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SOL (MSHA) V. PEABODY COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DAVID R. SKELTON, Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No. LAKE 94-204-D
PEABODY COAL COMPANY, Respondent	:	VINC CD 92-02
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MICHAEL E. KRESS, Complainant	:	Docket No. LAKE 94-205-D
v.	:	VINC CD 92-03
PEABODY COAL COMPANY, Respondent	:	Squaw Creek Mine

ORDER DISMISSING PROCEEDINGS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern complaints of alleged discrimination filed by the Secretary of Labor on May 9, 1994, against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). The complaints were filed on behalf of two miners employed by the respondent (David R. Skelton and Michael E. Kress).

It would appear from the pleadings that Mr. Skelton and Mr. Kress filed their initial complaint with MSHA on August 17, 1992, after they were verbally reprimanded on June 23, 1992, by their supervisor for allegedly "taking too long for lunch and operating their pans (scrapers) too slow on open roadways to the point of being unproductive and insubordinate". In support of their complaint, Mr. Skelton and Mr. Kress stated that they "were operating our equipment in a safe manner as conditions dictated," and they demanded that the reprimands be removed.

The Secretary alleges that Mr. Skelton and Mr. Kress engaged in protected activity "by refusing to drive the vehicles they were driving, in the performance of their mining activities, because they had a good faith and reasonable belief, that operating at higher speeds would cause injury to themselves or to others". The Secretary also alleges that Mr. Skelton and Mr. Kress were discriminated against and reprimanded for driving their vehicles too slowly. It is not clear whether the Secretary is alleging two protected activities (refusing to drive the scrapers and/or operating them too slowly).

The pleadings reflect that the local UMWA union filed a grievance on behalf of Mr. Skelton and Mr. Kress on July 6, 1992, alleging that "mine management is creating an unsafe condition and practice by interfering with the safety rights of the members of local union 1189 and others". The grievance proceeded through several steps pursuant to the 1988 union/management agreement, and it was resolved and withdrawn on August 21, 1992, "with the understanding that management will not use intimidation to interfere with the safety rights of the members of local union 1189". It is not clear whether the verbal reprimands were ever recorded or removed from the employment records of Mr. Skelton and Mr. Kress.

The Secretary requests the following relief:

1. A finding that Mr. Skelton and Mr. Kress were unlawfully discriminated against when they were reprimanded for engaging in protected activity.

2. Expungement from the respondent's employment records of any and all references to the reprimands.

3. The posting of a Notice at the mine for a period of not less than 60 days which states the respondent's recognition of the miners' statutory rights to file discrimination or hazard complaints with MSHA, and the respondent's commitment to honor these rights and not to interfere in any manner with the exercise of these rights.

4. A civil penalty assessments of $8,500, against the respondent for the alleged violations of section 105(c)(1).

In its answer, the respondent admitted that Mr. Skelton and Mr. Kress were verbally reprimanded by their supervisor for operating the scrapers too slowly on the haul road and for taking excessively long lunch periods. However, the respondent denied any discrimination, and asserted that the filing of the Secretary's complaints approximately two (2) years after the alleged discriminatory reprimand, and approximately twenty (20)

months after the miners' complaints were filed with MSHA are untimely and have prejudiced the respondent in its efforts to respond to and defend against the complaints.

On June 15, 1994, I issued an Order to Show Cause requiring the Secretary to State why these cases should not be dismissed as untimely. The Secretary's response was received on July 8, 1994. The respondent filed a reply to the Secretary's response, and it was received on July 11, 1994.

The Secretary's Arguments

The Secretary takes the position that the complaints should not be dismissed as untimely because a dismissal would not serve to protect the health and safety of mine workers. The Secretary further believes that the respondent would not be materially prejudiced if the complaints were allowed to go forward, and he points out that the respondent has not stated the nature of any prejudice and only gives a vague reference that it would be prejudiced in trying to defend the complaints. The Secretary concludes that the claim of prejudice by the respondent is merely based upon the Secretary's failure to meet the statutory time limits set forth in section 105(c)(3) of the Act. The Secretary asserts that these time limits are not jurisdictional, and that the rights of the complaining miners to be free of intimidation in the exercise of their protected rights far outweighs any claim of prejudice by the respondent.

