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ROY FARMER AND OTHERS V. ISLAND CREEK COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 9, 1991

ROY FARMER AND OTHERS

v. Docket No. VA 91-31-C

ISLAND CREEK COAL COMPANY

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

DECISION
BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). On December 20, 1990, Commission Administrative Law Judge James A. Broderick issued an Order of Dismissal dismissing the pro se compensation complaint filed in this matter by Roy Farmer on his own behalf and on behalf of some 275 other miners at the Virginia Pocahontas No. 3 Mine of Island Creek Coal Company ("Island Creek"). 12 FMSHRC 2641 (December 1990)(ALJ). Granting a motion to dismiss filed by respondent Island Creek, the judge found that the compensation complaint had been filed late and that complainants had not advanced any explanation for the late filing. Complainants filed a pro se Petition for Review of the judge's order. We also received a Supplement to Petition for Review from the United Mine Workers of America ("UMWA") and an Opposition to Petition for Review from Island Creek. On January 29, 1991, we issued a Direction for Review and stayed briefing in this matter. For the reasons explained below, we vacate the judge's dismissal order and remand this matter to the judge in order to afford complainants the opportunity to present to the judge the reasons for their late filing asserted in their petition for review. The judge shall determine whether those reasons excuse the late filing of the compensation complaint. 1/

We briefly summarize the relevant procedural history. It appears from the record that on April 17, 1990, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Island Creek an imminent

danger withdrawal order alleging the presence of a dangerous concentration of methane in the Pocahontas Mine. The order states that the affected area was the "entire mine." On the same date, MSHA also issued Island Creek a citation alleging that various conditions contributing to the buildup of methane constituted a violation of the operator's ventilation plan and,

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1/ The papers already filed with the Commission on review adequately discuss the legal issues raised by complainants' petition and, accordingly, we continue the briefing stay provided in our Direction for Review and decide this matter without additional briefing.

hence, of 30 C.F.R. 75.316.

By letter dated October 29, 1990, and received by the Commission on November 2, 1990, Roy Farmer filed a "Request for compensation per section 111 of Coal Mine Safety and Health Act of 1977." Among other things, the letter states that Island Creek, in violation of section 111 of the Mine Act, 30 U.S.C. 821, had refused to compensate its employees who were idled by the imminent danger order during the period April 17 through 20, 1990. The letter notes the issuance of the citation accompanying the imminent danger order. Attached to the letter is a list of some 275 Island Creek miners allegedly idled by the withdrawal order. The letter asserts that all such employees lost three 8-hour shifts due to the idlement and asks that Island Creek "be ordered to immediately compensate all employees idled." Complaint at 1. Mr. Farmer identifies himself as a miner's representative.

Commission Procedural Rule 35, 29 C.F.R. 2700.35 ("Rule 35"), provides:

> A complaint for compensation under section 111 of the Act, 30 U.S.C. 821, shall be filed within 90 days after the commencement of the period the complainants are idled or would have been idled as a result of the order which gives rise to the claim.

Farmer's Complaint, submitted to the Commission more than six months after the issuance of the imminent danger order, is silent as to reasons for the late filing.

On November 28, 1990, Island Creek filed its Answer to the compensation complaint. (See 29 C.F.R. 2700.37.) As an affirmative defense, the Answer states that "the Complaint must be dismissed because it was not filed within the period required by Commission Rule 35." Answer at 2 (% 6). Island Creek also asserts that it did not violate any mandatory standard in connection with any idlement alleged in the Complaint and notes that it contested the citation, which, at the time, was the subject of a civil penalty proceeding pending before the Commission.

On November 30, 1990, Island Creek filed a Motion to Dismiss Compensation Complaint. The Motion argues that the Complaint was late filed and that no excuse was offered for the untimeliness and that, accordingly, the proceeding ought to be dismissed. On December 5, 1990, the matter was assigned to Judge Broderick. The official file contains no response from the complainants to the dismissal motion. 2/

2/ Under Commission procedures, a party has 10 days after date of service,

plus five additional days for documents served by mail, to file a statement in opposition to a motion 29 C.F.R. 2700.8(b) & .10(b). In this instance, complainants' 15-day period for filing a response ended on December 17, 1990.

