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UMWA V. NACCO MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 6, 1989

LOCAL UNION 1810, DISTRICT 6
UNITED MINE WORKERS OF
AMERICA (UMWA)

v. Docket No. LAKE 87-19-C

NACCO MINING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This is a compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act" or "Act"). The principal issue presented is whether an operator may challenge in a compensation proceeding the validity of a withdrawal order and its modification, despite the operator's failure to contest previously the order or the modification pursuant to section 105 of the Mine Act (n.4 infra). 1/ Commission Administrative Law Judge William

1/ Section 111 of the Mine Act provides in part:

[1] 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] of this Act, 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. [2] 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

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Fauver held that the withdrawal order and the modification that idled the miners had not been timely contested by Nacco Mining Company ("Nacco") and had become final for purposes of section 111. Finding that the prerequisites for compensation were met, the judge awarded the complainants compensation, including prejudgment interest. 9 FMSHRC 1349 (August 1987)(ALJ); 9 FMSHRC 1671 (September 1987)(ALJ). For the reasons that follow, we affirm the judge's award of compensation and interest, but direct that the interest be calculated in accordance with the formula set forth at 54 Fed. Reg. 2226 (January 19, 1989). See Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988).

The material facts are not in dispute. On December 10, 1984, during an inspection of Nacco's Powhatan No. 6 underground coal mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") found that an intake-ventilated escapeway in the north mains area of the mine was not being maintained to ensure safe passage of mine personnel, including disabled persons. The inspector, citing a violation of 30 C.F.R. 75.1704, issued Order of Withdrawal No. 2329934, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. 814(d)(2). 2/ The cited conditions consisted of a failure to maintain

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. [3] 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 [Act], for a failure of the operator to comply with any mandatory health or safety standard, 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.

30 U.S.C. 821 (sentence numbers added for convenience).

2/ Section 75.1704, which substantially repeats section 317(f)(1) of the Mine Act, 30 U.S.C. 877(f)(1), provides:

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times

of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked.

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appropriate height and width in "many locations" in the escapeway and the presence of obstructions in the escapeway. The withdrawal order closed all areas in the north mains of the mine inby the two main east junction.

The inspector permitted the mine to reopen about 30 minutes after its closure when he modified the order for the first time. The modification required Nacco to devote at least 25 manshifts per week to rehabilitating the escapeway until the work was completed. 3/ The modification allowed Nacco to continue its usual mining operations in the north mains while the work of rehabilitating the intake escapeway was being conducted. After the issuance of this modification, normal mining operations resumed, all previously withdrawn miners returned to work, and Nacco thereafter devoted at least 25 manshifts per week to rehabilitating the escapeway. MSHA modified the order for the second time on December 11, 1984, to add an additional thousand feet to the length of escapeway needing rehabilitation. On January 18, 1985, MSHA modified the order for the third time to reduce its estimate of the number of workers affected by its issuance.

On January 25, 1985, the State of Ohio Department of Mines conducted an inspection of the mine, found that the escapeway violated Ohio's mining laws, and issued an order to Nacco requiring that Nacco continue to devote the MSHA-imposed 25 manshifts per week to the rehabilitation efforts. On March 22, 1985, the state issued another order to Nacco, requiring some relocation of the route of the escapeway and continuance of the rehabilitation effort.

On October 2, 1986, about 22 months after the initial issuance of the withdrawal order, different MSHA inspectors determined that the violation of section 75.1704 had not been abated and that the time for abatement should not be further extended. (MSHA inspection responsibility for the Powhatan No. 6 Mine had been transferred as of April 1, 1986, from MSHA's Vincennes, Indiana, office to its Morgantown, West Virginia, office.) At this time, MSHA issued a fourth modification of the order to Nacco requiring that the intake escapeway and all active sections inby be closed and ordering the withdrawal of miners because the escapeway was alleged to still be in violation in several locations.

Nacco was able to continue mining operations without idling any

Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present

at or in each escapeway shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

3/ "Manshift" is defined in part as, "The ... work done by a man in one shift." Bureau of Mines, U.S. Dep't of the Interior, A Dictionary of Mining, Mineral, and Related Terms 679 (1968).

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miners during the shift on which the modification was issued and for the rest of that work week by relocating the affected workforce to another area of the mine. However, during the following work week, on October 6, 7 and 8, 1986, Nacco laid off the 87 complainants as a result of the idling effect of the modification. On October 8, 1986, MSHA determined that the violative conditions had been corrected to a degree that would allow mining to resume, and it again modified the order to provide that the escapeway and the north mains could be reopened. At that time the miners were recalled.