The Secretary argues that the respondent has not shown any legitimate claim of material prejudice. Citing Secretary of Labor (MSHA) ex rel Donald R. Hale v. 4-A Coal Company, 8 FMSHRC 905 (June 1986), where the Commission reversed an ALJ decision dismissing an untimely complaint which had been filed by the Secretary more than two years after the miners' complaint had been filed with MSHA, the Secretary asserts that his failure to meet any of the statutory deadlines was subjugated by the miner's rights, and that the innocent miners should not be prejudiced or lose their protected rights because of the Secretary's failure to timely meet his obligations.

Commenting on my reference to the Commission's "untimely filing" decisions in Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982), and David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 1984), upholding the dismissal of the complaints as untimely (eleven months in one case, and more than six months in the other), the Secretary asserts that those cases are distinguishable from the instant complaints in that the respondent mine operators apparently had no notice that the miners were alleging discrimination until their complaints were filed with the Commission.

The Secretary maintains that the respondent in the present cases had ample notice that the two miners had filed complaints and were pursuing their rights under the Act, as well as their rights under the labor/management grievance procedure. The Secretary points out that the investigation of the complaints commenced within the time set by statute, that the respondent was notified of the complaints by mail on August 25, 1992, and that the respondent's counsel was present when its supervisory employees were interviewed.

The Secretary asserts that the respondent cannot claim unfair surprise because it has been aware for some time that the complaints were pending, and that prudence would have dictated that the respondent place itself in a position to defend against the potential claims from the outset, until respondent was informed that the investigation had been concluded, and the Secretary issued his findings.

The Secretary states that he has good reasons for the delay in the filing of the complaints in these cases. In support of this conclusion, the Secretary asserts that the cases are somewhat novel in that there is no request for a monetary "make whole" remedy from the complainants, but only for a civil penalty assessment for the alleged acts of discrimination. The Secretary further states that the grievance which arose out of the same set of facts giving rise of the instant cases was withdrawn after the respondent agreed that it would not intimidate the miners in the exercise of their rights. The Secretary further states that additional guidance was needed in order to determine whether any more of his scarce resources should be invested in these cases, when the objectives of the Mine Act might have been served through the BCOA/UMWA labor contract grievance process.

The Secretary further argues that there were more levels of review in these cases than normal, and that certain portions of the cases had to be reinvestigated before a final determination that complaints should be filed with the Commission. In addition, because of the additional levels of review, the investigation file had several destinations and was misplaced for a time and the file had to be duplicated for the Secretary's counsel who eventually filed the complaints. The Secretary states that in Secretary v. M. Jamieson Company, 12 FMSHRC 901 (March 1990), Chief Judge Paul Merlin allowed late filing of penalty contests where a file was misplaced.

In conclusion, the Secretary states that the time limits set by Congress were not only to avoid the bringing of stale claims, but also to bring swift relief for a miner who had been wronged in the exercise of his statutory rights. The Secretary admits that he failed to make his determination quickly, but maintains that the miners should not lose their rights for his failure particularly since they did what was required of them. The

Secretary believes that the objectives of the Mine Act will only be served by allowing the claims of Mr. Skelton and Mr. Kress to go forward.

The Respondent's Arguments

With regard to the Commission's decision in the 4-A Coal Company case cited by the Secretary, holding that a complaining miner "should not be prejudiced by the failure of the Government to meet its time obligations", the respondent asserts that these rationale applies with greatly diminished force in the instant cases where the Secretary has admitted that he seeks no monetary remedy for the miners and only seeks civil penalty assessments against the respondent.

The respondent candidly admits that it does not allege that any witnesses have died or become otherwise unavailable or that documentary evidence has been lost or destroyed in the nearly two years in which the Secretary was deciding what to do with these cases. However, the respondent asserts that the longer the interval between event and trial, the more difficult it is to present a case because memories of details dim, while witnesses' versions of events harden like cement in their minds, and the search for truth is impeded. In addition to this general prejudice, the respondent maintains that it will be inconvenienced by the Secretary's delay in that the Superintendent of Squaw Creek Mine at the time of the alleged discrimination has been reassigned to another mine in the interim and his participation as a witness in these proceedings, involving a mine for which he is no longer responsible, will interfere with his ability to manage the mine for which he is currently responsible.

