

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 5, 2017

SHELLEY KELHI,
Complainant,

v.

ALPHA COAL WEST, INC. and
CONTURA COAL WEST, LLC,
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2017-38-D
DENV-CD-2016-06

Mine: Belle Ayr Mine
Mine ID: 48-00732

ORDER GRANTING RESPONDENT’S MOTION TO DISMISS

Before: Judge Simonton

This case is before me upon a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. The Complainant, Shelley Kelhi, worked for Alpha Coal West, Inc. ¹ (“Alpha” or “Respondent”) as a haul truck operator at the time of her injury in 2014. In the early morning of January 19, 2014,² a shovel loaded a large rock onto Kelhi’s haul truck and jarred the truck. Kelhi sustained a concussion and bloody nose and later developed various physical and cognitive complications from the accident. Though she briefly returned to work, when Kelhi developed complications from her injuries she was eventually placed on disability leave, where she remained for 365 days until her termination under Alpha’s disability policy. Kelhi alleges various instances of harassment prior to and after the injury because of her reputation as a safety advocate at the mine. Due to deficiencies in Kelhi’s claim and her *pro se* status, the court required both parties to submit multiple motions and briefs to explain the timeliness of Ms. Kelhi’s complaint under 30 U.S.C. § 805(c)(3) and clarify the facts surrounding Kelhi’s allegations.

For the reasons explained below, the case must be dismissed because the Complainant did not offer sufficient justification for the extremely late filing of her section 105(c)(3) complaint. The court finds first that January 19, 2014 is the proper violation date for the purpose

¹ In August 2015, Alpha filed for bankruptcy, and Contura Coal West LLC (“Contura”) acquired Alpha’s assets, including the Belle Ayr Mine. *See* Respondent’s Reply to Kelhi Explanation (“Resp. Reply.”) at 9. When MSHA informed Kelhi that it would not be taking on her case, it included Contura instead of Alpha as the responsible operator. *Id.* Kelhi never worked for Contura.

² In the court’s Order Requesting Additional Information, the court characterized the inquiry date as “on or around January 18, 2014.” The evidence demonstrates that Kelhi started her shift on January 18 and was injured in the early hours of January 19. Because Kelhi alleges that Alpha denied her medical treatment following her injury, the violation date for purposes of the brief will be January 19, 2014.

of assessing the timeliness of Kelhi's complaint because Kelhi failed to provide sufficient detail of any allegations of adverse action that took place after that date. The court also finds that Kelhi failed to provide a justifiable explanation sufficient to excuse the 684-day filing delay. 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 Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999) (ALJ) (dismissing 105(c) claim filed over two years late because Complainant's serious injuries did not prevent him from filing worker's compensation claim and thus did not excuse the delay in filing with MSHA).

Commission Procedural History

Kelhi was injured on January 19, 2014 and was terminated on January 24, 2015, following her 365th day on disability leave. Kelhi filed a discrimination complaint with MSHA on February 1, 2016. She alleged multiple instances of harassment due to her reputation as a safety advocate at the mine. While Kelhi does not allege that she was improperly terminated under Alpha's disability policy, she identified multiple instances of harassment prior to her injury, claims that mine management denied her prompt medical treatment following her injury and without specificity that Alpha's Human Resources Department harassed her when she contacted them after her termination.

On September 14, 2016, MSHA notified Kelhi that it would not pursue the claim on her behalf. Ms. Kelhi subsequently filed a *pro se* section 105(c)(3) complaint on October 12, 2016. The Respondent filed a motion to dismiss the claim on November 16, 2016, alleging that Kelhi's complaint was untimely and that she did not provide evidence that Alpha committed any adverse actions. On November 28, 2016, the court issued an Order to Show Cause requiring Ms. Kelhi to explain why she failed to file her complaint within the 60-day limit and to provide a more detailed description of the instances of alleged harassment and discrimination.

On December 19, 2016, Kelhi submitted her response to the court's Order to Show Cause. Kelhi explained that the filing delay was due to the development of complications stemming from her head injury. Specifically, Ms. Kelhi explained that she had developed expressive aphasia and other cognitive issues that inhibited her ability to collect and express her thoughts. Kelhi December 19, 2016 Response to Order to Show Cause ("Kelhi Explanation"). The severity of the injury forced Kelhi to focus on her recovery and undergo extensive therapy, and thus delayed her ability to file a complaint. *Id.*

Kelhi also elaborated upon three instances of adverse action that stemmed from her reputation as a safety advocate and her submission of numerous safety complaints at the Belle Ayr Mine. *Id.* She stated that she was harassed prior to the accident due to this reputation. *Id.* She also alleged that Alpha denied her prompt medical attention following the incident, in contravention of the mine's protocol. *Id.* Finally, Kelhi alleged that she was mistreated by Alpha's Human Resources Department when she contacted the mine after she was terminated under Alpha's disability leave policy. *Id.*

