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SOL (MSHA) V. EASTERN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF THOMAS H. MAY,
COMPLAINANT

Complaint of Discharge,
Discrimination, or Interference

Docket No. KENT 81-216-D

v.

EASTERN COAL CORPORATION,
RESPONDENT

ORDER GRANTING MOTION TO WITHDRAW

Counsel for the Secretary of Labor filed on March 8, 1982, in the above-entitled proceeding a motion to withdraw the complaint filed on behalf of Mr. Thomas H. May because the Secretary has found that no violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred. Paragraph 6 of the complaint filed in Docket No. KENT 81-216-D alleged that respondent had refused to hire Mr. May "* * *" because he was the subject of a medical evaluation in that his pre-employment chest X-ray revealed evidence of pneumoconiosis." The motion to withdraw states that it has now been determined that Mr. May was not at any time the "* * *" subject of medical evaluations and potential transfer under a standard published pursuant to section 101" of the Act. The motion, therefore, concludes that the statutory prerequisite, that is, the existence of a protected activity required in order to establish a violation of section 105(c)(1), does not exist.

The motion further states that Mr. May has been advised of the aforesaid finding and that he has been told that he may file a complaint with the Commission within 30 days after he receives notification of the fact that the Secretary has found that no violation of section 105(c)(1) has occurred. The motion to withdraw requests that the motion be granted with the understanding that Mr. May will have 30 days from the time he receives the order granting the motion to file his own complaint with the Commission pursuant to section 105(c)(3) of the Act.

Section 105(c)(3) of the Act provides, in pertinent part, as follows:

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination

or interference in violation of paragraph (1). * * *

The Act does not specifically cover a situation, such as this, in which the Secretary has reversed his original belief that a violation did occur to a finding that a violation of section 105(c)(1) did not occur. The Secretary cannot be forced to pursue an action before the Commission after further review of the facts convinces him that his original finding of a violation was in error. Therefore, I find that the motion to withdraw should be granted with the understanding that Mr. May has a period of 30 days after receipt of this order within which to file a complaint in his own behalf under section 105(c)(3) of the Act.

The answer to the complaint raises some legal issues which will be difficult for a non-lawyer to understand and oppose either with an evidentiary presentation or with countervailing legal arguments. The certificates of service show that a copy of the complaint, a copy of respondent's answer to the complaint, and a copy of the motion to withdraw the complaint were sent to Mr. May. I strongly recommend that Mr. May take the three aforementioned documents to an attorney and seek legal advice in determining whether he should file a complaint under section 105(c)(3) and, if so, how he should frame the allegations which would constitute the basis for his argument that a violation of section 105(c)(1) of the Act has occurred.

Nearly all complainants who file their own complaints under section 105(c)(3) do so under the mistaken impression that they are filing an appeal of the Secretary's finding that no violation occurred. Most complainants also assume that the Commission operates just like MSHA in that they think the Commission has investigators who interview respondent's employees and officials for the purpose of gathering information to support the Commission's findings. I should note, first of all, that the Commission is not a branch of the Department of Labor. Therefore, we do not have in our files copies of the data gathered by MSHA's investigators and the Commission does not have investigators. When a complaint is filed with the Commission, it is assigned to an administrative law judge who holds a hearing at which the complainant has the burden of proving that a violation of section 105(c)(1) occurred. The proof is normally presented through witnesses under oath who will be subject to cross-examination by counsel for respondent. Respondent will have the opportunity of presenting witnesses to testify in opposition to any statements made by complainant and his witnesses. Both the complainant and respondent will also be permitted to introduce documentary evidence when it is properly supported by witnesses who can attest to its authenticity.

After the judge assigned to the case has heard any arguments which either party wishes to offer, he will study the testimony and documentary evidence and make findings of fact. Based on his findings of fact, he will determine whether a violation of section 105(c)(1) has been proven by complainant.

I have pointed out the way complaints are handled so that Mr. May can determine for himself whether he should try to

proceed in a case as

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complicated as his without first securing an attorney to represent him. It should also be noted that if Mr. May wins his case, respondent will be ordered to reimburse Mr. May for legal expenses, but if Mr. May loses his case, he will be liable personally to pay all expenses associated with filing the complaint and presenting evidence in support of the complaint when the case is eventually scheduled for hearing.

WHEREFORE, for the reasons given above, it is ordered:

(A) The Secretary of Labor's motion to withdraw the complaint is granted, the complaint is deemed to have been withdrawn, and the proceedings in Docket No. KENT 81-216-D are dismissed.

(B) If he so desires, Mr. Thomas H. May has a period of 30 days from receipt of this order to file a complaint in his own behalf under section 105(c)(3) of the Act.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)