is completed.” The order was modified at 8:58 p.m., extending it to the entire No. 5 mine. The order was terminated on June 11, 2002. It is undisputed that at least one “owl shift” miner, John Wallace, was not contacted about the mine closure until approximately 8:30 p.m.

In its motion for summary decision, JWR argues that it is entitled to a summary decision based on the undisputed facts and the Commission’s decision in *Local Union 1261, District 22, UMWA v. Consolidation Coal*, 11 FMSHRC 1609, (September 1989), *aff’d* 917 F.2d 42 (D.C. Cir. 1990). Section 111 of the Act provides that if a mine is “closed by an order issued under Section 103 . . . [and] such order is not terminated prior to the next working shift, all workers on that shift who were idled by such order shall be entitled to full compensation . . . but for not more than four hours of such shift.” In the *Local Union 1261* case the Commission held however that since the mine operator in that case had voluntarily withdrawn all miners for their safety before the issuance of the withdrawal order and since the operator advised miners on later shifts that the mine was “idle until further notice” none of those for whom compensation was claimed were on “the next working shift.” The Commission accordingly held that the miners in that case were not entitled to compensation. *Local Union 1261*, 1614 n. 6.

The rationale for this holding was stated by the Commission therein as follows:

Here, the record shows immediate action on the part of a mine operator to remove all afternoon shift employees from the mine because of rising gas levels - - clearly a threat to the health and safety of the miners. The wisdom of this action was attested by the action of MSHA inspectors who, after being summoned by the operator, issued a control order on the following morning, officially closing the mine and thereby confirming the evacuation order issued during the previous evening by the mine operator. Thus, apart from the fact that no miners were present in the mine when MSHA closure order was issued, it is apparent that the

² Section 103(k) of the Act provide as follows:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return to the areas of such mine to normal.

safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as *Consol* took here.

The Commission noted in *Local Union 1261* however, that the case did not involve an attempt to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by the Secretary, suggesting a different result if that were the case.

In its response to JWR's Motion for Summary Decision, the UMWA argues that the closure of the mine by JWR was only an attempt to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by the Secretary, and that, therefore, the Commission decision in *Local Union 1261* is inapplicable to this case. The UMWA further argues that a factual dispute remains therefore as to whether JWR withdrew the miners only to avoid Section 111 liability in anticipation of withdrawal action by the Secretary or whether it was done for the protection of the miners consistent with the Commission's decision in *Local Union 1261*. I agree that such a factual dispute exists requiring evidentiary hearings and credibility determinations to resolve these issues.³

Under Commission Rule 67, 29 C.F.R. § 2700.67, a motion for summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law.

Under the circumstances herein, in light of the factual issue remaining in dispute, the motion for summary decision must be denied. Commission Rule 67, 29 C.F.R. § 2700.67.

³ The UMWA's claim that some "owl shift" miners were not notified of the mine closure and that some appeared at the mine before the 11 p.m. startup time (though it does not claim that any of the miners performed any work on that shift) is not in itself, directly relevant to the issue of compensation rights but goes only to the credibility of JWR's reasons for withdrawing the miners. In addition, the bald allegations asserted in this regard by the UMWA in its reply to the motion for summary decision are not in compliance with Commission Rule 67.

ORDER

The Motion for Summary Decision filed by Jim Walter Resources on May 31, 2002, is denied.

Gary Melick
Administrative Law Judge
703-756-6261

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