

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 23, 2017

KENNETH L. WOLFF,  
Complainant,

v.

BRIDGER COAL COMPANY,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-602  
DENV-CD-2016-17

Jim Bridger Mine  
Mine ID: 48-00677

**ORDER GRANTING RESPONDENT’S MOTION TO DISMISS**

Before: Judge Simonton

This case is before me upon a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. The Complainant, Mr. Kenneth Wolff, worked for Bridger Coal Company (“Bridger” or “Respondent”) as a leadman for ten years and a supervisor for two to three years until his resignation in August of 2012. Statement of Kenneth Wolff to MSHA, August 23, 2012, pp. 1-4 (“Wolff Statement”). Wolff alleged that he was improperly placed on “crisis suspension”<sup>1</sup> because he discussed and criticized Bridger Coal’s handling of his safety concerns with a co-worker. *Id.* at 4. On July 27, 2012, Mr. Wolff quit in response to being placed on crisis suspension. His resignation became official on August 3, 2012.

Mr. Wolff first filed a section 105(c) complaint with MSHA on April 14, 2016, three years and eight months after his resignation and the alleged adverse action. On June 9, 2016, MSHA notified Wolff that “MSHA does not believe that there is sufficient evidence to establish by a preponderance of the evidence that a violation of Section 105(c) occurred.” June 9, 2016 MSHA Notification Letter. Mr. Wolff filed a 105(c)(3) complaint with the Commission on July 26, 2016.

For the reasons explained below, the court finds that the Complainant failed to provide a justifiable explanation sufficient to excuse the initial filing delay of over three and a half years, and that such a delay materially prejudices the Respondent. 30 U.S.C. 815(c)(2) (requiring miners to file discrimination claims with the Secretary of Labor within sixty days of the date of discrimination); *see also Herman v. Imco*, 4 FMSHRC 2135, 2138 (Dec. 1982) (affirming ALJ dismissal of 105(c) claim filed eleven months late where Complainant knew of his rights and decided to file a late complaint after developing a desire to be vindicated); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999)(ALJ) (dismissing 105(c) claim filed over two

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<sup>1</sup> In his statement to MSHA, Mr. Wolff defined a “crisis suspension” as “sending a person home while [mine management] makes a decision.” Wolff Statement, at 4. According to Paul Gust, Manager of Safety, Health and Training at the Surface Operations at Bridger Coal, crisis suspension includes pay. Respondent’s Mot. to Dismiss, Declaration of Paul Gust, at 1.

years late because Complainant's serious injuries did not prevent him from filing worker's compensation claim and thus did not excuse the delay in filing with MSHA).

### Commission Procedural History

Mr. Wolff filed a discrimination complaint with MSHA on April 14, 2016, over three and a half years after he resigned due to the alleged adverse action. Kenneth Wolff December 30, 2016 Explanation Letter ("Wolff Explanation"). Wolff alleged that he resigned because he was improperly placed on crisis suspension for discussing and criticizing Bridger's safety decisions surrounding the emergency stop on a vacuum truck. Wolff Statement at 4. On June 9, 2016, MSHA notified Wolff that it did not have sufficient evidence to pursue the claim.

Mr. Wolff subsequently filed a 105(c)(3) complaint on July 26, 2016. On the same date, Chief Judge Robert J. Lesnick sent Wolff an acknowledgement letter to inform him that his complaint was incomplete and ordered Wolff to provide proof of service and a short and plain statement of the pertinent facts surrounding his complaint within 30 days. Chief Judge July 26, 2016 Acknowledgement Letter. When Wolff failed to provide proof of service within the 30-day period, Chief Judge Lesnick issued an Order to Show Cause requiring Wolff to provide proof of service, contact information, and a short and plain statement of the facts, or face dismissal. Chief Judge October 5, 2016 Order to Show Cause.

Though never properly served, Bridger Coal discovered that Mr. Wolff filed a 105(c)(3) complaint against it when it submitted a routine FOIA request for quarterly Dodd-Frank disclosures on November 7, 2016. Resp. Mot. to Dismiss at 1-2. On December 2, 2016, Bridger filed a motion to dismiss the case because Wolff failed to file his complaint with MSHA within the 60-day deadline and failed to serve the complaint on Bridger. *Id.* at 2-3. The case was assigned to this court on December 8, 2016.

On December 15, 2016, the court issued a second Order to Show Cause requiring Mr. Wolff to provide a statement of the facts and an explanation for his late filing. Mr. Wolff responded with a brief handwritten letter on December 30, 2016. Bridger filed a reply on January 6, 2017. The Respondent argued that Wolff's complaint should be dismissed because he provided no justifiable circumstances for the three and a half year filing delay and because the delay materially prejudiced Bridger. *See generally* Resp. Rep. Specifically, Bridger argued that the key witnesses to the events in Mr. Wolff's complaint had either passed away or retired in the time between the alleged adverse action and the claim being filed. *Id.* at 6-7.

After careful review, the court finds that the Complainant has not provided a justifiable explanation sufficient to excuse a filing delay nearing four years, and that such a delay materially prejudices the Respondent. Having made this determination, analysis of the Respondent's alternate grounds for dismissal is unnecessary.

