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FRANCIS A. MARIN V. ASARCO
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August 25, 1992
FRANCIS A. MARIN

v. Docket No. WEST 91-161-DM

ASARCO, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This is a discrimination proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act") by complainant Francis Marin against Asarco, Inc. ("Asarco"). At issue is whether the Commission and its administrative law judges may impose sanctions against private parties in litigation arising under the Mine Act, under Commission Procedural Rule 1(b), 29 C.F.R. • 2700.1(b), and Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 11 and 37(b)(2). Commission Administrative Law Judge John J. Morris denied Asarco's motion for sanctions in which Asarco alleged that Ms. Marin filed a frivolous lawsuit and abused the discovery process. 13 FMSHRC 1113 (1989)(ALJ). The Commission granted Asarco's petition for discretionary review, challenging the judge's rulings. For the reasons that follow, we affirm the judge's decision.
I.
Factual and Procedural Background
Marin was a haulage truck driver for Asarco's Ray Unit in Hayden, Arizona, and as of May 1990, had worked in the mining industry for sixteen years.(Footnote 1) Asarco terminated Marin on April 25, 1990. On May 14, 1990, Marin filed a discrimination complaint against Asarco with MSHA, pursuant to section 105(c) of the Mine Act, 30 U.S.C. • 815(c). At the same time, she also filed sex discrimination charges with the federal Equal Employment Opportunity Commission and the Arizona Civil Rights Division. Marin subsequently brought a complaint in state court charging Asarco with sexual discrimination and harassment.

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There was no hearing in this matter; the background information set forth herein is taken from pleadings and briefs filed by the parties. No affidavits support the factual assertions made by either party.
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Marin's MSHA complaint alleged that Asarco committed a "violation of safety operations and discrimination on the basis of her sex." Her

allegations involve driving unsafe trucks. Asarco denied Marin's allegations of safety violations.

By letter dated December 3, 1990, MSHA informed Marin that it had determined that no violation of section 105(c) had occurred. On December 15, 1990, Marin, proceeding pro se, filed a request with the Commission for a hearing on her complaint under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). The matter was assigned to Judge Morris

On April 26, 1991, attorney Mary Judge Ryan of the law firm of Strompoly & Stroud notified the Commission that her firm was representing Marin. Counsel for Asarco, Henry Chajet, asserts that he did not learn of Ms. Ryan's representation until receipt of Notice by Judge Morris dated May 14, 1991, which listed Ryan's firm on the distribution list. Mr. Chajet scheduled a deposition of Marin for May 29, 1991, by mailing a notice of deposition to Marin, personally, on May 16. On May 22, Chajet also served that notice on Marin's counsel by Federal Express. The notice arrived at her office on May 23. On May 27, two days before the scheduled deposition, Marin was personally served with a subpoena to appear at the deposition. There is no indication that, prior to scheduling the deposition, counsel for Asarco attempted contact with Ms. Ryan to arrange a mutually agreeable time or even to alert her to the deposition.

Counsel for Marin states in her brief that she attempted to contact Chajet on Friday, May 24, to reschedule the deposition. When she called Chajet's office, Ryan learned that he had left Washington and was travelling to Arizona on other business. Ryan then informed Chajet's colleague that Marin would appear at the deposition as scheduled, and sent a confirmation letter. The following days, May 25, 26, 27, were Memorial Day Weekend. On Tuesday, May 28, Ryan and Marin met to prepare for the next day's scheduled deposition. Upon advice of counsel, Marin decided at that time to withdraw the section 105(c)(3) proceeding and pursue her claims solely in state court. Marin and Ryan appeared at the deposition on May 29. There, Ryan announced on the record that Marin was withdrawing from the Commission proceeding, and requested that the deposition be postponed until the motion to withdraw was decided. She also instructed Marin not to answer any questions. Chajet protested, and Ryan telephoned Judge Morris but was unable to reach him. She advised Judge Morris' clerk by telephone that Marin was willing to move for withdrawal, which would make the deposition unnecessary. On May 31, Marin filed a formal motion to withdraw from the Commission proceeding. Asarco opposed the motion, and filed its motion for sanctions and a motion to dismiss with prejudice.

The administrative law judge granted Marin's motion to withdraw and denied Asarco's motions for sanctions and dismissal with prejudice. 13 FMSHRC at 1115. After recounting the facts leading up to the dismissal, Judge Morris concluded that "the Commission lacks jurisdiction to impose sanctions." 13 FMSHRC at 1115. He relied on the Commission's decision in

Rushton Mining Company, 11 FMSHRC 759 (May 1989).

II.

Disposition of Issues

A. Applicability of Rule 11 Sanctions

The first issue presented is whether the Commission may impose sanctions against a private litigant under Fed. R. Civ. P. 11 ("Rule 11"), which provides sanctions for the filing of frivolous pleadings.(Footnote 2) The Commission's Procedural Rules, 29 C.F.R. Part 2700, do not provide for monetary sanctions. Commission Procedural Rule 1(b) provides:

> On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

29 C.F.R. • 2700.1 (emphasis added). Asarco essentially requests the

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2 Rule 11, entitled "Signing of Pleadings, Motions, and Other Papers; Sanctions," provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.... The signature of an attorney or party constitutes a certificate by the signer that the signer had read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Commission to impose Rule 11 sanctions against Marin on the basis of Commission Procedural Rule 1(b). We conclude that Rule 11 sanctions are unavailable in Commission proceedings as a general matter and, in any event, that they would not be warranted on the facts of this case.

