

CCASE:
CLYDE COLE (MSHA) V. CANYON COUNTRY ENTERPRISES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 1, 1991

SECRETARY OF LABOR,
MINE SAFETY & HEALTH
ADMINISTRATION (MSHA)

On behalf of CLYDE C. COLE

Docket No. WEST 90-165-DM

v.

CANYON COUNTRY ENTERPRISES
d/b/a CURTIS SAND AND GRAVEL,
a corporation

ORDER

A petition for discretionary review has been filed on behalf of Complainant Clyde C. Cole seeking review of a decision issued by Commission Administrative Law Judge Michael A. Lasher on January 22, 1991. In that decision, the judge granted the Secretary of Labor's motion, to withdraw her complaint of discrimination filed on Mr. Cole's behalf under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2), and the judge dismissed the section 105(c)(2) complaint with prejudice.

As grounds for his granting of the motion to withdraw and his dismissal of the section 105(c)(2) complaint, the judge indicated that upon completion of discovery in this matter, the Secretary determined that no violation of section 105(c) of the Mine Act had occurred. The judge further declined a request by David P. Koppelman, Esq., International Union of Operating Engineers, Local 12, AFL-CIO, attorney for Mr. Cole, to substitute Mr. Cole in lieu of the Secretary as sole complainant. In so declining, the judge stated, "such rights as Mr. Cole has would appear to be provided in section 105(c)(3) of the [Mine] Act." The judge's disposition of this matter is correct.

The statutory scheme devised by Congress for addressing miners'

complaints of discrimination provides that when the Secretary determines that no discriminatory violation has occurred, the miner may still pursue his individual complaint of discrimination pursuant to section 105(c)(3) of the Act. "The

1/ Section 105(c)(3) provides, in part:

"If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 3 days of notice of the Secretary's

presence of section 105(c)(3) within the statutory scheme establishes the appropriate recourse Congress intended the miner to have under the Mine Act, when the Secretary determines that a complaint should not be filed or, as here, should be withdrawn. *Robert K. Roland v. Secretary of Labor*, 7 FMSHRC 630, 635-636 (May 1985). See also S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-625 (1978).

The appropriate procedural route in this case, is the one indicated by the judge, i.e., the complainant's filing of a complaint under section 105(c)(3). Under the circumstances presented here, we deem the filing of the petition for discretionary review as suspending the 30-day time limit applicable to the filing of individual complaints under section 105(c)(3). Should complainant wish to pursue this matter, he may do so by filing a section 105(c)(3) complaint within 30 days after receipt of this order. The record in the section 105(c)(2) case may be noticed judicially in any such new proceeding.

Accordingly, under the circumstances, the petition for discretionary review is denied.

Richard V. Backley, Acting Chairman

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]."

30 U.S.C. 815(c)(3).

~319

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