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UMWA V. UTAH POWER AND LIGHT
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 23, 1990

UNITED MINE WORKERS OF AMERICA,
LOCAL UNION 1769,
DISTRICT 22

v. Docket No. WEST 87-86-C

UTAH POWER AND LIGHT COMPANY,
MINING DIVISION

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

DECISION

BY: Backley, Lastowka and Nelson, Commissioners

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act"). Commission Administrative Law Judge John J. Morris granted the motion of Utah Power and Light Company ("UP&L") to dismiss this proceeding after a settlement agreement was executed by UP&L and the United Mine Workers of America ("UMWA" or "Union"). 11 FMSHRC 1641 (ALJ)(September 1989). We granted the UMWA's petition for discretionary review. The principal issue presented on review is whether the judge erred in granting UP&L's motion to dismiss. For the reasons that follow, we affirm the judge's decision.

I.

The UMWA sought compensation from UP&L, on behalf of miners belonging to its Local Union 1769, District 22 ("Local Union"), pursuant to the third sentence of section 111 of the Mine Act. 1/ The members of

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1/ Section 111 provides in part as follows:

[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 all miners working during the shift when such an order was issued who are idled by such order shall be entitled, regardless of the

for all shifts on November 4, 5, 6, 7 and 10, 1986.

The UMWA's complaint for compensation filed January 29, 1987, requested compensation for each miner who worked the 8:00 a.m. to 4:00 p.m. shift on November 3, 1986, and for each miner scheduled to work the 4:00 p.m. to midnight shift on November 3, 1986, the midnight to 8:00 a.m., 8:00 a.m. to 4:00 p.m., and 4:00 p.m. to midnight shifts on November 4, 5, 6, 7, and 10, 1986. The complaint did not identify any individual miner claimants or the amount of compensation claimed. Rather, the UMWA stated in the complaint that it was incapable of listing every miner affected by the imminent danger order or the exact dollar amount claimed under section 111, and that a prompt effort would be made to obtain this information through discovery procedures.

On February 12, 1987, the UMWA filed interrogatories addressed to UP&L, requesting: (1) the name of each UMWA member employed at the mine who was scheduled to work during the period covered by the complaint (Interrogatory No. 5); (2) the name of each individual who had reported in as unavailable to work and the purported reason for each individual's lack of availability for work (Interrogatory No. 6a); (3) the "hourly or daily rate of pay upon which each individual's most recent paycheck preceding November 3, 1986, was computed" (Interrogatory No. 6b); and (4) the name of each individual paid wages by UP&L for work performed from November 3, 1986 to November 10, 1986, the amount received by each individual, and the specific hours for which compensation was paid to each individual (Interrogatory No. 6c).

On March 25, 1987, UP&L filed answers to the UMWA's interrogatories. In response to Interrogatory No. 5, UP&L provided a list, labeled "Exhibit A," which identified all miners employed at the mine who worked or were scheduled to work during the period for which compensation was sought. In response to Interrogatory 6a, UP&L provided a list, labeled "Exhibit B," which identified miners who were unavailable for work during the period in question. In response to Interrogatories 6b and 6c, UP&L provided "Exhibit C," which was UP&L's payroll record for the period from November 3 to 10, 1986. This list included all wages paid by UP&L to miners for work performed during the period. It also listed the dates worked by each miner, the number of hours worked on each date, and the applicable rate of pay for each miner.

UMWA Legal Assistant Joyce A. Hanula reviewed these exhibits for the purpose of identifying the miner claimants included within the UMWA's complaint. In an affidavit, Hanula states that at least part of her copy of Exhibit A was not legible and that she informed Thomas Means, counsel for UP&L, of this. In her affidavit, Hanula further asserts that Means

indicated that he would contact UP&L and attempt to get a clear copy, but that she never received another copy. Hanula also asserts that Means and John Scott, another counsel for UP&L, told her that "Exhibit C" was the best list to use since it had the miners' names and hourly rates of pay. Scott, however, states in his affidavit that he made no representations to the UMWA about Exhibit C other than to say that it could be used to show which miners had already been paid and the miners' rates of pay. Means states that he made no representations as

to how the interrogatory answers should be evaluated by Hanula. The UMWA filed additional interrogatories on April 3, 1987, but did not request any further information concerning the identity of the miners scheduled to work during the period from November 3 to 10, 1986.

