

CCASE:
ROY FARMER AND OTHERS V. ISLAND CREEK
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TTEXT
September 2, 1992
ROY FARMER AND OTHERS

v. Docket No. VA 91-31-C

ISLAND CREEK COAL CO.

BEFORE: Ford, Chairman; Backley, Doyle, Holen, and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This complaint for compensation, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988) ("Mine Act"), is before the Commission a second time. Respondent, Island Creek, seeks interlocutory review of Commission Administrative Law Judge Gary Melick's September 27, 1991, decision denying the operator's motion to dismiss the complaint for compensation as untimely filed. 13 FMSHRC 1564. Judge Melick's decision was issued pursuant to the Commission's May 9, 1991, decision (13 FMSHRC 1226)(Footnote 1) vacating an earlier order of dismissal issued by Commission Administrative Law Judge James Broderick (12 FMSHRC 2641 (December 1990)) and remanding the matter to determine "whether appropriate circumstances exist to excuse the late filing of the compensation complaint and to allow this matter to go forward." 13 FMSHRC at 1233.(Footnote 2) For the reasons that follow, we affirm the judge's denial of Island Creek's motion to dismiss.

I.

Factual and Procedural History

Island Creek operates the Virginia Pocahontas No.3 Mine in Southwest Virginia. On April 17, 1990, a representative of the Department of Labor's Mine Safety and Health Administration (MSHA) issued a section 107(a), 30 U.S.C. • 817(a), imminent danger order alleging excessive methane concentrations in the mine's bleeder system and also issued a section 104(a), 30 U.S.C. • 814(a), citation alleging a violation of the mine's ventilation plan. All miners were withdrawn from the mine until the order was terminated

1 The decision appears in the August 1991 Volume of Commission decisions.

2 Following remand, the case was reassigned from Judge Broderick to Judge Melick.

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on April 20, 1990. Under section 111 of the Act, 30 U.S.C. • 821, if miners are idled by a section 107(a) order issued for a failure to comply with a

mandatory standard, they are entitled to compensation for the time they are idled, up to one week. (Footnote 3)

Roy Farmer, a miners' representative, filed a "Request for Compensation per section 111 of the Coal Mine Safety and Health Act of 1977," by letter dated October 29, 1990, and received by the Commission on November 2, 1990. The request indicated the dates for which compensation was sought, stated that Island Creek had refused to provide the compensation, and included a list of approximately 275 miners alleged to have been idled by the imminent danger order.

Island Creek filed an answer on November 28, 1990, wherein it asserted two affirmative defenses: that the complaint was not filed within the time period (90 days) set forth in Commission Procedural Rule 35, 29 CFR • 2700.35 ("Rule 35") and that Island Creek did not violate any mandatory standard that would give rise to a claim for compensation. On November 30, Island Creek filed a motion to dismiss the complaint for compensation as untimely filed, which Judge Broderick granted by order of December 20. In his order of dismissal, the judge noted that the complaint was filed 198 days after the idlement and 108 days beyond the time allowed in Rule 35. He also noted that Farmer's November 2, 1990 filing lacked any explanation for the delay. 12 FMSHRC at 2641.

On January 4, 1991, Farmer, acting pro se, filed a petition for review of Judge Broderick's order of dismissal, in which he alleged that he had been told by an Island Creek representative that the miners would be compensated for their idlement once the contest of the citation was resolved and if the operator was found to have violated the ventilation plan. Farmer also asserted that he had been told by representatives of both MSHA and this Commission (Footnote 4) that there was no time limit on filing such a complaint but that, even if there were a limit, it would not begin to run until the contest of the citation was resolved against Island Creek. Farmer asserted, additionally, that the local union's financial inability to retain counsel, coupled with Farmer's own lack of knowledge of procedural matters, justified the late filing of the complaint. (Footnote 5)

3 Island Creek has contested the section 104(a) citation in a separate proceeding, Secretary v. Island Creek Coal Co., Docket No. VA 91-2, pending before Judge Broderick. By order issued October 10, 1991, Judge Melick stayed this compensation proceeding pending disposition of the contest proceeding.

