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JOSEPH HERMAN V. IMCO SERVICES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JOSEPH W. HERMAN,
COMPLAINANT

v.

IMCO SERVICES,
RESPONDENT

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

DOCKET NO. WEST 81-109-DM

Mine: Mountain Springs Plant

Appearances:

Joseph W. Herman appearing Pro Se
Reno, Nevada

Richard O. Kwapil, Jr. Esq.
Woodburn, Wedge, Blakey & Jeppson
Reno, Nevada, For the Respondent

Before: Judge John J. Morris

DECISION

Complainant Joseph W. Herman, (Herman), brings this action on his own behalf alleging he was discriminated against by his employer, Imco Services, (IMCO), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

No 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and

potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits was held in Reno, Nevada on February 21, 1982. The parties filed post trial briefs.

ISSUES

The threshold issue is whether complainant's failure to file any complaint for almost a year after he was allegedly discriminated against requires a dismissal of his claim.

Secondary and alternative issues are whether respondent discriminated against complainant, and, if so, what damages are appropriate.

SNYOPSIS OF THE CASE

Joseph Herman asserts he was fired when he complained to company officials and to the Mine Safety and Health Administration (MSHA) about an unsafe storage bin at IMCO's Battle Mountain project. Imco denies these allegations and asserts that budget overruns resulted in the termination of the project and Herman's position as supervisor.

The legal principles applicable in this case are enumerated in *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980) rev'd on other grounds, sub nom *Consolidation Coal Co. v. Marshall* 688 F.2d 1111 (3rd Cir. 1981) and in *Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2765, (1981).

SUMMARY OF THE EVIDENCE

The uncontroverted evidence concerning the late filing of the complaint will be initially reviewed.

Herman was terminated as Senior Project Engineer by IMCO at the Battle Mountain project on April 9, 1979 (Tr. 56, P1). After being discharged Herman thought he was a scapegoat and, after thinking it over, he filed a claim (Tr. 152). Herman's initial effort at filing a claim was a letter he wrote on March 3, 1980 to the Employment Security Department for the State of Nevada. His letter was referred to the Department of Occupational Safety and Health (Nevada) on March 11, 1981. The Department forwarded Herman a complaint form.

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On April 7, 1980, Herman used the form furnished to him by Nevada and filed a detailed two page discrimination complaint with the State (Tr. 139, 142, P1). In due course the complaint was referred by Nevada to the Federal Mine Safety and Health Administration (MSHA). The agency assigned Juan Wilmoth as a special investigator for the case (Tr. 139, 144, 147, P5, P7).

On September 3, 1980, after conducting its investigation, MSHA advised Herman that no discrimination had occurred within the meaning of the Act (P6). There was subsequent correspondence between Herman and MSHA. Herman lodged his complaint before this Commission on January 5, 1981 (Commission File).

DISCUSSION

Section 105(c)(2) of the Act, [30 U.S.C. 815(c)(2)], provides in part as follows:

Any miner or applicant for employment or representative of miners who believes that 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 alleging such discrimination.

It has been held that none of the deadlines in the discrimination section of the Act are jurisdictional in nature. This view originates in cases arising under the 1969 Coal Act. *Christian v. South Hopkins Coal Company*, 1 FMSHRC 126, 134-36 (1979).

In *Bennett v. Kaiser Aluminum and Chemical Corporation*, 3 FMSHRC 1539, (June, 1981) it was stated that

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 first action taken by Herman in regards to his discrimination claim was when he wrote to the Nevada Employment Security Department on March 3, 1980 (Tr. 152, P8). I consider this letter to be at least an attempt, within the meaning of the Act, to file a complaint. However, by that time almost 11 months had passed since the alleged discrimination.

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During the trial the Judge explained the 60 day statutory limitation to Herman. Herman gave two reasons for his late filing. These were that he discussed the filing with MSHA officials. Further, he stated he "wasn't familiar with court procedures naturally associated with a case of this nature" (Tr. 154, 156).

I find from the evidence that Herman's discussion with MSHA officials occurred after investigator Wilmoth had been appointed. In point of time this was after the complaint filed with Nevada had been referred to MSHA (Tr. 157, 159, P5). Accordingly, this was not a situation where Herman could have been misled by MSHA officials as in *Christian v. South Hopkins Coal Company, Inc.*, supra.

Herman's secondary claim that he was unfamiliar with court procedures does not constitute justification for the delay. Herman no doubt remained unfamiliar with court procedures since when he filed his complaint it was in the wrong jurisdiction. The evidence fails to establish any facts that would justify the late filing of the complaint.