On September 28, 1988, Hanula sent Scott a list of miners employed at the mine during November 1986 and their daily rates of pay. She stated that she could not determine from the information obtained through discovery the shift that each of these miners was scheduled to work and requested Scott to provide such information. She stated that "[o]nce I receive this information I will send you the Union's complete list of each individual entitled to compensation and the amount due." On September 29, 1988, Scott returned the list with shift designations beside each miner's name.

A few days later Scott suggested to Hanula that UP&L might offer to settle the case by compensating the miners scheduled to work in the specific area described in the imminent danger order. On October 6, 1988, Hanula sent a letter to Robert Jennings, UMWA Health & Safety Representative in Utah, attaching a list of the names of miners she believed were entitled to compensation. She requested that the Local Union review the list for accuracy. The letter further discussed UP&L's possible offer of settlement. Jennings forwarded this information, including the list of miners, to George Baker, President of the Local Union.

On November 9, 1988, Hanula sent another letter to Jennings attaching a revised list of miners, the miners' daily rate of pay, the number of days each miner was idled, and the amount of compensation that would be claimed by each miner in this compensation proceeding. The letter stated that this information was gathered from UP&L payroll records and that it was imperative that the Local Union contact her regarding any changes or additions. The letter concluded by stating that "[i]f I am not contacted by you or the Local by November 21, 1988, I will assume the list is accurate and forward a copy to the company."

On November 18, 1988, Scott proposed a settlement that would have compensated each idled miner one shift of pay, and would have resulted in a total payment of about $20,000. This offer was rejected by the Local Union. The UMWA proposed a counteroffer as follows: "That each miner listed on the enclosed attachment be paid the amount indicated under the column entitled 'amount due' prior to December 25, 1988." (emphasis in original.) This counteroffer is contained in a letter dated December 5, 1988, from Hanula to Scott. The letter states that each listed miner would be entitled to one-half the normal amount of pay and that the amount of this settlement would total $5,961.64 more than UP&L's offer.

The attachment listed 148 miners who were entitled to compensation and 34 miners who were not entitled to compensation. At Scott's request, one name was subsequently deleted from the list of miners to be paid and other adjustments were made.

By letter of agreement dated December 8, 1988, from Scott to Hanula, UP&L accepted the UMWA's counteroffer. This letter was signed by Scott for UP&L and approved and signed by Hanula for the UMWA. The

settlement agreement states in numbered paragraph one "at Exhibit A is a list of all claimants in this proceeding" and that "UP&L shall pay to each listed claimant the amount of compensation specified for that claimant." Additionally, the settlement agreement provides that "UP&L shall endeavor to make the payments by December 25, 1988, and in any event shall do so by December 31, 1988." Furthermore, the settlement agreement states that "[p]ayments to the claimants shall terminate any obligations of UP&L, and the UMWA shall, after receiving notice from UP&L that payments have been made, immediately file a motion with the Commission to withdraw its complaint." The list attached to the settlement agreement was identical to the list provided by Hanula with her December 5, 1988 letter, including the agreed-to modifications, and identified those persons who were entitled to receive payment, and the amount to be paid. The agreement also acknowledges that the agreement was entered into for purposes of settlement and that UP&L does not admit that any compensation was due under the Mine Act.

UP&L filed the jointly signed settlement agreement with the judge on December 15, 1988. In an order also dated December 15, 1988, the judge requested the UMWA to move to withdraw its complaint for compensation when it received notice that the miners have been paid.

On December 23, 1988, UP&L paid all the miners listed in Exhibit A of the settlement agreement the sums therein specified, and notified the UMWA that the payments had been completed. In late December 1988, however, Hanula received a call from Baker, president of the Local Union, informing her that there were four miners who were not on the list attached to the settlement agreement, but who were "entitled" to compensation. Scott, when informed of this matter, indicated a willingness to approve payment to these four miners, but no more. Baker also contacted Dave Lauriski, a UP&L manager, who took the same position as Scott. Later in the week, however, Baker determined that 10 more "eligible" miners has not been included in the settlement and approached Lauriski, who then indicated that UP&L would not pay any of the 14 miners.