4 The record clearly establishes that Farmer did not speak with an attorney in this Commission as he once believed; rather, he spoke with an attorney in the Solicitor of Labor's Office. Tr. 118-120.

5 The United Mine Workers of America ("UMWA") filed a "Supplement" to Farmer's petition, which asserted that Farmer appeared to have been misled by Island Creek and government officials. The UMWA argued that, under those

circumstances, Farmer's late filing of the complaint for compensation and his
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In vacating Judge Broderick's order and remanding the matter for further proceedings, the Commission noted that, unlike section 105(c) of the Act, 30 U.S.C. • 815(c), section 111 does not specify a time period within which complaints for compensation must be brought. Rather, the 90-day limit is derived solely from Rule 35 of the Commission's Procedural Rules. 13 FMSHRC at 1229. The Commission further noted that the 60-day limit in section 105(c) is not jurisdictional and that Congress specified that the time limit could be extended in justifiable circumstances. Citing *Loc. U. 5429, UMWA v. Consolidation Coal Co.*, 1 FMSHRC 1300 (September 1979) ("Consol"), the Commission concluded that the 90-day requirement in Rule 35 also could be waived in appropriate circumstances. 13 FMSHRC at 1230-31. (Footnote 6) The Commission recounted the assertions made by Farmer in his petition and concluded that "[i]f true, those allegations could possibly establish adequate explanation or justification for the late filing." 13 FMSHRC at 1232. However, since the Petition was unsworn and contained no details as to relevant dates and persons involved, the Commission remanded the matter to the judge to allow him to "assess the merits of [the] allegations". *Id.* The Commission indicated that, even if Farmer could establish an adequate excuse for the late filing, the complaint might nevertheless be dismissed if the delay resulted in material legal prejudice to Island Creek. *Id.*

On remand, Judge Melick first determined that good cause existed for Farmer's failure to respond to Island Creek's motion to dismiss. He based his conclusion on the fact that Farmer had made reasonable efforts to obtain copies of the Commission's procedural rules but without success. The judge also concluded that Farmer "testified credibly" that he thought there would be a hearing on the motion to dismiss, thus obviating the need for a written response. 6 FMSHRC at 1566.

The judge found that there was "adequate justification" for Farmer's late filing. The judge stated that there was "credible evidence" that Farmer was ignorant of the filing requirements. The judge also concluded that despite Farmer's undergraduate degree in business and his "reading the law" for the Virginia bar, "it cannot reasonably be inferred that he should have had or should even be expected to have such esoteric knowledge" (of the filing requirements of Rule 35). *Id.*

Additionally, the judge found "sufficient credible evidence" that Farmer had conversed with mine manager Eddie Ball about compensation and that, at the very least, Ball advised Farmer that nothing would be done about compensation until the contest of the underlying citation was resolved. The judge fur

subsequent failure to file a response to the motion to dismiss should be excused. The UMWA cited Commission precedent allowing for relief from judgements rendered below in default cases. See, e.g., *Secretary v. J.R. Thompson, Inc.*, 12 FMSHRC 1194 (June 1990).

6 In *Consol*, the Commission determined that Commission Interim Rule 29, the forerunner to Rule 35, which required complaints for compensation to be filed within 30 days of idlement, could be extended in appropriate circumstances.

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found that Farmer had contacted MSHA officials on the compensation issue but was not provided sufficient information to file a timely complaint with the Commission. *Id.* Lastly, the judge found insufficient evidence of "'legal prejudice' to otherwise warrant dismissal of these proceedings". Accordingly, the judge denied the motion to dismiss and ordered the case to proceed on the merits. *Id.*

II.

Disposition of Issues

Island Creek argues that the judge's decision should be reversed on three general grounds: (1) that it is contrary to Commission precedent; (2) that it is not supported by substantial evidence; and (3) that it does not comply with Commission Procedural Rule 65(a), 29 CFR • 2700.65(a).

The operator contends that, in light of Farmer's experience and education, the judge was bound to dismiss Farmer's complaint by Commission precedent established in *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (January 1984) *aff'd mem.*, 750 F. 2d 1093 (D.C. Cir. 1984) (table). Island Creek notes that Farmer was both local union president and chairman of the union safety committee, that he has an undergraduate degree in business from the University of Virginia and is currently "reading the law" for the Virginia bar under the tutelage of an attorney specializing in workers' compensation cases.