On December 20, 1990, Judge Broderick issued his Order of Dismissal. The judge noted that the motion to dismiss argues for dismissal because the complaint was filed 198 days after the date of the alleged entitlement and Rule 35 requires filing within 90 days after entitlement. 12 FMSHRC at 2641. Referencing the late filing and complainants' failure to respond to the motion or to offer any justification for the late filing the judge granted the motion and dismissed the proceeding. 12 FMSHRC at 2641-42.

On January 4, 1991, Farmer filed with the Commission a pro se Petition for Review. The Petition, which is signed by Farmer and is unsworn, alleges essentially that the miners were misinformed by both Island Creek and government officials as to their compensation rights and the time limit for filing a compensation complaint. Pet. at 1-2. Among other things, the Petition asserts that government officials whom the miners contacted informed them that any applicable time limit would run from the date of the resolution of the related civil penalty proceeding. Id. 3/ The Petition does not provide details concerning the dates, circumstances, or individuals involved in the alleged contacts with company and government officials. In conclusion, Farmer states:

> So due to the above set of facts, our local union's financial inability to retain legal counsel, and our local union's representatives' inabilities and lack of knowledge in these procedural matters, we respectfully request a review and reversal of [the judge's] decision to dismiss our claim for compensation.

Pet. at 2.

On January 9, 1991, the UMWA filed a Supplement to Petition for Review. The UMWA asserts that the complainants have alleged several explanations that would justify late filing, including a representation that "Island Creek officials misled complainants and contributed to the delay in

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3/ In connection with this alleged assurance regarding filing time limits, Farmer states that unnamed government officials referred the miners to section 111 of the Act, a copy of which is highlighted and attached to the Petition. Pet. at 1 (% 2). The highlighted portion is the third sentence, which deals with "one-week compensation." Apparently Farmer's reference is to the language in that sentence stating that any required compensation is to be paid "after" the compensation triggering withdrawal order is "final." 30 U.S.C. 821 (third sentence). The language addresses the procedural requirement that compensation itself may not bs awarded until the underlying withdrawal order is deemed to be final, whether through the operator's failure to contest it or through a separate judicial determination of its

validity. Se generally Loc. U. 181O, UMWA v. Nacco Mining Co., 11 FMSHRC 1231, 1239 (July 1989). This language does not, however, prescribe any time limit for the filing of a miner's complaint for compensation. As noted below, section 111 does not address the subject of such a time limit.

filing." UMWA Supp. at 2. The UMWA states that the complainants were "not sleeping on their rights" but, rather, contacted government officials for advice on how to proceed and relied upon "erroneous information" provided by the latter. Id. The UMWA asks the Commission to review the case for the purpose of remanding it to the judge in order to allow complainants to present to him their reasons for the late filing. The UMWA notes that the Commission has afforded pro se mine operators relief from default orders where their failures to respond to judges' orders were due to inadvertence or mistake. UMWA Supp. at 3.

Also on January 9, 1991, Island Creek filed an Opposition to Petition for Review. Island Creek relies mainly on the review limitation in section 113(d)(2)(A)(iii) of the Act: "Except for good cause shown, no assignment of error ... shall rely on any question of fact or law upon which the ... judge had not been afforded an opportunity to pass." 30 U.S.C. 823(d)(2)(A)(iii). Island Creek contends that review should be denied because the basis of complainants' petition was not first presented to the judge and good cause has not been shown for the failure to do so. I.C. Opt. at 1.2. Island Creek also argues that the filing delay involved here was "particularly egregious," that complainants failed to advance any justification to the judge for the late filing, and that their present explanations for the delay are "plainly nor believable." I.C. Opt. at 1-2.

