FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 15 1981

SECRETARY OF LABOR, on behalf of GARY M. BENNETT,	:	Complaint of Discharge, Discrimination, or Interference
Complainant	:	Docket No. CENT 81-35-DM
v.	:	
	:	Baton Rouge Alumina Plant
KAISER ALUMINUM AND CHEMICAL CORPORATION,	:	
Respondent	:	

DECISION

Appearatices: Marigny A. Lanier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Complainant; Stephen H. 'Booth, Esq., Labor Counsel, Kaiser Aluminum and Chemical Corporation, Oakland, California, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The Secretary of Labor asserts that Complainant Bennett was suspended for thirty days without pay because he refused to work under unsafe conditions. Respondent contends that Bennett was disciplined for insubordination. Respondent also contends that the complaint is barred by time limitations.

A hearing was held, pursuant to notice, on February 26, 1981 in New Orleans, Louisiana. Gary Bennett, Ferdinand Johnson, Ronnie Procell, Riley Jester, all employees of Respondent, and Otis Pilgrim and Melvin Robertson, employees of the Mine Safety and Health Administration (MSHA), testified on behalf of Complainant. Theodore Peno, Flavius Galloway, Willie Brown, Alvin Saizan and Roland Bertram, employees of Respondent, testified on Respondent's behalf.

Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent operates an alumina plant in Baton Rouge, Louisiana, milling bauxite ore into alumina powder.

2. The plant includes sand traps located in what is called the tank farm. The sand traps are large, conically-shaped vessels that filter and cook a caustic liquid known as "liquor" which helps remove impurities from the bauxite ore.

3. The "liquor" is heated to between.200 and 300 degrees Fahrenheit. Even a small amount on a person's skin can cause a severe burn.

4. Complainant was employed as a pipefitter and as such he participated in the sandtrap 'turnaround' which occurred every six months. This process involves the draining and cleaning of the vessel.

5. Complainant's duties during the turnaround included opening the manway door, removing valves for repairs and setting 'blinds,' which are metal disc's the same diameter as the pipes and which prevent any flow of liquid into the vessel.

6. All valves are closed and tagged during a turnaround and the pump to the feedline entering the sandtrap is turned off and locked out.

7. There are two "downcomer lines' which lead from the main feedline to the sandtrap. Each of these lines contains double valves which are shut during turnaround and can only be opened_ by hammering them with at least an eight pound maul. Blinds are inserted in the downcomer lines as added protection for the carpenters and laborers who enter the sandtrap to remove built-up scale on the vessel.

8. After the scale is removed from the inner walls, Complainant's tasks were to "pop" scale from a side valve and reinstall the valves at the bottom of the vessel. Popping a valve consists of heating and thereby removing the scale around the valve with a torch.

9. There is a sharp conflict in the testimony on the question of whether Complainant did, or was required to, insert any part of his body into the vessel while popping the valve. I generally accept Complainant's testimony, supported by the testimony of Ferdinand Johnson and Riley Jester, on this issue, and find that Complainant did insert his arms and shoulders inside the vessel while popping the side valve.

10. On October 11, 1979 sandtrap #3 was undergoing the turnaround. By lunchtime Complainant had finished popping the side valve. He still had to reinstall the other valves and close the vessel; the carpenters and laborers had left the vessel.

11. During the lunch hour Complainant was told by some co-workers that the blinds had been removed. Complainant and Ferdinand Johnson, who worked with him, complained to their foreman, Willie-Brown, that this created a safety hazard.

12. In fact, only the two blinds on the downcomer lines had been removed after the carpenters and laborers left the vessel. This was in accord with past practice in the turnaround.

13. Complainant refused to return to work after lunch until a "safety man" came to evaluate the situation.

'14. Foreman Brown notified Theodore Peno, Maintenance Superintendent who came to sandtrap #3 with Maintenance Coordinator Flavius Galloway. Peno and Galloway spent nearly 40 minutes checking the vessel and the blinds and valves and determined that in their judgment. all safety measures had been-observed.

15. The matter was discussed with Complainant and Johnson. Peno explained that he and Galloway had checked the entire system and he offered to remain at the site. Johnson agreed to return to work but complainant refused a direct order to return.

16. On the following day, October 12, 1979, Respondent suspended complainant for 30 days without pay.

17. On February 4, 1980 Complainant filed a complaint with MSHA and on October 13, 1980, the Secretary of Labor filed this action with the Commission.

ISSUES

1. Is the complaint barred by the time limitations contained in § 105(c) of the Act?

2. Did Respondent violate § 105(c) when it suspended Complainant for 30 days without pay for refusing to perform his assigned duties on October 11, 1979?

Discussion.

Complainant's original complaint was filed with MSHA nearly three months after the end of the suspension period, and the Secretary's complaint on his behalf was filed with the Commission more than eight months after that. The statute provides that a miner "may" file a complaint with MSHA within 60 days of the event complained of. § 105(c)(2). The Secretary "shall" notify the miner of his determination within 90 days of the date it was received, § 105(c)(3), and, if he finds a violation, "he shall immediately file a complaint with the Commission." § 105(c)(2).

