

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2000

DAVID MORALES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 99-188-DM
v.	:	
	:	Mission Mine Complex
ASARCO INCORPORATED,	:	
Respondent	:	Mine I.D. 02-02626

DECISION AFTER REMAND

Before: Judge Manning

This case is before me on a complaint of discrimination brought by David Morales against Asarco Incorporated (“Asarco”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). The complaint alleges that Asarco terminated Mr. Morales on August 13, 1998, in violation of section 105(c). A hearing in this case was held in Tucson, Arizona. In a decision issued on May 8, 2000, I held that Mr. Morales did not establish a violation of section 105(c) of the Mine Act and I dismissed his discrimination complaint. 22 FMSHRC 659.

Mr. Morales appealed my decision to the Commission. On August 30, 2000, the Commission vacated my decision and remanded the case to me to “determine whether any attempt was made [by Asarco] to influence [Tony] Rivera’s testimony as alleged in the petition, and if so, whether any such conduct had a material effect on the outcome of the proceedings before the judge.” 22 FMSHRC 947, 948. Mr. Rivera testified at the hearing in this case on December 15, 1999. His testimony was quite brief. (Tr. 113-18). Mr. Rivera testified regarding events that occurred on Interstate 19 on March 20, 1998, when Ken Dickey, an Asarco hourly employee who was driving another vehicle, displayed a handgun to Mr. Morales as they were driving down the freeway. Rivera also testified regarding the events that occurred in the company parking lot and at the mine after Mr. Morales and Mr. Dickey arrived that day. He also stated that he was aware that Morales complained about fumes in his truck and that he did not know whether Asarco supervisors took any action against Mr. Morales for his complaint. Although Mr. Morales called Mr. Rivera as a witness and examined him on direct and redirect, Morales did not ask Rivera detailed questions about Morales’s health complaint, the circumstances of his termination, or Asarco’s treatment of employees.

In his petition for discretionary review to the Commission, Mr. Morales attached written statements of Mr. Rivera and Rito Orrantia, another witness at the hearing. Mr. Rivera’s statement is as follows, as edited for spelling errors:

The day of David Morales's court, Mr. Jim Coxon told me not to say anything about safety or anything about the mine. I think that this is not right because I didn't testify freely.

Mr. Orrantia's statement is as follows, as edited for spelling errors:

My name is Rito Orrantia, Jr. I was a witness for David Morales but before I went into the courtroom, me and Tony Rivera met Jim Coxon right outside the courtroom doors. I overheard Jim Coxon tell Tony Rivera not to say anything about what goes on at the mine. The underground is a whole different department.

Mr. Coxon, the industrial relations manager at the Mission Mine complex, testified at the hearing on behalf of Asarco.

The focus of the Commission's remand is quite narrow: whether Asarco made any attempt to influence Mr. Rivera's testimony and, if so, whether any such conduct had a material effect on the outcome of the case. The Commission stated that I could, in my discretion, hold a hearing on this issue, if appropriate.

I. SUMMARY OF THE PARTIES' ARGUMENTS

On September 6, 2000, I ordered Asarco to respond to Mr. Morales's allegations. In a response filed on September 29, 2000, Asarco made a number of arguments in support of its position that Mr. Coxon did not take any action, intentional or unintentional, that could be viewed as an attempt to influence witness testimony at the hearing. A declaration signed by Mr. Coxon was attached to Asarco's response. In his declaration, Mr. Coxon provided the following explanation for the events that transpired outside the courtroom. During the entire time that Morales was employed at Asarco's Mission Mine Complex, Rivera worked in the underground mine. Mr. Morales, on the other hand, worked on the surface during his employment. As a consequence, Messrs. Morales and Rivera never worked in the same areas of the Mission Mine Complex during their employment.

Mr. Coxon stated that because he is the head of the mine's human resources department, he was familiar with Mr. Morales's case and he knew all of the witnesses Mr. Morales called to testify. When he arrived at the courthouse, he said hello to everyone and several of these employees asked why they were called to testify. Mr. Coxon told them that Mr. Morales, not Asarco, had called them and that they should simply tell the truth when asked questions at the hearing. Mr. Coxon denies that he instructed anyone how to testify at the hearing.

With respect to Mr. Rivera, Mr. Coxon recalls exchanging greetings and that Mr. Rivera asked why he was called because he did not know anything about Mr. Morales's case. Coxon recalls that Mr. Rivera was concerned because he worked underground and he did not understand what Mr. Morales's case had to do with the underground mine. Mr. Coxon states that, although

he cannot remember his exact words, he told Mr. Rivera that Mr. Morales's case "had nothing to do with the underground ... or with safety in the underground." (Coxon Declaration 3). He does not recall having any further conversation with Mr. Rivera. Coxon stated that because he frequently must testify at administrative hearings and arbitrations, he is "careful to avoid any discussion with any potential witnesses that could be misinterpreted by them as any attempt to influence testimony." *Id.* at 4.