Both parties rely on Rushton to support their opposing positions on Rule 11. In Rushton, the Commission determined that the monetary sanctions provision of Rule 11 could not be imposed against the Secretary of Labor in Mine Act proceedings. 11 FMSHRC at 759-60. Asarco contends that Rushton is limited to Rule 11 motions brought against the Secretary. Although Rushton dealt specifically with the subject of sanctions against the Secretary, the Commission also stated broadly:

> The essential question presented is whether the monetary sanctions provision of Fed. R. Civ. P. 11 applies to Commission proceedings. In accord with the judge, we conclude that it does not.

11 FMSHRC at 763.

Moreover, a number of the principles underlying Rushton apply equally to cases involving private litigants. In Rushton, the Commission emphasized that the Mine Act is silent on the subject of monetary sanctions against the government and that "the absence of specific statutory authorization for an asserted form of relief under the Mine Act `dictates cautious review....'" 11 FMSHRC at 764, citing Council of So. Mtn. v. Martin County Coal Corp., 6 FMSHRC 206, 209 (February 1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985); Kaiser Coal. Corp., 10 FMSHRC 1165, 1169-70 (September 1988)). The Commission also noted in Rushton that it has strictly interpreted monetary award provisions in analogous Mine Act contexts. Id. For example, in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1498-99 (November 1988), aff'd sub nom. Clinchfield Coal v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990), the Commission followed the `American Rule' that "attorney's fees are not available to prevailing litigants ..., except where the [Mine] Act specifically authorizes such fees." There, the Commission refused to award attorney's fees in compensation proceedings where the Act failed to so provide. See also Odell Maggard v. Chaney Creek Coal Corp., etc., 9 FMSHRC 1314, 1322-23 (August 1987), aff'd in part, rev'd in part on other grounds, 866 F.2d 1424 (D.C. Cir. 1989). Likewise, the Mine Act is silent on the subject of monetary sanctions against private litigants for engaging in frivolous litigation, the subject of Rule 11.

Additionally, as explained in Rushton, Commission Procedural Rule 1(b) "does not dictate that any particular Federal Rule of Civil Procedure be reflexively applied in Commission proceedings on procedural questions not regulated by the Mine Act." 11 FMSHRC at 765. This is because "[t]he Commission, of course, is not a federal court. The Commission is an agency created under the Mine Act with certain defined and limited administrative

and adjudicative powers. (Citations omitted)." 11 FMSHRC at 764. The Commission is not bound by the Federal Rules of Civil Procedure, and only looks to those rules insofar as is administratively "practicable" and "appropriate."

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We reject Asarco's urging to apply Rule 11 under the authority of Commission Procedural Rule 1(b). We perceive no statutory warrant in the Mine Act for the imposition of monetary sanctions for frivolous pleading in Mine Act proceedings. We conclude that the Commission is without authority to impose monetary sanctions for frivolous claims filed against private parties under the Mine Act.

In any event, on the facts of this case, Rule 11 sanctions would not be warranted. Marin filed this case as a pro se complainant. In general, courts take into account the "special circumstances of litigants who are untutored in the law." Maduakolam v. Columbia University, 866 F.2d 53, 56 (2d Cir. 1989); see also Haines v. Kerner, 404 U.S. 519, 520 (1972)(pro se complainant's pleadings held to less stringent standards than pleadings drafted by attorneys); cf. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 12-13 (January 1984)(pro se miner's late filing may be excused in justifiable circumstances). Approximately one month after Marin retained an attorney, she moved to withdraw her section 105(c) complaint, deciding instead to bring all of her claims in state court.

Asarco asserts that the following events demonstrate that the complaint is frivolous: (1) Marin discontinued her original complaint for "lack of protected activity;"(Footnote 3) (2) the MSHA investigator found no violation of section 105(c); and, (3) counsel's ultimate decision to withdraw the complaint. None of these events demonstrate frivolity. Marin's decision to discontinue the MSHA investigation and then reinstitute it does not indicate that her suit was groundless. In her complaint to MSHA dated May 14, 1990, Marin alleged that Asarco committed a "violation of safety regulations and discrimination on the basis of her sex." Her allegations concern driving unsafe trucks. Additionally, an MSHA determination of no violation is not binding on the Commission. See 30 U.S.C. • 815(c)(3). Section 105(c)(3) of the Act expressly provides that a complainant has the right to file an action with the Commission if the Secretary determines that there was no violation. Similarly, Marin's motion to withdraw was without prejudice and, thus, was not an admission that her claim lacked merit.

