

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

AUG 14 1986

DAN L. THOMPSON, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 85-77-DM  
: MSHA Case No. MD 82-27  
GILBERT INDUSTRIAL, :  
Respondent : Cyprus Thompson Creek Project

DECISION DENYING JOINDER

On July 22, 1986, the Complainant filed with this Commission a request for joinder of the Secretary of Labor as a "party-respondent" in this case of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," and as grounds therefore stated as follows:

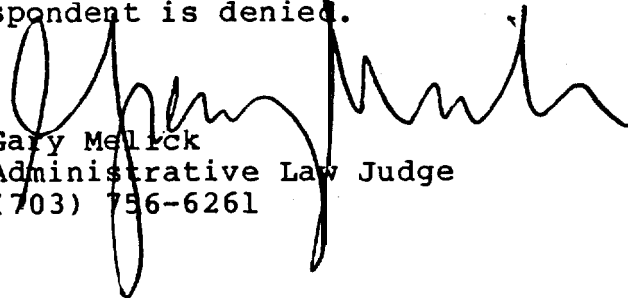
This matter has been allowed to languish, wrongly, for approximately five (5) years. It is only with the intervention of the Commission that MSHA has even nominally been willing to address their statutory responsibility [presumably under section 105(c)(3) of the Act] to resolve this matter. At this juncture, the Complainant simply does not know what it is that the Secretary has done to fairly investigate and/or assess the underlying Complaint herein. Without the inclusion of the Secretary, so as to be subject to service of process, can the Complainant fully present the facts of this matter to the Commission.

FED. R. CIV. P. 19(a) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b), provides in relevant part as follows:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief can not be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition if the action in his absence may (i) as a practical matter impare or impede his ability to protect an interest or (ii) leave any of the persons already a party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of

his claimed interest. If he has not been so joined the court shall that he be made a party . ...

The Secretary opposes joinder **arguing that** there are no circumstances under which the exercise of his discretionary function under section **105(c)(3)** can constitute discrimination under section **105(c)**.<sup>1/</sup> Roland v. Secretary of Labor, 7 FMSHRC 630 (1985), **aff'd** Roland v. Federal Mine Safety and Health Review Commission et al., No. 85-1828 (10th Cir. July 14, 1986). Under the present status of law the Secretary's position must prevail. Under these decisions review of the Secretary's exercise of this function is not permitted regardless of how wrong, negligent or improperly motivated it might be. Accordingly this Commission could not in any event provide the relief sought by the Complainant **against the Secretary**. **There is therefore no basis for the joinder of the Secretary in this proceeding. Under the circumstances the Motion for Joinder of the Secretary as a party-respondent is denied.**



Gary Mellick  
Administrative Law Judge  
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**1/ Section 105(c)(3) of the Act provides in part as follows:**

"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).

rbg