In response to the Secretary's contention that the respondent failed to act prudently when it was initially informed of the complaints in the Summer of 1992, the respondent asserts that the Secretary ignores the fact that he does not necessarily inform operators when he concludes his investigations, and that the respondent's counsel is still waiting to hear from the Secretary on a discrimination claim filed by a miner four years ago. Further, the respondent points out that it requested production of the Secretary's written determination of discrimination in these cases and that the Secretary objected to production on the grounds that the documents were privileged. Under the circumstances, the respondent believes that "it borders on the disingenuous for the Secretary to suggest that PCC should have waited for the Secretary's findings."

In response to the Secretary's proferred excuses for his substantial delay in filing the complaints, the respondent states that the Secretary does not describe the "additional guidance" needed in these cases or why it took more than a year to obtain such guidance.

With regard to the Secretary's assertion that he wanted to await the outcome of the grievance proceedings to insure that his "scarce resources" were not wasted, the respondent points out that the attachments to the Secretary's response to my show-cause order show that the grievance was withdrawn on August 21, 1992, just four days after the miner's complaints in the these cases were filed in the MSHA field office.

With regard to the Secretary's misplacement of the investigative file and the need to replace it by duplication of the investigating office's file, the respondent believes that two weeks is a generous time allowance for copying a file and that the actual delay was on the order of 18 months. The respondent points out that in response to its interrogatory seeking an excuse for his delay the Secretary did not mention any lost file and the respondent believes that the Secretary's attitude toward the time limits of section 105(c) of the Act is that those limits need not be taken very seriously.

The respondent states that the Secretary's position appears to be that unless a witness had died or left the country, any delay by the Secretary in filing a discrimination complaint, no matter how long and no matter how flimsy his excuse, must be tolerated. The respondent concedes that there may be justification for such a position where the rights of miners would be prejudiced by dismissal, but it emphasizes that in this case the Secretary does not seek an relief for the miners, only a civil penalty. The respondent believes that the Secretary would be the only party to suffer for his dilatory handling of this matter if the complaints were dismissed, and since the Secretary has shown no substantial excuse for his delay, the respondent concludes that the complaints should be dismissed.

Discussion

Section 105(c)(3) of the Mine Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. Section 105(c)(2) and (c)(3) require the Secretary to act within the following time frames:

1. Commence the investigation of the complaint within 15 days of its receipt from the miner.

2. Within 90 days of the receipt of the complaint, notify the complaining miner of any determination as to whether a violation has occurred.

3. If a determination is made that a violation has occurred, immediately file a complaint with the Commission.

The Commission's Rules, at Part 2700, Title 29, Code of Federal Regulations, implement the statutory time provisions. Rule 40(a), 29 C.F.R. 2700.40(a), requires the Secretary to file a complaint after an investigation if he finds that a violation has occurred. Rule 41(a), 29 C.F.R. 2700.41(a), requires the Secretary to file the complaint within 30 days after his written determination that a violation has occurred.

The 4-A Coal Company case cited by the Secretary concerned a discharged miner who claimed he was fired for making safety complaints. While it is clear that the Commission relied on the legislative history reflecting congressional intent "to protect innocent miners from losing their cause of action because of delay by the Secretary," 8 FMSHRC 908, the Commission also recognized that Congress was equally aware of the due process problems that may be caused by the prosecution of stale claims. In this regard, the Commission stated as follows at FMSHRC 908:

> * * * * The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim. * * * * If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay.

See also fn. 4, at 8 FMSHRC 909, where the Commission stated as follows:

> We reject the Secretary's contention that because he filed his complaint within 30 days of determining that a violation had occurred, he acted in a timely fashion. This contention ignores the 90-day time frame specified in section 105(c)(3) and the possibly prejudicial effect of the considerable delay involved here.

