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PAULA PRICE V. MONTEREY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 28, 1989

PAULA PRICE

v. Docket No. LAKE 86-45-D

MONTEREY COAL COMPANY

BEFORE: Ford, Chairman, Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this discrimination proceeding, initiated by Paula Price pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Sec. 815(c)(3), the administrative law judge dismissed the complaint for lack of jurisdiction because Price had filed her private action with the Commission prior to a determination by the Secretary that no violation had occurred. 9 FMSHRC 1663 (Sept. 1987). In reaching that conclusion, the judge exclusively relied upon the then recently issued decision of the Commission in the matter of Gilbert v. Sandy Fork Mining Company, Inc., 9 FMSHRC 1327 (Aug. 1987), wherein the Commission invalidated part of Procedural Rule 40(b), 29 C.F.R. 2700.40(b).*/ In its decision, the Commission concluded that under Section 105(c)(3) "the complainant may file his private action only after the Secretary has informed the complainant of his determination that a violation has not occurred." Gilbert at 1337 (emphasis in original).

Because the Commission's decision in Gilbert expressly extended the holding to all pending Section 105(c)(3) cases, and because the judge found that the required Secretarial determination had not been made regarding Paula Price's complaint, the judge

below concluded that dismissal of the complaint was required.

Subsequent to the Commission's direction for review in this matter, the United States Court of Appeals for the District of Columbia Circuit issued his opinion in the case of Gilbert v. FMSHRC, No. 87-1499 (January 27, 1989), reversing the Commission's retroactive application of revised Procedural Rule 40(b).

*/ That part of former Commission Procedural Rule 40(b) invalidated by the Commission provided that a complainant could file a private action for discrimination if the Secretary failed to make a determination that no violation had occurred within 90 days after the miner complained to MSHA.

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In light of the D. C. Circuit's opinion, the stated basis for the judge's dismissal of Price's Sec. 105(c)(3) complaint cannot stand. Therefore, we remand the case to the administrative law judge for the purpose of completing the record and entering a decision. Accordingly, the Commission's direction for review previously issued in this matter is hereby vacated and the case remanded for further appropriate proceedings.

FORD B. FORD, Chairman

RICHARD V. BACKLEY, Commissioner

JOYCE A. DOYLE, Commissioner

JAMES A. LASTOWKA, Commissioner

L. CLAIR NELSON, Commissioner

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