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NORTHCUTT, MYERS & EBERLE V. IDEAL BASIC INDUSTRIES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 20, 1991

DONALD NORTHCUTT, GENE MYERS,
and TED EBERLE,

v. Docket No. CENT 89-162-DM

IDEAL BASIC INDUSTRIES, INC.

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

ORDER

This discrimination proceeding under the Federal Mine Health and Safety Act of 1977, 30 U.S.C. 801 et seq. (1988) (the "Mine Act" or "Act") is before the Commission on interlocutory review.

On January 31, 1991, the petition for interlocutory review filed on behalf of Ideal Industries, Inc. ("Ideal") was granted. In its petition, Ideal seeks review of the December 7, 1990 Order of Commission Administrative Law Judge John J. Morris. Specifically, Ideal urges that the final disposition of the proceeding will materially advance upon immediate review of the following issues: (1) Does a miner's claim that he was discharged in retaliation for filing a workers' compensation claim state a claim for which relief can be granted under section 105(c) of the Act, and if so, (2) Is this claim barred under the doctrine of res judicata where the miner has already settled and dismissed with prejudice his workers' compensation retaliatory claim in federal district court. Subsequent to filing the instant petition, Ideal received the December 14, 1990 Order of the judge, which purported to set forth the scope of the issues pending in the subject section 105(c)(3) action. Ideal filed an amendment to its petition seeking Commission clarification of the issues pending before the judge. Amendment at 1.

For the reasons that follow, we decline to rule that, as a matter of law, the filing of a workers' compensation claim fails to constitute a protected activity under section 105(c) of the Act; we remand, for

reconsideration the issue of whether the doctrine of res judicata bars the subject complaint of discharge; and we clarify the specific issues pending before the judge.

We have reviewed the record in this case, and the record of the predicate section 105(c)(2) discrimination case docketed at No. CENT 88-142-D. We conclude that it is necessary, at this juncture, to set forth

1/ The petition was filed by Holnam, Inc., described by counsel as "successor by operation of law to Ideal Basic Industries, Inc. ..."

the specific issues pending before the judge.

The instant action has been filed pursuant to section 105(c)(3) of the Act. To be valid a complaint thereunder must allege violations that were investigated by the Secretary of Labor and were determined by the Secretary not to be violative of section 105(c)(1) of the Act.

In this case the clearest indication of the issues investigated by the Secretary is contained in the predicate section 105(c)(2) complaint of discrimination and discharge filed by the Secretary on behalf of the complainants and others on August 23, 1988 and docketed at No. CENT 88-142-D. In that complaint, the Secretary alleged that the complainants engaged in two forms of protected activity: (1) prior to October 16, 1987. complainants filed Oklahoma State workers' compensation claims based on disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant. and (2) complainants made safety complaints to supervisors and agents of Ideal. The Secretary also alleged three separate adverse actions taken by Ideal: (1) Ideal discriminated against the complainants by requiring them to wear respirators and hearing protection devices that were different from those required of other miners performing the same job' and in more areas of the mine than other miners, (2) complainants were disciplined for failure to comply with such disparate requirements and (3) that Ideal's "discrimination and, or discharge of complainants was in violation of section 105(c)(1) of the Act." Complaint at 3.

Thus, the complaint filed by the Secretary on behalf of the complainant miners alleged illegal discharges because the complainants engaged in the two aforementioned protected activities. Although the Secretary failed to set forth any details regarding the discharges, the record discloses that discharges allegedly occurred in April of 1988. Order of December 7, 1990 at 4.

On July 28, 1989, the Secretary and Ideal filed a joint "motion to approve settlement agreement and motion to withdraw." In that document, Ideal effectively admitted engaging in the first two of the three alleged adverse actions charged by the Secretary. In that same motion, the Secretary effectively determined that no discriminatory discharge violation had occurred. The motion contained the following:

The Secretary of Labor, after further review and evaluation, has determined that there is an insufficient basis for the Secretary to proceed with the claim of discriminatory discharge of any of the complainants.

Motion at 4.

2/ The complaint was amended on November 4, 1988. However, the amendment contained therein related only to the amount of civil penalty sought by the Secretary.

In his Decision Approving Settlement, on August 3, 1989, Commission Administrative Law Judge Michael A. Lasher Jr., properly construed the Secretary's withdrawal of the allegation of discriminatory discharge to have triggered the provisions contained in section 105(c)(3) of the Act:

(Complainant and Respondent have agreed that the Secretary of Labor's withdrawal shall not prejudice the rights of the individual claimants to pursue, pursuant to 30 U.S.C. 815(c)(3) and 29 C.F.R. 2700.40(b), 41(b) and 42(a), their allegations of discriminatory discharge).

Decision at 2.

Consequently, at the conclusion of the predicate section 105(c)(2) action filed by the Secretary on behalf of the complainants (No. CENT 88-142-D), only one of the three allegations of violation of section 105(c)(1) survived. Specifically, the surviving allegation was that: complainants were illegally discharged because they had engaged in two protected activities: (1) filing workers' compensation claims based upon disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant, and (2) making safety complaints to supervisors and agents of Ideal. Accordingly, this allegation of violation was the sole allegation which could properly have been the subject of a complaint filed pursuant to section 105(c)(3) of the Act.