In a letter dated January 10, 1989, Hanula informed Scott that 14 miners were not compensated and requested that these miners be paid. Hanula stated that these miners were not compensated because she had relied on UP&L's assertedly inaccurate payroll records to compile the list of claimants. Hanula further indicated that as soon as these 14 miners were paid, the complaint would be withdrawn but that if the miners were not paid, the compensation complaint would proceed. In a letter to Hanula dated January 19, 1989, Scott stated that the 14 miners were not entitled to compensation under the terms of the settlement agreement and construed Hanula's request "as an attempt to set aside the settlement agreement and

as a breach of terms of that agreement."

UP&L then filed a motion to dismiss the complaint for compensation on February 23, 1989. UP&L argued that the settlement agreement was intended to resolve all issues and to terminate the proceeding in return for payment to the 147 miners listed in the attachment to the agreement, that UP&L had paid all of the miners on the list, and that under the terms of the agreement the UMWA was obligated to withdraw its complaint.

The UMWA took the position that the parties had agreed that all idled miners would be compensated, but that when the agreement was reduced to writing, it did not include 15 miners entitled to payment under the settlement. 3/ Alternatively, in the UMWA's view, the omission of the 15 miners was the result of a mutual mistake on the part of both parties. The UMWA argued that reformation of the settlement agreement was necessary to include the 15 individuals along with the appropriate amount to be paid to each, and requested a hearing. The UMWA also argued that if there were a dismissal of the proceeding, such dismissal should affect only the miners who had already received payments under the settlement agreement, leaving the remaining 15 miners free to pursue their section 111 claim or to negotiate a separate settlement.

The judge denied UP&L's motion to dismiss and scheduled the case for hearing. UP&L filed a motion for reconsideration on May 25, 1989. Thereafter, the judge granted UP&L's motion to reconsider his earlier ruling and he dismissed the UMWA's complaint for compensation.

The judge found that this proceeding was settled when Hanula signed the settlement agreement on December 8, 1988. 11 FMSHRC at 1653. After reviewing the record, the judge found that any mistake made in the determination of who should be included in the settlement of the compensation claim was a unilateral mistake on the part of the Local Union or the UMWA and was not a mutual mistake. 11 FMSHRC 1652. The judge found that the UMWA, not UP&L, prepared the list of eligible claimants, that the UMWA had asked the Local Union on two occasions to verify the accuracy of this list, and that the UMWA had submitted the list to UP&L when it made its counteroffer. 11 FMSHRC 1653. In addition, the judge held that there was no mutual mistake as to the number of miners entitled to compensation in this case because the parties were consciously disputing that issue during their negotiations. 11 FMSHRC 1652. The judge found that the parties were making concessions and compromising their positions with respect to whom, if anyone, should receive compensation and how much money each should receive. Id.

Having found no mutual mistake, the judge held that the agreement could not be rescinded. He concluded that unilateral mistake could not form the basis for rescission, and that only mutual mistake would support a rescission. 11 FMSHRC at 1652. The judge also rejected the UMWA's request that he hold a hearing and order that the excluded miners be compensated. Id. He held that if a misrepresentation or mutual mistake had occurred, the remedy was to rescind the settlement agreement, not to reform it. 11 FMSHRC at 1653. Moreover, the judge held that UP&L had already performed its side of the agreement, and that to declare that the excluded miners be paid would impose a new and different settlement agreement on

UP&L. Id. The judge further concluded that the miners of the Local Union could not keep the fruits

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3/ Another miner (unnamed on this record) subsequently came forth claiming that his name was improperly omitted from the settlement agreement. Hanula Affidavit at n.3.

of the settlement agreement and at the same time seek additional compensation. Id.

II.