In *Hollis*, the Commission affirmed the dismissal of a section 105(c) discrimination complaint filed four months after the 60-day deadline by a union safety committee chairman with two years of college education. Island Creek contends that the Commission "endorsed an ALJ's finding that the claimant 'should have known of his rights under the Act' in light of his education and experience as a local union official". Br. 6, quoting 6 FMSHRC at 25. Island Creek argues that Farmer should be held to the same or higher standard of knowledge as the complainant in *Hollis*, and his complaint must, accordingly, be dismissed. The operator further contends that Farmer's education and experience constitute, at least, constructive knowledge of the requirement to file a written response to a motion to dismiss.

Island Creek has inaccurately interpreted the Commission's holding in *Hollis*. In that case the judge simply did not believe the claimant's assertion that he was unaware of his rights under section 105(c) of the Act and, consequently, was unaware of the filing requirements therein. The fact that *Hollis* was an active safety committee chairman and had completed two years of college were considered by the judge as indicators of *Hollis*' ability both to understand his rights and to waive them in order to pursue alternative remedies outside the Mine Act. 6 FMSHRC at 24-25.

On review, the Commission upheld the judge's credibility determinations:
When reviewing a judge's credibility
resolutions, as here, our role is
necessarily limited. The judge observed
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Hollis as a witness and did not believe
his testimony of ignorance concerning
his Mine Act rights. We discern nothing
in the record that would justify our
taking the extraordinary step of
overturning this credibility resolution.
6 FMSHRC at 25.

While the Commission concluded that substantial evidence supported "the
judge's inference that Hollis did know of his Mine Act rights during the 60-
day time period", the Commission made no mention of Hollis' educational
background as a factor in its determination that the judge's inferences
supported his disbelief of the complainant's assertions that he was ignorant
of the filing requirements of section 105(c). Thus, Island Creek's contention
that the Commission in Hollis, "endorsed an ALJ's finding that the claimant
`should have known his rights under the [Mine] Act' in light of his education
and experience as a local union official" (Br.6) is incorrect. We reject the
operator's argument that Hollis dictates dismissal of Farmer's complaint for
compensation. On the contrary, we are reluctant to disturb the judge's
credibility determinations here as we were reluctant to disturb the same
judge's credibility determinations in Hollis. The Commission has often stated
"a judge's credibility resolutions cannot be overturned lightly." Hall v.
Clinchfield Coal Co., 8 FMSHRC 1624, 1629 (November 1986).

In arguing that the judge's decision is not supported by substantial
evidence, the operator first contends that the judge failed to address an
issue remanded to him by the Commission. Island Creek notes that, at the start
of the hearing Farmer withdrew his contention that the local union was
financially unable to retain counsel to pursue the compensation claim. The
operator argues that, since the local union's financial inability to retain
counsel was a factor the Commission focused on in its decision to remand, it
was incumbent on the judge to address the issue if only in terms of evaluating
Farmer's credibility. Island Creek further contends that the judge erred in
ignoring the fact that Farmer had access to local and international UMWA
counsel.

Financial inability was only one of several allegations that, as we
stated in our earlier decision, "could possibly establish adequate explanation
or justification for the late filing." 13 FMSHRC at 1232. We conclude that
the judge found sufficient additional justification to excuse the late filing.
We further note that in its brief on review Island Creek concedes that
Farmer's withdrawal of his assertion of financial inability to retain counsel
"might only reflect his confusion about the financial status of his UMWA

local." Br. 14.

As for Farmer's access to UMWA counsel, in its brief on review the UMWA argues that Farmer had no reason to think he needed legal advice since he had been "lulled" by mine manager Ball into believing that the miners would be paid. In a somewhat similar vein, the judge concluded that Farmer and Ball did discuss the compensation issue and that "Ball at the very least advised ~1542

Farmer that nothing would be done about compensation until the contest of the underlying citation was resolved." 13 FMSHRC at 1566. Given the judge's conclusion on that issue as well as his earlier conclusion that Farmer was ignorant of the filing requirements for compensation claims, we infer that the judge did not find it relevant that Farmer had not sought legal advice from sources within the UMWA.