Asarco also argues that neither Mr. Rivera's nor Mr. Orrantia's testimony "was material to the trial or to the resolution of the case." (Asarco Response 6). It contends that their testimony was limited to a few minor issues so that, even assuming that they felt intimidated by Mr. Coxon's presence or his conversation prior to the hearing, his conduct did not have "a material effect on the outcome of the proceedings."

On October 6, 2000, I ordered Mr. Morales to reply to Asarco's response. In his reply, Mr. Morales raises a whole host of issues, most of which are outside the boundaries of this remand. For example, he believes that the MSHA official who investigated his discrimination complaint was biased against him. I do not fully understand many of his other arguments. He makes several references to the fact that Asarco is now a wholly-owned subsidiary of Grupo Mexico S.A. de C.V. As it relates to the issue on remand, Mr. Morales states that Mr. Coxon intimidated his witnesses not to give "details pertinent to safety." (Reply 2). As a consequence, Mr. Morales states that these witnesses did not speak freely at the hearing.

Because Mr. Morales believes that he was not given a fair hearing, I also consider in this decision the major issues raised by Mr. Morales that are outside the boundaries of the Commission's remand order. These arguments are discussed below.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

In discussing the issues raised in the Commission's remand, it is important to understand the configuration of the courtroom. The hearing was held in a U.S. Bankruptcy courtroom that was located in a commercial office complex. This office complex was a series of two-story stucco buildings built around a plaza. The second floor of each building was accessed by an outside elevated walkway. This walkway functioned as the corridor for the second floor. When entering the building, one stepped into a rather cramped room that contained a small desk for the security guard, several chairs, and security devices. The courtroom opened directly into this room. I sequestered the witnesses at the hearing. As a consequence, if a witness were to be called within a relatively short period of time, he waited his turn in this small room or on the outside walkway. The weather was pleasant the day of the hearing.

In addition to testifying, Mr. Coxon was also Asarco's designated representative at the hearing. Thus, he sat next to counsel for Asarco during the entire trial. The hearing started at 9 am and all of Mr. Morales's witnesses arrived at that time. The conversation between Messrs. Coxon and Rivera occurred on the first day of the hearing, either as the witnesses arrived or during a break in the proceedings.

It is also important to understand a little about Asarco's Mission Mine Complex. Although I do not have detailed knowledge of all of the activities that occur there, I do know that there is an underground mine and an open pit operation. There are also other surface facilities at the Mission Mine Complex that are involved in mineral milling. When individuals at the Mission Mine Complex speak of "the mine," they are usually referring to the underground mine. Thus, someone who works in the open pit does not work in "the mine." The open pit is referred to as "the pit" or by other names associated with certain areas of the pit, such as the Mission Ramp. (Tr. 454).

As stated above, Mr. Rivera worked in "the mine," while Mr. Morales worked in the pit. In his statement, Mr. Rivera said that Coxon told him not to say "anything about safety or anything about the mine." Mr. Coxon states that he told Mr. Rivera that the case "had nothing to do with the underground ... or with safety in the underground." It is possible that Coxon used the word "mine" rather than "underground" when talking with Rivera. Coxon said these words after Rivera asked him why he was called to testify because he worked underground, not with Morales. Thus, when put in context, it appears that, at most, Coxon told Rivera not to talk about conditions in the underground mine. This interpretation is supported by Mr. Orrantia's statement. He said that he overheard Coxon tell Rivera "not to say anything about what goes on at the mine." He then said "[t]he underground is a whole different department." Thus, it appears that he used the term "mine" in his statement to mean the underground mine. The evidence indicates that Mr. Coxon did not intentionally attempt to influence the testimony of Mr. Rivera with respect to the issues raised in Mr. Morales's complaint of discrimination. I credit Mr. Coxon's declaration in this respect. It appears that he was attempting to assure Mr. Rivera that he need not testify about any concerns he might have with respect to the underground mine.

Nevertheless, it appears from the face of Mr. Rivera's statement that he believed that he could not "speak freely" at the hearing as a direct result of Mr. Coxon's statements. I also note that most employees will feel nervous and somewhat intimidated if they are required to testify under subpoena about employment issues in front of their employer's human resources director. For the reasons set forth below, I find that even if Mr. Rivera felt intimidated by Mr. Coxon's statements and believed that he could not speak freely at the hearing, this fact had no material effect on the outcome of this proceeding.

