

CCASE:
ARMANDO M. RIVAS V. PHELPS DODGE MORENCI
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ARMANDO M. RIVAS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 89-395-DM

v.

MD 89-36

PHELPS DODGE MORENCI, INC.,
RESPONDENT

ORDER DENYING MOTION

Following an on-the-record preliminary hearing on February 6, 1990, for the special purpose of resolving Respondent's Motion for Summary Decision, counsel for both parties submitted their positions by oral argument at the close of hearing in lieu of filing written briefs.

Respondent contends the Complaint should be dismissed since Complainant did not file such with MSHA until approximately 174 days (T. 52) after he was discharged on September 15, 1988 (T. 14), or some 3 1/2 months beyond the 60-day filing limit provided in Section 105(c) of the Mine Act.

Complainant presented three witnesses at the hearing to establish that the filing delay resulted from his suffering epilepsy, and memory defects, and from the time it took for him to consult with attorneys and to investigate his remedies with other agencies (T. 12-13).

Respondent presented no witnesses (T. 49) but claimed both general and specific prejudice (T. 54) from the filing delay. Thus Respondent contends:

". . . there are approximately two dozen employees that are listed in Mr. Rivas's three page complaint who either participated in alleged harassment of him or observed that alleged harassment. . . it is not reasonable for this tribunal to assume that all 24, 25, 30 of those employees mentioned in there would have the same recollection of events two years ago as they would have of events if they were permitted to testify to them in a timely manner.

And with respect to the specific prejudice issue . . . it is clear from the testimony that Mr. Rivas gave, and that of his mother, that he himself has very specific recollection problems. He testified that he has trouble remembering things, his memory is not good, that he is confused. His mother testified that there are some things he remembers and other things that he does not."

". . . there has been an inadequate (sic) showing of justification. The complainant clearly was aware of the Mine Safety Act and his right to assert complaints under it as early as February of 1988. He apparently was contacting both agencies and attorneys as early as November of 1988. And if he has received poor advice from those attorneys, from those agencies, that is not obviously the fault of the respondent."

According to Complainant, Armando M. Rivas, (age 32 with a high school education), he made contact with his employer, Phelps Dodge, when he met with James Madison to request his job back (T. 15). After that he called "several attorneys" and several agencies who advised him they could do nothing (T. 15, 20).

Mr. Rivas, an epileptic, was depressed and had "disorder" seizures during the period after his discharge which seizures cause him to get confused, jerk, and affect his memory (T. 16). This condition worsened in October and November, 1988 (Tr.).

In November, 1988, Complainant apparently found out about his rights to go to MSHA and file a complaint against his employer (T. 35).

In January or February, 1989, while at the Civil Rights Division (believed to be a division of the Arizona Attorney General's Office), a call was made in his behalf to MSHA which subsequently sent him complaint forms to be filled out (T. 22-26). Complainant received help from a Community Action agency in Safford, Arizona in completing the MSHA forms which led to the Complaint (Ex. R-2) being prepared in late February, 1989 (T. 45-48) being filed in early March, 1989 (T. 23, 27, 48).

According to Complainant's mother, Maria Meza, Complainant never left "the home". She indicated that Complainant had seizures in October, November and December of 1988, and that his "mind wasn't well," (T. 42) and that "he remembers some things, others he doesn't." (T. 44).

The Commission has held that the 60-day time limit is not jurisdictional and that while the purpose of the 60-day time limit is to avoid stale claims, a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). the Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. 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 674 (1978) (emphasis added).

Timeliness questions therefore must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation. *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (1984).

To prevail, the Respondent mine operator must establish that it suffered material legal prejudice which was attributable to the Complainant's delay in filing his complaint. See *Secretary of Labor v. 4-A Coal Company, Inc.*, 8 FMSHRC 905 (June 1986); *Buelke v. Thunder Basin Coal Company*, 11 FMSHRC 238 (February 1989).

In this matter, the Complainant established the existence of a most significant mental handicap affecting both his ability to function as well as his memory following his discharge. It also appears that following his discharge he made, in the context of his condition, reasonable efforts to ascertain his remedies and to obtain direction. The delay of 3 1/2 months beyond the filing period is not sufficient to constitute the basis for creation of a presumption of legal prejudice to the operator. Respondent's allegations of prejudice, specific and general, are broad and speculative and do not constitute grounds for a determination that it has suffered sufficient material legal prejudice which are attributable to the filing delay.¹ See *Nealey v. Transportation Maritime Mexicana, S.A.*, 662 F.2d 1275, 1280-1281 (9th Cir. 1980)

