

CCASE:  
LOCAL UNION (UMWA) V. WESTMORLAND COAL  
DDATE:  
19830812  
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, DC  
August 12, 1983

LOCAL UNION 1889, DISTRICT 17,  
UNITED MINE WORKERS OF AMERICA

v. Docket No. WEVA 81-256-C

WESTMORELAND COAL COMPANY

DECISION

This is a compensation proceeding arising under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981). The United Mine Workers of America ("Union") sought, in part, one week's compensation based on an imminent danger withdrawal order issued under section 107(a) of the Mine Act to Westmoreland Coal Company following an explosion at one of the company's mines. The Union requested in the alternative that if the judge were not prepared to resolve that claim, he reserve a final decision until the Department of Labor's Mine Safety and Health Administration ("MSHA") completed its investigation of the cause of the explosion. The Union believed that MSHA would then terminate the order either with or without modifying it to allege a violation of a mandatory health or safety standard. 1/

The judge denied the Union's claim for a week's compensation because the language of the order, as it currently stands, does not contain an allegation that the operator failed to comply with any mandatory health or safety standard. He also declined to retain jurisdiction and dismissed the claim without prejudice. The Union's petition for discretionary review raises the issue of whether the judge should have retained jurisdiction over the proceeding. For the reasons that follow, we vacate the judge's order dismissing the claim for one week's compensation without prejudice and remand for further proceedings. 2/

The facts were stipulated by the parties. 3/ In the early morning hours of November 7, 1980, an explosion occurred inside Westmoreland's

---

1/ Section 111 provides for miners' compensation for up to one week only if the miners are idled by a section 104 or section 107 order issued "for a failure of the operator to comply with any mandatory health or safety standards." See full text of section 111, note 7, *infra*.

2/ The Secretary of Labor was not a party below but has filed an amicus brief before the Commission.

3/ The parties filed a set of joint stipulations on February 5, 1982, which are incorporated in the judge's decision at 4 FMSHRC 773, 774-75 (April 1982)(ALJ).

~1407

Ferrell No. 17 mine, an underground coal mine located in West Virginia. When management became aware that an explosion occurred, it withdrew the miners working on the 12:01 a.m. to 8:00 a.m. shift from the mine. At 7:30 a.m. an MSHA inspector issued withdrawal order No. 0668337 pursuant to section 103(j) of the Mine Act. 4/ The order applied to all areas of the mine, and provided in part:

An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure, smoke was encountered in the 2-South section. Five employees in the mine could not be accounted for. [The area or equipment involved is] the entire mine....

At 8:00 a.m. on November 7th, one half hour after the 103(j) order had been issued, an MSHA inspector issued Order No. 0668338 pursuant to section 107(a) of the Mine Act. 5/ This imminent danger withdrawal order, which also applied to all areas of the mine, did not allege a violation of any mandatory health or safety standard. The order stated:

All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

---

4/ Section 103(j) provides:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. 813(j).

5/ Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent: of the area of such mine throughout which the danger exists, and issue an order

requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. 817(a).

~1408

The bodies of all five miners were recovered on November 8, 1980. Subsequently, the 2-South area of the mine was sealed off. On December 10, 1980, both orders were modified to show that the area of the mine affected by the orders was limited to the seals and the area in by the seals. Neither of the orders has been terminated so that they both remain in effect.

The miners who were withdrawn from the mine during the 12:01 a.m. to 8:00 a.m. shift on November 7, were paid for their entire shift. Seventy-six miners were expected to work the November 7 day shift (8:00 a.m. to 4:00 p.m.) at the mine. Eight of these miners reported for work, remained at the mine, worked for eight hours, and were fully paid for that work. At least some of the remaining sixty-eight miners, however, were prevented from entering the mine property by state police, who had erected a road-block at the entrance to Westmoreland's property. Westmoreland later paid all sixty-eight miners four hours of compensation. 6/

On February 5, 1981, the Union filed its original complaint for compensation under section 111 of the Mine Act. 7/ The complaint alleged that "the imminent danger that existed on November 7, 1980, and which led to the issuance of Order Nos. [0668337] and [0668338] was caused by the operator's failure to comply with mandatory safety and health standards." Complaint at 4. Thus, under the third sentence of section 111, the Union claimed that each miner was entitled to up to one week's compensation based on the imminent danger order. The Union subsequently filed an amended complaint on November 9, 1981, seeking limited compensation for both the 103(j) and 107(a) orders under the first two sentences of section 111. The Union also repeated its original claim for a week's compensation under the third sentence of section 111.

---

6/ Westmoreland broadly characterized the payment of 4 hours to the day shift as "compensation." It argued that the payment of 4 hours compensation fulfilled both the "reporting pay" obligations under its collective bargaining agreement with the Union and section 111 of the Mine Act. The judge found the miners were entitled to four hours reporting pay under the contract and four hours under section 111. 4 FMSHRC 776-79. This issue is not raised on review.

