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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

Complaint of Discharge,  
Discrimination, or Interference

ON BEHALF OF  
LENWARD H. WOOD,

Docket No. CENT 81-183-DM

MD 79-02

COMPLAINANT

v.

Jenny Lind Quarry and Plant

ARKHOLA SAND AND GRAVEL COMPANY,  
RESPONDENT

DECISION

Appearances: Richard Collier, Esq., Office of the Solicitor, U.S.  
Department of Labor, Dallas, Texas, on behalf of  
Complainant;  
William B. Miller, Esq., Atlanta, Georgia, on behalf  
of Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant alleges that he was discharged on January 1, 1979, from the position he held with Respondent as a shovel operator because he refused to work under unsafe conditions. He does not seek reinstatement and is claiming lost wages for the two-week period from January 1, 1979 to January 15, 1979. Respondent denies that Complainant was discharged and denies that his leaving Respondent's employ was related to activities protected under the Mine Safety Act. Complainant filed his complaint with the Secretary of Labor on January 5, 1979. His complaint was filed with the Review Commission on May 7, 1981.

Pursuant to notice, the case was called for hearing on the merits on September 14, 1982, in Fort Smith, Arkansas. Lenward H. Wood, the Complainant, and William Wilcox, a Federal Mine Safety and Health Administration special investigator, testified for Complainant. George Ross, Bill Scarbrough, and Joe Wasson testified on behalf of Respondent.

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Both parties waived their rights to file posthearing briefs and made oral arguments on the record at the close of the hearing. Based on the entire record, and considering the contentions of the parties, I make the following decision.

#### FINDINGS OF FACT

1. Respondent at all times pertinent to this proceeding was the operator of the Jenny Lind Quarry and Plant near Fort Smith, Arkansas, which was a mine as that term is defined in the Federal Mine Safety and Health Act of 1977.

2. Complainant was employed by Respondent as a shovel operator from about June 1975 to April 1977 and from November 1977 until January 1, 1979, and was a miner as that term is used in the Act. He normally worked from about 7 o'clock a.m. until dark, 6 days per week.

3. The shovel which Complainant operated consisted of a cab and crane with a large scoop in front designed to pick up rocks and load them into dump trucks. The trucks then took the rocks to the crusher. The capacity of the shovel was in excess of 5 tons of rock.

4. The shovel in question had both hand and foot controls. Levers operated by hand were used to swing the crane around and hoist the load. Foot pedals were used to keep the bucket in place, that is to keep the stick from going in or out, and to keep the bucket from dropping. While the shovel is being operated, the hand and foot controls are constantly being used. At some time in the Spring of 1978, Respondent had a partition put in the cab of the crane which had the result of deflecting some of the heat from the engine away from the cab.

5. On a number of occasions prior to January 1, 1979, Complainant complained to his supervisor about the lack of heat in the cab of the shovel.

6. Complainant operated the shovel in January, 1977, in January 1978, and in February 1978, when temperatures ranged from 4 degrees Fahrenheit to 19 degrees Fahrenheit with wind speeds varying from 3 to 13 knots per hour.

7. On January 1, 1979, when Complainant reported to work, he was informed that the temperature was minus 11 degrees Fahrenheit. In fact, at the Fort Smith, Arkansas airport the temperature was 19 degrees Fahrenheit at 6:00 a.m., January 1, 1979. It was 18 degrees at 9:00 a.m. The wind speed at 6:00 a.m. was 10 knots, and at 9:00 was 13 knots. The wind was coming from North by Northwest. The subject quarry was on the north slope of the mountain and therefore exposed to the wind.

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8. It is necessary for the safe operation of the power shovel in question, that the operator have full feeling in his hands and feet when he operates the controls.

9. Complainant reported to work on January 1, 1979. The employees attended a regular safety meeting prior to the beginning of the shift. Complainant asked his supervisor, Jack Servold if a heater had been put in the cab. When he was told that it had not been installed, Complainant told Servold he would not run it because of the cold weather. Complainant offered to take a heater from another crane that was not running and install it in the crane involved herein. The supervisor refused the offer and told Complainant to punch out and go home.

