

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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October 17, 2016

JOSHUA A. FRANKS,  
Complainant

v.

D&L WELD and TRILLIUM  
CONSTRUCTION SERVICES,  
Respondents

DISCRIMINATION PROCEEDING

Docket No. PENN 2016-261-DM  
MSHA Case No. NE-MD-16-04

Mine: Nazareth Plant 1  
Mine ID: 36-00190  
Contractor ID: T5E (D&L), Z824 (Trillium)

**ORDER AMENDING CAPTION OF CASE**  
**ORDER DENYING MOTION TO DISMISS**  
**ORDER REQUESTING COPY OF ORIGINAL COMPLAINT**

This case is before me upon a complaint of discrimination filed by Joshua A. Franks against mine operators D&L Weld and Trillium Construction Services, (collectively, “the Respondents”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”), 30 U.S.C. § 815(c)(3), and upon D&L Weld’s Motion to Dismiss.

As a preliminary matter, it is **ORDERED** that the caption of this case is **AMENDED** to change the listed Respondents from “D&L WILD & TRILLIUM CONSTRUCTION, Respondent” to “D&L WELD and TRILLIUM CONSTRUCTION SERVICES, Respondents.”

Procedural Background

Franks filed his initial discrimination complaint with the Secretary of Labor on February 25, 2016. After conducting an investigation pursuant to section 105(c)(2) of the Mine Act, the Secretary notified Franks by letter dated June 9, 2016 that he had determined there was insufficient evidence to find a violation of section 105(c) and that MSHA (the Mine Safety and Health Administration) would not be pursuing the case before the Commission on Franks’ behalf.<sup>1</sup>

On July 6, 2016, Franks sent the Commission an email requesting appeal of the Secretary’s determination, thereby initiating this discrimination proceeding pursuant to section 105(c)(3). Franks did not attach a copy of his initial February 2016 complaint to his email. The

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<sup>1</sup> Franks has submitted a copy of this letter which is date-stamped June 9, 2016 and appears authentic. D&L Weld has submitted a copy which is missing the headers at the top of the page showing MSHA’s and D&L Weld’s addresses, and which bears a blurry, illegible date stamp that has been crossed out and replaced with the handwritten notation “Apr. 22.” I accept Franks’ proffered copy of the letter as authentic.

Commission immediately sent Franks a letter acknowledging that his case had been docketed and directing him to deliver his complaint to the Respondents by certified mail, return receipt requested. On August 9, 2016, Franks mailed a letter to both Respondents stating, “I am sending this letter to inform you that I disagree with MSHA’s determination and have sought legal representation with a labor lawyer.” He did not attach copies of his initial February 2016 complaint. Neither of the Respondents filed an answer, so the Commission issued a show cause order on October 5, 2016.

On October 12, 2016, Respondent D&L Weld filed an “Answer to Order to Show Cause and Motion to Dismiss.” In support of the motion to dismiss, D&L Weld argues that (1) Franks did not file for review before the Commission within 30 days of receiving notification of the Secretary’s determination not to pursue the case, in violation of 30 U.S.C. § 815(c)(3); (2) Franks’ complaint does not include a short and plain statement of facts setting forth the alleged discrimination; and (3) Franks failed to properly notice D&L Weld of the initiation of this proceeding.

### Discussion

Section 105(c) of the Mine Act provides that after receiving a discrimination complaint, the Secretary shall promptly investigate the complaint and notify the complainant of his determination as to whether a violation has occurred. 30 U.S.C. § 815(c)(3). If the Secretary determines that 105(c) has not been violated, “the complainant shall have a right, within 30 days[’] notice of the Secretary’s determination, to file an action in his own behalf before the Commission.” *Id.* The Commission has repeatedly held that the time limits to file Mine Act cases, including the time limits set forth in 105(c)(3), are not jurisdictional and that failure to meet them should not result in dismissal absent a showing of material legal prejudice. *See, e.g., Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386-87 (Dec. 1999); *Sec’y on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2215 (Nov. 1994); *see generally Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012) (discussing prejudice).

In this case, Franks’ appeal request was timely filed with the Commission within the 30-day time limit set forth in section 105(c)(3). It was received via email on July 6, 2016, less than 30 days after the Secretary sent his June 9, 2016 letter notifying Franks of his decision not to pursue the claim.

Regarding notice, although Franks’ August 9, 2016 letter notifying D&L Weld of his intent to appeal does not specifically say that he filed a case with the Commission, I find that D&L had notice of the initiation of this proceeding within a reasonable amount of time. D&L was given the opportunity to contest the claim, which it has now done. Even to the extent D&L was not placed on notice of the claim within the time limits contemplated in the Act, the motion to dismiss has not been justified by a showing of material legal prejudice. It is true that Franks’ August 9, 2016 letter does not recite the factual basis for his complaint or include a copy of the original February 2016 complaint, which may not be in his possession if he sent his only copy to MSHA. However, these deficiencies can be remedied by asking Franks to obtain a copy of the original complaint and file it with the Commission rather than by taking the drastic measure of dismissal. *See Ribble v. T&M Development*, 22 FMSHRC 593, 594-95 (May 2000) (making it

clear that motions to dismiss for failure to state a claim are disfavored, especially when pro se parties are involved); *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996) (same). In addition, D&L Weld is likely already aware of the general factual allegations underpinning Franks' discrimination claim, as the motion to dismiss includes a redacted copy of the original complaint and a copy of the position statement D&L sent to MSHA disputing the factual basis for the claim.

For the reasons discussed above, I find that Franks substantially complied with section 105(c)(3). Accordingly, Respondent D&L Weld's motion to dismiss is **DENIED**.

Joshua Franks is **ORDERED** to send the Commission and both Respondents a legible, non-redacted copy of his original February 2016 complaint **within ten (10) days of receiving this Order**. If he does not have a legible, non-redacted copy of the complaint, he should contact MSHA to obtain one.

Franks is also directed to provide my office with his current telephone number and email address, if he uses email. This information should be provided to my clerk, Elizabeth Katona, at 202-434-9956 or ekatona@fms SRC.gov.



Priscilla M. Rae  
Administrative Law Judge

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