The Commission s oversight of proposed settlements is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC 668 (May 1986); Birchfield Mining Co., 11 FMSHRC 1428 (August 1989). We conclude that the judge's finding that a mutual mistake was not established is supported by substantial evidence and that he did not err in concluding that the settlement agreement signed by UP&L and the UMWA on December 8, 1988, was valid and binding, and required dismissal of the UMWA's complaint.

The UMWA maintains that the intent of the settlement agreement was to pay all idled miners 50 cents on the dollar and that if the list was incomplete it was a mutual mistake of both parties. The UMWA argues that "when the parties reduced their agreement to writing they did not include 15 of the miners who ... were entitled to a settlement." UMWA Br. 3. It attributes this omission to a mutual mistake in the compilation of the list of claimants. Id. The UMWA claims that UP&L attorneys directed the UMWA to consult UP&L's payroll records in Exhibit C to UP&L's answer to interrogatories, which it claims is inaccurate, as the best list of eligible miners. UP&L denies that it gave any such direction or that Exhibit C was inaccurate or misleading. The judge did not resolve this particular dispute, but it is not critical to proper resolution of this matter.

Exhibits A and C were submitted by UP&L in response to specific interrogatories posed by the UMWA. In submitting the exhibits, UP&L was providing to the UMWA the specific information that the UMWA requested. Thus, in reviewing the nature of the responses, it is important to keep in mind the specific questions asked. In this context, it is clear that Exhibit A, attached to UP&L's response to interrogatory No. 5, would contain the names of miners not listed on Exhibit C because of the scope of the respective interrogatories. Exhibit A is a list of all miners scheduled to work during the shutdown, while Exhibit C is UP&L's payroll record listing miners who received wages for work during the shutdown. Miners who were paid no wages were not listed on Exhibit C. Although, a portion of Exhibit A was apparently illegible, an answer to an interrogatory that is illegible in whole or in part is non-responsive. Thus, the UMWA could have demanded a complete response to its interrogatories, but it chose to proceed to settlement without ever clarifying the response to Interrogatory No. 5.

Furthermore, the record does not support the UMWA's contention that UP&L took joint responsibility for determining who might be eligible to be included in the settlement. UP&L responded to the UMWA's interrogatories. UP&L then relied on the list prepared by the UMWA and sought only to eliminate miners who had been previously paid. It was the UMWA that made the settlement offer that each miner on the now-

challenged list be paid oneself of his normal wages. The Union did not ask UP&L to verify the completeness of the list. Instead, it appropriately asked its Local Union, twice, to verify the list's accuracy. The obligation was the UMWA's, as representative of the miners, to make sure that the list it was submitting for settlement included all the miners it sought compensation for in the settlement. The fact that a list of miners who were not entitled to compensation was also attached to the settlement agreement does not establish that UP&L intended to pay compensation to miners who were on neither list. Thus, our review of the record leads us to conclude that substantial evidence supports the judge's conclusion that any mistake in preparing the list of eligible miners was not mutual but was unilateral on the part of the UMWA.

Whether UP&L believed that the UMWA's list of miners to be compensated included all of the miners who would have been entitled to compensation had the UMWA prevailed on its theory on the merits is irrelevant. The UMWA agreed to withdraw its complaint if the miners on the list were paid. UP&L was entitled to rely on the list of miners to be paid prepared by the UMWA. The UMWA keyed its settlement offer to the list of miners it had prepared in conjunction with the Local Union. The evidence does not support UMWA's contention that UP&L agreed to pay all miners 50 cents on the dollar. Rather, the evidence shows that UP&L agreed solely to pay all miners set forth on the UMWA's list of miners 50 cents on the dollar. The evidence further shows that UP&L abided by its part of the agreement and promptly discharged its duty by making the payments required thereunder. Only after the payments were made and disbursed to the 147 identified claimants did the UMWA belatedly demand payment for another 15 miners, and refuse to do what it had agreed to do upon payment to the listed miners, i.e., withdraw its complaint.

