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MSHA (MICHAEL PRICE, JOE VACHA),
AND UMWA V. JIM WALTER RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 28, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of MICHAEL L. PRICE
and JOE JOHN VACHA

and

UNITED MINE WORKERS OF AMERICA

v. Docket No. SE 87-128-D

JIM WALTER RESOURCES, INC.

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq (1988) ("Mine Act" or "Act"). Jim Walter Resources, Inc. ("JWR") has filed a Motion for Reconsideration of the Commission's prior decision in this matter (12 FMSHRC 1521 (August 1990)), which, in relevant part, vacated the administrative law judge's conclusion that JWR had established a successful affirmative defense to the complainants' prima facie case of discriminatory discharge and remanded the issue to the judge for further proceedings. JWR asserts that it was effectively denied an opportunity to brief the affirmative defense issue during the prior review and requests the Commission to permit such an opportunity before reaching a final determination as to that issue. The Secretary of Labor and United Mine Workers of America ("UMWA") have filed responses opposing JWR's motion. Upon consideration of JWR's motion and the responses, and for the reasons explained below, we deny the motion.

The relevant procedural history may be summarized briefly. After the complainants prevailed before Commission Administrative Law Judge James A. Broderick, the Commission granted JWR's Petition for Discretionary Review, which challenged Judge Broderick's conclusion (10 FMSHRC 896 (July 1988) (ALJ)) that JWR's Substance Abuse Rehabilitation and Control Program ("Drug Program") was, on its face, unlawfully discriminatory under the Mine Act. In Part III of its brief on review, the UMWA, which had not petitioned for review, also attacked the judge's other conclusion to the effect that the Drug Program had not been discriminatorily applied to the complainants. UMWA Br. 21.27. In that portion of its brief, the UMWA addressed the judge's determination that JWR had established a successful affirmative defense to

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the prima facie case of discriminatory discharge under the "as applied" theory. UMWA Br. 22, 23.27.

JWR filed a motion to strike Part III of the UMWA's brief on the grounds that the "as applied" issue was not within the scope of the Commission's Direction for Review. In this motion, JWR did not request that, in the event the Commission were to deny the motion to strike, it be allowed to brief the merits of the issue raised by the UMWA. The UMWA and the Secretary filed oppositions to the motion to strike.

The Commission reserved ruling on the motion to strike and scheduled oral argument in this case. Shortly before the argument took place, the Commission voted to deny JWR's motion to strike. Chairman Ford announced that determination at the outset of oral argument: During the ensuing oral argument, counsel for JWR and for the UMWA argued a number of "as applied" issues relevant to the affirmative defense (see Tr. Oral Arg. 21.27 (JWR argument); 53.56 (UMWA argument) and Commissioners asked questions pertaining to the affirmative defense. JWR's counsel did not, at that time, request leave to file written argument on the merits of the "as applied" issues. Further, at no time during the period between notification on December 6, 1989, that the motion to strike had been denied and the issuance of the Commission's decision on August 20, 1990, did JWR seek leave from the Commission to file a reply brief in response to the issues raised in Part III of the UMWA's brief.

In its decision, the Commission concluded that JWR's Drug Program was not facially discriminatory in violation of section 105(c)(1) of the Mine Act, and reversed Judge Broderick's conclusion to the contrary. 12 FMSHRC at 1531.33. As indicated at oral argument, the Commission also held that it could properly entertain the "as applied" affirmative defense issue raised by

1/ The Chairman stated:

Before we begin the arguments, I would advise the parties at the outset that the Commission has carefully considered both JWR's motion to strike a portion of the UMWA's brief and the other parties' oppositions to that motion. The Commission has decided to deny JWR's motion to strike.

I'm informing you of this now so that in the limited time available for argument the parties may focus their attention on the other issues in this case, including the merits of Judge Broderick's conclusion

that the JWR's drug program was not discriminatorily applied to complainants Price and Vacha.

You may address that, if you wish, Counsel Spotswood [JWR's counsel].

Tr. Oral Arg. 4.5 (emphasis added).

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the UMWA, and denied JWR's motion to strike. 12 FMSHRC at 1528-29. As to the merits of the "as applied" issues, the Commission affirmed on substantial evidence grounds the judge's conclusion that the complainants had established a prima facie case of discriminatory discharge. 12 FMSHRC at 1533.34. However, the Commission vacated the judge's conclusion that JWR had affirmatively defended against the prima facie case and remanded that issue to the judge for further findings and analysis. 12 FMSHRC at 1534.36. The Commission stated: "On remand, the judge shall provide all parties with the opportunity to brief the merits of the issues being remanded." 12 FMSHRC at 1536.

The thrust of JWR's present motion is that the Commission should reconsider its prior action vacating the judge's determination on the "as applied" theory and remanding the affirmative defense issue to the judge. JWR argues further that the Commission should "allow JWR to brief the issue of discriminatory application ... before [the Commission] makes a final determination to remand the affirmative defense issue to the ALJ." Motion at 3.

As argued by the Secretary and the UMWA in their oppositions to JWR's Motion for Reconsideration, JWR had ample opportunity ... both at the time that it submitted its motion to strike and following denial of that motion ... to submit a request for leave to file a reply brief in response to Part III of the UMWA brief. JWR chose not to do so.

As noted above, at oral argument, the Commission specifically denied JWR's motion to strike and permitted argument of "as applied" issues. This made clear the Commission's intention to consider those issues in its disposition of this case. Under these circumstances, JWR's failure, either at oral argument or at any time prior to issuance of the Commission's decision, to submit a briefing request was tantamount to waiver of any right to file a reply brief. JWR's present request for reply briefing after the Commission decision remanding this matter to the judge for further proceedings is untimely and inconsistent with orderly judicial process. We emphasize that the Commission's prior decision expressly affords JWR the right to brief the affirmative defense issue on remand. Nor is this a hollow opportunity because it affords JWR the right to focus on the issues raised in Part III of the UMWA brief and to respond in light of the Commission's broad observations concerning the evidence. See 12 FMSHRC at 1534.36. We further note that in its prior decision the Commission did not reach or resolve the ultimate merits of the affirmative defense issue.

Indeed, the Commission based its remand of the affirmative defense issue, in large part, on a determination that the judge had not completely

examined and evaluated all evidence relevant to the merits of JWR's affirmative defense. See 12 FMSHRC at 1534.36. The Commission's remand therefore contemplates reanalysis of the evidence and factual resolutions by the judge. To grant JWR's motion at this point would enmesh the Commission in the necessity of fact finding and evidentiary analysis which is best performed by the judge.

Finally, the Commission's decision in this case, given its remand to

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the judge, is not final Commission action. JWR and the other parties will have the right, following the judge's decision on remand, to petition the Commission again for discretionary review of any and all issues in this case, whether by way of a request for reconsideration of any of the Commission's prior holdings or by way of appealing the judge's determinations on remand. In view of this consideration, and the others discussed above, we are satisfied that JWR has not been deprived of any due process and has had, and will continue to have, adequate opportunity to plead its case to the Commission.

Accordingly, for the foregoing reasons, JWR's motion for reconsideration is denied. 2/

2/ Commissioner Holen assumed office after this case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, and such participation is discretionary. Commissioner Holen elects to participate in the disposition of this matter.

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