### Section 105(c)(2) Discrimination Claim Filing Requirements

Under 30 U.S.C. § 815(c)(2), "Any miner...who believes that [s]he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection

may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination.” After a miner files a complaint, the Mine Safety and Health Administration (MSHA) investigates it on behalf of the Secretary of Labor. *See, e.g., Simpson v. Fed. Mine Safety & Health Review Comm’n*, 842 F.2d 453, 456 n. 3 (D.C. Cir. 1988). If the Secretary finds that a violation occurred, the Secretary may pursue the claim on the miner’s behalf before the Commission. 30 U.S.C. § 815(c)(2). If not, the miner may file a claim with the Commission on his own behalf under 30 U.S.C. § 815(c)(3).

The Mine Act’s legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be constructed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted* in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

Accordingly, the Commission does not consider the 60-day time limit of § 815(c)(2) to be jurisdictional. *See Morgan v. Arch*, 21 FMSHRC 1381, 1386 (Dec. 1999) (“Commission case law is clear that the 60-day period for filing a discrimination complaint under section...§ 815(c)(2), is not jurisdictional”). It will hear cases in which a complaint’s untimely filing is due to “justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996).

On the other hand, “[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal.” *Id.* at 1922; *see also Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999)(ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”); *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ) (delay of over three years is “inherently prejudicial”). The Commission places the burden of proving justifiable circumstances on the miner, and places the burden of demonstrating material legal prejudice on the mine operator. *See id.*; *Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

### Analysis

Mr. Wolff resigned in response to Bridger’s decision to place him on crisis suspension on July 27, 2012, effective August 3, 2012. Mr. Wolff did not file a claim with MSHA until April 14, 2016, three years and eight months after his resignation. The Complainant must therefore demonstrate that justifiable circumstances explain the 1,289 day delay that occurred after the 60 day filing period expired on or about October 3, 2012.

It is undisputed that Wolff was aware of his right to file a 105(c) complaint. In fact, Wolff states he was encouraged by MSHA Inspector Jim Ellenberger to file a 105(c) complaint with MSHA a few weeks after his 2012 resignation. Wolff Explanation. MSHA Inspector Rick Dickson also apparently encouraged Mr. Wolff to file a complaint in late 2015, and Wolff again declined. Resp. Rep. at 2. Wolff claimed that he did not want to file a complaint on either occasion because he was “sick...and done with Bridger,” and thought that the matter would go away with time. Wolff Explanation.

Wolff did not give extensive detail regarding his sickness, but did mention that on one occasion he had to be rushed to Salt Lake City for medical care due to the stress caused by the events surrounding his resignation. Kenneth Wolff Letter to Chief Judge Robert J. Lesnick (“Wolff Letter”). It does not appear that Wolff’s illness was incapacitating, however, as he was able to procure other work following his resignation. Wolff Statement. Rather, Wolff argues that he simply wished to move on with his life, and believed that the pain that resulted from his severance with his employer would diminish with time. Wolff Letter. Wolff has been unable to get over the matter, however, claiming that it “ate at [him] night and day.” *Id.* He thus decided to file a complaint to obtain closure.

The Complainant failed to justify the filing delay because his illness and reluctance to file his complaint with MSHA do not amount to “excusable neglect.”

The court finds that the combination of the Complainant’s illness and enduring reluctance to file a complaint does not justify a filing delay of over three and a half years. The Commission has identified “excusable neglect” as a justifiable circumstance that may excuse a late filing, but held that “the fair hearing process does not allow us to ignore serious delay.” *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 25 (Jan. 1984); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999)(ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”); *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ) (delay of over three years is “inherently prejudicial”).

Wolff first argues that he did not file a claim when first encouraged to do so because he was sick. Wolff Explanation. The court sympathizes with the Complainant’s health issues, but cannot find that they prevented him from filing a complaint for the entire three and a half year delay period. Administrative law judges have been reluctant to find even significant injuries and surgery to be sufficient reasons for a delay unless the complainant is fully incapacitated or clearly prevented from filing. *See Hacking v. Staker & Parson Companies*, 38 FMSHRC 851 (Apr. 2016) (ALJ) (holding that Complainant’s complications from surgery, divorce, and caring for her son were not sufficient justifications for a 900 day filing delay because she nonetheless managed to testify before Utah Labor Board in that time); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127 (Oct. 1999) (ALJ) (holding that Complainant’s significant injury was not a justifiable circumstance because he was not incapacitated and continued to pursue a worker’s compensation case).

Wolff did not claim that his illness rendered him incapable of filing a claim within the 60-day limit, nor did he suggest that he was significantly ill or incapacitated for the entire three and a half year period. In fact, Wolff quickly found another job after his resignation and was

thus able to continue working in spite of his illness. The 105(c)(3) filing process is not so difficult or taxing that one who is healthy enough to return to work cannot complete the paperwork, especially with the aid and encouragement of an MSHA Inspector. Thus, I find that Wolff's decision not to file within the 60-day limit is due to his personal choice rather than health limitations.