The Secretary also relies on a ruling by Chief Judge Merlin in Secretary v. M. Jamieson Company, 12 FMSHRC 901 (March 2, 1990), a civil penalty case in which Judge Merlin allowed the late filing of the Secretary's proposed civil penalty assessment due to a misplaced file. In excusing the delay, Judge Merlin relied on the fact that a relatively short period of time was involved, the Secretary's response to this show-cause order was prompt, and the operator did not allege or show any prejudice.

In Lawrence Ready Mix Concrete Corporation, 6 FMSHRC 246 (February 1984), Judge Merlin dismissed the Secretary's proposed civil penalty petition filed a year and a half late. Judge Merlin ruled that the Secretary's excuse that the delay was caused by the placing of certain documents in the wrong file and

the inadvertent failure to file the petition did not constitute good cause "for such an extraordinarily long delay", and he concluded that the operator should not have to answer such a stale claim.

In Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981), the Secretary argued that its two-month delay in filing a proposed civil penalty assessment was due to an extraordinarily high caseload and lack of clerical personnel. In denying the operator's contention that the penalty proposal should have been dismissed because of the late filing, the Commission held that on balance, and in the absence of prejudice to the operator, dismissal of the case because of a procedural error would not further the public interest in effectuating the Mine Act's substantive civil penalty scheme. However, the Commission took note of the fact that the operator made no effort to demonstrate prejudice, and while recognizing that mistakes can happen because of the voluminous Secretarial litigation nationwide, the Commission stated as follows at 3 FMSHRC 1717:

> The Secretary's reason for delay, an extraordinarily high caseload and lack of clerical personal, might be deemed an improper excuse for filing a simple, two-page pleading two months late. As Salt Lake points out, almost any law office in the country can claim the same "cause" as an excuse to evade every time limit in the various rules of civil procedure. However, the Secretary is engaged in voluminous national litigation and mistakes can happen. We believe that the Secretary minimally satisfied the adequate cause standard in this case. This is not to say that we will tolerate a practice of filing relatively uncomplicated pleadings late. Therefore, we cannot too strongly urge the Secretary to comply with Commission Rule 27, to the end that the enforcement goals embodied in section 105(d) be realized. (Emphasis added).

Medicine Bow Coal Company, 4 FMSHRC 882 (May 1982), concerned a 15-day delay in the filing of civil penalty proposals by the Secretary. In affirming the trial judge's conclusion that the delay did not warrant a dismissal of the case, the Commission relied on its decision in Salt Lake County Road Department, a two-part test, namely, a showing by the Secretary that there was adequate cause for the delayed filing, and mine operator prejudice caused by the delayed filing. The Commission concluded that the operator failed to show a delay so great that preparation or presentation of its case was prejudiced.

In The Anaconda Company, 3 FMSHRC 1926, (August 1981), Judge Morris dismissed the Secretary's civil penalty petition that was filed nearly two years late. Citing the Salt Lake County Road Department decision, Judge Morris stated as follows at 3 FMSHRC 1927:

> The Commission established a two prong test to determine if the late filing of the proposal for penalty addressed to the Commission is in substantial compliance with the Act and, therefore, should not result in the dismissal of the case. The Secretary must show that there was adequate cause for the delay. The mine operator must show that it has been prejudiced by the delay. These two requirements are to be balanced against each other with the scales weighing heavily on the side of enforcement. However, the objective of effective enforcement can be thwarted by the Secretary's inexcusable delay over a substantial period of time. The Commission warned the Secretary against any unwarranted dilatory action.
>
> The above test is directly applicable here. Congress perceived that the prompt assessment of a penalty was necessary for effective enforcement. In the present case, the delay of nearly two years is on its face a blatant disregard of this objective. Contrary to the Secretary's statement in its response to the motion, Section 815(a) of the Act provides the statutory authority for the vacation of a citation where the Secretary has been so dilatory in assessing a penalty that effective enforcement of the Act is impossible.

In Price River Coal Company, 4 FMSHRC 489 (March 1982). Judge Morris sustained the operator's motion to dismiss the Secretary's untimely civil penalty proposals, citing Salt Lake County Road Department. Judge Morris concluded that the Secretary's asserted excuse of a high volume of case workload and lack of clerical personnel were inadequate reasons for the delay, and the absence of a key witness prejudiced the mine operator's case.