A settlement agreement may be reopened only on the grounds of mutual mistake or fraud. A unilateral mistake is not sufficient to allow the mistaken party to limit or avoid the effect of an otherwise valid settlement agreement. See, Brown v. County of Genesee, 872 F.2d 169, 174-75 (6th Cir. 1989); Mid.South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 392 (5th Cir. 1984); Cheyenne-Arapaho Tribes of Indians v. United States, 671 F.2d 1305, 1311 (Ct. Cl. 1982); Callen v. Pennsylvania R.R., 332 U.S. 625, 630 (1948); Gaines v. Continental Mortgage & Investment Corp., 865 F.2d 375, 378 (D.C. Cir. 1989). Only a unilateral mistake by the UMWA in identifying the miners it believed were entitled to compensation occurred here. Fraud or mutual mistake is not present. Therefore, we agree with the judge that rescission or reformation of the settlement agreement is improper.

Finally, we agree with the judge that a hearing was not required to

resolve this issue. No genuine issue of material fact has been presented because the terms of the settlement are clear from the face of the document itself. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1985). If the language used by the parties to an agreement is "plain, complete and unambiguous," the intention of the parties must be gathered solely from that language, no matter what the "actual or secret intention of the parties may have been." 17 AM. JUR. 2D Contracts 245 (1964). Because the language of the settlement agreement between UP&L

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and the UMWA is plain, complete and unambiguous," a hearing to determine the parties' actual or secret intention" was not necessary.

III.

Accordingly, we conclude that the judge did not err in dismissing the UMWA's complaint for compensation.

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford, dissenting:

This Commission has held that individual miner claimants under section 111 of the Act, 30 U.S.C. 821, are deemed to be parties even if their miner's representative is actually prosecuting the compensation claim as a party on their behalf. Loc. Union No. 1881, Dist. 17, UMWA v. Westmoreland Coal Co. and Secretary of Labor, 9 FMSHRC 1195, 1196 (July 1987). Amidst the charges and countercharges exchanged in the affidavits below, there appear to be 15 miners who have as cognizable a claim against UP&L as the 147 miners who were paid as part of the disputed settlement agreement.

Even if one were to assume that section 111 allows the "compromising" of the claims of the 15 miners in exchange for the benefits conferred by settlement upon their 147 fellow workers, the record in this case does not support such a result.

The December 8, 1988 letter from John T. Scott III, counsel for UP&L, to Joyce Hanula, representative for the UMWA, sets forth the terms of the settlement agreement ultimately approved by the judge. Paragraph No. 1 of that agreement states: "Attached as Exhibit A is a list of all claimants in this proceeding. UP&L shall pay to each listed claimant the amount of compensation specified for that claimant." UMWA Ex. H, attached to Hanula Affidavit. "Exhibit A," however, consists of more than just a list of all claimants; it also includes on pp. 8-9 a list of miners identified as "Members of Local Union 1769 Who Are Not Entitled to Compensation." The ineluctable conclusion is that the attachment of both lists to the agreement signified that both the UMWA and UP&L meant to account for all miners at the Deer Creek Mine - those who were entitled to some compensation through the settlement and those who were, for various reasons, not so entitled. 1/

Since the names of the 15 miners do not appear on either list I find more than sufficient grounds for establishing the mutual mistake argued by the UMWA. To be sure, the responsibility for compiling a true and complete list of claimants rested with the UMWA's representative and had her inquiries to the local union for verification of the claimants' list been carefully considered and answered, this matter might not be before us today. By attaching the list of non-claimants to the agreement, however, counsel for UP&L in effect endorsed the UMWA's error

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1/ For some unexplained reason the list of those not entitled to compensation was not submitted to the judge with the rest of the settlement agreement. The list was, however, submitted for the record (as part of the December 8, 1988 letter) on UP&L's subsequent motion to dismiss the

proceeding. Hanula Affidavit, supra. In his order of dismissal, however, the judge refers only to the seven page list of claimants. 11 FMSHRC 1650.

so as to provide grounds for finding a mutual mistake.