This case presents two issues on review: whether the late filing of the compensation complaint precludes the compensation claim, and whether complainants' failure to present to the judge their explanations for the late filing bars Commission consideration of those issues on review. We address first the issue of the effects of the late filing.

Section 111 does not provide any time limit for the filing of a compensation complaint. In relevant part, section 111 merely states:

> The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5.

30 U.S.C. 821 (fifth sentence). Neither the legislative history of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977), nor that of the Mine Act addresses time periods for the filing of compensation complaints.

As referenced above, however, the Commission's Rule 35 does deal with the subject and establishes a 90-day period for the filing of compensation

claims. As Island Creek appropriately points out (I.C. Opt. at 2), this is a generous period, larger than other filing periods in the Commission's Procedural Rules. However, particularly in view of the statutory silence on the subject, this time limit is not jurisdictional in nature.

In Loc. U. 5429, UMWA v. Consolidation Coal Co., 1 FMSHRC 1300 (September 1979)("Consol"), the Commission held that the 30-day filing

period in former Commission Interim Procedural Rule 29, 43 Fed. Reg. 10320, 10324 (March 10. 1978) ("Interim Rule 29"), for filing compensation complaints could be extended in "appropriate circumstances." In that case, a UMWA Local had filed a compensation complaint late but had attempted to seek timely relief in other ways and was apparently confused as to applicable procedural requirements. The Commission noted that section 111 itself does nor contain a time limit and that its Interim Procedural Rules "shed little light" on the issue. 1 FMSHRC at 1302. Accordingly, the Commission interpreted the rule in a manner consistent with the remedial nature of the statute in general and of section 111 in particular. 1 FMSHRC at 1302-03. The Commission relied in part on the Mine Act's legislative history, which indicates that the time limits for filing discrimination complaints under section 105(c) of the Act, 30 U.S.C. 815(c), may be extended in justifiable circumstances. 1 FMSHRC at 1303, citing S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of Federal Mine Safety and Health Act of 1977, at 624-25 (1978). Determining that sections 105(c) and 111 are similar remedial provisions, the Commission concluded that the filing limit in Interim Rule 29 could be extended in "appropriate circumstances," just as could the time limits in section 105(c). 1 FMSHRC at 1303.

Turning to the question of whether the UMWA's late-filed complaint should be entertained, the Commission stated that the "primary purpose" of a limitations period is "to ensure fairness to the parties against whom claims are brought." 1 FMSHRC at 1305, quoting Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965). The Commission indicated, however, that to be "balanced against this policy of repose ... are considerations of whether 'the interests of justice require vindication of the plaintiff's rights' in a particular case." 1 FMSHRC at 1305, quoting Burnett, 380 U.S. at 428. The Commission determined that the UMWA "did not sleep on its rights," and had taken other timely steps to secure relief. Id. The Commission emphasized that the operator did "not argue, and the record [did] not indicate, that it in any manner relied on the policy of repose embodied in Interim Rule 2[9] ... or was otherwise prejudiced." Id. The Commission accordingly excused the late filing.

Consol is largely dispositive of the issue presented here. Although Consol construed former Interim Rule 29, the principles announced in that decision are so fundamental that they apply with equal appropriateness to similar timeliness problems under present Rule 35. Accordingly, the Commission may excuse the late filing of compensation complaints in "appropriate circumstances." Such excusable circumstances could include situations where a miner is misinformed or misesd as to his compensation rights and procedural responsibilities, or has taken some timely, although incorrect, action to vindicate those rights, or presents some other

potentially justifiable excuse for late filing. However, the Commission expects a showing of good cause to explain any such delay. If a miner has knowingly slumbered on his rights, those rights may be lost. Cf. David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 25 (January 1984), aff'd mem. 750 F.2d 1093 (D.C. Cir. 1984)(table). If serious delay has prejudiced the respondent's right to due process in an adversarial

proceeding, the policies of judicial repose may override the opportunity for vindication of the complainant's rights.