For these reasons I conclude the complaint was not timely filed and it should be dismissed.

IMCO asserts that a further procedural delay requires dismissal of the claim. This delay arises from the statutory requirement that the person claiming to have been discriminated against has 30 days to proceed with his own suit after the Secretary has refused to proceed, 30 U.S.C. 815(c)(3).

IMCO's secondary procedural argument lacks merit. The Commission file reflects that MSHA wrote Herman on September 3, 1980 and advised him that they found no violation of the Act. On November 24, 1980, after Herman had apparently written to the MSHA office in Reno, Nevada, MSHA again wrote and advised Herman that he had "30 days to file with the Review Commission." The Commission file further contains Herman's letter of January 5, 1981 directed to the Commission inquiring about his claim. After he was advised by MSHA that they would not pursue his case Herman's actions were such that the strict application of the 30 days filing requirement would not be warranted.

Herman's post trial brief states that there is a two year limitation controlling in this case. Perhaps such a limitation is contained in the general statutes of the State of Nevada. However, a Nevada statute would not apply here. The pertinent controlling limitation for filing a complaint is the 60 day provision contained in the Act, 30 U.S.C. 815(c)(2).

However, for the reasons initially stated, namely, because of the delay of approximately 11 months before any claim was filed, I rule that the complaint should be dismissed as not timely filed.

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The cases previously cited relating to the timely filing of complaints are Judge's decisions. Inasmuch as the Commission has not passed on this issue, I deem it necessary to review the merits of the case and to enter alternative findings of fact and conclusions of law.

Accordingly, all findings of fact and conclusions of law hereafter stated relating to the merits of the case are in the alternative to the primary ruling dismissing the complaint.

EVIDENCE ON THE MERITS

The essential facts are controverted and as hereafter noted I credit Herman's version of the facts.

Joseph W. Herman, age 65, with a degree in mechanical engineering, was hired by IMCO on April 4, 1978 (Tr. 20, 21). He was employed as the Senior Project Engineer at the IMCO Mountain Springs plant near Battle Mountain, Nevada (Tr. 22). Herman's duties included the supervision and construction of facilities to enhance the production of barite (Tr. 23, 24). Barite, which is mined by the open pit method, is a white chalky powder. It is used as a seal in the drilling process (Tr. 24).

Herman's supervisor was Norman Cornell, located in Houston, Texas. On the site Herman cooperated with Dave Brown and John Miller, IMCO managers (Tr. 25, 26). IMCO and Herman agreed his work assignment was of a temporary nature which would terminate when the Battle Mountain project was finished. Herman also agreed not to leave before the project was completed (Tr. 28).

Herman supervised the building of a boiler room as well as the installation of the boiler. His principal duties involved the drier. His crew averaged about 25 workers (Tr. 34). The only other engineer available was Cornell who would occasionally fly in from Houston (Tr. 34).

About March 3, 1979, a question arose over the safety of a 200 ton storage bin. The dimensions of the bin had been furnished by IMCO's engineering department. Herman (not a structural engineer) calculated the load bearing capability of the structure and became alarmed. After discussing the matter with Cornell it was agreed that the concrete slab could be enlarged (Tr. 37-39).

After the slab was poured the next question centered on the supports for the structure (Tr. 39). On April 9, Cornell and Herman talked at length. Herman told Cornell that when the bin was loaded the columns would self destruct, twist, and collapse (Tr. 40). Herman further explained the basis for his views (Tr. 40-41). Herman recommended that certain remedial action be undertaken (Tr. 42).

Cornell told Herman to proceed with the construction "irregardless", and under any condition (Tr. 39). Cornell also said not to worry if it

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was unsafe but to proceed as per the drawings and sign them (Tr. 41, 43). Herman told Cornell that to make him liable for something he felt was unsafe would jeopardize his engineering integrity (Tr. 42).

The next day Herman, following Cornell's directions, erected the bin by raising it into position with a boom. Herman intended to expedite the erection of the bin and then reinforce it before it was used (Tr. 44, 47).

The following day Herman scheduled a meeting with Donald R. Barris, an MSHA representative. Before the meeting with MSHA Herman met Ed Ruth, an IMCO employee, in downtown Reno. Ruth told Herman that Dave Brown, the IMCO Manager, had advised Houston about Herman calling in MSHA about the bin (Tr. 129, 130).

