

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

FEB 10 2016

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| UNITED MINE WORKERS OF AMERICA | : | |
| (UMWA), on behalf of MARK A. FRANKS | : | |
| | : | |
| v. | : | PENN 2012-250-D |
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| EMERALD COAL RESOURCES, LP | : | |
| | : | |
| UNITED MINE WORKERS OF AMERICA | : | |
| (UMWA), on behalf of RONALD M. HOY | : | |
| | : | |
| v. | : | PENN 2012-251-D |
| | : | |
| EMERALD COAL RESOURCES, LP | : | |
| | : | |
| SECRETARY OF LABOR | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | PENN 2013-305 |
| | : | PENN 2013-306 |
| EMERALD COAL RESOURCES, LP | : | |

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY: Young, Cohen, and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve complaints of discrimination filed by the United Mine Workers of America (“UMWA”) on behalf of Mark A. Franks and Ronald M. Hoy pursuant to section 105(c)(3) of the Mine Act. After a hearing on the merits of the complaints, a Commission Administrative Law Judge concluded that Franks and Hoy demonstrated by a preponderance of the evidence that they had been discriminated against as a result of their participation in activities protected by the Mine Act and in violation of section

105(c).¹ 35 FMSHRC 1696 (June 2013) (ALJ). The Judge ordered backpay for the complainants.² *Id.* at 1707.

Emerald then petitioned the Commission for review of the Judge's decision, which the Commission granted. On review, a majority of the Commission affirmed the Judge's decision in result. 36 FMSHRC 2088 (Aug. 2014). Emerald then appealed the decision to the United States Court of Appeals for the Third Circuit. For the reasons articulated below, the Third Circuit vacated the Commission's decision and remanded the cases to the Commission for further analysis.³

The Commission's decision to affirm the Judge's decision, in result, was a split decision. 36 FMSHRC 2088 (Aug. 2014). Commissioners Young and Cohen voted to affirm on the grounds that substantial evidence supported the Judge's conclusion that Emerald *discriminated* against Franks and Hoy in violation of section 105(c) of the Mine Act. *Id.* at 2103. Chairman Jordan and Commissioner Nakamura voted to affirm the Judge's decision after concluding that Emerald *interfered* with the protected statutory rights of the miners in violation of section 105(c). *Id.* at 2119. Commissioner Althen voted to vacate the decision of the Judge. *Id.* at 2144.

The Third Circuit concluded that the two concurring opinions presented "conflicting rationales" to support the finding that Emerald violated section 105(c) of the Mine Act, and therefore, the Commission failed to provide a majority rationale that was "amenable to review."

¹ Section 105(c)(1) provides that "[n]o person shall discharge *or in any manner discriminate against* or cause to be discharged or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner . . .*" 30 U.S.C. § 815(c)(1) (emphasis added).

² The Judge noted that the UMWA had presented an interference theory in its post-trial brief, 35 FMSHRC at 1701 n.3, but she analyzed the case under traditional discrimination standards. *See* 35 FMSHRC at 1702 (citing *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981)).

³ As a result of the Commission's decision that Emerald violated the Mine Act, the Secretary of Labor subsequently filed petitions for assessment of civil penalty pursuant to sections 105 and 110 of the Mine Act. The proposed penalties were \$20,000 each, for a total penalty of \$40,000. The petitions were assigned to the Judge. The parties filed joint stipulations addressing the penalty criteria and the Judge assessed the total penalty of \$40,000. Unpublished Order (October 29, 2014) (Docket No. PENN 2013-305 et al).

Emerald petitioned the Commission for review of the Judge's civil penalty decision. However, no two Commissioners voted to grant the petition. Emerald then appealed the Judge's decision to the Third Circuit. The Third Circuit consolidated the civil penalty cases with the cases involving Franks and Hoy's complaints of discrimination.


Emerald Coal Res. v. Hoy, 620 Fed. Appx. 127, 129, 132 (3rd Cir. 2015) (citation omitted). However, the Court further concluded that because “four of five [Commissioners] agreed that the Mine Act was violated and relief was appropriate, [it] believe[d] the agency should have a chance to explain its reasoning.” *Id.* at 133. Therefore, the Court vacated and remanded the Commission’s decision, noting that it was not expressing an “opinion as to how the Commission may decide the discrimination or interference issues or whether it should remand the case to the [Judge] to conduct the interference analysis in the first instance” *Id.*

We have elected to remand these consolidated proceedings to the Judge “to conduct the interference analysis in the first instance.”

Accordingly, these captioned matters are hereby remanded for further proceedings consistent with the decision of the Third Circuit. On remand, the Judge may reopen the record to receive briefs concerning the elements of a claim of interference under section 105(c)(1), the application of the law to the facts in the record, appropriate remedies under the Mine Act, and other issues the Judge may deem appropriate.⁴



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



William I. Althen, Commissioner

⁴ On September 30, 2015, the Commission received a letter from the Secretary of Labor requesting “the opportunity to brief the question of whether proof of discriminatory intent is required [for claims of interference under section 105(c)].”

Chairman Jordan and Commissioner Nakamura, dissenting:

In the Commission's initial decision affirming the Judge in result, we set forth an analysis for evaluating interference claims brought pursuant to section 105(c) of the Mine Act. 36 FMSHRC 2088, 2108 (Aug. 2014). After applying this standard to the evidence in the record, we concluded that Emerald interfered with Franks' and Hoy's protected rights, in violation of section 105(c). *Id.* at 2119. Consistent with that opinion, we would not remand the case to the judge for an analysis of an interference claim under the Mine Act.



Mary Lu Jordan, Chairman



Patrick K. Nakamura, Commissioner

Distribution:

Samuel Lord, Esq.
Office of the Solicitor
U.S. Department Of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450

Laura P. Karr, Esq.
United Mine Workers of America
18354 Quantico Gateway Drive, Suite 200
Triangle, VA 22172-1779

R. Henry Moore, Esq.
Jackson Kelly PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222

Administrative Law Judge Margaret A. Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
875 Greentree Road
7 Parkway Center, Suite 290
Pittsburgh, PA 15220