CCASE:
RICHARD JOHNSTON V. OLGA COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| RICHARD C. JOHNSTON, COMPLAINANT | COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE |
| v. | |
| | Docket No. WEVA 82-236-D |
| OLGA COAL COMPANY, RESPONDENT | HOPE CD 82-23 |
| | Olga Mine |

DECISION

Appearances: James A. Swart, Esq., Beckley, West Virginia, and Mary Lu Jordan, Esq., Washington, D. C. (on the brief), for Complainant James R. Haggerty, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the complaint of Richard C. Johnston, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "1977 Act," alleging that the Olga Coal Company (Olga) reduced his level of pay on or about June 18, 1981, in violation of his statutory rights as a miner deemed to have been transferred because of pneumoconiosis and therefore contrary to section 105(c)(1) of the 1977 Act.(FOOTNOTES 1, 2) Evidentiary hearings were held on Mr. Johnston's complaint in Bluefield, West Virginia.

At hearing, Olga renewed in a Motion to Dismiss its argument made in prior motions that Complainant had failed to meet the time deadlines set forth in sections 105(c)(2) and 105(c)(3) of the 1977 Act. Under section 105(c)(2), of the 1977 Act, the miner who believes that he has been discriminated against "may, within 60 days after such violation occurs, file a complaint with the Secretary". There is no dispute in this case that the alleged discriminatory event, i.e., Mr. Johnston's reclassification from pay grade 4 to grade 1, occurred on or about June 18, 1981, and that Mr. Johnston did not file a complaint of discrimination with the Secretary of Labor, Mine Safety and Health Administration (MSHA), until February 16, 1982, more than seven months later.

Whether an extension of the filing deadline should be granted depends on whether "justifiable circumstances" exist for the delay and whether the operator was prejudiced by the delay. Joseph W. Herman v IMCO Services, 4 FMSHRC 2135 (1982). The Commission said in that case that the time limit might warrant extension where the miner, within the statutory 60 days, brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

In this case, Johnston does not deny that as early as June 18, 1981, he knew he could have filed a discrimination complaint with MSHA. His only explanation for not doing so until February 16, 1982, was that he was advised by the Union Safety Committeeman, Leonard Sparks, that he should first exhaust the grievance procedures under the collective bargaining agreement. Although the grievance procedures were apparently exhausted as of November 17, 1981, there is no explanation why Mr. Johnston did not even then file his complaint with MSHA for almost three more months.

The operator claims that it was prejudiced by the delay because two of its witnesses were no longer its employees at the time of the hearing. It claims that a Mr. Hick left Olga in December 1981 and resided at the time of hearing in South Carolina, and that a Joe McIntyre left Olga in September 1982 and resided at the time of hearing about 100

miles from the hearing site. Hick's testimony concerning the execution by Johnston of a purported waiver of his option to transfer to a low dust area of the mine (pursuant to former section 203(b)(2) of the Federal Coal Mine Health and Safety Act of 1969) may indeed have been relevant to this case. However, in the absence of a proffer as to the precise testimony to be elicited from Hick and McIntyre and reasons for the non-production of the witnesses, I cannot conclude that the operator has been prejudiced.

In summation, it appears that the Complainant did bring a complaint about his pay reduction to the attention of his employer through grievance procedures initiated on June 18, 1981, that he relied upon the representations of his union safety committeeman that he should first exhaust these procedures before filing with MSHA, and that the delay between the exhaustion of his grievance proceedings on November 17, 1981, and the filing of this discrimination complaint with MSHA on February 16, 1982, was not significant. In light of these extenuating factors and insufficient evidence of prejudice to the operator caused by the delay, I conclude that the complaint should be deemed to have been timely filed.

I further find that Johnston did, in fact, satisfactorily comply with the filing requirements set forth in section 105(c)(3). It is undisputed that the MSHA letter dated March 16, 1982, finding no discrimination, was received by Johnston on or about March 21, 1982. It is also undisputed that on April 15, 1982, Johnston filed with the Commission a letter expressing his disagreement with the MSHA decision. While another Administrative Law Judge has ruled that the filing of that complaint had not been perfected until July 2, 1982, I find for the limited purpose of tolling the period of limitations that Mr. Johnston's filing was constructively accomplished on April 15, 1982, the date his letter was filed with the Commission. Accordingly, filing for this purpose was accomplished within the 30 days required by section 105(c)(3). The operator's Motion to Dismiss is accordingly denied.

The Merits

As clarified in Mr. Johnston's post hearing brief, his complaint is limited to an assertion that he was entitled to the rights of a "transferred miner" under section 101(a)(7) of the 1977 Act(FOOTNOTE 3) and that Olga

interfered with those statutory rights in violation of section 105(c)(1) of the 1977 Act by reducing his rate of pay in June 1981 from grade 4 to grade 1, a reduction at that time of $5.30 per day.(FOOTNOTE 4) There is no dispute that Mr. Johnston's wage rate was in fact reduced as alleged. Moreover, there is no dispute that if Mr. Johnston had been in fact transferred in accordance with the provisions of section 101(a)(7) of the 1977 Act (and in accordance with 30 C.F.R. Part 90 of the regulations), such a reduction in pay would have been a violation of both section 101(a)(7) and an unlawful interference with those statutory rights under the provisions of section 105(c)(1). The dispute herein accordingly centers on the question of whether in June 1981 Mr. Johnston met the criteria to be a "transferred miner" under section 101(a)(7) of the 1977 Act (or a "Part 90" miner under the regulations promulgated pursuant to that section; i.e., 30 C.F.R. Part 90).

A transferred or "Part 90" miner is defined in 30 C.F.R. 90.2 as "a miner employed at an underground coal mine or at a surface work area of an underground coal mine who has exercised the option under the old section 203(b) program Õformer section 203(b) of the Coal Mine Health and Safety Act of 1969Ê or under section 90.3 (Part 90 option; Notice of Eligibility; exercise of Option) of this Part to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights." Johnston argues that he should be deemed to have exercised the option in 1972 under the old section 203(b) program and that he accordingly should have been brought under the new regulations as a transferred "Part 90" miner. Thus he argues his rate of pay could not legally have been reduced.

There is no dispute that Mr. Johnston had been notified in accordance with former section 203(b) of the 1969 Act of his rights to transfer to another area of the mine because of X-ray evidence showing his development of Category 2 Simple Pneumoconiosis. In particular, he was notified by letter dated November 30, 1970, from the Department of Health, Education and Welfare, by letter dated October 28, 1971, from the Federal Bureau of Mines, and by letter dated November 12, 1973, from the Federal Mining Enforcement and Safety Administration. While

Mr. Johnston initially sought to exercise his transfer rights in January 1972, he apparently changed his mind and executed a written waiver of these rights on February 24, 1972 (Exhibit 0-1). It is undisputed that he never since that date has made any effort to exercise his transfer rights.

The evidence shows that in January 1972 Johnston was offered the option to transfer to a less dusty area on the "hoot owl" or night shift. Johnston was then working the day shift and, according to him, he elected to waive the transfer option rather than transfer to the night shift.(FOOTNOTE 5) According to the regulations then in effect, Johnston did not, upon exercising the transfer option, have the choice of remaining on his regular shift. See 36 F.R. 20601, October 27, 1971. Johnston's contention that his waiver of the transfer option was invalid or "involuntary" because he was not offered a transfer to the day shift is accordingly without merit.

While subsequent regulations issued pursuant to section 101(a)(7) of the 1977 Act did require that the mine operator transfer the miner exercising his transfer rights to a position on the same shift or shift rotation on which he was employed immediately before the transfer, those regulations did not take effect until February 1, 1981. See 46 F.R. 5585, January 21, 1981.(FOOTNOTE 6)

Within this framework of evidence, it is clear that Johnston's waiver of his transfer rights in February 1972 was not invalid but was a completely voluntary and intentional relinquishment of the right to transfer as it then existed. Johnson v. Zerbst, 304 U.S. 450 (1938). Accordingly, Johnston cannot be "deemed" to have exercised his transfer rights. He has not therefore met his initial burden of proving that the reduction in his pay grade in June 1981 was in violation of sections 101(a)(7) or 105(c)(1) of the 1977 Act. Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Secretary, 663 F.2d 1211 (3d Cir. 1981); Boitch v. FMSHRC, 704 F.2d 275 (6th Cir. 1983), reh'g granted on other grounds, May 23, 1983.

The Complaint herein is accordingly denied and this case dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

FOOTNOTES START HERE-

1 Section 105(c)(1) provides in part as follows:

No person shall * * * in any manner discriminate against * * * or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal * * * mine subject to this Act because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to 101 * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

2 In John Matala v. Consolidation Coal Company, MORG 76-53 (April 5 1979), the Commission held that review of discrimination complaints of a miner based on allegations that the miner suffers from pneumoconiosis should be resolved under the specific statutory provisions set forth in section 428 of the Black Lung Benefits Act rather than under the general anti-discrimination provisions in section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, the "1969 Act". That case was, therefore, in accordance with the provisions of section 428 of the Black Lung Benefits Act, transferred to the Department of Labor for adjudication by one of its Administrative Law Judges.

The case at bar is brought, however, under the revised provisions of section 105(c)(1) of the 1977 Act, and by virtue of section 101(a)(7) of the 1977 Act and regulatory standards published pursuant to that section, i.e., 30 C.F.R., Part 90, effective February 1, 1981. Accordingly, this case comes within the jurisdiction of this Commission.

3 Section 101(a)(7) of the 1977 Act authorizes the Secretary of Labor to promulgate mandatory health and safety standards to protect miners against exposure to certain hazards. In particular, that section provides as follows:

Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer.

4 Johnston does not allege that he was discriminated against because he was "the subject of medical evaluations and potential transfer" under section 105(c)(1). See fn 1 supra.

5 While Johnston also alleged at hearing that he turned down the transfer option because he believed there was just as much dust on the "hoot owl" shift, the evidence does not bear this out. The uncontradicted testimony of Mine Superintendent Dwight Strong was that the "hoot owl" shift was then a non-producing maintenance shift with a record of lower dust levels.

6 The evidence in this case is insufficient to indicate when Mr. Johnston first knew of this revision in the regulations or that he failed to exercise his transfer option because he did not know of these revisions. On the record before me I am unable to speculate why he did not exercise the option after these revisions.