The meeting with Herman and MSHA took place on April 11, 1979. MSHA representatives Burris and McAlexander attended. Also present were Lambert, the contractor, and Ed Ruth (IMCO). In addition IMCO's manager John Miller was "in and out" of the meeting (Tr. 48, 49, R7).

The focus of the meeting was the storage bin. Herman submitted his calculations to MSHA and it was agreed that MSHA would have its technical staff in Denver review the matter. The technical staff subsequently concluded that the bin structure should be redesigned (Exhibit P3).

Herman called Cornell by telephone and told him of the meeting with MSHA to evaluate the safety of the bin (Tr. 56). (FOOTNOTE- 1) Before Herman could finish [his conversation] Cornell said "Lay off your crew, and you are terminated immediately" (Tr. 57). Cornell stated the company was shutting down the project for reasons of economy. The Company had run out of money (Tr. 105).

Herman told Cornell he would not leave until he had secured the area and properly shut it down. Herman shut down the project on April 12, 1979 and left on April 13, 1979 (Tr. 62-64).

Two weeks later Herman visited the site. Contractor Tomporski was present at that time (Tr. 64).

DISCUSSION

The factual setting here involves extensive conflicts in the evidence. IMCO contends Herman failed to establish a prima facie case of discriminatory discharge. I disagree.

Herman's complaints about the 200 ton bin which culminated in him calling in MSHA for an opinion were clearly protected activity. The evidence establishes Herman was forthwith and abruptly fired for that activity. The direct evidence: "I told him [Cornell] of the meeting with MSHA to discuss the safety of the bin . . . and before I [Herman] could finish he [Cornell] said I was terminated and lay off your crew" (Tr. 56, 57). A clear case of protected activity, adverse action, and hostility has been established here Cf Chacon v. Phelps Dodge Corporation, supra.

IMCO denies the statements attributed to Cornell by Herman. Cornell states the engineering problems had nothing to do with the decision to fire Herman. That determination was made because the project costs were exceeding the budget (Tr. 199-201).

Cornell's testimony of the telephone call resulting in Herman's discharge is based solely on Cornell refreshing his recollection with a summary previously prepared from his telephone logs. This summary was apparently prepared in April 1979 at the request of R.E. Jones, Cornell's supervisor (Tr. 214, R8). No further explanation appears in the record why the logs were prepared. The underlying original detail of the daily telephone call logs was destroyed when Cornell left IMCO.

I do not find Cornell's version of the telephone conversation to be credible. As indicated the foundation of the logs themselves is mysterious. Cornell has no direct recollection of the conversation when he discharged Herman but an obvious element in this case is Herman's volatility in matters of safety and engineering integrity.

Herman agrees that Cornell said he was shutting down the project because of budget problems but in my view Cornell seized on that reason to terminate Herman.

The telephone log appears to be at best a self serving document. Unrelated to any particular date on the telephone log is the statement that "all candidates for the position of Project Engineer are given a copy of a list which is entitled 'Duties of a Project Engineer'. Copy attached. Joe Herman had been given this list. He does not measure up to the minimum as far as performing these duties" (R8). However, according to Cornell the basis for this observation was that he had on occasion reprimanded Herman concerning the costs of the project. In addition, Herman would miss an occasional weekly report (Tr. 215). The record reflects that the project costs were only incidentally the responsibility of Herman. In fact Herman was so unrelated to the costs of the project he was not one of the company officials receiving a copy of the projected budget

overrun prepared by

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IMCO's Manager Brown in April 1979 (R6). In addition, an occasional missing weekly report would not appear to establish that Herman did not "measure up."

Cornell's testimony is conflicting. At one point he testified he was not aware of the bin problem before Herman's termination (Tr. 217, 218). At another point he testified to the contrary (Tr. 220).

A further issue requiring discussion involves the specific date of the telephone conversation when Cornell fired Herman. The evidence indicates that this conversation took place on April 9, 1979. Herman noted there was a discrepancy as to that date. (Tr. 56, 57). Due to Herman's subsequent activity on the job site I conclude he could not have been terminated on the exact date of April 9. But the actual date is not vital to the case since the pivotal issues concern the protected activity and resultant immediate discharge.

Was there a budget overrun? The budget overrun was initially generated in a memorandum dated April 3, 1979. The written report, prepared by IMCO's manager Brown states, in part, "assuming a 10% allowable overrun, available capital was \$1,980,000. This leaves a maximum balance of \$194,359. Further, if these estimates are even remotely accurate, and I emphasize that they are extremely rough, we will be short by \$116,500" (Tr. 180, R6).