Section 105(d) of the Mine Act provides that an operator or representative of miners may contest the issuance or modification of an order issued under section 104 of the Act within 30 days of receipt of the order or modification and that an operator may also contest the Secretary's proposed assessment of a civil penalty within 30 days of receipt. 4/ Neither Nacco nor the United Mine Workers of America ("UMWA"), the representative of the miners at the Powhatan No. 6 Mine, contested the initial issuance of the withdrawal order or any of the subsequent modifications of the order. Further, on May 7, 1985, Nacco, without contest, paid the civil penalty of \$500 proposed by MSHA for the violation of section 75.1704 alleged in the withdrawal order.

4/ Section 10(d) states in part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section [104] of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section [104] of this [Act], or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section [104] of this [Act], or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section [104] of this [Act], the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of

fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing her appropriate relief. Such order shall become final 30 days after its issuance....

30 U.S.C. 815(d).

On December 8, 1986, the United Mine Workers of America ("UMWA") filed the subject compensation complaint against Nacco to obtain compensation under the third sentence of section 111 for the complainants. The complaint alleged that the 87 complainants were idled on October 6, 7, and 8, as the result of the October 2, 1986, modification of the withdrawal order and, therefore, were entitled to compensation. Nacco answered, admitting that the order and modification were issued but denying that the complainants were entitled to compensation. In a motion for summary decision and in oral argument before the administrative law judge, Nacco asserted that section 111 does not provide a right to compensation for miners idled by a modification of a withdrawal order and, in any event, that the order and the modification requiring closure of the intake escapeway were invalid. Responding with a cross-motion for summary decision, the UMWA contended that the requirements for an award of compensation under the third sentence of section 111 were met because the withdrawal order had been issued under section 104 of the Act for a violation of a mandatory safety standard and the order and modifications were final because of Nacco's failure to contest them in a timely manner.

The judge granted summary decision for the complainants. The judge observed that in compensation cases arising under the first or second sentences of section 111 (n.1 supra), a compensation claim can proceed to hearing immediately because the miners' rights to compensation are independent of any subsequent review of the validity of the order upon which the claim is based. 9 FMSHRC at 1352-53. In contrast, a compensation claim under the third sentence of section 111 may not be heard until the order upon which the compensation claim is based has become final. (The third sentence of section 111 states, "all miners who are idled due to...[an] order [issued under section 104] shall be fully compensated after all interested parties are given an opportunity for a public hearing...and after such order is final.") 9 FMSHRC at 1353. The judge reasoned that under the Act an order issued pursuant to section 104 becomes final either upon being upheld in a contest proceeding under section 105(d) of the Act or upon the operator's waiver of its section 105(d) contest rights. *Id.* The judge stated, "If the... order [is] not challenged it is, as a matter of law, final and not subject to further review." *Id.* He determined that the finality of the violation of section 75.1704 was established when Nacco paid the civil penalty for the violation of section 75.1704 and that the order and modifications became final when neither Nacco nor the UMWA contested them within 30 days of their issuance. *Id.*

The judge concluded that in the compensation proceeding Nacco was "statutorily barred from contesting the validity of the order, its four modifications, and the charge of a violation of 30 C.F.R. 75.1704" and,

therefore, that its arguments attacking the validity of the October 2, 1986 modification could not be heard. 9 FMSHRC at 1353. The judge noted that Nacco had conceded that the miners were laid off as a result of the October 2, 1986, modification. Accordingly, he awarded compensation to the miners for wages lost on October 6, 7 and 8, 1986, and he also awarded interest, to be computed from October 8, 1986, until paid. 9 FMSHRC at 1353-54. In a Supplemental Decision, he awarded the complainants \$30,424.08 in compensation plus interest. 9 FMSHRC

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at 1671-74.

We granted Nacco's petition for discretionary review. 5/ At Nacco's request, we stayed briefing pending our resolution of two cases posing similar or related issues, *Loc. U. 2333, UMW v. Ranger Fuel Co.*, 10 FMSHRC 612 (May 1988) and *Clinchfield Coal*, *supra*. Following issuance of *Clinchfield*, we dissolved the stay and the parties filed briefs. On review, Nacco reiterates the arguments that it made to the judge that a modification of an order does not entitle miners to compensation under section 111 of the Act and that, in any event, the order and modification in this case are invalid and cannot support a compensation award.

