

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

August 30, 2000

DAVID MORALES :  
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 v. : Docket No. WEST 99-188-DM  
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 ASARCO, INC. :

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioner

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(3) (1994). At issue is Commission Administrative Law Judge Richard Manning’s decision dismissing the complaint of discrimination filed by David Morales against Asarco, Inc. (“Asarco”). 22 FMSHRC 659, 671 (May 2000) (ALJ). The Commission granted Morales’ petition for discretionary review challenging the judge’s decision. For the reasons set forth below, we vacate the judge’s decision and remand this matter to him to conduct further proceedings consistent with this decision.

Asarco terminated Morales on August 13, 1998. *Id.* at 660. Morales filed a complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) alleging that Asarco fired him because on April 7, 1997, he complained to MSHA that fumes in the cab of a truck he was operating were making him sick. *Id.* Morales’ complaint was tried before Judge Manning under section 105(c)(3) of the Act. Although the judge found that Morales had engaged in protected activity (22 FMSHRC at 665), he dismissed the discrimination complaint on the grounds that “there is nothing [in the record] to suggest that Mr. Morales was targeted for discharge, that he was being closely watched because of his MSHA complaint, or that his discipline was unusually harsh.” *Id.* at 666. The judge concluded: “If I review the evidence presented in this case against the indicia of discriminatory intent frequently relied upon by the Commission, I find that Mr. Morales did not establish that his discharge was motivated in any part by his protected activity.” *Id.* at 670.

In his petition for discretionary review, however, Morales alleged that an attempt was made by an Asarco employee to interfere with the testimony of a witness he called, Tony Rivera.

This allegation was supported by notarized statements from Rivera and Rito Orrantia, another witness Morales called. In a Supplemental Memorandum in Opposition to Complainant's Petition for Discretionary Review and Motion for Reconsideration of the Commission's Grant of Review,<sup>1</sup> Asarco "categorically denies" Morales' allegation of witness interference, and avers that the allegation was "raised at trial and rejected based on the evidence." Supp. Opp. at 1-2.

We find that the record does not support Asarco's assertion that the judge addressed Morales' allegation of witness interference. To the contrary, the specific allegation made in the PDR was not brought up before the judge, whose decision is dated May 8, 2000, whereas the Rivera and Orrantia statements are dated May 18, 2000. The allegation is of a serious enough nature, however, that we find good cause exists to consider it on review. *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded the opportunity to pass.").

We are unable, however, to evaluate Morales' allegation. This must be done by the finder of fact in the first instance. We thus remand this case to the judge to determine whether any attempt was made to influence Rivera's testimony as alleged in the petition, and if so, whether any such conduct had a material effect on the outcome of the proceedings before the judge. In considering these questions, the judge may, in his discretion, order further proceedings as appropriate.<sup>2</sup>

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<sup>1</sup> We hereby deny Asarco's motion for reconsideration.

<sup>2</sup> On August 18, 2000, the Commission received an additional document from Morales containing additional allegations regarding his employment history and termination, and witness intimidation. We have not considered this additional information in reaching our decision. The judge may consider this information on remand, if appropriate.

Accordingly, we vacate the judge's decision and remand this matter to him to conduct further proceedings consistent with this decision.<sup>3</sup>

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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<sup>3</sup> Morales raises many other issues in his petition for discretionary review that we do not reach at this time. He may, of course, raise these issues again, as appropriate, in a petition for review of the judge's decision on remand, including any parts of the decision we vacate today that the judge reinstates in his remand decision, or that are necessary predicates to the remand decision.

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