By IMCO's figures there would be an .058 shortfall. The projected shortfall is not impressive in relation to the total budget. IMCO's manager testified a written memorandum later confirmed his superior's verbal approval of his proposal. However, no such written confirmation was offered in evidence. The project was eventually completed within the original budget figure (Tr. 188).

Was the project shut down? I believe IMCO simply misspoke on this issue. IMCO's managers agreed the project continued (Tr. 182, 183). Herman found contractor Tompokaski was on the site when he visited two weeks after his discharge (Tr. 64).

Was there a reduction in force, commonly called a RIF? IMCO's evidence shows contractor Tomporaski continued on the job after Herman's discharge. And the size of his crew remained the same (Tr. 183). Also destroying IMCO's claim of a RIF is its own written budget estimate (R6). That document states by April 20 "we should resume work on the drier" (R6, page 6). In short, work was to be resumed on the drier on the very day Herman's salary was terminated. Since the drier was Herman's primary responsibility any RIF was illusory rather than real.

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If a budget overrun, shut down, or reduction in force occurred they can be established by more credible evidence than that offered here.

In Chacon v. Phelps Dodge Corporation, supra the Commission directed its Judge's not to exceed appropriate limits in examining a company's business practices and I assume without deciding that a budgetary cutback can be a business practice. However, I find IMCO did not sustain its burden of proof as required by Pasula, supra. I conclude the IMCO's proported justification is so weak and so implausible that it was a mere pretext seized upon to cloak a discriminatory motive.

But for the primary ruling of untimely filing, this case would be affirmed on the merits.

REINSTATEMENT

Complainant does not seek reinstatement (Tr. 68).

MONETARY AWARD

Any monetary award requires a summary of the evidence.

Herman was hired at an annual salary of \$24,000 (Tr. 22, 63). He left the the project on April 12, 1979. Herman estimated the project would be finished about the last week in May, 1979. The project was 85 to 90 percent completed when he left (Tr. 27, 63-64). Herman's wages were terminated as of April 20, 1979. His agreement with IMCO was to stay until the project was finished (Tr. 101).

Herman sought employment with several Nevada companies in the months following his discharge (Tr. 79). Generally, Herman would talk to the plant or personnel manager at the place of prospective employment. When he interviewed with these companies the same "barriers" arose when he discussed why he left IMCO (Tr. 79-87).

Herman found employment on October 20, 1979, when he took a job with Sikorsky Engineering as an hydraulic engineer (Tr. 67).

DISCUSSION

In a proceedings brought by a miner on his own behalf under Section 105(c)(3) the Commission is to award back pay with interest as well as a sum for "all costs and expenses."

Concerning the award for back pay: Herman was hired solely for the Battle Mountain project. His pay was terminated on April 20, 1979.

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Accordingly, his award for back pay would be for the six weeks until the project would have been completed. Based on his annual pay of \$24,000 Herman would be entitled to \$2,769.18 (weekly gross of \$461.53 x 6 weeks). Any award for back pay would necessarily include deductions for applicable state and federal laws concerning the withholding of taxes. *Estle and Dunmire v. Northern Coal Company* 4 FMSHRC 126 (1981).

No further award would be made since there is no evidence of any additional costs or expenses.

Herman seeks \$166,000 in lost wages and \$150,000 in punitive damages. No evidence supports the claim of lost wages other than as stated above. Herman's claim for punitive damages appears to be based on his view that IMCO interfered with his subsequent efforts at securing employment. Herman claims that this "interference" arose with prospective employers when he would advise them of the fact that he had left IMCO over an argument concerning safety.

The evidence fails to show that this information in any manner influenced any decision of any prospective employers to hire or not hire Herman. The Act does not authorize punitive damages but if Herman had proven interference by IMCO with his subsequent employment his resultant costs and expenses could have been substantial.

One additional feature of this case requires discussion. In his post trial brief Herman states he is not a miner. IMCO's reply brief accepts Herman's statement and asserts that the Commission lacks jurisdiction to entertain the case.

I reject IMCO's argument. I consider Herman's statement to mean that he is a mining engineer and not per se a miner as that vocation is primarily defined. (FOOTNOTE- 2) The uncontroverted evidence shows that at this facility barite is mined by the open pit mining process. Herman was the mining engineer on the project. Since IMCO does business in Nevada and Texas it is, on these facts, a mine operator subject to the Act.