On January 9, 2017, the Respondent filed a reply and renewed its motion to dismiss the case. The Respondent argued that Kelhi's claim was untimely and that Kelhi was never

employed by Contura Coal, Alpha's successor, and therefore did not have a cause of action or available remedy against it. *See generally* Respondent's Response to Kelhi Explanation. Due to a lack of detail concerning the specific claims of alleged adverse actions and Ms. Kelhi's medical condition, the court issued an order requiring Kelhi to provide (1) a detailed, factual explanation of how the Respondent denied Ms. Kelhi timely medical treatment after the accident; (2) medical information describing Kelhi's diagnosis, therapy, and treatment of expressive aphasia following the injury; and (3) a detailed, factual explanation of Kelhi's alleged harassment by the mine's Human Resources Department following her termination.

On February 1, 2017, Ms. Kelhi responded to the Order and provided a short answer to each question, as well as medical records and witness statements. Shelley Kelhi Response to Order for More Information ("Kelhi Response"). The Respondent filed a Reply on February 17, 2017 reiterating its previous arguments and provided a January 26, 2017 decision concerning Ms. Kelhi's workers compensation contest. Respondent's Reply to Kelhi Response ("Resp. Reply"), at 1-2. The Respondent argued that Kelhi again failed to demonstrate instances of adverse action and did not provide adequate justification for the significant filing delay. *Id.*

After careful review, the court finds that the Complainant has not demonstrated that an adverse action occurred when Ms. Kelhi contacted Alpha's Human Resources Department. Thus, the most recent date of alleged discrimination is January 19, 2014, the date that Kelhi alleged that she was denied medical treatment. The length of the delay following the 60-day period amounts to 684 days. The Complainant has not provided a justifiable explanation sufficient to excuse a filing delay of 684 days. Having made this determination, 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." 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 constructed 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 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 time limit of § 815(c)(2) to be jurisdictional. *See Morgan v. Arch*, 21 FMSHRC 1381, 1386 (Dec. 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 (Nov. 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; *see also Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999) (ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”); *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ) (delay of over three years is “inherently prejudicial”). 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 (Jan. 1984).

Analysis

In order to determine whether to proceed with this case, this court must identify the date of the most recent adverse action and determine whether justifiable circumstances excuse the Complainant’s failure to file her 105(c)(3) complaint within the 60-day deadline. I find that the proper tolling date is January 19, 2014, the date of Ms. Kelhi’s injury, because she did not provide the court with the requested additional information to support her allegation of harassment at the hands of Alpha’s Human Resources Department in February of 2015. Even if Kelhi had properly established her January 2015 interaction with Alpha’s Human Resources Department as the latest violation date, I find that Kelhi failed to justify the delay because she was not fully incapacitated and was able to apply for and defend her workers’ compensation claim during that period.

The Violation Date

The Complainant alleges that Alpha employees harassed her prior to her injury, immediately after her injury, and following her termination under Alpha’s disability leave policy. These events occurred as early as 2009 and up to Kelhi’s termination on January 24, 2015. *See Kelhi Explanation, Kelhi Response.* Kelhi did not file a discrimination complaint until February 1, 2016. The court must discern the most recent violation date from which to calculate the length of the delay, and the Complainant bears the burden of demonstrating that justifiable circumstances excuse that delay. *See Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999) (ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”).

The Respondent argues that Kelhi has not provided any evidence of discrimination occurring after her injury. Alpha argues that Ms. Kelhi's allegation that she was told "all the incidents have to stop," occurred in 2009, well before her injury, and is thus irrelevant to the claims at issue. Resp. Reply at 5. The Respondent also asserts that the witness statements provided do not provide first-hand information of specific instances of harassment. *Id.* It maintains that two of the witnesses were not employed by Alpha at the time of the injury, and that the third statement identifies Kelhi's complaints, but no instances of retaliation. *Id.*

Kelhi alleges that she was harassed by Alpha's Human Resources Department over the phone following her termination on January 24, 2015.³ Kelhi Explanation. Accepting this instance as the violation date would place the delay at 314 days past the 60-day limit.⁴ I find that this date cannot serve as the violation date for purposes of determining timeliness because Kelhi failed to provide any details regarding the alleged harassment.

