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SOL (MSHA) V. METRIC CONSTRUCTORS  
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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) ON BEHALF OF BRIAN S. OUSLEY, COMPLAINANT	DISCRIMINATION PROCEEDING  Docket No. SE 87-85-DM  MD 86-18  C.P.L. Plant
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v.

METRIC CONSTRUCTORS, INC.,  
RESPONDENT

ORDER DENYING RESPONDENT'S MOTION  
TO DISMISS OR FOR SUMMARY DECISION

In its Answer, filed on June 16, 1987, Respondent moved to dismiss "or For Summary Decision." On June 23, 1987, the Secretary, on behalf of the Complainant, filed a motion to extend the time to reply to Respondent's motion. On June 24, 1987, an order was entered extending the time for the Secretary to reply to this motion until July 13, 1987. On July 14, 1987, the Secretary filed its response to the Respondent's motion.

In essence, the basis for the Respondent's motion is that the complaint herein is time-barred. The alleged act of discrimination occurred on January 21, 1986, and a complaint was filed with MSHA on February 3, 1986. MSHA conducted an investigation but did not, within 90 days after the filing of the claim with MSHA or at any time, issue any determination of a violation of the Federal Mine Safety and Health Act. On May 12, 1987, a complaint of discrimination was filed with the Commission.

Judge Broderick, in Secretary v. Jim Walter Resources, Inc., 9 FMSHRC 263 (February 1987), analyzed the relevant law with regard to the time obligations of the Act. I concur in his analysis as follows:

The Act further provides that upon receipt of a complaint by a miner, the Secretary shall commence an investigation within 15 days, and if he determines that discrimination has occurred, shall immediately file a complaint with the Commission. It directs the Secretary to notify the miner within 90 days of the receipt of a complaint of his determination whether a violation has occurred. The Legislative History of the

Act makes it clear that this time limitation is not jurisdictional and that Complainant should not be prejudiced by the failure of the Government to meet its time obligations. S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee 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). However the Commission has held that a long delay coupled with a showing of prejudice to the operator may subject the complaint to dismissal. Secretary/Hale v. 4AA Coal Company, Inc., 8 FMSHRC 905 (1986). (Secretary v. Jim Walter Resources, Inc., supra, at 266).

In essence, it is Respondent's position that the complaint herein is frivolous and that there is no justification for the delay by the Secretary in filing the complaint more than a year after the period established in the Act. Without making any decision as to the merits of this action, I find that the allegations in the complaint do state a cause of action under the Act, and as such the complaint is not frivolous. Furthermore, according to the affidavit of July 9, 1987, of William H. Berger, ("Attach" 4 to the Secretary's response), the case was received in the Atlanta Regional Solicitor's Office on June 11, 1986, and in August 1986, when Berger contacted the Complainant about the case, he was informed that the latter had instituted a State Court Action arising out of the same transaction alleged in the MSHA complaint, except that "the State Law supposedly provided for punitive damages." Berger then informed the Complainant and his attorney, Ronald S. Webster, that the Department of Labor would not proceed with his case while the State Court proceeding was ongoing. Berger stated that he was told by both the Complainant and Webster, on several occasions, that they desired to proceed in State Court because of the possibility of recovering punitive damages. Berger stated in his affidavit that in mid December 1986 he was informed, by the Complainant, that the State Court had denied any claim for punitive damages and that he, the Complainant, wished to proceed with the MSHA claim. The case was subsequently transferred to the National Solicitor's Office on March 11, 1987. Based upon the affidavit of Berger, I conclude that there was some justification for the Secretary's delay in filing a complaint in this matter.

In addition, the Respondent alleges that it has suffered substantial prejudice, by reason of Respondent's delay in bring this action, in that all material witnesses have been laid off, and that it has been denied an opportunity to conduct discovery and defend the claim while witnesses and documentary evidence were readily and inexpensively available. Respondent also argued

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that the residences of key witnesses, including Elmer Podratz and Michael O. Webb, are outside the State of Florida and unknown. However, it appears from the affidavit of John K. Day, Jr., that Podratz (who left the Respondent on or about July 10, 1986), and Webb (who left the Respondent on May 15, 1987) are, to the best of Day's knowledge, residing in Charlotte, North Carolina and Louisiana respectively. No facts are alleged to establish any reason why Podratz and Webb cannot be subpoenaed to testify in this matter. The same pertains to Duke Roberts and James Wilkerson who, accordingly to the affidavit of Day, left the Respondent on May 28, 1987 and January 9, 1986 respectively, and, to the best of Day's knowledge, are residing in Virginia and Washington State respectively.

According to Day's affidavit, Fred K. Coogle and Robert Baker left the Respondent on July 9, 1986 and October 6, 1986, and as to each of them Day indicated "I do not know his current whereabouts." Respondent has not described in any detail the scope of any prospective testimony of Coogle and Baker. As such, it has not been established that their testimony is critical to Respondent's case. Further, Respondent has not set forth any facts which would establish that Coogle and Baker can not be served with a subpoena. The fact that Day does not know their current whereabouts does not establish that Respondent has no way of locating these individuals.

According to the affidavit of Day, the other individual having knowledge as to the fact and circumstances surrounding the Complainant's termination is John Camball, who is currently employed by Respondent and certainly is available to testify.

Therefore, accordingly, I find that Respondent has not shown material legal prejudice attributable to the Secretary's delay in filing the complaint with the Commission. (See Secretary/Hale v. 4AA Coal Company, Inc., 8 FMSHRC 905 (June 1986).

Based upon all the above, and in the interest of justice, it is ORDERED that Respondent's Motion to Dismiss or for Summary Decision is DENIED.

Avram Weisberger  
Administrative Law Judge  
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