We reject Nacco's contention that a modification of a withdrawal order may never support a compensation claim under section 111. The third sentence of section 111 states that the right to compensation arises when a mine or an area of a mine is closed by an "order" issued under sections 104 or 107 of the Act. The Act expressly contemplates that such orders may be modified: all citations and orders issued by the Secretary under section 104 are subject to modification by the Secretary, the Commission, or the courts. 30 U.S.C. 814(h) & 815(d). Depending upon the nature of the modification, the substantive effect of the underlying enforcement action may or may not be changed but the enforcement action nevertheless remains in effect as modified. See, e.g., *Southern Ohio Coal Co.*, 10 FMSHRC 138, 143-144 (February 1988).

Section 104(h) of the Act provides that any citation or order issued under section 104 shall "remain in effect until modified, terminated or vacated by the Secretary..., the Commission or the courts..." 30 U.S.C. 814(h). Modification differs from termination or vacation. Termination occurs when the Secretary determines that the condition cited has been abated; vacation occurs when either the Secretary, the Commission, or a court concludes that the citation or order as issued or modified is null and void. Thus, the language of section 104(h) that states that a citation or order issued under section 104 "shall remain in effect until modified" does not necessarily mean that the original citation or order ceases to have any effect following modification, as Nacco suggests. Rather, the original citation or order remains in effect, as modified.

Nacco contends that the lack of mention of "modification" in section 111 is not an oversight but rather is reflective of MSHA's lack of authority to close mines or idle miners by issuing modifications of extant orders. Nacco notes that Webster's New Collegiate Dictionary 763 (1986) defines "modify" as "1: to make less extreme ... moderate; 2: to

5/ Subsequent to our direction for review, the Powhatan No. 6 Mine was

acquired by Ohio Valley Coal Company. In its brief, the operator states that Ohio Valley now "carries on the litigation as the responsible operator." Op. Br. 1 n. 1. In the absence of any formal request for substitution and amendment of the case caption, we retain the existing caption and continue to refer to the operator as "Nacco" in this decision.

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limit or restrict the meaning of...." Nacco further argues that in *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988), the Court determined in an analogous context that the term "modify" refers to a narrowing, not a broadening, effect. Thus, according to Nacco, MSHA was not authorized to modify the withdrawal order in issue, which had not been idling miners, to provide that miners would be withdrawn.

This case does not require us to decide whether all instances of modification of withdrawal orders leading to the idling of miners can support compensation under section 111. However, in general, we reject Nacco's restrictive interpretation of the power of modification under the Mine Act and the operator's correspondingly technical interpretation of section 111. Modifications of citations or withdrawal orders often expand the scope of the original enforcement action. For example, the second modification of the original withdrawal order here, of which Nacco does not complain, enlarged the order's scope to cover an additional one thousand feet of escapeway requiring rehabilitation.

Further, in ordinary usage, the word "modify" includes not only a sense of moderation (as Nacco would circumscribe the term) but also a sense of alteration--including basic or important amendments not necessarily confined to moderating change. See, e.g., Webster's Third New Int'l Dictionary (Unabridged) 1452 (1986 ed.)(definition of modify). Similarly, a standard legal dictionary defines "modify" as meaning:

To alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce. Such alteration or change may be characterized, inquantitative sense, as either an increase or decrease.

Black's Law Dictionary 905 (5th ed. 1979). This accepted usage is consistent with a broad, rather than constrictive, view of the modification power under the Mine Act. We find nothing in the Act's language or legislative history indicating that Congress intended to confine modification only to a narrowing sense.

The D.C. Circuit's opinion in *Dart*, supra, upon which Nacco relies, does not contradict this conclusion. In that case arising under the Export Administration Act ("EAA"), the Court overturned the Secretary of Commerce's reversal of an administrative law judge's export licensing decision on the grounds that the Secretary's act of reversal was not authorized by the EAA's administrative review provisions, which permitted the Secretary only to affirm, modify, or vacate such orders. 848 F.2d at 227-30. In reaching this conclusion, the Court stated:

It is clear that the common usage of the word "modify" does not describe the Secretary's action in this case. The dictionary's first meaning of "modify" is "to make more temperate and less extreme." Webster's Third New International Dictionary 1452 (Merriam-Webster ed. 1981). At most, the word means "to make a basic or important change in." *Id.* (fourth definition). In this case,

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the Secretary did not "temper" or even "make a basic change in" the ALJ's decision. Rather, he completely overturned the ALJ's conclusion....

848 F.2d at 228 (emphasis added). The Court expressly acknowledged the alternative sense of modification. In the present proceeding, the underlying withdrawal order was not "overturned" or "reversed" but was altered to require further rehabilitation work.

