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THOMAS J. MCINTOSH V. FLAGET FUELS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

THOMAS J. MCINTOSH,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 90-113-D
MSHA Case No. BARB CD 90-06

FLAGET FUELS, INC.,
RESPONDENT

No. 1 Surface

ORDER DENYING RESPONDENT'S REQUEST
TO DISMISS COMPLAINT

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complainant alleges that he was discharged by the respondent from his employment as a bulldozer operator on or about December 8, 1989, because of his refusal to operate a bulldozer he reasonably and in good faith believed to be unsafe and because he had voiced safety complaints about said bulldozer to the respondent's vice-president.

The respondent has filed an answer to the complaint denying that it discharged the complainant or discriminated against him in violation of the Act. With regard to the complainant's jurisdictional pleading at paragraph three (3) of his complaint, the respondent takes the position that the complaint is untimely and states that it "specifically controverts jurisdiction of the Commission for failure to meet the statutorily prescribed filing deadline." Respondent requests that the complaint be dismissed with prejudice.

Although the Act provides that a discrimination complaint must be filed within 30 days after receipt of the Secretary's written determination that no violation has occurred, and the Commission's proposed rule changes as published in the Federal Register on February 12, 1990, 55 Fed. Reg. 4853-4866, will include the same statutory time limit, under the Commission's present rules of procedure there is no time limit for filing such a complaint. The applicable present rules provide as follows:

2700.40 Who may file.

(a) The Secretary. A complaint of discharge, discrimination or interference under section 105(c) of the Act, 30 U.S.C. 815(c), shall be filed by the Secretary after an investigation under section 105(c)(2) of the Act, if he finds that a violation of section 105(c)(1) of the Act has occurred.

(b) Miner, representative, or applicant for employment. A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred.

2700.41 When to file.

(a) The Secretary. A complaint of discharge discrimination or interference shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.

(b) Miner, representative, or applicant for employment. A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred.

The pleadings reflect that the complainant timely filed his complaint with MSHA on December 11, 1989. By letter dated January 26, 1990, and received by the complainant on February 1, 1990, MSHA advised the complainant that based on a review of the information gathered during its investigation of his complaint, it concluded that a violation of section 105(c) of the Act had not occurred. The complainant then filed the instant complaint with the Commission by letter and enclosure dated March 5, 1990, and the complaint was docketed on March 9, 1990.

It has been held that the time limitations found in section 105(c) of the Act are not jurisdictional. See: *Christian v. South Hopkins Coal Company*, 1 FMSHRC 126, 134-136 (April 1979); *Bennett v. Kaiser Aluminum & Chemical Corporation*, 3 FMSHRC 1539 (June 1981); *Secretary v. 4-A Coal Company, Inc.*, 8 FMSHRC 905 (June, 1986); *Buelke v. Thunder Basin Coal Company*, 11 FMSHRC 240 (February, 1989).

In the following cases, the Commission held that the failure by miners to timely file discrimination complaints for time periods ranging from 60 days to 7 months after the events complained of should not be barred, and the complaints were

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permitted. See: Gary M. Bennett v. Kaiser Aluminum & Chemical Corp., 2 MSHC 424 (1981); Charles J. Frazier v. Morrison-Knudsen, Inc., 2 MSHC 2057 (1981); Rex Allen v. UNC Mining & Milling, 2 MSHC 2089 (1981); Richard C. Johnston v. Olga Coal Co., 2 MSHC 2247 (1981).

The respondent makes no claim that it has been prejudiced by the complainant's slight delay in filing his complaint with the Commission after receiving notification from MSHA that it did not intend to pursue his case further, and I cannot conclude that any such delay has deprived the respondent of a fair and meaningful opportunity to defend against the claim of alleged discrimination.

ORDER

In view of the foregoing, the respondent's request to dismiss the complaint IS DENIED, and this case will be scheduled for a hearing on the merits in the near future at a time and place convenient to the parties.

George A. Koutras
Administrative Law Judge