Island Creek's other challenges to the judge's decision on substantial evidence grounds are, in large part, based upon its argument that Farmer, by reason of his education and experience, should have been charged with actual or, at least, constructive knowledge of the procedural requirements for filing complaints for compensation. This argument is, in essence, a reiteration of Island Creek's contention that Hollis compels dismissal of Farmer's complaint, an argument that we have rejected.

The relative rarity of compensation complaints in litigation before the Commission may have led the judge to characterize knowledge of the procedural requirements relating to such complaints as "esoteric" in nature. 13 FMSHRC at 1566. Further, unlike section 105(c) of the Act, which sets a 60-day deadline for filing discrimination complaints, section 111 is silent as to a filing deadline. That time constraint is set forth in the Commission's Procedural Rules, which are published in Title 29 of the Code of Federal Regulations. All other standards and regulations applicable to the Mine Act are in Title 30 of the Code.

Island Creek's third argument is that the judge failed to comply with the requirements of Commission Procedural Rule 65(a). The operator contends that the judge's "summary conclusions" lacked "reasons or bases... on all material issues of fact, law or discretion presented by the record." Br. 24. Essentially, Island Creek argues that, although the judge repeatedly refers to "credible evidence" supporting his decision, he does not address un rebutted evidence that contradicts Farmer's testimony.

It is important to focus on what the judge concluded on the basis of the evidence presented. Farmer's petition for discretionary review indicates that he believed he was misled, intentionally or otherwise, by officials of both Island Creek and MSHA. The judge found that mine manager Ball said that "nothing would be done about compensation until the contest of the underlying citation was resolved" (13 FMSHRC at 1566), a characterization of the Ball-Farmer conversation that both Ball and Island Creek share. Tr.193-194; Br. 19. The judge found that Farmer "was not provided sufficient information to file a timely complaint with this Commission." 13 FMSHRC at 1566. Our

reading of the judge's decision with respect to Farmer's contacts with Island Creek and MSHA is that he concluded that Farmer could reasonably have believed, on the basis of those contacts, that no action on his part was necessary while resolution of the underlying citation was still pending. We find that substantial evidence supports the judge's conclusion.

As for the operator's additional contention, that the judge did not explain his conclusion that there was "insufficient evidence of 'legal prejudice' to otherwise warrant dismissal of these proceedings" (13 FMSHRC at 1566), we conclude that no explanation was necessary. At the close of the
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hearing, the judge asked whether Island Creek had anything to say with regard to the legal prejudice issue. Counsel for the operator replied, "Just that we aren't going to present any evidence in that regard, your Honor." Tr. 203-204.

In response to the Commission's remand order the judge determined that Farmer produced "credible evidence" that he was ignorant of Commission procedures and that he had made reasonable efforts, after filing his complaint but before Island Creek filed its motion to dismiss, to secure a copy of the Commission's procedural rules.(Footnote 7) The Commission's remand order noted that "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." 13 FMSHRC at 1231, citing *Walter A. Schulte v. Lizza Indus, Inc.*, 6 FMSHRC 8,13 (January 1984). The Commission stated that this principle was "correspondingly valid in the compensation complaint context". 13 FMSHRC at 1231. Thus, we find that Farmer's reasons for his untimely filing, which were credited by the judge, meet the "genuine ignorance" requirement of *Schulte*, supra.

7 Island Creek's own Exhibit 4 is a November 6, 1990, letter from Farmer to the Commission requesting party status in the contest proceeding on the underlying citation and requesting a copy of the Commission's Procedural Rules. The letter indicates that it was received by the Commission on November 14, 1990, eleven days prior to the date of Island Creek's motion to dismiss.

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Accordingly, the judge's order denying Island Creek's motion to dismiss is affirmed and the matter is remanded to the judge for further proceedings pending disposition of the issues in *Secretary v. Island Creek Coal Co.*, Docket No. VA 91-2.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner