

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 1, 2016

GINA HACKING,  
Complainant,

v.

STAKER & PARSON COMPANIES,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-931-DM  
RM MD 14-11

Mine: Lehi Point East  
Mine ID: 42-02130

## ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Complainant, Ms. Gina Hacking, worked as an equipment operator at the Respondent's Lehi Point East mine from September 2004 to April 2011. After formally informing the Respondent that she was suffering from back pain in September 2010, the Complainant began leave in April 2011 under the Family and Medical Leave Act (FMLA) to undergo back and neck surgery.<sup>1</sup>

Hacking's allowable FMLA leave expired in August 2011 when her doctor cleared her to return to a "light duty" position. However, she was not cleared to work with heavy equipment. Glassford Medical Order, August 10, 2011. The Respondent subsequently informed the Complainant that they did not have any light duty positions<sup>2</sup> available for her and terminated the Complainant's employment on August 11, 2011.

Hacking first filed a section 105(c) complaint with MSHA on May 1, 2014, two years and nine months after her discharge, alleging that the Respondent had terminated her

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<sup>1</sup> Ms. Hacking filed a workmen's compensation claim with the Utah Labor Commission on January 25, 2011 while she was still working for Staker & Parson Companies. The Respondent contested this claim and argued that Ms. Hacking had not provided timely notification of her injuries and that her injuries were not work related. Following a decision by the Utah Labor Board and multiple appeals, the Complainant and Respondent eventually settled the workmen's compensation claim in December 2013. December 12, 2013 Settlement Order.

<sup>2</sup> The Respondent does not offer light duty to workers with off-duty injuries but does offer light duty positions to workers injured on the job. *Wilson Aff.*, 2. In August 2011, the Respondent considered Hacking's injuries non-work related based upon the evaluation of the company physician. *Thackery Aff.*, 2.; Oct. 2, 2012 ULB Decision, 4. Even if this matter were to proceed to hearing, the dispute regarding the cause of the Complainant's injuries and the Respondent's response to those injuries is not one this court could resolve. *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) ("the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act."); *Jason Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129, 133 (ALJ Manning) (March 2003) (operator's refusal to offer miner light duty position after suffering workplace injury was not governed by section 105(c) of the Mine Act).

employment based upon her workplace injuries, gender, and safety complaints. MSHA May 1, 2014 Complaint, 2. On July 11, 2014, MSHA notified Hacking that “MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred.” July 11, 2014 MSHA Notification Letter. Hacking then filed a 105(c)3 complaint with the Commission on August 13, 2014 and the Chief Judge assigned this matter to the court on June 9, 2015.

Following further discovery, this matter must be dismissed as the Complainant has not offered a justifiable excuse for the extremely late filing of her complaint and the delay has prejudiced the Respondent’s ability to defend itself. 30 U.S.C. 815(c)(2) (requiring miners to file discrimination claims with the Secretary of Labor within sixty days of the date of discrimination); see also *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 25 (affirming ALJ dismissal of 105(c) claim filed four months late and stating that Congress did not intend to “excuse a miner’s late-filing where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act”).

### Commission Procedural History<sup>3</sup>

Hacking initially filed a discrimination claim with MSHA on May 1, 2014. The complaint alleged that the Respondent failed to adequately respond to Hacking’s complaints regarding a faulty haul truck seat, bad haul roads, and treated her differently as a woman. MSHA May 1, 2014 Complaint, 2. MSHA notified Hacking it did not find sufficient evidence to pursue the claim on July 11, 2014.<sup>4</sup>

Hacking filed a 105(c)3 complaint with the Commission on August 14, 2014, restating the allegations contained in her initial complaint to MSHA. The Respondent failed to answer the Complaint and the Chief Judge ordered the Respondent to submit an answer on April 10, 2015. The Respondent filed a response on May 11, 2015, moving to dismiss the complaint on jurisdictional, timeliness, and factual grounds. The Respondent specifically objected to the Complainant’s two and a half year delay in filing her initial complaint. Resp. May 11, 2015 Mot. to Dismiss, 1. The Respondent also cited Hacking’s failure to file her 105(c)3 complaint with the Commission within 30 days after receipt of the Secretary’s decision as additional grounds to dismiss the complaint for timeliness concerns. *Id.* at 2.

On June 1, 2015, the Chief Judge denied the Respondent’s Motion to Dismiss. The Chief Judge directly addressed and excused Hacking’s failure to file with the Commission within thirty days of receiving notice that MSHA would not pursue her claim, stating,

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<sup>3</sup> Both parties submitted numerous documents and records concerning Hacking’s employment with Staker & Parson Companies. The court has reviewed all documents submitted but has only referenced those relevant to the threshold issue of timeliness under section 105(c)2 of the Mine Act.

<sup>4</sup> MSHA did issue Citation No. 8824803 to the Respondent on July 31, 2014, for failure to report an injury pursuant to 30 CFR 50.20(a). Staker & Parson Companies, 37 FMSHRC 2099, 2100 (September 2015) (ALJ Gill). Citation No. 8824803 alleged that the Respondent failed to report Hacking’s injuries as a workplace injury after being given official notice on July 2, 2013 by the Utah Labor Board that her injuries were workplace related. *Id.* The ALJ affirmed Citation No. 8824803 and assessed a penalty of \$100.00 after the Respondent failed to respond to a motion for summary judgment submitted by the Secretary. *Id.* at 2101-2102.

Although it is not clear when Complainant actually received the Secretary's July 11, 2014 letter, I do not consider a three day delay to be prejudicial. Delays much greater than this have been approved by the Commission.

Chief Judge June 1, 2015 Order, 2.

However, the cases cited by the Chief Judge dealt with delays caused by the Secretary after the miner filed their claim with MSHA within the statutory period. The Chief Judge did not appear to specifically address Ms. Hacking's failure to initially file her claim with the Secretary within sixty days of the alleged discrimination. Chief Judge June 1, 2015 Order, 2, citing *Sec'y Labor ex ref. Hale v. -1-A Coal Co.*, 8 FMSHRC 905, 909 (June 1986)(reinstating 105(c) complaint when miner filed complaint with MSHA 5 days after alleged discrimination and Secretary delayed filing a discrimination complaint with the Commission for over two years); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15(Nov. 1994)(excusing Secretary's four month filing delay when miner submitted discrimination complaint to MSHA approximately forty days after alleged discrimination occurred).

The Chief Judge stated that all other matters were "factual in nature and should be remanded to the Judge." Chief Judge June 1, 2015 Order, 2. The Chief Judge subsequently assigned this matter to me on June 9, 2015. After conducting a teleconference call with the parties, the court permitted the Complainant to respond to the Respondent's Motion to Dismiss. Hacking submitted a response on July 20, 2015 restating many of her initial complaints to MSHA, but also alleging that she complained to her supervisor about unsafe haul road and pit conditions. Hacking July 20, 2015 Response, 2.

On August 17, 2015, the court denied the Respondent's Motion to Dismiss. Within, the court restated the Chief Judge's initial findings regarding timeliness without further analysis. August 17, 2015 Order, 2. The court also rejected the Respondent's objection that Hacking's pleading failed to properly allege a prima facie case of discrimination. The court noted that the Commission maintains a lenient pleading standard for pro se discrimination complainants and determined that the Complainant's supplemental answer satisfied the minimal pleading burdens of 30 CFR 2700.42. *Id.* at 4.

The court then scheduled this matter for hearing in December 2015 and subsequently rescheduled the hearing to permit further discovery. Following the close of discovery, the Respondent submitted a motion for summary judgment on February 16, 2016. The Respondent stated within the motion that the Complainant's claim should be dismissed for the following reasons:

- 1) A claim waiver in a December 2013 settlement agreement executed by the parties barred claims arising from Hacking's employment with Staker-Parson from 2004 through 2011.

- 2) The claim was time-barred by section 105(c)2 of the Mine Act as Hacking filed more than two years past the 60 day statutory filing period and has not provided a justifiable excuse for the delay.
- 3) The claim failed to provide any evidentiary link between Hacking's safety complaints and Respondent's management decision to terminate her employment in August 2011.
- 4) The Complainant is unsuited for backpay or reinstatement as she continues to suffer from significant back pain and requires prescription medication during work activities.

February 16, 2016 Resp. Mot.,6, 9, 11, 17.

The court again postponed the hearing and allowed the Complainant three weeks to respond with instructions to answer the specific issues outlined above. Hacking filed a response on March 8, 2016 and the court reviewed all submissions at length before issuing this decision. After careful review, the court finds that the Complainant has not provided a justifiable explanation sufficient to excuse the nine-hundred day initial filing delay. Having made this determination, further analysis of the Respondent's alternate grounds for dismissal is unnecessary.

#### Section 105(c)2 Discrimination Claim Filing Requirements

Under 30 U.S.C. § 815(c)(2), "Any miner ... who believes that [s]he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination." (emphasis added). After a miner files a complaint, the Mine Safety and Health Administration (MSHA) investigates it on behalf of the Secretary of Labor. See, e.g., *Simpson v. Fed. Mine Safety & Health Review Comm'n*, 842 F.2d 453, 456 n. 3 (D.C.Cir.1988). If the Secretary finds that a violation occurred, the Secretary may pursue the claim on the miner's behalf before the Commission. 30 U.S.C. § 815(c)(2). If not, the miner may file a claim with the Commission on her own behalf under 30 U.S.C. § 815(c)(3).