10. In the evening of January 1, 1979, Complainant called Ed Ellis, Superintendent of the mine and told him what happened. Ellis told Complainant that if Servold told him to punch out and go home, that meant he was fired.

11. After Complainant went home on January 1, 1979, the shovel was operated by his assistant George Ross. Ross completed the shift and does not recall any safety problems related to the cold weather.

12. At the time his employment was terminated, Complainant was earning \$5.50 per hour with time-and-one-half for all hours worked over 40 in a week. He worked an average of 50 hours per week, and thus earned \$302.50 per week.

13. Respondent's records show that Complainant voluntarily quit work "because he did not want to run shovel without heater installed in it."

14. The Arkansas Employment Security Division found with respect to Complainant's claim for unemployment benefits that he quit his job "when he became dissatisfied with his job assignment" and denied unemployment benefits.

15. Complainant filed a discrimination complaint with the Mine Safety and Health Administration on January 9, 1979. Respondent was notified of the claim and an investigation was conducted at the mine on January 10 and January 11, 1979. The MSHA investigator spoke to Servold and Ellis in addition to other company officials.

16. The Solicitor of Labor filed a complaint on behalf of Lenward Wood with the Review Commission on May 7, 1981.

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17. Neither Servold nor Ellis was in Respondent's employ at the time of the hearing. Counsel for Respondent stated that Ellis died about 2 weeks prior to the hearing and Servold is presently living in Colorado.

#### STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) 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 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.

(2) 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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a

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hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under a paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred.

#### ISSUES

1. Whether the complaint is barred by the statute of limitations or by laches.
2. Whether Complainant was discharged or voluntarily left his employment with Respondent.
3. Whether Complainant's refusal to work was protected under the Mine Safety Act.
4. If Complainant was discriminated against, what is the appropriate relief to which he is entitled.

#### CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Federal Mine Safety Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. The complaint is not barred by the limitations contained in section 105(c) of the Act or by laches.

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DISCUSSION

The Complainant filed his complaint with MSHA within 10 days of the alleged discrimination. The Secretary forwarded a copy of the complaint to Respondent upon its receipt and commenced an investigation within 2 or 3 days of the filing of the complaint. It does not appear that the Secretary notified Complainant in writing within 90 days of the receipt of the complaint whether a violation occurred. There is no specific requirement in the Act that such notification be sent to the mine operator. The record does not indicate when the Secretary determined that a violation occurred, but he did not file a complaint with the Commission until May 7, 1981, more than 2 years after the alleged discrimination and more than 2 years after the investigation was apparently completed. The only explanation for the delay in filing is that the case "was never entered into the computer system" of the Dallas Solicitor's Office and was overlooked because of the immense caseload in the Office from 1979 to 1981.

It has been held that the statutory filing deadlines are not jurisdictional. *Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation*, 3 FMSHRC 1539 (1981). See also *Christian v. South Hopkins Coal Co.*, 1 FMSHRC 126 (1979); *Local 5429 v. Consolidation Coal Co.*, 1 FMSHRC 1300 (1979); S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY OF the FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Committee on Human Resources (July 1978) 624 (hereinafter LEG. HIST.) ("It should be emphasized, however, that these time-frames [in 105(c)] are not intended to be jurisdictional.")

In considering whether the complaint is barred because of late filing, by analogy to a statute of limitations or principle of laches, it must be remembered that this proceeding is not brought solely to make the Complainant whole, but to vindicate a public right. The primary purpose of section 105(c) as of the entire Act, is to promote health and safety in the nation's mines.

The failure to file a timely complaint with the Commission in this case was the fault of the government, and not of the Complainant. The Senate Committee report states that "the Complaint should not be prejudiced because of the failure of the Government to meet its time obligations." The time obligation that the Secretary failed to meet in this case is the obligation under section 105(c)(2) to "immediately file a complaint with the Commission, with service upon the alleged violator . . ." when the Secretary has determined that the provisions of the subsection have been violated.