Kelhi failed to explain or identify any facts that lend credit to her alleged claim of harassment against Alpha's Human Resources Department. The court explicitly requested additional information regarding this allegation in its Order to Show Cause and its Order Requesting Additional Information. In her initial explanation to the court, Kelhi alleged, without additional detail, that she was "harassed and will be able to provide proof – including witness to a conversation from Kim Coleman (Human Resources) on the 365th day following [her] injury." Kelhi Explanation. Kelhi did not mention the event at all in her response to the Order Requesting Additional Information, however. Instead, Kelhi touched upon her reputation as a reporter of potential safety issues and discussed a series of events that occurred prior to her injury. Kelhi Response, at 2. She also noted being clicked out during radio communications, and that she was told by mine management that "all the incidents have to stop." *Id.* It is clear that these events occurred well before the termination of her disability and employment on January 24, 2015, and do not speak to harassment or discrimination by Alpha's Human Resources Department or its representatives. In fact, Kelhi does not mention Alpha's Human Resources Department at all in her Response.

Nor do Kelhi's witness statements materially substantiate a claim of harassment following her termination. Two of Kelhi's witness statements, provided by Sue Torres and Scott Lindblom, do not discuss any incidents taking place after Kelhi's injury. *See* Kelhi Response. The third witness statement, from Kelhi's spouse Dale Britton, alleges that the "secretary-HR

³ Kelhi does not allege in any of her statements that she was improperly terminated. While the witness statement of Dale Britton opines that she was terminated because of the injury, the court sees no actual evidence to support that claim, and plenty of evidence suggesting the contrary. *See* Kelhi Response, statement of Dale Britton. The Respondent provides a form letter stating that Kelhi was terminated in accordance with Alpha's disability policy because she was unable to return to work after 365 days on disability. *See* Resp. Reply at 6. The Respondent asserts, and Ms. Kelhi does not challenge, that it did not contest nor participate in her worker compensation claims and the recent hearing. Thus, the only adverse action under consideration is her allegation of harassment by the mine's Human Resources Department.

⁴ The court calculated the duration date from March 24, 2015 to account for the 60-day time period outlined in 30 U.S.C. § 805(c)(3).

supervisor” told Kelhi that she was no longer the mine’s problem. *See Kelhi Response, Statement of Dale Britton.* The statement also alleges that the secretary was short and unhelpful, and did not give Kelhi the retirement or company benefits to which she was entitled. *Id.* While the Court is inclined to accept the complainant’s allegations as valid for purposes of determining whether the delay is justified, it cannot accept a claim that Ms. Kelhi did not herself identify, elaborate upon, or provide evidence for in any of her previous statements. *See generally Kelhi Explanation; Kelhi Response.* Thus, the court finds that there is insufficient detail to consider this allegation.

The Court does, however, find that Kelhi provided sufficient detail to support a claim of adverse action on the date of her injury. Kelhi alleges that she was denied prompt and required medical treatment immediately following her head injury on January 19, 2014. Accepting this instance as the violation date would place the delay at 684 days past the 60-day limit.

Kelhi argues that the injuries she sustained were visible and clearly required medical assistance. *Kelhi Response, at 1-2.* While Kelhi refused treatment immediately after the injury, she argues that Alpha should not have taken her at her word, and forced her to undergo an examination. *Id.* at 1. Kelhi also explains that the next step in treatment, her drug and alcohol test, was not administered until nearly four hours after the injury. *Id.* Testing was not finished until over five hours after the injury. *Id.* Kelhi argues that this is contrary to company protocol, and that she was denied prompt assistance because of her reputation as a safety advocate at the mine. *Id.* I find that she presents sufficient evidence that an adverse action occurred. I credit Kelhi’s claim that her visible injuries should have alerted Alpha’s management to require medical assistance as a possible example of adverse action. Thus, the violation date is January 19, 2014, for purposes of determining whether circumstances justified Kelhi’s filing delay.

I therefore find that the violation date is January 19, 2014, the time of Ms. Kelhi’s head injury and the alleged failure to provide proper medical treatment.

Justifiable Circumstances

Even if Kelhi properly established that the violation date should be January 24, 2015, Kelhi’s injury complications do not justify the length of either delay because she was still able to pursue relief. The Commission has identified “excusable neglect” as a justifiable circumstance that may excuse a late filing, but held that “the fair hearing process does not allow us to ignore serious delay.” *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 25 (Jan. 1984).

Kelhi does not dispute that she was aware of her right to file a 105(c) complaint with MSHA, and the Respondent has provided numerous records of MSHA training that demonstrate that Kelhi attended training and knew of her right to file a complaint with MSHA. *See Resp. Reply.* Kelhi’s primary argument is that the complications of her head injuries rendered her incapable of filing a complaint with MSHA sooner than she did. *See Kelhi Explanation; Kelhi Response.* Kelhi argues that she sustained multiple post-concussion symptoms following the accident, including but not limited to migraines, seizures, expressive aphasia, slowed response times, and some loss of memory. *See Kelhi Response.* Kelhi claims that her injuries were

debilitating and required her full focus on her health and recovery, and thus justify the delay. *Id.* at 3.