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 Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

Accordingly, the Commission does not consider the 60-day limit of § 815(c)(2) to be jurisdictional. See *Morgan v. Arch*, 21 FMSHRC 1381, 1386 (1999) (“Commission case law is clear that the 60-day period for filing a discrimination complaint under section. . . § 815(c)(2), is not jurisdictional.”). It will hear cases in which a complaint's untimely filing is due to “justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921–22 (1996).

On the other hand, “[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal.” *Id.* at 1922. The Commission places the burden of proving justifiable circumstances on the miner, and places the burden of demonstrating material legal prejudice on the mine operator. See *id.*; *Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (1984).

### Analysis

The Respondent terminated Hacking’s employment on August 11, 2011 and Hacking did not file a claim with MSHA until over two years and nine months later on May 1, 2014. February 16, 2016 Resp. Mot., 9; March 8, 2016 Hacking Ans., 3; August 11, 2011 Wilson E-Mail. Thus, the Complainant must demonstrate that justifiable circumstances explain the nine hundred day delay that occurred after the 60 day filing period expired on or about November 11, 2011.

The court is sympathetic to Hacking’s contention that she was suffering from complications from surgery, undergoing a divorce, and caring for her son during the two plus years that elapsed between her termination and her claim filing. March 8, 2016 Hacking Ans., 3. However, less than a month after being terminated by the Respondent, Hacking testified at length on September 8, 2011 before the Utah Labor Board (ULB).

Following a ULB decision on October 2, 2012 and multiple appeals proceedings, Hacking, with aid of counsel, later negotiated a settlement agreement finalizing all issues related to her workmen’s compensation claim. December 12, 2013 Settlement Agreement. Hacking has stated that she took a very active stance during those settlement negotiations, refusing to sign an expansive liability waiver presented by the Respondent when the parties reduced their agreement to writing. March 8, 2016 Hacking Ans., 2.

Thus, Hacking’s personal affairs did not prevent her from participating in work-related legal action in a different jurisdiction from September 2011 through December 2013. Accordingly, this court cannot accept Hacking’s personal affairs as a legitimate excuse for the lengthy delay that occurred in this matter.

Furthermore, the workmen’s compensation claim did not serve as a substitute for filing a complaint with MSHA, as the workmen’s compensation claim centered on the cause of the Complainant’s injury rather than on the Complainant’s protected safety activities. October 2, 2012 ULB decision. As such, the Complainant cannot rely on the ULB proceedings to toll or extend the section 105(c) filing deadlines. *Hollis*, 6 FMSHRC 25 (affirming ALJ dismissal on

timeliness grounds when miner filed a 105(c) complaint with MSHA four months late after first pursuing a claim before state agency alleging racial discrimination).

The Complainant has not claimed that she was ignorant of her rights under the Mine Act. Hacking has readily acknowledged that the Respondent provided yearly refresher training on miner's safety rights. March 8, 2016 Hacking Ans., 5-6. Hacking has specifically confirmed that this training covered protection from discrimination, stating "I know that in MSHA training we learned that we are supposed to be able to make a complaint without fear of being terminated." *Id.* at 5.

Hacking does contend that the Respondent failed to instruct on her how to file a discrimination claim during miner training and was unaware of the 60 day filing requirement. March 8, 2016 Hacking Ans., 6; Hacking Admission Response No. 5. Even accepting these contentions as true, this rather bare explanation is insufficient to explain the nine hundred day delay that occurred after her termination. As an initial matter, Hacking had clear notice that MSHA was the governing regulatory agency in regards to her discrimination claim. The training documents submitted by the Respondent and acknowledged by the Complainant clearly outline MSHA's authority to issue fines for various infractions and list discrimination against safety activities as prohibited conduct. Resp. Miner Training Outline, 4; March 8, 2016 Hacking Ans., 5.

Neither the Commission nor MSHA have ever required an operator to give miners explicit step-by step instructions on how to file a discrimination claim. *Hollis*, 6 FMSHRC 24 (holding that miner's regular participation in safety committees and MSHA meetings indicated that miner was sufficiently aware of his 105(c) rights to enforce filing requirements); *Sinott v. Jim Walter Resources, Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994)(ALJ Maurer)(holding that section 105(c)2 does not require operators to notify discharged miners that discrimination may have occurred). Furthermore, the court is not persuaded that the lack of specific instructions regarding filing requirements is in fact the actual reason for more than two years of delay in filing. *Olson v. FMSHRC*, 381 F.3d 1007, 1012-1013 (affirming Commission ALJ finding that Complainant's alleged fear of retaliation was not, under the circumstances, a credible explanation for filing delay).