The Commission has on several occasions in the past admonished the Secretary for failing to meet the Mine Act's statutory time limits for filing discrimination complaints, and in my view, these cases are an example of unjustified and unreasonable delays. If the time constraints found in the Act and the Commission's Rules are to have any meaning, I believe the Secretary should set the example, and be sensitive to those requirements, particularly in cases brought on behalf of miners who may find their protected rights in jeopardy because of his failure to timely bring case before the Commission.

After careful review and consideration of the Secretary's reasons for the protracted delay in these cases, they are rejected, and I conclude and find that they are insufficient and inadequate reasons for justifying the delay. The asserted "novelty" of these cases is no excuse. Indeed, the fact that these cases, in their present posture, were admittedly filed by the Secretary "only for a civil penalty assessment for the alleged acts of discrimination" is all the more reason for insuring compliance with the time limitations of the Act and the Commission's Rules. Protracted unjustified delays in cases where the Secretary's primary reason for filing the complaints is to seek civil penalty assessments of $8,500, against a mine operator are inherently prejudicial to an operator's expectation and right to defend and be heard within a reasonable time.

With regard to the union grievance that was filed by Mr. Skelton and Mr. Kress, I take note of the fact that it arose out of the same set of facts giving rise to the instant complaints and that it was withdrawn on August 21, 1992, approximately twenty-one (21) months before the filing of the complaints by the Secretary on May 10, 1994. I fail to understand why the disposition of the grievance, which apparently resolved the safety dispute between the parties, added to the protracted delay.

With respect to the additional reasons advanced by the Secretary for the delay (additional levels of review, reinvestigation, and lost files), I am not persuaded that they justify the delay in filing these complaints.

The Secretary admits that the misplaced file was duplicated for his counsel who filed the complaints. The Secretary does not state how long the file was misplaced, and it would appear to me that the file located at the MSHA investigating office was not lost or misplaced and was readily available.

Although the respondent in these proceedings admittedly does not allege that any witnesses are unavailable, or that any documentary evidence has been lost or destroyed, the supporting affidavit of its trial counsel states that the passage of time inevitably hinders and impedes the effective preparation and presentation of a case. Counsel confirms that the respondent was notified of the initial filing of the miners's complaints with MSHA in August 1992, and that he represented management's witnesses during the interviews with MSHA's investigators. However, after the passage of 6 months, with no further notice from MSHA, counsel assumed that MSHA decided not to proceed further.

Respondent's counsel further maintains that the longer the interval between the alleged discriminatory act and the trial, it is more difficult to present a case because memories of the

details and the witnesses' versions of the events dim with the passage of time. I conclude and find that the respondent has made a minimum showing of prejudice. I reject the respondent's assertion that it will be inconvenienced if it had to produce the miner superintendent who is no longer working at the mine where the alleged reprimand of the miners took place. Everyone who participates in trials in cases of this kind may, in one manner or another, claim that is not convenient for them to appear or participate. There is no showing that the superintendent cannot be deposed at the mine where he is now employed.

After careful review and consideration of the pleadings and arguments filed by the parties, I conclude and find that the Secretary's delay in bringing these cases to the Commission is not justified and I agree with the respondent's position in support of its motion to dismiss. I am not unmindful of the fact that the dismissal of a discrimination complaint may prejudice the rights of miners who are not responsible for the delay, and that dismissals are not to be taken lightly. However, on the facts of these cases where it appears that the identical issue was pursued by the miners through the grievances they filed and that the grievances were withdrawn, and the Secretary has admitted that he is not seeking a "make whole" remedy for the miners but only a civil penalty assessment, I believe that on balance, the scales tip in favor of the respondent. Further, I am not convinced that the public interest is served by continually allowing the Secretary to avoid the timely filing of cases of this kind, particularly where he is seeking rather substantial civil penalty assessments for an alleged incident of discrimination that appears to have been resolved nearly 2 years ago through the grievance process. I believe that basic fairness dictates that the Secretary act with reasonable dispatch in pursuing a case. I simply cannot conclude that he has done so in these cases.

ORDER

In view of the foregoing, the respondent's motion to dismiss these cases as untimely IS GRANTED, and the complaints ARE DISMISSED.

George A. Koutras
Administrative Law Judge

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