

CCASE:
RANDALL V. BIG MINING
DDATE:
19940816
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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RANDALL PATSY, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 94-132-D
BIG "B" MINING COMPANY, : MSHA Case No. PITT CD 93-27
Respondent :

ORDER REINSTATING DISMISSAL

Before: Judge Feldman

This discrimination proceeding arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 815(c), concerns alleged protected activity associated with an incident that occurred on or about October 23, 1992, that involved the preparation of a mobile home site in the Peter Rabbit Campgrounds. A threshold question in this case is whether the complainant, Randall Patsy, was a "miner" as defined by section 3(g) of the Act, 30 U.S.C. 802(g), at the time of the alleged discriminatory discharge.

Patsy has expressed a reluctance to prosecute his complaint on several occasions. In correspondence dated April 7, 1994, Patsy stated there may be ". . . no sense of pursuing this any farther (sic)." In an April 18, 1994, written statement Patsy concluded that "[he]. . . would be better off to pursue this as a civil suit locally." The latter statement was made in response to an April 14, 1994, Order to Show Cause requesting Patsy to state unequivocally whether he wished to pursue his complaint.

On May 13, 1994, Patsy's discrimination complaint was dismissed in view of his apparent disinclination to pursue this matter. Order of Dismissal, 16 FMSHRC 1094 (May 1994). However, on June 2, 1994, Patsy requested that his case be reopened. The Commission deemed Patsy's June 2, 1994, request as a timely filed petition for discretionary review. Consequently, on June 21, 1994, the Commission vacated the May 13 Order of Dismissal and remanded this matter to me for further proceedings. Order, 16 FMSHRC 1237 (June 1994).

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Consistent with the Commission's Order, on July 11, 1994, I issued a combined Order On Remand and Notice Of Hearing scheduling this matter for trial on September 20, 1994. The Notice Of Hearing noted a fundamental issue was whether Patsy was a "miner" as defined by the Act at the time the alleged discrimination occurred. Noting that neither party was represented by counsel, I directed the parties' attention to the Commission's decision in Cyprus Empire Corporation, 15 FMSHRC 10, 14 (January 1993), that an individual's status as a "miner" under the Act is determined by whether the individual works in a mine and not by whether one is employed by a mine operator. Copies of the Cyprus case were provided to the parties to facilitate their preparation for hearing.

Patsy responded to the July 11, 1994, Notice of Hearing on July 20, 1994. The text of Patsy's response is as follows:

After reading the decision made for Cyprus Empire Corporation I cannot prove I was a miner at the time I was fired. I was employed by a mine operator, though I was working at a mobile home park he was developing. Being I don't fall under the miner category, is there some other agency I should contact.

In an abundance of caution, given Patsy's propensity for equivocation, my office contacted Patsy on July 25, 1994. Patsy was asked if he wanted his case dismissed. Patsy replied, "I don't have a leg to stand on after reading the Cyprus decision attached." However, Patsy expressed a desire to confer with his attorney. In response to Patsy's inquiry concerning other regulatory alternatives, Patsy was provided with the telephone number of the Occupational Safety and Health Division.

On August 5, 1994, Patsy was again contacted by my office. He indicated his attorney was on vacation and would return on August 9, 1994. Patsy stated he would contact his attorney on August 10, 1994, and inform my office of his attorney's recommendation. To date I have not heard from Patsy. Nor has any attorney filed an appearance in this matter.

In view of Patsy's July 20, 1994, statement, which is entirely consistent with his previous statements evidencing a waning interest in this matter, the May 13, 1994, Order dismissing this case IS HEREBY REINSTATED. Accordingly, the discrimination complaint in Docket No. PENN 94-132-D filed by Randall Patsy IS DISMISSED with prejudice.

Jerold Feldman
Administrative Law Judge

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Distribution:

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