

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

MAY 10 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of GEORGE M. SCOLES,
Complainant,

v.

HARRISON COUNTY COAL CO.,
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEVA 2016-274-D
MSHA Case No.: MORG-CD-2016-13

Mine: Harrison County
Mine ID: 46-01318

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Andrews

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on March 14, 2016, filed a Complaint on behalf of miner George M. Scoles ("Complainant"), alleging that Scoles was discriminated against in violation of his rights under the Mine Act.

On April 13, 2016, Respondent filed a Motion to Dismiss Complaint based on the miner's untimely filing of his discrimination complaint. Respondent argues that the Mine Act contains a 60-day statute of limitations, after which a miner may not file a discrimination complaint, unless there are justifiable circumstances. In the instant case, the miner filed his discrimination complaint 80 days after the alleged discrimination occurred, and the Respondent argues that the miner knew of his rights under the Mine Act, but chose to pursue relief through a grievance procedure instead.

The Secretary responded by arguing that Scoles was unaware of his rights under the Mine Act, as well as the time constraints contained in the Act. Furthermore, the delay was relatively short, and Respondent has alleged no prejudice. Therefore, the Secretary argues that the matter should not be dismissed.

The relevant facts in this matter are that Scoles was suspended with intent to discharge on September 15, 2015. Scoles grieved the matter, and on November 8, 2015, following an arbitration hearing, the suspension with intent to discharge was modified to a 40-day suspension. Scoles filed the instant discrimination complaint with MSHA on December 4, 2015—80 days after his initial suspension and 26 days after the arbitration decision.

The Mine Act allows any miner who believes that he or she has been discharged, interfered with, or otherwise discriminated against due to his or her protected activity to file a

discrimination complaint with the Secretary within 60 days of the alleged violation. 30 U.S.C. §815(c)(2). The Commission has consistently held that “the time limits in sections 105(c)(2) and (3) ‘are not jurisdictional’ and that the failure to meet them should not result in dismissal, absent a showing of ‘material legal prejudice.’” *Sec’y of Labor ex rel. Nantz v. Nally & Hamilton Enterprises*, 16 FMSHRC 2208, 2215 (Nov. 1994) (citing *Sec’y of Labor obo Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986)). Indeed, the legislative history stated this point explicitly.¹ The Commission has excused a miner’s late filing on the basis of “justifiable circumstances.” *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). In determining if such circumstances exist, a judge is required to review the facts “‘on a case-by-case basis, taking into account the unique circumstances of each situation.’” *Id.* (citations omitted). Justifiable circumstances 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.” *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), citing legislative history, 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).

The example cited in the Senate Report accompanying the Mine Act appears to describe Scoles’ situation. Scoles has stated in his Declaration that he does not fully understand his rights under the Mine Act. *Scoles Declaration* ¶¶ 18-24. Specifically, he did not understand what type of violation “‘triggers’ the time-filing requirement under the Act,” and believed that the arbitrator’s decision on November 8 was part of the discriminatory conduct. *Id.* at ¶¶ 18, 22. Furthermore, Scoles believed that prior to filing a §105(c) complaint he had to first exhaust other remedies, including arbitration. *Id.* at ¶ 20. Scoles brought the matter to his employer’s attention and proceeded through a grievance proceeding.

Respondent argues that Scoles was aware of his rights under the Mine Act and failed to proceed in a timely fashion. It grounds this argument in the fact that Scoles was “vocal” about safety issues at the mine, was a miner’s representative, and had made previous §105(c) complaints. Respondent relies almost exclusively on the 1984 Commission case of *Hollis v. Consolidation Coal*, 6 FMSHRC 21, where the Commission affirmed the ALJ’s findings that the miner’s discrimination complaint was time-barred.

Despite Respondent’s almost complete reliance on *Hollis*, it fails to note the important procedural distinction between *Hollis* and the instant case. In *Hollis*, an evidentiary hearing had

¹ Referring to discrimination cases, the Senate Committee stated:


It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 181, 95th Cong., 1st Sess. 24 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 3401, 2436 (1978).

been held, and based on the evidence and testimony admitted at hearing, the ALJ determined that the miner's testimony concerning ignorance of his rights under the Mine Act was not credible. *David Hollis v. Consolidation Coal Co.*, 4 FMSHRC 1974 (Nov. 12, 1982) (ALJ Melick) ("*Hollis I*"). Noting its limited role in reviewing a judge's credibility determinations, the Commission found that the judge's conclusions were appropriate because the miner filed his complaint 133 days late, despite his assertions that he was knowledgeable about the Mine Act, that he was a militant chairman of the Safety Committee, and that he had written notice in his arbitration decision of remedies available under the Mine Act. *Hollis*, 6 FMSHRC at 24-25.

In the instant case, there is no credible evidence that the miner knew of the time limitations or his specific rights under §105(c) of the Act. Scoles's delay in filing was quite short—only 20 days. Had Respondent reviewed more recent caselaw beyond *Hollis*, it would have found that discrimination complaints by miners who alleged ignorance of their rights under the Act, filed shortly after the 60-day time-limit had run, where the Respondent has shown no actual prejudice, are rarely held to be time-barred. *See e.g. Daniel C. Howell v. Capitol Cement Corp.*, 23 FMSHRC 901 (Aug. 6, 2001) (ALJ Bulluck) (4 month delay in filing permitted where miner claimed he lacked knowledge of discrimination procedure); *Sec'y of Labor obo Smith v. Jim Walters Resources, Inc.*, 21 FMSHRC 359 (March 23, 1999) (ALJ Melick) (10 month delay excused by filing within 61 days of first learning of section 105(c) and no claim of prejudice by Respondent); *Sec'y of Labor obo Rocio Ray Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 1233 (Oct. 27, 1998) (ALJ Melick) (permitting complaint filed 21 days late); *Sec'y of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (Feb. 15, 1996) (ALJ Manning) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act).

The miner's justifications for filing his complaint 20 days late appear reasonable. Respondent has not alleged that it has been prejudiced by the delay in filing. Accordingly, the Motion to Dismiss is **DENIED**.


Kenneth R. Andrews
Administrative Law Judge

Distribution (Via E-mail and First Class Mail):

M. del Pilar Castillo, Esq., U.S. Dept. of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306; Castillo.m.pilar@dol.gov

Philip K. Kontul, Esq., Ogletree Deakins, One PPG Place, Suite 1900, Pittsburgh, PA 15222
Philip.kontul@ogletreedeakins.com

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