The principal Rule 11 cases on which Asarco relies are inapposite. These cases involve egregious behavior, which is not present here. For instance, in Dean v. ARA Environmental Services, Inc., 124 F.R.D. 224, 227 (N.D. Ga. 1988), the sanctioned party continued to file suits against the same parties based on the same facts, even after 28 suits based on those facts had been dismissed. In Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (D. Ill. 1985), a plaintiff's attorney was sanctioned for filing a suit when, more than two years after the underlying incident and after eight

months of litigation, he summarized the facts supporting the suit as "none."

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3 Marin withdrew her original complaint in June, 1990. She reinstated her complaint on September 4, 1990, stating: "Since then I have reconsidered and now I believe my termination was because I refused to drive a truck with a blown up turbo charger."

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We find absent from the record any evidence of deliberate abuse or harassment by Marin or her counsel. Asarco asserts that Ryan's confirmation letter of May 24, 1991, reflects a deliberate intention to mislead Chajet into believing that the deposition would proceed and justifies Rule 11 sanctions. We do not perceive deception. Ryan asserts that she telephoned Chajet and attempted to postpone the deposition on May 24, the day after she received the notice. She spoke with another attorney at Chajet's firm and learned that Chajet had already left Washington for Arizona on other business. They agreed that the deposition should go ahead as scheduled, and Ryan sent a confirmation letter. Chajet could not have been misled by the letter prior to the deposition because he had already traveled to Arizona on other business.

These facts suggest to us that what occurred resulted from a lack of communication in the context of a tight schedule unilaterally imposed upon Marin. Chajet did not consult Ryan with regard to scheduling the deposition. Ryan received notice of the deposition on May 23, only six days before the designated date, and the Memorial Day Weekend accounted for three of those six days. As of May 24, Chajet was already unavailable. Given the short time period involved, and the lack of evidence that Chajet's office offered information as to how he could be reached, we see no basis to criticize Ryan's actions. After consulting with her client the day after Memorial Day, Ryan decided to dismiss the Mine Act complaint. We would be hard pressed on this record to regard her dismissal motion as an abusive pleading causing harm to Asarco. Cf. Robert K. Roland v. Secretary, 7 FMSHRC 630, 635-36 (May
1985). In short, we do not find any evidence of abusive behavior by Marin or her counsel meriting imposition of Rule 11 sanctions.

B. Applicability of Rule 37(b)(2) Sanctions

The second issue presented is whether the Commission may impose sanctions against Marin under Fed. R. Civ. P. 37(b)(2)("Rule 37(b)(2)"),

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which provides, in relevant part, monetary sanctions for discovery abuse.(Footnote 4) Apart from whether the Mine Act provides for the imposition of discovery abuse sanctions, we conclude that Rule 37(b)(2), by its express terms, does not apply to the proceeding before us.

Rule 37(b)(2) applies when an order compelling discovery has been issued upon motion and a party, in defiance or violation of such an order, fails to provide or communicate the discoverable material. E.g., Salahuddin

v. Harris, 782 F.2d 1127, 1131 (2d Cir. 1986); Fox v. Studebaker Worthington, Inc., 516 F.2d 989, 994 (8th Cir. 1975). Here, Marin was not being deposed pursuant to such an order but, rather, appeared pursuant to a subpoena. Thus, invocation of Rule 37(b)(2) is inappropriate.

Even if this matter were viewed as a subpoena compliance dispute under the Mine Act, Rule 37(b)(2) would not apply. As Rule 1(b) indicates, the Commission consults the Federal Rules for guidance only when the Mine Act and Commission Procedural Rules do not otherwise provide for appropriate procedure in a given area. The Mine Act and Commission Procedural Rules explicitly provide for subpoena enforcement. Pursuant to the Act and the Commission's rules, federal district courts have the power to enforce a subpoena and impose sanctions for failure to comply with the subpoena. 30 U.S.C. • 823(e); 29 C.F.R. • 2700.58. Asarco's enforcement remedy, if any, was to request the judge or Commission to apply for subpoena enforcement in the appropriate district court. Asarco's reliance on Commission Procedural Rule 1(b) is misplaced.

Furthermore, if Rule 37(b)(2) were applicable to the facts of this case, monetary sanctions would not be warranted. Commission Procedural Rule 56(b) contemplates that the parties will attempt to agree on deposition schedules. 29 C.F.R. • 2700.56(b). As noted above, Chajet sent the notice of deposition to Marin's counsel shortly before the scheduled date and had

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4 Rule 37(b)(2) falls under the general heading "Failure to Comply with Order" and is entitled "Sanctions by Court in Which Action is Pending." It provides in pertinent part:

> If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> * * * *
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> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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not consulted her as to an acceptable date. Ryan telephoned Chajet the day after receipt of the notice to attempt to postpone the deposition and found that he was already en route to Arizona. Ryan agreed to go ahead with the deposition and, during the course of preparation, decided to withdraw the Mine Act complaint. She announced her intention at the deposition and

attempted to reach Judge Morris by telephone at that time to move to withdraw the complaint. The facts of this case do not disclose discovery abuse by a recalcitrant party.

III.

Conclusion

For the reasons set forth above, we affirm the judge's decision.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner