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ANN RILEY OWENS V. MONTEREY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ANN RILEY OWENS, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 86-33-D
v.	
	VINC CD 85-21
MONTEREY COAL COMPANY, RESPONDENT	Monterey No. 2 Mine

ORDER

Respondent, Monterey Coal Company (Monterey), moves for dismissal or summary decision on the ground the captioned discrimination complaint fails to state a claim for which relief may be granted and therefore the Commission lacks jurisdiction over the subject matter.

Complainant, a woman miner, appears pro se. She has filed a 32 page verified, handwritten opposition. The matter is set for an evidentiary hearing in St. Louis, Missouri on April 22, 1986.

Monterey's motion is bottomed on the proposition that complainant's admitted on-the-job foot injuries were self-inflicted, not work related, and therefore the claim that such injuries created an underground safety hazard, even if true, was not a protected safety related activity. At this stage of the proceedings, I am not called upon to determine the validity of Monterey's hypothesis. Complainant maintains her injuries were work-related--the result of her good faith attempt to comply with Monterey's metatarsal protective shoe policy. There is therefore a disputed issue of material fact.

It is well settled that on a motion to dismiss or for summary judgment all facts well pleaded must be accepted unless it is shown there is no dispute as to the material facts and that movant is entitled to judgment as a matter of law. Commission Rule 64; FRCP 12(b)(6), 56. Since both parties rely on matters outside the pleadings, Monterey's motion has been treated as one for summary decision. Carter v. Stanton, 405 U.S. 669 (1972). Verified pleadings, of

course, qualify as affidavits if, as is true of Ms. Owens opposition, they are based on the pleader's first-hand knowledge. Forts v. Malcolm, 426 F.Supp. 464, 466 (S.D.N.Y.1977).

Except in the clearest of cases, the Commission does not look favorably on motions for summary decision as they tend to deprive litigants of their day in court. Missouri Gravel Company, 3 FMSHRC 2470 (1981). This is especially true in pro se cases where the trial judge has a duty to satisfy himself all the relevant facts have been developed. Burns v. Asarco, 5 FMSHRC 1497, 1498 n. 2 (1982).

The applicable standard for review of a motion for summary decision is the same as that applicable to a motion for summary judgment under Rule 56. This is that:

> "A summary judgment is authorized only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' The function of the court on a summary judgment motion "is limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue.' Once it is determined that material facts are in dispute "summary judgment may not be granted,' and in "making this determination doubts . . . are to be resolved against the granting of summary judgment.' To warrant summary judgment the record "should show the right of the movant to a judgment with such clarity as to leave no room for controversy, and . . . should show affirmatively that the [adverse party] would not be entitled to [prevail] under any discernible circumstances . . . Summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear." Weiss v. Kay Jewelry Stores, Inc., 470 F.2d 1259, 1261Ô62 (D.C.Cir.1972).

A summary decision is particularly inappropriate in discrimination cases where "the inferences the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir.1962). Finally,

> "The burden on a party moving for summary judgment is affirmative: "The party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden of proof at trial, and even if the

> opponent presents no conflicting evidentiary matter.' (Citations omitted). That is, the moving party must present affirmative evidence of facts that, if true, would compel a judgment for that party . . . .
>
> In assessing whether a party moving for summary judgment has met his or her burden, a court must view all inferences to be drawn from underlying facts in the light most favorable to the party opposing the motion. (Citations omitted). McKinney v. Dole, 765 F.2d 1129, 1134Ô1135 (D.C.Cir.1985).

Under the Mine Act, unlawful reprisal occurs when (1) a miner participates in a statutorily protected activity, (2) an adverse employment action is taken against him or her, and (3) a causal connection existed between the two. Here complainant's verified opposition shows she participated in numerous acts of claimed protected activity, including the fact that on July 18, 1985 she reported, that due to the disabilities suffered to her feet while working in the No. 2 Mine during the period July 15 to 18, she had become a hazard to her own safety and to that of her co-workers. With respect to the second element, Ms. Owens pleadings and opposition set forth numerous adverse actions such as (1) Monterey's continuing refusal to classify her injuries as work-related, (2) its refusal to reimburse complainant for the legal expense she incurred in prosecuting her own workmen's compensation claim, and (3) regular and continuing acts of claimed job discrimination, vilification, retaliation, and harrassment due to an anti-women miner and safety animus.

Third, it seems clear that if complainant's injuries were, in fact, work related as well as the proximate cause and justification for her refusal to work from July 18 to 29, 1986 she has stated a claim for which relief, including injunctive relief, may be granted under the Mine Act if any of the many adverse actions alleged were motivated in any part by her safety complaints and activities. See, Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 142 (1982); Rosalie Edwards v. Aaron Mining Co., 5 FMSHRC 2035 (1983); Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529 (1983).

It is axiomatic that on a motion for summary decision, the trial judge cannot try issues of fact but only determine whether there are issues of fact to be tried. Once this is determined in the affirmative the motion must be rejected. This is true whether or not the case will ultimately be tried to a judge or a jury.

~601

The Mine Act and its legislative history show that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation in enforcement of the Act. To further the congressional aim of making the Nation's coal mines safe places to work, the concept of protected activity must be so construed as to assure that miners will not be inhibited in any way from exercising the rights afforded them by law. Donovan v. Stafford Const. Co., 732 F.2d 954, 960, 961 (D.C.Cir.1984)

Based on an exhaustive review of the record, I conclude the many issues of material fact and credibility presented make the granting of Monterey's motion improper, improvident and an abuse of discretion.

Accordingly, it is ORDERED that Monterey's motion be, and hereby is, DENIED.

Joseph B. Kennedy
Administrative Law Judge