The UMWA urges upon the Commission the "equitable solution" of reforming the settlement agreement to include the 15 miners, or in the alternative dismissing the proceeding involving the 147 miners as settled and allowing a new complaint to proceed with respect to the 15 miners excluded from the settlement agreement. Serious impediments stand in the way of both proposals. With respect to reformation of the settlement agreement, such an action would amount to holding UP&L liable for an estimated $4200.00 in additional compensation even though the operator insists it is not liable for any compensation in the first place and would, in the absence of the settlement agreement at issue, reserve its option to pursue the entire matter on the merits. As for dismissing the proceeding regarding the 147 miners already paid and allowing a new claim on behalf of the 15 miners to proceed, such an action would amount to reforming the settlement agreement inasmuch as the parties, in particular UP&L, had assumed the settlement to cover all ostensible claims arising from the withdrawal order issued at the Deer Creek mine. Either option would, as the judge indicated impose "an entirely new and different settlement agreement on UP&L. 11 FMSHRC 1653.

Although the judge found no mutual mistake, I agree with his conclusion that if one had occurred the appropriate remedy would be rescission rather than reformation of the agreement. Shear v. National Rifle Association, 606 F.2d 1251, 1260 (D.C. Cir. 1979). I further note that both parties have offered rescission as an alternative to their principally recommended dispositions of this matter. Brief of UP&L on Review, p. 22; UMWA Reply Brief, below, at pp. 6-7.

In view of my foregoing conclusion that a mutual mistake was made in the course of agreeing to the disputed settlement, I see no reason for a hearing on that issue. I would therefore rescind the settlement agreement, return the parties to the status quo ante, and remand the matter to the judge for whatever additional proceedings may be appropriate.

Ford B. Ford, Chairman

Commissioner Doyle, dissenting:

The majority, after setting forth the opposing views advanced to the administrative law judge by affidavits of UP&L and the UMWA as to the intent of the settlement agreement, concludes that the judge did not err when he found that the settlement argument was valid and binding and required dismissal of the UMWA's complaint. I disagree.

The UMWA asserts that the settlement was intended to compensate all miners scheduled to work during the relevant period, at the rate of fifty cents on the dollar. UP&L asserts that the intent was to compensate only those miners whose names were on the list attached to the settlement agreement. Thus, we have a dispute as to an issue of material fact. Case law is clear that, in such instances, the party challenging the settlement agreement is entitled to a hearing on that issue. "[W]hen opposition to enforcement of the settlement is based not on the merits of the claim but on a challenge to the validity of the agreement itself, the parties must be allowed an evidentiary hearing on disputed issues of the validity and scope of the agreement." Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 390 (5th Cir. 1984). In that case, the court found that the judge erred when he made a factual finding without holding an evidentiary hearing. Id. at 391.

In Auteria v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969), the court found summary proceedings ill-suited to the resolution of factual issues related to the formation of the contract (a settlement agreement). Id. at 1200. There, as here, the judge appeared to rely on the statements of the attorney representing the party seeking to uphold the settlement agreement, which required rejection of the countervailing version set forth in the appellants' affidavit. Because appellants raised substantial issues of fact as to whether the parties were in mutual accord on the terms of the settlement, and because there was no opportunity for cross-examination or for credibility determinations by the judge, the court determined that appellants were entitled to an evidentiary hearing on the disputed facts. Id. at 1201-1203. Here, the judge made findings of fact in support of his conclusion that the case was settled, in its entirety, at the time the UMWA signed the settlement agreement. 11 FMSHRC 1653. However, his conclusions are both contradictory and unsupported by substantial evidence of record.

The judge found that "[t]he Union proposed instead that everyone receive a $.50 on the dollar" and that "[t]his was agreed to by UP&L." Id. at 1651. (emphasis added.) He then determined that "[u]nfortunately, when the parties reduced their agreement to writing they did not included 14 (or 15) of the miners ... entitled to settlement." Id. at 1651-52. Thus, there was an unqualified finding that both parties intended to

compensate all miners and that the settlement agreement did not reflect what both parties intended to be the settlement. The judge then found, however, that "[i]n this case there was no mutual mistake." If a mistake occurred it was unilateral on the part of Local 1769 or the UMWA." Id. at 1652. The judge does not explain on what he based this conclusion but it should be noted that, while UP&L's attorneys argue this position,

neither the affidavit of Mr. Scott nor that of Mr. Means asserts that it was UP&L's intention to compensate only 147 miners rather than all miners working or scheduled to work during the period in issue. There being no other evidence in this record aside from the disputed settlement agreement, except the affidavit of Ms. Hanula to the contrary, I must conclude that there is no evidence in this record to support the judge's finding that any mistake was unilateral. Instead, by virtue of the judge's finding that the parties intended to compensate all miners, it is clear that the settlement agreement does not reflect the parties actual agreement.

