

CCASE:

UMWA v. SOL (MSHA), AND ROBERT KIYKENDALL

UMWA v. SOL (MSHA) AND J. WEEKLY AND WILLARD QUERRY

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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
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Falls Church, Virginia 22041

UNITED MINE WORKERS OF  
AMERICA ON BEHALF OF  
DAN NELSON,  
COMPLAINANT  
v.

DISCRIMINATION PROCEEDING  
Docket No. SE 88-92-D  
Jim Walter Resources

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
AND ROBERT KIYKENDALL,  
RESPONDENTS

No. 7 Mine

UNITED MINE WORKERS OF  
AMERICA ON BEHALF OF  
DAN NELSON, RONALD SONEFF,  
TOMMY BOYD, STAN ODOM AND  
CARROLL JOHNSON,  
COMPLAINANTS  
v.

DISCRIMINATION PROCEEDING  
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SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
AND JOHN WEEKLY AND,  
WILLARD (GENE) QUERRY,  
RESPONDENTS

ORDER OF DISMISSAL

Before: Judge Weisberger

In this action commenced pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), Complainants seek to hold MSHA and three of its employees liable for alleged violations of Section 105(c) of the Act. On November 20, 1991, the Secretary filed a Motion to Dismiss arguing that, in essence, the instant proceeding should be dismissed on the basis of the decision of the Court of Appeals, D.C. Circuit, in *Wagner v. Pittston Coal Group, et al.* (Case No. 90-1335, unpublished decision, November 5, 1991). On December 13, 1991, Complainants filed a Response to this Motion. On December 30, 1991 an Order was issued denying the Motion to Dismiss.

On January 23, 1992, the Secretary filed a Motion to Dismiss the proceeding against both MSHA and the individual employees of MSHA based on the decision of the Court of Appeals in Wagner, supra, and the Commission decision in Wagner, 12 FMSHRC 1178, (June 1990). UMWA filed its response on July 7, 1992.

#### I. Proceedings against MSHA

The Commission in Wagner, 12 FMSHRC at 1185 supra held that ". . . MSHA is not a 'person' subject to the provisions of Section 105(c)", and dismissed the complaint that had been brought against MSHA. It is true, as argued by complainants, that this holding of the Commission, 12 FMSHRC supra was not affirmed by the Court of Appeals in Wagner supra, as that issue was not before the Court. However, it is just as clear, for the same reasons, that the Court of Appeals did not reverse the Commission with regard to its decision on this issue. Accordingly, I am bound to follow the decision of the Commission as it is applicable law. Hence, based on the decision of the Commission, 12 FMSHRC supra, I conclude that MSHA is not a "person" subject to Section 105(c) of the Act, and that the portion of the Complaints herein seeking relief against MSHA for alleged violations of Section 105(c) of the Act should be dismissed.

#### II. Proceedings against individual employees of MSHA

The Commission, 12 FMSHRC supra at 1185 held that ". . . MSHA employees are not 'persons' subject to Section 105(c) and thus. . . can not be sued individually under Section 105(c)". Complainants argue that the Court of Appeals in Wagner, supra reversed this holding of the Commission, as it held that an individual MSHA employee can be held liable under Section 105(c) of the Act. I do not agree with this interpretation of the Wagner, decision. The Court in Wagner, supra, slip op. at 4, concluded that ". . . MSHA employees acting within the scope of their authority are agents of the sovereign, and therefore can not be liable under Section 105(c)" The Court then examined whether the employees therein acted so far beyond the scope of their authority as to become "persons" who may be liable under Section 105(c). The Court, in this connection held as follows: "In the absence of a statutory prohibition against such disclosure, there is no sound basis for the court to conclude that Inspector Sloce exceeded the bounds of his statutory authority by communicating Wagner's identity to Wayne Fields and Clinchfield Coal." (Wagner, supra, slip op. at 5)

In light of this conclusion, it may be seen, as argued by the Secretary, that the Court on Wagner, supra, did not reach the question as to whether individuals who act beyond the scope of their authority are liable under Section 105(c). Further, the Court in Wagner, supra, explicitly affirmed the decision of the Commission which held that MSHA employees can not be sued

~339

individually under Section 105(c). Hence, as correctly argued by the Secretary, the applicable law as set forth in the Commission's decision, 12 FMSHRC, supra and not reversed by the Court of Appeals, requires a finding that the complaints herein against employees of MSHA alleging liability under Section 105(c) be dismissed.

It is ORDERED these cases be DISMISSED.

Avram Weisberger  
Administrative Law Judge