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RONALD SIZEMORE V. WHITAKER COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RONALD SIZEMORE,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 87-223-D
BARB CD 85-64

WHITAKER COAL CORPORATION,
RESPONDENT

DECISION

Appearances: Mr. Ronald Sizemore, Hazard, Kentucky,
pro se;
A.P. Gullet, Esq., Gullett, Combs & Holliday,
Hazard, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Ronald Sizemore under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act", alleging that the Whitaker Coal Corporation discharged him on August 21, 1985, in violation of section 105(c)(1) of the Act. The preliminary issue before me is whether Mr. Sizemore filed his Complaint with this Commission in a timely manner.

Mr. Sizemore initially filed his Complaint with the Secretary of Labor, on August 26, 1985. Thereafter by letter dated November 21, 1985, the Secretary of Labor, through his agent, Willard Querry, District Manager, informed Mr. Sizemore of his determination that a violation of section 105(c) had not occurred. This letter was received by Mr. Sizemore on November 23, 1985. Sizemore did not however file his complaint of discrimination with this Commission until August 13, 1987, more than 19 months later.

Section 105(c)(3) of the Act provides, in part, that "if the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission charging discrimination or interference in violation of paragraph (1)."

Clearly Mr. Sizemore did not file within the prescribed 30 day time period. The relevant legislative history provides however that "this 30-day limitation may be waived by the court

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in appropriate circumstances for excusable failure to meet the requirements". Senate report 95Ä181, 95th Congress, 1st Session 37 (1977), reprinted for the Senate Subcommittee on Labor, Committee on Human Resources, 95th Congress, 2nd Session, Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978). See also Herman v. Imco Services, 4 FMSHRC 2135 (1982), and Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (1984).

Mr. Sizemore testified in reference to filing his complaint that he thought he "could wait a while and pick it up later". He claims that this was the first opportunity he had to file for nearly 19 months. He maintained that "he had so much to deal with" including the hospitalization of his wife and child, divorce proceedings and a house fire, that he presumably did not have time to file. He concedes however that everyone was out of the hospital, his divorce proceedings were concluded, and that he had received an insurance settlement on his house fire by July 1986, yet did not file for more than a year after that.

Sizemore also acknowledges that he talked to several attorneys about this case. In January 1986 one attorney declined to handle the case advising him that he had not filed timely. Thus as early as January 1986 Sizemore had legal advice that he had not filed within the statutory time limits. He nevertheless further delayed filing a complaint with this Commission until August 13, 1987, over a year-and-a-half later.

Under all the circumstances I have little difficulty in finding that Mr. Sizemore has no legally sufficient excuse or justification for the untimely filing of his complaint with this Commission. Accordingly the Complaint must be dismissed.

ORDER

Discrimination Proceedings Docket No. KENT 87Ä223ÄD are dismissed.

Gary Melick
Administrative Law Judge
(703) 756Ä6261