The judge also erred when he found that "there can be no mutual mistake as to the number of miners entitled to compensation because on this issue the parties compromised." 11 FMSHRC 1652. In support of this finding, he cited Corbin on Contracts, which states, in relevant part:

> [W]here the parties are consciously disputing an issue and agree upon a compromise in order to settle it, they are making no mistake as to the matter at issue and thus settled. There must be a mistake as to matters that were not at issue and were not compromised in order that the settlement may be avoidable on the grounds of mistake.

6 Corbin, Contracts 1292 (1963).

There is no evidence in the affidavits before the judge that the parties were consciously disputing whether 162 or 147 or any lesser number of miners were entitled to compensation and that the parties had agreed to compromise on 147. Rather, the conscious disputes were over whether the operator was required to compensate any miners, whether only those miners assigned to the section described in the order were entitled to compensation, whether all miners in the entire mine were entitled to compensation, and the amount of compensation, if any, due each miner. If the UMWA had agreed to settle for compensation for only those miners on the idled section, the claim would be considered compromised. When the UMWA agreed to settle for fifty cents on the dollar rather than full compensation, that was a compromise. At no time (at least as evidenced by this record) did the UMWA contemplate settling on behalf of less than all of the miners scheduled to work during the period in issue. Therefore, there was no "compromise" on this issue and the settlement may be voidable on the grounds of mistake. Corbin, supra.

I must disagree with the majority that the inaccuracies in Exhibit C are not critical to the resolution of this case. Slip. op at 7. I believe they are in error when they state that "it is clear that Exhibit A ...

would contain the names of miners not listed in Exhibit C because of the scope of the respective interrogatories." Id. In fact, the scope of Interrogatories No. 5 and No. 6 are identical. Interrogatory No. 5 applied to each UMWA member employed at Deer Creek and scheduled to work on the dates in issue. All of the names contained on Exhibit A should have been included on Exhibit C because Interrogatory No. 6 states as follows:

> "6. With respect to each of the individuals identified in Interrogatory No. 5, please:
>
> b. State in dollars and cents the hourly or daily rate of pay upon which each individual's most recent paycheck preceding November 3, 1986, was computed;"

Complainants' First Set of Interrogatories at 2. (emphasis added.)

In response to Interrogatory No. 6(b), UP&L answered "See Exhibit C." Answers to Interrogatories at 4. Thus, contrary to the majority's assertion, UP&L, in effect, represented that all of the names contained on Exhibit A were also contained on Exhibit C. 1/

Irrespective of whether an accord was reached as to whether all miners were to be compensated, it is clear from the UMWA's Complaint for Compensation that a claim was being made on behalf of each and every miner who worked or was scheduled to work during the statutory period. Complaint at 2. The individual miners are the real parties in interest in this action, not the UMWA. The case was settled as to only 147 of the 162 miners who appear to fall within the categories set forth in the complaints. Because the other fifteen miners were not part of the settlement agreement and received no consideration as a result of it, the settlement agreement is void as to them. Therefore, I believe the judge erred in dismissing their action.

Even if one were to assume, for the sake of argument, that the mistake was not mutual but rather that UP&L was aware of the fifteen additional miners and intended to exclude them from the settlement, they would be just that, excluded from the settlement and not bound by it. Thus, the result is the same, i.e., their claims should not have been dismissed.

For the reasons set forth above, I would reverse the judge and remand for an evidentiary hearing and a reanalysis of the law.

Joyce A. Doyle, Commissioner

1/ The affidavits of UP&L's attorneys assert basically that they made no representations as to the lists provided in response to the Interrogatories. However, the Commission's Rule 57 requires that interrogatories be answered under oath, a requirement with which UP&L's attorneys failed to comply.