Kelhi's medical records indicate that her post-concussive complications were serious but not permanently incapacitating. Records from Thunder Basin Orthopedics suggest antegrade and retrograde amnesia, post-concussion syndrome, and headaches during a January 31, 2014 appointment. *See* Kelhi Response. On a June 23, 2016 checkup, records show Kelhi continued to experience headaches, unsteadiness on her feet, and memory disruptions, all related to her injury. *Id.* Sheridan Neurology identifies Kelhi's complications in March and October 2014 checkups, including decreased attentional functions, speed of information processing, simple reaction time, bilateral motor functions, and severe microsmia and depression. *Id.* Sheridan cited improvement in a June 2015 checkup, but still noted deficits in response control, working memory, and information processing. *Id.* It also notes that Kelhi expressed that her condition was not improving, and may have gotten worse. *Id.* Kelhi also provides letters from Clear Creek Counseling and Central Wyoming Neurologists, dated January 24, 2017 and February 2, 2017 respectively. These letters suggest that Ms. Kelhi was being treated for posttraumatic headaches, acquired cognitive dysfunction, expressive aphasia, and localization related epilepsy. *Id.* Clear Creek Counseling expressed that Kelhi was able to do most daily activities, but not on a consistent basis due to her migraines and other complications. *Id.* It found that Kelhi's injuries are substantial enough to prevent her from seeking and keeping employment. *Id.*

The court sympathizes with the Complainant's health issues, but cannot find that they prevented her from filing a complaint with MSHA for the entire 684-day period. Administrative law judges have found that even significant injuries, surgery, and other noteworthy life events do not excuse significant filing delays, especially if the complainant demonstrated an ability to pursue remedies through other means. *Hacking v. Staker & Parson Companies*, 38 FMSHRC 851 (Apr. 2016) (ALJ) (holding that Complainant's complications from surgery, divorce, and caring from her son were not sufficient justifications for a 900 day filing delay because she nonetheless managed to testify before Utah Labor Board in that time); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127 (Oct. 1999) (ALJ) (holding that Complainant's significant injury was not a justifiable circumstance for a delay of over two years because he was not incapacitated and continued to pursue a worker's compensation case).

The instant case falls squarely within this line of precedent. To this court's knowledge, a 684 day filing delay would be much longer than any similar delay excused by the Commission. Such delays have only been justified when the Respondent, MSHA, or another agency is responsible for the delay. *See Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 909 (June 1986) (Commission upheld a two year delay because the complainant timely filed his complaint, but the Secretary delayed filing the complaint for over two years).

Kelhi's injuries were not permanently incapacitating, and no external cause of the delay exists in this case. A significant and compelling reason is therefore needed to justify a delay of 684 days. There is no doubt that the Complainant sustained serious injuries, and was likely incapacitated for some time. However, her injuries did not permanently incapacitate her or prevent her from applying for and defending her claim for worker's compensation. Thus, I find she could have filed her discrimination complaint as well in a timely fashion. Ms. Kelhi's

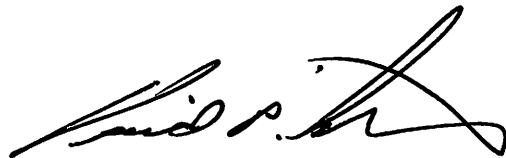
symptoms did not prevent her from performing daily activities, but prevented her from consistently performing those tasks. *See* Kelhi Response. The 105(c)(3) process does not require consistent daily work or demanding work on a daily basis. Even given Kelhi's injuries the 60-day statutory limit provided ample time to make such a claim which, at the outset for timeliness purposes, merely requires that she contact MSHA at their 1-800 hotline number or via email.

Furthermore, Kelhi challenged and testified in a denial of workers' compensation case over the past two years. The Wyoming Office of Administrative Hearings' recent workers' compensation decision indicated that Kelhi was denied compensation for pharmacy and medical benefits on October 27, 2015, November 4, 2015, and November 12, 2015, and thus was working on her claim at least before those dates. Kelhi filed her 105(c) complaint with MSHA on February 1, 2016, 684 days after allegedly being denied timely medical treatment. The court declines to accept that filing a 105(c) complaint is more difficult than applying for worker's compensation, is the equivalent of a full-time job, or requires intensive daily work. It is therefore evident that Ms. Kelhi has failed to provide justifiable circumstances for the significant delay in filing her discrimination complaint.

I therefore find that allowing the Complainant to proceed without a justifiable excuse would exceed the permissible limits of delay under the Mine Act.

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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