In fact, Hacking states in her answer that she "had other things to deal with that took time and money and had the need of my immediate attention." *Id.* at 3. While the Commission has listed "excusable neglect" as a justifiable circumstance that may excuse a late filing, the Commission has clarified that "the fair hearing process does not allow us to ignore serious delay." *Hollis*, 6 FMSHRC 25. Indeed, a fellow ALJ has previously characterized a claim filed three years and three months after the alleged discrimination as "extra-ordinarily late" and "inherently prejudicial." *Sinott*, 16 FMSHRC 2447-48.

In this matter, one potential witness who appears to have worked closely with Hacking died in October 2015. *Thackeray Aff.*, 3. The court notes that transcripts and recordings of Utah Labor Board proceedings on July 7, 2011 and September 8, 2011 are available, including testimony from Hacking's deceased co-worker. March 8, 2016 Hacking Ans., 5. However, upon review, the testimony in these proceedings centers almost exclusively on the condition of the

haul truck seat beginning as early as 2006 and whether or not Hacking notified her supervisors of her back pain in a timely fashion. July 7, 2011 Hacking Deposition; September 8, 2011 ULB Hearing. The circumstances and possible motivations surrounding Hacking's dismissal in August 2011 were not detailed during either of these hearings.<sup>5</sup> As such, transcripts and recordings of those hearings offer this court little relevant evidence regarding a possible connection between Hacking's safety complaints and the Respondent's decision to terminate her employment in August 2011.

Hacking has indicated that she intends to call a number of Staker & Parson Companies employees to testify at hearing. The court does not doubt that these witnesses would attempt to describe events from early 2011 and earlier to the best of their ability. However, a fellow Commission ALJ has noted in similar circumstances arising from a three year delay,

it is highly questionable whether the other company employees who might have had some knowledge of the events surrounding (the) termination would have a present recollection of those events.

*Sinott*, 16 FMSHRC 2448.

Indeed, Hacking's own testimony during a recent deposition indicates that she has difficulty remembering the details and sequence of her alleged safety complaints and termination. February 11, 2016 Hacking Depo., 65, 92, 94,109. As such, the quality of testimony that would be produced at hearing is likely to prejudice the Respondent's ability to defend itself.

The court notes that the Respondent's failure to timely answer the Complainant's 105(c)3 filing with the Commission added seven months to the delay present in this case. June 1, 2015 Chief Judge Order, 1. The court is also aware that this matter has proceeded for an additional ten months after being assigned by the Chief Judge. Nevertheless, the Respondent has never waived their timeliness objection and the court has only considered the thirty-one month delay attributable to the Complainant.

To this court's knowledge, a thirty-one month filing delay is more than three times longer than any similar initial filing delay previously excused by the Commission. *Morgan*, 21 FMSHRC 1386 (excusing claim filed by miner nine months late when miner initially lodged complaint with union). Furthermore, there has been no showing that the Respondent, MSHA, or any other agency or entity is responsible for the initial thirty one month filing delay. Thus, the Complainant's individual delay is unlike lengthy delays caused by the Secretary that have been previously excused by the Commission. *Hale v. -1-A Coal Co*, 8 FMSHRC 909 (reinstating 105(c) complaint when miner filed complaint with MSHA 5 days after alleged discrimination and Secretary delayed filing a discrimination complaint with the Commission for over two years); *Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2214-15 (excusing Secretary's four

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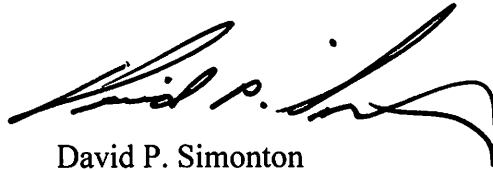
<sup>5</sup> Hacking testified in the Utah Labor Board proceedings that she had recently been terminated due to her inability to work in a loader pursuant to the company's policy regarding light duty positions and off-duty injuries. The manager responsible for her termination, David Wilson, did not testify at the September 8, 2011 ULB Hearing as it does not appear he was involved with her injury report. *Wilson Aff.*, 2.

month filing delay when miner submitted discrimination complaint to MSHA approximately forty days after alleged discrimination occurred).

Therefore, allowing the Complainant to proceed without a justifiable excuse would exceed the limits of delay permissible under the Mine Act. *Sinott*, 16 FMSHRC 2447, (stating that, “At some point there has to be an outer limit, if the 60 day rule contained in the statute has any meaning at all”).

**ORDER**

The Respondent’s Motion to Dismiss is **GRANTED**. Accordingly, this matter is **DISMISSED** with prejudice. The Complainant may appeal this matter to the Commission within 30 days of the date of this order.



David P. Simonton  
Administrative Law Judge

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