7/ The first three sentences of section 111 provide:

[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 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 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

(Footnote continued)

~1409

Thereafter on February 19, 1982 the Union filed a motion for partial summary decision. In discussing its claim for a week's compensation, the Union acknowledged that the judge may feel "unable to grant this part of the UMWA's motion on the basis of the current record." Motion at 11. If this occurred, the Union requested the judge to reserve final decision until MSHA completes its investigation. *Id.* At that time the order would presumably be terminated either with or without modifying the order to allege a violation of a mandatory health or safety standard. 8/ Westmoreland answered by filing a cross-motion for summary decision.

The judge issued a summary decision on April 28, 1982. He granted the Union's request for four hours of compensation for the day shift based on the section 103(j) order and the second sentence of section 111. The judge denied the Union's concurrent claims for limited compensation under the first two sentences of section 111 based on the section 107(a) order.

Regarding the Union's claim for one week's compensation under the third sentence of section 111, the judge concluded, "Inasmuch as imminent danger Order No. 668338, here involved, does not cite Westmoreland for failure to comply with any mandatory health or safety standard ... the obvious conclusion is that the miners cannot claim compensation for 1 week of pay under section 111 of the Act." 4 FMSHRC at 785 (emphasis in original). The Union had also sought permission to introduce evidence at a hearing to show that the ignition was the result of Westmoreland's failure to comply with one or more mandatory health or safety standards. The judge refused to permit the Union to present such evidence. He believed it would result in the Union's usurping the Secretary's prosecutorial role. 4 FMSHRC at 785-86.

Finally the judge declined to reserve ruling on the Union's request for one week s compensation based on legal and practical reasons. First, the judge referred to the fact that he was reversed by the Commission in *Council of Southern Mountains v. Martin County Coal Corp.*, 2 FMSHRC 3216 (November 1980), for issuing a decision that failed to dispose of all

---

Fn. 7/ continued

by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, 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.

8/ As noted earlier, the 2-South section of the mine was sealed after the explosion. MSHA will not complete its investigation until the section is reopened. Westmoreland expected to unseal the area in approximately July, 1983. 4 FMSHRC at 785. The Union believes that once MSHA completes its investigation the Union will be able to establish that the 107(a) order was issued for Westmoreland's failure to comply with a mandatory health or safety standard.

~1410

pending issues. He also relied on section 113(d)(2)(C), which requires that when a decision is ready for issuance, the judge must forward the record to the Commission. Then, if a petition for discretionary review is filed, the Commission has the complete record. The judge's last reason for denying the Union's request was that:

[T]here is nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify outstanding imminent danger Order No. 668338 to allege one or more violations of the mandatory health or safety standards by Westmoreland.

4 FMSHRC at 789. Accordingly, the judge denied the Union's request for deferral of his decision and dismissed the claim without prejudice.

We hold that the judge erred in not retaining jurisdiction over the one week's compensation claim. First, Council of Southern Mountains does not require dismissal of the Union's claim; that case is distinguishable from the facts presented here. It involved a single claim of discrimination under section 105(c) of the Mine Act. The judge issued a decision finding that the operator had discriminated against the Council and ordered the operator to reimburse the Council for expenses and attorneys' fees pursuant to section 105(c)(3) of the Act. The judge's decision did not specify the amount of this award. We held that section 113(d)(1) of the Act and Commission Rule 65(a), 29 C.F.R. 2700.65(a), require that the judge's decision finally dispose of the proceedings. The judge could have obtained an accounting of the expenses and attorneys' fees tied to the discrimination claim and specified the amount in his decision. Because the judge failed to resolve the amount of fees and expenses in that case, his decision did not finally dispose of the one claim.

In contrast, here the Union has made three separate claims for compensation. The judge finally disposed of all issues relating to the first two claims. At the time of his decision, however, MSHA had not completed its investigation of the cause of the mine explosion and, accordingly, the judge was not prepared to issue a decision on the merits of the claim for a week's compensation. Council of Southern Mountains does not mandate that a judge resolve all claims when he is not ready to do so. It is limited to cases where the judge could resolve all claims but fails to do so.

Second, dismissal without prejudice could cause possible time

limitation problems under Commission Rule 35, 29 C.F.R. 2700.35.  
That rule 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.

~1411

The Union timely filed its claim for a week's compensation within 90 days from the time the miners were idled by the orders. Had the Union later refiled its claim following the judge's dismissal, the operator could have opposed the complaint on the ground that it was not timely filed. We need not resolve in this case whether Rule 35 would have barred later refileing. We hold, however, that retention of the Union's claim was the preferable procedural course because it prevented, rather than created, possible time limitation problems. 9/

We also emphasize that compliance with Rule 35 enhances judicial administration of compensation claims. Records needed to identify the complainants as well as their rates of pay are easily accessible within 90 days of idlement. In the event a mine is closed for some length of time, as here, it is preferable to have a claim remain on a judge's docket than to have the parties establish or defend a claim several months or years later. In short, retention of the Union's compensation claim during the pendency of the MSHA investigation would have provided the miners with more certain protection of their interests under section 111 than dismissal without prejudice. Cf. *Eastern Assoc. Coal Corp.*, 2 FMSHRC 2774, 2775-78 (October 1980)(stay of a notice of contest preferable to dismissal without prejudice.)