Mr. Morales called Mr. Rivera to testify on his behalf. Mr. Morales asked Mr. Rivera detailed questions about the incident that occurred on the Nogales Highway (I-19) on March 20, 1998, involving Ken Dickey, another Asarco hourly employee. (Tr. 114-16). This incident is described at 22 FMSHRC 662-63. Mr. Rivera was in a separate car that was behind Morales's car and Dickey's truck. He testified about what he observed. With the exception of one question, Mr. Morales limited his questioning of Mr. Rivera to that incident. Morales also asked Rivera if he was aware of Morales's MSHA complaint about fumes in the cab of his truck. Rivera stated that all he knew about the complaint was what Morales had previously told him. (Tr. 116). Morales did not ask Rivera anything else about his health complaint or about working conditions at the Mission Mine Complex. Morales also did not ask him any questions concerning Asarco's treatment of employees at the Mission Mine Complex. After cross-examination, Mr. Morales

asked Mr. Rivera on redirect whether he was intimidated by Asarco when he came to testify. (Tr. 118). Mr. Rivera replied, “No, they didn’t say nothing much.” *Id.*

For purposes of this decision after remand, I assume that Mr. Rivera believed that he was instructed by Mr. Coxon not to talk about safety and health issues at the Mission Mine Complex or the treatment of employees by Asarco. I find, however, that Mr. Coxon’s instruction did not have any effect on the outcome of the proceeding because Rivera was not asked any questions by Mr. Morales about these issues. Morales only asked him about the incident on the highway, the subsequent related events at the mine, and whether he was aware of his MSHA health complaint. I also take into consideration the fact that I did not discuss Mr. Rivera’s testimony in my decision in this case, except that I mentioned Rivera’s description of a comment Dickey made to Morales in the parking lot when they arrived at the Mission Mine Complex on March 20, 1998. (22 FMSHRC 663; Tr. 115). His testimony was not significant in my resolution of the issues.

In reviewing the transcript on remand, I notice that Asarco’s counsel, David Farber, asked questions on cross-examination that arguably went beyond the scope of Morales’s direct examination. In the interest of fairness, I hereby strike from the record the cross-examination questions and answers at page 117, line 2 through page 118, line 5 of the transcript. If Mr. Rivera was influenced in any way by Mr. Coxon’s comments at the courthouse, it would have been in answering these questions.

As stated above, Mr. Morales raised issues in this remand proceeding that are outside of the Commission’s remand order. Morales notes that the caption of this proceeding contains the words “DISCRIMINATION PROCEEDING,” but that I would not allow him to introduce all of the evidence that he wanted to introduce concerning discriminatory acts that Asarco took against him. I attempted to explain to Mr. Morales that a Commission administrative law judge is not a court of general jurisdiction. Many times during the hearing, Mr. Morales sought to introduce evidence supporting his claim that he was discriminated against because he is Mexican. I explained to him that I could not rule on those issues and I limited the amount of evidence he could introduce on such issues. I note that in the discrimination complaint he filed with MSHA in the case, he alleges that his rights were violated under the Civil Rights Act of 1964, that he was treated differently because he was Mexican, and that he was fired for filing complaints under Title VII of that Act. (Ex. R-25). Mr. Morales attempted to fold those issues into this proceeding, but I advised him that I was without jurisdiction to consider civil rights issues. It appears that he is still confused about this distinction. Most of the issues he raised in his reply on remand relate to his misunderstandings about the scope of Commission proceedings.

I tried to help Mr. Morales understand what this proceeding was about and how to best present his case. Mr. Morales continues to believe that I thwarted his efforts. For example, he states that I changed the translator that was to be used at the hearing on the day of the trial. He apparently expected me to use the same translator used by Mr. Farber at his deposition. I engaged a competent, independent translator for the hearing who did an excellent job. He also alleges that I did not give him sufficient time for rebuttal. Although I excluded some of the evidence that he sought to introduce on rebuttal because it was repetitive or irrelevant to the

issues in the case, I gave him all of the time he needed to establish his case in chief and to rebut the evidence presented by Asarco. As the administrative law judge in this case, I could not represent him at the hearing, but I tried to provide a fair and impartial forum in which he could present his evidence.

I conclude that Mr. Coxon of Asarco did not deliberately attempt to influence the testimony of Mr. Rivera. I also find, however, that Mr. Rivera may have misinterpreted his conversation with Mr. Coxon as an instruction not to openly discuss safety and health issues at the hearing or to otherwise testify in a manner that would compromise Asarco's position in the case. Nevertheless, I find that this possible misunderstanding did not affect the outcome of this proceeding. Mr. Morales limited Mr. Rivera's testimony to the events that occurred on Interstate 19. As I held in my decision on the merits, there was no showing that Mr. Morales's discipline following this incident was different from the discipline given Mr. Dickey. 22 FMSHRC 668. Mr. Rivera's testimony did not touch upon the fundamental issues in the case or materially affect its outcome.

III. ORDER

For the reasons set forth above, I find that Asarco did not purposefully attempt to influence the testimony of Tony Rivera and, to the extent that his testimony was influenced, such influence did not have any material effect on the outcome of this proceeding. Accordingly, for the reasons set forth in my decision of May 8, 2000, the complaint of discrimination filed by David Morales against Asarco, Inc., under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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