Mr. Wolff next claimed that he did not file within the 60-day period because he no longer wished to associate with Bridger or revisit the stress and trauma of the events surrounding his resignation. Wolff Explanation. The Complainant explained that he disregarded MSHA Inspector Ellenberger's recommendation to file a complaint two weeks after his resignation because he "was done" with Bridger Coal. *Id.* Specifically, Wolff claimed that these events were too painful to discuss and that he believed that the pain matter would fade with time. Wolff Letter; Wolff Statement. When the events continued to "[eat] at [him] night and day," Wolff ultimately decided to file his claim in the hope that resolving the issue through the Commission may bring closure. *Id.*

The Commission has held that a miner's conscious and voluntary decision not to file a 105(c)(3) claim does not constitute excusable neglect. *Herman v. Imco Services*, 4 FMSHRC 2135, 2138 (Dec. 1985). In *Herman*, the Commission affirmed the administrative law judge's decision to dismiss the complaint where the miner did not file a complaint within the deadline because he did not want to do so at the time. *Herman*, 4 FMSHRC at 2138. The Complainant explained that, after thinking about his situation for some time, "he concluded that he had been wronged and that he desired to be vindicated." *Id.* The Commission held that the Complainant's explanation was not attributable to his being misled as to or misunderstanding his rights under the Act, and thus did not constitute a justifiable circumstance for the delay. *Id.* at 2138-39.

Like *Herman*, it is clear that Mr. Wolff knew that he could file a complaint with MSHA shortly after his resignation. Mr. Wolff was twice encouraged by MSHA Inspectors to file a 105(c) complaint and both times elected not to do so. While the Complainant stressed that the mental and emotional difficulties he experienced following his resignation from Bridger Coal made him reluctant to pursue a claim, his initial decision not to file stemmed from his desire not to associate with Bridger Coal, not from a mental or emotional inability to file. In fact, it appears that Mr. Wolff's emotional difficulties with the events are what finally encouraged him to interact with Bridger Coal and file a complaint nearly four years later. The court therefore finds that Mr. Wolff's explanation does not amount to "excusable neglect" and does not excuse the 1,289 day filing delay.

The extreme filing delay materially prejudiced the Respondent.

Even if the Complainant's explanation justified the filing delay, the Respondent has demonstrated that the 1,289 day filing delay is materially prejudicial because key witnesses are no longer available to testify. As the Commission stated in *Herman v. Imco*, the 60-day limitation is designed to ensure fairness for the opposing party by:

...preventing surprises through the revival of claims that have been allowed to slumber until evidence have been lost, memories have faded, and witnesses have

disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

*Herman* 4 FMSHRC at 2139; *see also Fulmer v. Mettiki Coal Corp.*, 30 FMSHRC 523, 525-26 (June 2008) (ALJ); *Wilson v. CSR Southern Aggregates*, 22 FMSHRC 1218, 1221 (Oct. 2000) (ALJ); *Sinnott v. Jim Walter Res., Inc.*, 6 FMSHRC 2445 (Dec. 1994) (ALJ) (claim filed three years and three months after the alleged discrimination was “inherently prejudicial”).

I agree that Mr. Wolff’s 1,289 day filing delay materially prejudiced Bridger Coal’s opportunity for a fair hearing. Bridger indicated that six key witnesses in the case are no longer available to testify. *See* Resp. Rep. at 6; Mot. to Dismiss, pp. 10-13; Wolff Statement pp. 3-7. Three Bridger employees with firsthand knowledge of the facts surrounding Wolff’s complaint passed away between 2013 and 2016. Resp. Rep. at 6. Two other Bridger employees, as well as the MSHA inspector that investigated the hazard complaints of the vacuum truck at issue, have retired. *Id.* Bridger notes that, had the Complainant filed his complaint within the 60-day limit, all of these witnesses would have been readily available to testify on the matter. *Id.*

Even if Bridger were able to locate the three living witnesses, it is highly unlikely that they would have a present and accurate recollection of events that took place four years earlier. *See Sinnott*, 16 FMSHRC at 2448. In *Sinnott*, the administrative law judge found that after a delay of three years, “it is highly questionable whether the other company employees who might have had some knowledge of the events surrounding (the) termination would have a present recollection of those events.” *Id.* Here, the delay nears four years, significantly longer than any delay previously excused by the Commission. *See Hacking*, 38 FMSHRC 851 (noting that a delay of 31 months is more than three times longer than any filing delay previously excused by the Commission) (citations omitted). The length of the delay and the general unavailability of key witnesses materially prejudice Bridger’s ability to put on its defense to Mr. Wolff’s allegations, and must be dismissed.

Thus, allowing the Complainant to proceed without a justifiable excuse would not only exceed the limits of delay permissible under the Mine Act, but would materially prejudice the Respondent’s right to a fair hearing. *Sinnott*, 16 FMSHRC 2447, (stating that “At some point there has to be an outer limit, if the 60 day rule contained in the statute has any meaning at all”).

### **ORDER**

The Respondent’s Motion to Dismiss is **GRANTED**. Accordingly, this matter is **DISMISSED** with prejudice. The Complainant may appeal this matter to the Commission within 30 days of the date of this order.



David P. Simonton  
Administrative Law Judge

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