After review of the subject section 105(c)(3) complaint filed September 11, 1989, and complainants' statement of issues filed February 12, 1990, in response to Judge Morris' Order of January 23, 1990, we conclude that the case presently pending before Judge Morris does contain the very same allegation of illegal discharge initially filed by the Secretary, i.e., that the complainants were illegally discharged in violation of section 105(c)(1) because complainants engaged in two protected activities: (1) filing workers' compensation claims based on disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant, and (2) making safety complaints to supervisors and agents of Ideal.

To the extent that the record in this matter contains conclusions, findings or orders by the judge that conflict with the foregoing, they are hereby vacated.

Protected Activity

Ideal argues that a miner's claim that he was discharged in

retaliation for filing workers' compensation claims fails to state a claim for which relief can be granted, i.e., that such a claim does not constitute an activity protected by 105(c) of the Act. In relevant part, section 105(c)(1) provides:

No person shall discharge ... any miner ...
because such miner ... has filed or made a
complaint under or related to this Act,
including a complaint notifying the operator
... of an alleged danger or

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safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... (emphasis supplied).

This issue has not been the subject of prior review by the Commission, but several Commission administrative law judges have found the existence of protected activity when agencies other than the Mine Health and Safety Administration were contacted regarding health or safety hazards. ^{3/}

In the predicate section 105(c)(2) action before Judge Lasher. Ideal moved for dismissal or summary judgment based upon the same argument. In denying the motion Judge Lasher held:

[T]he filing by a miner with an appropriate state agency of a claim for Workmen's Compensation can in the abstract be considered to be a notification to a mine operator of an alleged danger or safety or health violation as provided in section 105(c)(1) of the Act. Whether such claim should be so considered and become a protected activity can only be determined on the basis of all the evidence. In this connection, in the perspective of the issue raised on motion for dismissal or summary judgment, it is pointed out that Petitioner has specifically alleged that the Oklahoma State Workmen's Compensation claims were "based on disabilities allegedly caused by hazardous conditions" Petitioner also contends that such claims are complaints "related" to the Mine Act.

Order of June 13, 1989, at 2.

We agree with Judge Lasher that the issue is not summarily disposed of by exclusive reference to the text of section 105(c) of the Act. The factual context in which the alleged activity occurred is determinative of whether the activity is protected.

Accordingly, we conclude that the issue of whether the filing of workers' compensation claims is a protected activity is a proper subject of litigation in this case. To the extent that the record in this matter contains conclusions, finding or orders that conflict with the foregoing,

^{3/} See Secretary of Labor on behalf of William Johnson v. Borden, Inc. (Chemical Div., Smith-Douglass), 3 FMSHRC 926, (April 13, 1981); Johnny

Howard v. Martin-Marietta Corp., 3 FMSHRC 1599, (June 19, 1981); Secretary of Labor on behalf of Joseph Gabossi v. Western Fuels Utah, Inc., 9 FMSHRC 1481, 1505 (August 21, 1987), remanded on other grounds, 10 FMSHRC 953 n. 3 (August 15, 1988). But see Randy J. Collier v. Great Western Coal, Inc., 12 FMSHRC 35 (January 9, 1990).

they are hereby vacated.

Res judicata

Ideal argues that the subject claim of illegal discharge under the Mine Act is barred by the doctrine of res judicata because the complainants previously settled and dismissed with prejudice workers' compensation retaliatory discharge claims in federal district court.

Prior to the initiation of the instant case, Ideal filed a civil action against complainants and other employees in the U.S. District Court for the Eastern District of Oklahoma charging, inter alia, violations of the Racketeer Influenced and Corrupt Organizations Act (Case No. 88-186-C). Complainants interposed a counterclaim alleging that Ideal discharged them in retaliation for filing state workers' compensation claims in violation of Oklahoma State law. However, on June 2, 1989, the parties consented to entry of an order whereby the complainants voluntarily dismissed with prejudice the counterclaim which alleged "workers' compensation retaliation wrongful discharge." Order at 1.

Reciting the foregoing, Ideal moved to dismiss the complaint in the instant case on the basis of res judicata. In his order of December 7, 1990, denying the motion, the judge concluded that "... different causes of action were involved in the District Court case and the case before the Commission." Order at 4. In explaining the basis for his legal conclusion, the judge said:

As indicated in this order, the issue of whether a workman's compensation claim is an activity protected under the Act is not an issue in this case. Such issue will not be decided, since it was dismissed with prejudice in the case filed before Judge Lasher. (CENT 88-142-D).

Order of December 14, 1990 at 4.

As we have indicated earlier, the workers' compensation claim issue was not dismissed with prejudice by Judge Lasher and is presently pending. Accordingly, we remand this issue to the judge for reconsideration.

Without intimating an opinion on this issue, we note that the Commission has previously considered the issue of res judicata and its impact upon matters arising under section 105(c) of the Act. *Bradley v. Belva Coal Company*, 4 FMSHRC 982 (June 4, 1982), 2 MSHC 1729. There the Commission set forth a framework for analyzing application of res judicata

to section 105(c) actions. The dismissed counterclaim should be compared to the present section 105(c)(3) complaint in light of the principles set forth in Bradley.

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For the foregoing reasons, this matter is hereby remanded to the judge.

Richard V. Backley, Acting Chairman

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