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NORTHCUTT, MYERS AND EBERLE v. IDEAL BASIC INDUSTRIES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

DONALD NORTHCUTT, GENE MYERS,
AND TED EBERLE,
COMPLAINANTS

v.

IDEAL BASIC INDUSTRIES, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. CENT 89-162-DM

Ada Quarry & Plant

ORDER

The Commission, after granting interlocutory review, has remanded the above case and directed the Judge to consider the present Section 105(c)(3) complaint in light of the principles set forth in the Commission decision of *Bradley v. Belva Coal Company*, 4 FMSHRC 982 (June 4, 1982), 2 MSHC 1729. The order of remand appears at 13 FMSHRC 327 (March 1991).

The parties filed briefs on the issues raised by the order of remand.

It is necessary to analyze the question of whether the dismissal of the Northcutt, Myers, and Eberle counterclaim in the U.S. District Court (Case No. 88-186-C) precludes litigation of their Mine Act claim or issues arising under that claim.

Since this case arises under a federal statute, the federal law of preclusion, rather than state law, must provide the criteria for analysis. *Maher v. City of New Orleans*, 516 F.2d 1051, 1056 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976).

Under the federal doctrine of *res judicata*, a judgment by a court of competent jurisdiction on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same claim. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). *Res judicata* also forecloses litigation in a second action of grounds for, or defenses to, the first claim that were legally available to the parties, even if they were not actually litigated in the first action. *Brown v. Felsen*, 442 U.S. 127, 131 (1978). *Res judicata* may be applied to the decision of administrative agencies acting in a judicial capacity. In this case, the crucial *res judicata* question is whether Complainants' state and federal claims action are identical; if they are not, *res judicata* is inapplicable. See *Newport News Ship Building & Dry Dock v. Director*, 583 F.2d 1273, 1278 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979).

ISSUES

As specified in the Commission's order of remand, it appears that the Complainants' surviving allegations are that they were illegally discharged because they had engaged in two protected activities: 1) filing workers' compensation claims based on disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant; and 2) making safety complaints to supervisors and agents of Ideal, 13 FMSHRC at 329.

The order of remand directed the Judge to analyze the issue of res judicata and its impact on matters arising under the Mine Act.

RES JUDICATA

Bradley v. Belva outlines the legal requirements necessary to support the doctrine.

In part, Bradley requires the following:

1. The party asserting the doctrine must prove all of the elements necessary to establish it.

2. There must be an identity of claims or of issues. The Commission further defines a claim for res judicata purposes as one that looks not only to the operative facts, but also to the substantive legal protection that may be afforded a miner under different statutes.

3. In cases of overlapping federal and state regulation, federal supremacy may, in effect, bar proceedings under a state law that conflicts with a federal statute.

Exceptions to the applicability of the preclusion doctrine include situations where there are reasons to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.

Section 105(c)(1) of the Federal Mine Act statute provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for

employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative or miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miner or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative or miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The counterclaim filed by Complainants in the U.S. District Court, and later dismissed, alleged as follows:

1. The Defendants incorporate by reference the jurisdictional allegations contained in the Complaint of Ideal Basic Industries, Inc., paragraphs 1, 2, 3, and 4.
2. The individual Defendants in this case have filed workers' compensation claims against the Plaintiff under the Workers' Compensation Act for the State of Oklahoma before the Workers' Compensation before Workers' Compensation Court.
3. The Plaintiff, Ideal Cement Company, Inc., has conducted a pattern of harassment and intimidation against the individual Defendants because they have maintained workers' compensation claims.
4. The individual Defendants were employed by the Plaintiff corporation at cement plant in Ada, Oklahoma; a) that the Defendants, in good faith, have filed workers' compensation claims against the Plaintiff; b) that the Defendants retained a lawyer to represent them in the workers' compensation claims; c) that the Defendants instituted in good faith a proceeding under Title 85 of the Oklahoma Statutes; d) that the Defendants have testified before the Workers' Compensation Court of the State of Oklahoma. Because of this, Defendants' employment with the Plaintiff has been terminated. The Plaintiff terminated the employment of the Defendants in violation of 85 O.S. Section 5, 6, 7.

5. The Defendants, who have been wrongfully discharged in violation of the Workers' Compensation Laws of the State of Oklahoma, are entitled to a sum of money equal to the Defendants' loss of earnings, both past and future.

6. Discharging the Plaintiffs [sic] in violation of the Workers' Compensation Laws of the State of Oklahoma, the Plaintiff subverted the purpose of the Workers' Compensation Laws and has been guilty of oppression and malice for which the Defendants are entitled to punitive damages in the amount of \$400,000.00.

7. As a result of the discharge of the Defendants from the employment of the Plaintiff in violation of the Workers' Compensation Law of the State of Oklahoma, the Defendants have been caused pain, embarrassment, humiliation, and mental anguish, and have been damaged in the sum of \$4,000,000.00.

The counterclaim in the U.S. District Court was dismissed on June 2, 1989.