As relevant here, we hold that, in general, withdrawal orders may be modified by the Secretary to expand, as well as contract, their scope and their terms. Whether a particular modification is proper must be determined on a case-by-case basis under the enforcement review provisions of the Act.

Furthermore, we agree with the judge that having failed to contest the validity of the order and its modifications pursuant to section 105(d), Nacco is barred from raising such challenges in this compensation proceeding. Section 105 of the Act establishes a comprehensive scheme for the review of citations and orders issued pursuant to section 104 of the Act. Section 105(d) (n.4 supra) provides operators with the opportunity to contest the validity of a withdrawal order or modification of a withdrawal order issued under section 104 within 30 days of receipt thereof and to request a hearing. In addition, after a civil penalty is proposed for any violation cited in such order, section 105(a) allows operators 30 days to contest the citation or proposed assessment of civil penalty. 6/

6/ Section 105(a) of the Act provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under

subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment

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Section 105(a) specifically provides that if an operator fails to contest a citation or proposed penalty within 30 days, it shall be deemed a final order of the Commission not subject to review by any court or agency. Further, payment of a proposed civil penalty (except by genuine mistake) extinguishes an operator's right to contest the underlying citation or withdrawal order. See *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (February 1985). See also *Ranger Fuel*, supra, 10 FMSHRC at 617-18; *Pocahontas Fuel Co.*, 8 IBMA 136, 143 (1977). By viewing the contest provisions of section 105 as an interrelated whole, the Commission has consistently construed section 105 to permit substantive review. See e.g., *Energy Fuels Corp.*, 1 FMSHRC 299, 308-309 (May 1979). The compensation provisions of section 111, however, stand apart from the interrelated structure for reviewing citations, orders and penalties created by section 105.

The distinct purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. That section 111 does not provide the basis for collaterally attacking the validity of an order that underlies a compensation claim is plainly revealed by the language of section 111, which, in its first two sentences, affords compensation "regardless of the result of any review" of an order and in its third sentence affords compensation "after such order is final." Thus, the Act contemplates that, for compensation purposes, the validity of the enforcement action upon which a compensation claim is based is either irrelevant or has already been otherwise established.

In *Ranger Fuel*, supra, we concluded that payment of a proposed civil penalty for an alleged violation precludes an operator from contesting the validity of the violation in a compensation proceeding. 10 FMSHRC at 617-20. We stated that permitting a challenge to the violation "could not be reconciled with the statutory framework of section 105 and 111 of the Mine Act...." 10 FMSHRC at 617. Underlying our decision in *Ranger Fuel* was a recognition that, in contest proceedings under section 105 of the Act, the Secretary is a party, whereas in compensation proceedings under section 111, only the miners, or their representative, and the operator are parties. We concluded that allowing an operator to challenge in a compensation proceeding the fact of violation despite having paid the resulting civil penalty would improperly place miners and their representatives in a prosecutorial role of establishing the violation. 10 FMSHRC at 619. Accord: *Int'l U. UMWA v. FMSHRC*, 840 F.2d 77, 81-82 (D.C. Cir. 1988).

In like manner, we conclude here that allowing *Nacco* to challenge in

this compensation proceeding the validity of the Secretary's action in modifying the withdrawal order 22 months after its original issuance so as to cause a further idling of miners necessarily would place miners

of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

30 U.S.C. 815(a).

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and their representatives in the role of defending, in the Secretary's absence, the validity of the Secretary's enforcement actions. We conclude that under the Mine Act that burden is appropriately imposed on the Secretary in a proceeding triggered by an operator's timely contest of an enforcement action by the Secretary.

Nacco also asserts that the disparity in the time periods allowed for an operator to contest an order or modification under section 105(d) of the Act (30 days) and the time provided under Commission Procedural Rule 35 (30 C.F.R. 2700.35) for claimants to file compensation claims under section 111 (90 days) offends the public's interest in avoiding enforcement disputes. Op. Supp. Br. 5. Nacco further asserts that the "practical effect of this disparity is simple--operators often must decide whether to contest an order without notice of whether they will face a compensation claim." Id. We disagree. Section 105(d) and Commission Rule 35 specify the times for requesting a hearing and, although the time frames are different, Nacco had ample notice of its possible section 111 exposure from the fact that miners were withdrawn who lost pay as a result of MSHA's enforcement actions.