I conclude that none of the filing deadlines are jurisdictional in nature. Rather, they are analogous to statutes of limitation, which may be waived for equitable reasons. It has already been held that the filing deadlines in discrimination cases arising under the 1969 Coal Act are not jurisdictional. Christian v. South Hopkins Coal Co., 1 FMSHRC 126, 134-36 (1979). The same result was obtained under § 111 of the present Mine Act, which directs' mine operators to compensate miners while withdrawn from a mine pursuant to government order. Local 5429, United Mine Workers v. Consolidation Coal Co., 1 PMSHRC 1300 (1979).

The proper test is whether tolling the filing period is consonant with the purposes of the statute. American Pipe and Construction Co. v. Utah, 414 U.S. 538, 557-58 (1974). Congress spoke plainly on the subject

when it declared that the 60 day filing period "should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in, (1977) U.S. CODE CONG. & AD. NEWS at 3436. The deadlines imposed on the Secretary also "are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings." Id.

Applying these standards, I find that the delay in filing the original complaint was justifiable. Before the period expired, Complainant asked Respondent's industrial relations representative which public agencies deal with safety complaints, but received no response. Complainant also brought his complaint to the attention of an MSHA inspector less than two months after the suspension ended. The inspector mistakenly gave Complainant the wrong name and the wrong phone number for properly notifying MSHA. The delay of approximately one month was thus justifiable.

The Secretary's delay in processing the complaint cannot defeat the action, in light of the legislative history quoted above. Moreover, it is commonly held that the government is not affected by the doctrine of laches when enforcing a public right. Intermountain Electric Co., 1980 CCH OSHD Para. 24202 (10th Cir. 1980); Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977); Nabors v. NLRB, 323 F.2d 686, 688 (5th Cir. 1963). Respondent's plea of limitations is rejected.

Turning to the merits, the first issue is whether Complainant was engaged in activity protected under § 105(c). Secretary of Labor ex rel Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980). I find that Complainant in good faith believed that it was dangerous to continue working after the blinds were removed. Therefore, his complaint concerning their removal was protected under § 105(c). Complainant's foreman explained that the blinds were removed because there were no workers inside the vessel. This did not satisfy Complainant so Brown called Peno who agreed to investigate the complaint. Brown told this to Complainant but Complainant remained dissatisfied and would not return to work. Complainant then left to find the safety supervisor, which he was unable to do. The safety supervisor, as it happened, was with an MSHA inspector, who was inspecting other areas of the plant.

Complainant's refusal to work at this point was protected by § 105(c). It had not been clearly explained to him that only the two blinds on the downcomer lines had been removed. The parties agree that removal of all blinds before the turnaround is finished would be an unsafe practice. Complainant's honest belief 'in this condition was therefore a reasonable one under the circumstances. Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 812 (1981).

After Peno was notified of the complaint, he and Galloway, who both parties trust as the expert on tank farm operations, spent nearly 40 minutes checking every aspect of the sandtrap turnaround. Peno, accompanied by Galloway, then explained their findings to Complainant and told him

that his job involved no safety hazard. Complainant still refused to return to work. Peno then offered to remain at the site and watch for trouble but Complainant persisted in his demand for a safety man. Peno then resolved to seek disciplinary action against Complainant.

I cannot conclude that Complainant's refusal to work was protected at this point. It may be that a miner is "not required to accept the foreman's evaluation of danger:' Phillips v. IBMA, 500 F.2d 772, 780 (D.C. Cir. 1974), but neither may a miner insist unreasonably on a right to refuse to work. Robinette, supra. Peno diligently investigated the complaint and, after finding it baseless, thoroughly explained his position to Complainant. Complainant still honestly believed the condition to be hazardous but this belief was not a reasonable one. It is important to note that Complainant had completed the task of popping the valve which required inserting his body in the vessel. At the time he refused to continue work, there was no requirement that he get inside the vessel again to finish the turnaround. Peno and Galloway made it plain to him that the procedure used with the blinds was the same Procedure he had worked under on prior turnarounds. Complainant's complaint was protected; his continued refusal to work after Respondent's investigation and explanation, I find to be unreasonable, and therefore not protected. 1/

Complainant's defiance of Brown played some role in the disciplinary action. However, Respondent has established that unprotected activity - Complainant's refusal to work after Peno's explanation to him - was an' important factor in the decision to suspend. In fact, until Complainant's defiance of Peno, Peno had been making every effort to accommodate him. I therefore find that Complainant would have been suspended for this alone.

CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and the parties to this proceeding.

2. Complainant's complaint is not barred by the time'limitations provisions of the Act.

3. Respondent did not violate § 105(c) when it suspended Complainant for 30 days without pay.

1/ The actual safety of the condition 'has some bearing on whether Complainant's belief-in an unsafe condition was a reasonable one, though it is not controlling. A few days after the incident, Respondent requested an MSHA inspector to tour the sandtrap area to see if there was merit to the complaint. The inspector, who testified' at the hearing, was of the opinion that the removal .of the blinds did not pose a safety hazard.

ORDER

Therefore IT IS ORDERED that the proceeding is DISMISSED.

James A. Broderick
Chief Administrative Law Judge

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