The Court's order of dismissal provided as follows:

2) Defendants Eberle, Myers, and Northcutt (the only Defendants with any presently pending counterclaims against the Plaintiff Ideal) voluntarily dismiss with prejudice their counterclaims heretofore raised and outstanding in this lawsuit against Plaintiff Ideal under 85 O.S. Sections 5, 6, and 7 for workers' compensation retaliation wrongful discharge. By this voluntary dismissal pursuant to Rule 41(a) F.R.C.P. contained herein, Defendants Eberly, Myers, and Northcutt make no admissions whatsoever regarding liability under, or regarding the validity of any claims heretofore raised or outstanding in this action or hereby dismissed.

The Oklahoma statute 85 O.S. 5, 6, and 7, under which the counterclaim was brought, provided as follows:

No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of Title 85 of the Oklahoma Statutes, or has testified or is

about to testify in any such proceeding. Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties.

Section 6 of Chapter 85 relating to damages provides as follows:

6. Penalties--Damages

Except as provided in Section 29 of this act, a person, firm, partnership or corporation who violates any provision of Section 5 of this title shall be liable for reasonable damages, actual and punitive if applicable, suffered by an employee as a result of the violation. An employee discharged in violation of the Workers' Compensation Act shall be entitled to be reinstated to his former position. Exemplary or punitive damage awards made pursuant to this section shall not exceed One Hundred Thousand Dollars (\$100,00.00). The burden of proof shall be upon the employee.

Section 6.1 of Chapter 85 of the Oklahoma Statutes addresses the liability of the State of Oklahoma and Section 7 thereof vests jurisdiction on the district courts of the State of Oklahoma.

As the Commission noted in its order of remand, it is necessary to examine both the facts and the substantive legal protection afforded a miner under both statutes.

DISCUSSION

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-818 (April 1981).

In examining the respective statutes, I find there are several areas of difference in the legal protection afforded miners.

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A comparison of the Federal Mine Act and the Oklahoma statutes indicates that under the Federal Act miners who make safety complaints to a company's supervisors and agents are generally protected in that activity. In its order or remand the Commission noted that the allegations by Messrs. Northcutt, Myers, and Eberle of such complaints survived in the instant case. 13 FMSHRC at 329.

On the other hand, the relevant Oklahoma statutes, cited above, deal with the filing of Workman's Compensation proceedings. The Oklahoma statutes and the cases annotated thereunder do not indicate that safety complaints are an activity protected under Oklahoma law. In enacting the Federal Mine Act, Congress considered the protection of miners making safety complaints to be an important facet of the Act.

Ideal vigorously argues that the filing of the Workman's Compensation cases were not independent from the safety complaints. Rather, "their safety complaint was their Worker's Compensation claim." I reject Ideal's argument. There is no evidenciary record in this case and as presiding judge, I must necessarily deal with the allegations of Complainants.

A further difference lies in the respective burdens of proof. The requirements for a miner to establish a prima facie case are outlined above. By way of a defense:

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Boich v. FMSHRC*, 719 F.2d 194, 195-196 (6th Cir. 1983); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-159 (D.C. Cir. 1984) (specifically approving the Commission's Pasula Robinette test); and *Goff v. Youghioghney & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986).

On the other hand, the Oklahoma burden of proof was described in *Buckner v. General Motors Corp.*, 760 P.2d 803 (Okla.

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1988). The Court stated, in reference to the rebuttal of a prima facie case:

the employer need not persuade the Court that it was actually motivated by the proffered reasons. The employer's burden is a burden of production of relevant and credible evidence, not a burden of persuasion. . . . if the employer carries this burden of production, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity. 760 P.2d at 807.

A further difference lies in the remedy of temporary reinstatement of a miner. See Commission Rule 44, 29 C.F.R. 2700.44. The Oklahoma law contains no such remedy.

A further difference lies in the remedy of attorney's fees. The Federal Mine Act authorizes such award but the Oklahoma statutes lack such a provision.

For the foregoing reasons, I conclude that the remedies under the Federal Mine Act are substantially different from those under the Oklahoma Statute.

Ideal contends that the controlling case in this situation is the Supreme Court decision of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) and on the basis of *Kremer* its motion to dismiss should be granted.

I do not find *Kremer* to be controlling. Specifically, the Supreme Court decided that a federal court in a Title VII case should give preclusive effect to a decision in a state court upholding a state administrative agency's rejection of an employment discrimination claim.

The EEOC complainant did not prevail in the state proceedings and he thereafter brought a Title VII action claiming discrimination on the basis of national origin and religion.

In *Belva*, the Commission distinguished *Kremer*, 4 FMSHRC at 987 fn. 5. It is not necessary for the undersigned to further restate the Commission ruling.

For the reasons stated herein, the motion of Respondent to dismiss on the basis of *res judicata* is DENIED.

~1058

The hearing will commence as scheduled on June 25, 1991, in
Tulsa, Oklahoma.

John J. Morris
Administrative Law Judge

Tel. (303) 844-3912
FAX (303) 844-5268