Nacco further contends that it had the right to wait to contest the modification until a civil penalty was assessed. Here, however, the civil penalty for the violation alleged in the order had been assessed and paid before the modification was issued. Op. Br. 6. Section 105(d) of the Act (n. 4 supra) provides operators with the opportunity to contest and request a hearing concerning an order of withdrawal or modification of an order issued under section 104 within 30 days of receipt thereof. In addition, after a civil penalty is proposed for any violation cited in such order, section 105(a) (n. 6 supra) allows the operator 30 days to contest the citation or proposed assessment of penalty. Section 105(a) specifically states that if an operator fails to contest a citation or proposed penalty within 30 days, it shall be deemed a final order of the Commission not subject to review by the court or agency. In the present case, Nacco was assessed a penalty of \$500 for the violation of 30 C.F.R. 75.1704, which it paid on May 7, 1985, without contest. As penalties are assessed for violations, and the alleged violation had occurred on December 10, 1984, no new penalty was to be forthcoming for the October 2, 1986, modification as no new violation was alleged in the modification. Since a civil penalty cannot be assessed without a violation, Nacco could not wait for a civil penalty assessment before initiating a contest of MSHA's modification action. Thus, if Nacco truly expected the issuance of another civil penalty assessment in conjunction with the modification, it erred and forfeited its right to contest the modification by failing to file for review in a timely manner under section 105(d). See *Old Ben*, 7 FMSHRC at 209. Therefore, we hold that because Nacco did not avail itself of the

opportunities to contest in a timely manner pursuant to section 105 either the validity of the section 104(d)(2) order, or the penalty proposed for the violation, or the validity of any of the subsequent modifications, it is precluded from raising such challenges here. We emphasize that we do not reach the validity of the Secretary's enforcement actions at the Powhatan No. 6 Mine. The steps taken by the Secretary to achieve compliance with section 75.1704 were, at least,

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open to question. 7/ We are troubled that the operator and the miners allowed such an oscillatory enforcement policy to persist. Nevertheless, there being no dispute in this compensation proceeding concerning the "nexus" between the modified order and the complainants' idlement, we affirm the judge's award of compensation. See, e.g., Ranger Fuel, 10 FMSHRC at 620-21.

Finally, we turn to the question of interest. The judge ordered Nacco to pay a total of \$30,424.08 in compensation to the complainants, plus interest computed in accordance with our decision in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042 (December 1983). Although Nacco asserts that complainants awarded compensation under section 111 are not entitled to prejudgment interest, or that if they are so entitled it is error to compute the interest according to the "quasi-punitive Arkansas-Carbona formula, it also acknowledges that our Clinchfield decision determines these issues for purposes of this proceeding. Op. Br. at 2 n.2. 8/

In Clinchfield, we concluded that interest may properly be included in a compensation award and that it should accrue from the date that the compensable pay would have been paid but for the idlement until it is tendered. 10 FMSHRC at 1501, 1503. We also approved, effective January 1, 1987, use of the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest, discarding

7/ In other cases pending before the Commission, the Secretary has recognized the significance of escapeways:

"The presence of adequate escapeways for use by all miners in an emergency is one of the most important of the mandatory safety standards under the Mine Act." Secy's Br., Utah Power and Light Co., Docket Nos. WEST 87-211-R, WEST 87-224-R, at 8.

"An adequate escapeway system is crucial for miner safety, and violations involving the maintenance of escapeways thus are extremely serious." Id. 11.

"The statutory standard requiring adequate escapeways from underground coal mines ... and the implementing mandatory standards ... are fundamental safety standards necessary to help prevent injuries and fatalities in the event of underground emergencies. Violations of such standards can have disastrous (sic) results should such an emergency occur." Secy.'s Pet. for Discr. Rev., Rushton Mining Co., Docket No. PENN 88-99-R, at 3.

8/ The judge directed the parties to confer as to the amount of interest owed. The parties, however, could not agree as to whether interest was owed and they offered to submit briefs on the interest issues. The judge

did not entertain the parties' offers to submit briefs but, instead, rendered his supplemental decision fixing the amount of the compensation award and interest in accordance with Arkansas-Carbona. Nacco argues that the judge erred in awarding interest without the benefit of the parties' memoranda of law on the subject. Although allowing the briefs may have been the preferred procedure, we see no error on the judge's part and note that Clinchfield resolves the substantive interest issues.

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for periods commencing after December 31, 1986, use of the adjusted prime rate previously approved in Arkansas-Carbona. 10 FMSHRC at 1504-06. Therefore, while we affirm the judge's award of compensation and interest, we modify his order regarding the computation of interest by directing that interest be computed as provided in Clinchfield, and 54 Fed. Reg. 2226, supra.

For the foregoing reasons, we affirm the judge's grant of the complainants' motion for summary decision and his award of compensation and prejudgment interest, but we modify the judge's order regarding computation of interest.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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