As noted, Consol relied on the Mine Act's analogous discrimination scheme. Since the time of that decision, the Commission has further clarified the principles applicable to the late filing of discrimination complaints. In Hollis, 6 FMSHRC at 24 the Commission indicated, as a preliminary guiding Proposition, that [t]imeliness questions must be resolved on a case-by-case basis taking into account the unique circumstances of each situation." The Commission has held that a miner's genuine ignorance of applicable time limits may excuse a late-filed discrimination complaint. Walter A. Schulte v. Lizza Indus., Inc., 6 FMSHRC 8, 13 (January 1984). The Commission's decisions make clear, however, that even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal: "The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay ... in filing discrimination complaint if such delay prejudicially deprives a respondent of a meaningful or opportunity to defend against the claim." Secretary on behalf of Donald R. Hale v. 4.A Coal Co., 9 FMSHRC 905, 908 (June 1986) (emphasis added). The Commission has noted that legally recognizable prejudice must be material" .. i.e., affect issues necessary to a meaningful opportunity to defend. Hale, supra. The Commission also has explained that material legal prejudice means more than merely being required to defend a case that could have been avoided if failure to file on time were treated as a jurisdictional defect:

> While the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated. [The operator] has not demonstrated ... the kind of legal prejudice [that we are prepared to recognize], namely, tangible evidence that has since disappeared, faded memories, or missing witnesses.

Schulte, 6 FMSHRC at 13. Given Consol's orientation, the foregoing discrimination principles are correspondingly valid in the compensation complaint context.

In evaluating the adequacy of explanations for failure to comply on time with filing requirements, the Commission also may appropriately consult the principles of mistake, inadvertence, and excusable neglect that it has employed pursuant to Fed. R. Civ. P. 60(b)(1) to determine whether to grant relief (usually to pro se parties) from defaults and other final judgments. See. e.g., M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1271 (September 1986), and authorities cited.

Here, complainants have alleged that they discussed their possible compensation entitlement with representatives of the operator and government and, essentially, were misinformed as to their compensation rights and filing responsibilities. In particular, they claim that they were informed .. mistakenly .. that any time limit would run from the final resolution of the related civil penalty proceeding. They assert a general lack of

knowledge as to applicable procedure and note financial inability to retain counsel. If true, those allegations could possibly establish adequate explanation or justification for the late filing. However, the Petition is unsworn and provides no details as to the relevant dates and persons involved. We cannot make a determination concerning this issue on the present record. Given the possibly exculpatory nature of these explanations, a remand to the judge to allow him to assess the merits of these allegations is appropriate.

Island Creek also argues that the Commission is barred from considering these issues because of complainants' failure to raise them before th judge. Like timeliness questions, determinations regarding the "opportunity to pass" review restriction "must be decided on a case-by-case basis." Richard E. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (June 1984). There is no dispute that complainants did not present to the judge the excuses for late filing now raised on review. The question presented is whether "good cause" has been shown for this failure.

Island Creek correctly observes that there is no express attempt in the Petition to make a showing of "good cause." However, in our opinion, this depiction of complainants' position takes too narrow a view of the procedural history and the Petition. Given complainants' silence below in the face of the operator's motion to dismiss, this case arrives at the Commission in virtually the same posture as a default. As in any default case, the defaulted party has failed to speak at some crucial juncture. The nature of the justification offered for late filing also impliedly suggests a reason for the failure to respond to the motion to dismiss: a pro se party's general lack of understanding of appropriate Mine Act and Commission procedure. The UMWA, in its Supplement, argues as much by asking the Commission to afford relief from the judgment below pursuant to the settled principles it has applied in default cases. See UMWA Supp. at 3.

We conclude that good cause has been shown to the extent that, in the interests of justice, the matter should be remanded to the judge so that complainants' explanations can be placed before him for his resolution. At that time, the operator will have the opportunity to present evidence of the material legal prejudice, if any, resulting from such delay.

Accordingly, we vacate the judge's dismissal order and remand this matter so that the judge may determine whether appropriate circumstances exist to excuse the late filing of the compensation complainant and to allow this matter to go forward.

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