In addition, there is procedural authority for separate adjudication of multiple claims. The Commission's rules do not expressly address the issuance of decisions in cases involving multiple claims. 10/ Therefore, we apply Commission Rule 1(b), 29 C.F.R. 2700.1(b), which states:

Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

Under Rule 1(b), it is thus appropriate to turn for guidance to the Federal Rules, which provide for separate adjudication of multiple claims.

Rule 54(b), Fed. R. Civ. P. permits adjudication of fewer than all claims presented in an action. 11/ Had the judge applied Rule 54(b), he

---

9/ Cases may arise in the future involving the issue of whether, under certain circumstances, the 90-day time limitation in Rule 35 may be waived. We intimate no view at this time as to the resolution of such questions.

10/ Commission Rule 65, which deals with judge's decisions, is silent on the issuance of decisions involving multiple claims.

11/ Rule 54(b) provides:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether

(Footnote continued)

~1412

could have resolved the Union's first two claims while retaining jurisdiction of the third claim. See *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980), and *Sears Roebuck and Co. v. Mackay*, 351 U.S. 427 (1956). The judge was prepared to issue a decision resolving the first two claims, and there was "no just reason to delay" that decision. Under the Rule, his adjudication of the first two claims would have been a final decision, subject to the review procedures of the Mine Act. Utilizing Rule 54(b) would also have been in harmony with Commission Rule 64(a), 29 C.F.R. 2700.64(a), which provides:

At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render summary decision disposing of all or part of the proceeding.

29 C.F.R. 2700.64(a)(emphasis added). Indeed, the Union had filed a motion under Commission Rule 64(a) for "partial" summary decision seeking resolution of its first two claims.

In general, the question of separate adjudication of claims belongs within the informed discretion of the judge. He is in the best position to evaluate the various procedural alternatives available "to secure the just, speedy and inexpensive determination of all proceedings." Commission Rule 1(c), 29 C.F.R. 2700.1(c). In this instance, however, the judge apparently did not consider applying Federal Rule 54(b), nor was such a course suggested by either party below. We find that in this particular factual situation of a pending MSHA investigation the judge should have applied Federal Rule 54(b) "so far as practicable and "appropriate," and separately adjudicated the claims. This action would have secured the "just, speedy and inexpensive determination" of all the proceedings. The claims for limited compensation, which were ripe for decision, could have been adjudicated. This would be in harmony with Congressional intent for expedited compensation proceedings. And, as we have indicated above, retention of the remaining claim would have avoided time limitation problems and better protected the miners' interests.

There is also an important practical aspect to our decision to remand. The status of the case has changed. The Union repeatedly advised the judge that MSHA would be taking enforcement action against Westmoreland. On July 15, 1982, MSHA issued thirteen section 104(d)(2) orders to Westmoreland. The

---

Fn. 11/ continued

as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

~1413

orders are based on statements taken during MSHA's investigation into the ignition. Westmoreland filed notices of contest of all thirteen orders and MSHA has initiated civil penalty proceedings. 12/ These cases are currently pending before the same judge who adjudicated these compensation claims. The question of whether the order litigated here was issued "for a failure of the operator to comply with any mandatory" standard may be resolved in the context of the notices of contest and penalty proceedings currently pending before the judge. In the alternative, because Westmoreland apparently plans to unseal the 2-South section during the summer of 1983, it may be feasible to proceed after MSHA completes its investigation.

We express no view about whether these thirteen 104(d)(2) orders or any later modification of the 107(a) Order No. 668338, may provide the basis for a week's compensation under the third sentence of section 111. We also do not reach the legal arguments raised by Westmoreland concerning whether the imminent danger order as issued must contain an allegation of a violation for purposes of section 111 compensation. All of these questions on the merits of the Union's claim are appropriate for resolution in the first instance by the judge.

We commend the judge's conscientious efforts to resolve this complicated litigation but, for the reasons discussed above, vacate his order dismissing without prejudice the Union's claim for a week's compensation. The case is remanded to the judge with instructions to hold the record open as to the Union's claim for a week's compensation. The parties are free to submit any appropriate motions or showings. If the Union fails to make appropriate showings upon the completion of MSHA's investigation, Westmoreland may file an application for a show cause order to determine if the claim should be dismissed. The judge's resolutions of the Union's other claims are final, since no review was taken as to those aspects of his decision.

---

12/ The notices of contest are contained in docket numbers WEVA 82-340-R through WEVA 82-352-R. The judge has consolidated these cases with the related civil penalty cases, docket numbers WEVA 83-73 and WEVA 83-143.

~1414

Distribution

Timothy M. Biddle, Esq.  
Crowell & Moring  
1100 Connecticut Ave., N.W.  
Washington, D.C. 20036

Mary Lu Jordan  
United Mine Workers of America  
900 15th St., N.W.  
Washington, D.C. 20005

Debra L. Feuer  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Administrative Law Judge Richard C. Steffey  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, 10th Floor  
Falls Church, Virginia 22043