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In a case brought by EEOC under Title VII of the Civil Rights Act of 1964 approximately 3 years after the complaint was filed with EEOC, the Supreme Court held that "the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 372 (1977). Prompt notice to Respondent of the filing of a complaint should alert him to the possibility of a proceeding and give him an opportunity to gather and preserve evidence. If he can show prejudice, a court "may restrict or even deny backpay relief." *Id.*, at 373.

The case of *Marshall v. Intermountain Electric Company, Inc.*, 614 F.2d 260 (10th Cir. 1980), was a suit by the Secretary of Labor to enjoin future violations of the prohibition under the Occupational Safety and Health Act against discharging an employee for filing safety complaints. The Court held, following the *Occidental Life Insurance* case, that the State statute of limitations did not apply.

"When an action is brought by the government to enforce private as well as public rights, state statutes of limitations do not apply to bar the action even though no federal period of limitations is provided. However, unlike the rule relating to actions brought exclusively for the benefit of the federal government, the doctrine of laches may be applied in these hybrid cases to limit relief." (Emphasis added). 614 F.2d at 263.

Following these principles, I conclude that if prejudice has occurred, laches may be invoked, not to defeat the claim, but only to limit relief. The evidence of prejudice in this record is the absence from the hearing of Ed Ellis, the Plant Superintendent who signed the document in which Complainant's employment termination was recorded and who allegedly told Complainant that he was fired, and witness, Jack Servold, who was Complainant's foreman. Counsel stated that Ellis died about 2 weeks prior to the hearing, and that Servold was out of State and unavailable to testify. No showing was made of any effort by Respondent to preserve testimony or to obtain the testimony of Servold by deposition or otherwise. I conclude, however, that potential prejudice has been shown, and I will consider that conclusion in discussing relief.

3. Complainant was discharged, actually or constructively, because of his refusal to perform certain work.

#### DISCUSSION

Complainant refused to operate the shovel unless a heater was installed, and he was told to punch out and go home. Complainant states that he was fired; Respondent states that he quit. What the termination



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of employment is called is not important to this proceeding if it resulted from protected activity.

4. Complainant's refusal to operate the shovel in question on January 1, 1979, was based on a good faith belief that it involved a safety hazard because of the extreme cold.

#### DISCUSSION

It is true that Complainant operated the shovel on prior occasions when the weather was more severe than it was on January 1, 1979. However, the partition referred to in Finding of Fact No. 4 had not been installed on these occasions and more heat from the engine came into the cab. It is also true that another employee operated the shovel on January 1, 1979, without incident. Neither of these aforementioned facts persuades me that Complainant was acting otherwise than in good faith when he refused to operate the shovel on January 1. There is no other adequate explanation for his refusal.

5. Complainant's refusal to operate the shovel in question on January 1, 1979, was based on a reasonable belief that it involved a safety hazard because of the extreme cold.

#### DISCUSSION

MSHA Special Investigator Wilcox, a mining engineer, stated his opinion that it was a safety hazard to run a shovel such as the one in question in subfreezing temperatures without any heat. Others who testified disagree with him, but I accept the testimony of Wilcox as establishing that Complainant's refusal to run the shovel was reasonable and was related to safety considerations.

6. Complainant's refusal to operate the shovel in question on January 1, 1979, was activity protected under the Mine Act.

#### DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act, if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982).

7. Complainant's employment was terminated by Respondent because of his refusal to operate the shovel on January 1, 1979, referred to above. This constituted a violation of section 105 of the Act.

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8. Because of the delay in filing the complaint, I will not order Respondent to pay interest on the award of back wages.

ORDER

Based upon the above findings of fact and conclusions of law, Respondent is ORDERED to pay Complainant within 30 days of the date of this decision the sum of \$605 for 2 weeks lost wages.

James A. Broderick  
Administrative Law Judge