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OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 12 2015

MARK L. LUJAN, Complainant v. SIGNAL PEAK ENERGY, LLC, Respondent	DISCRIMINATION PROCEEDING: Docket No. WEST 2015-252-D MSHA Case No. DENV-CD 2014-17 Mine: Bull Mountains Mine No. 1 Mine I.D. 24-01950

ORDER DENYING THE RESPONDENT'S MOTION FOR SUMMARY DECISION
NOTICE OF HEARING SITE

Before: Judge Barbour

This case is before the court on a Complaint of Discrimination brought by Mark L. Lujan, on his own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1988, as amended. 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). The Respondent, Signal Peak Energy, LLC ("the company" or "Signal Peak"), has filed a Motion for Summary Decision. For the reasons that follow, the Motion for Summary Decision is **DENIED.**

Procedural Background

On September 23, 2014, Mr. Lujan filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration ("MSHA"). On November 24, 2014, MSHA sent Mr. Lujan a letter informing him it did not find sufficient evidence to establish that a violation of section 105(c) occurred. Under section 105(c)(3) of the Act, if MSHA determines the provisions of section 105(c)(1) have not been violated, the complaining miner may file a discrimination complaint on his own behalf. Mr. Lujan filed an "appeal" of MSHA's determination to the Commission on December 30, 2014. Mr. Lujan's appeal was docketed by the Commission as a section 105(c)(3) discrimination complaint, and the case was assigned by the Chief Judge to the court. In a March 4, 2015, Notice of Hearing, the court scheduled the case to be heard on June 30, 2015. The court also suspended discovery and the filing of pretrial motions and submissions until April 6, 2015, in order to provide Mr. Lujan time to obtain representation.[1] On May 8, 2015, Signal Peak filed a motion for summary decision. Mr. Lujan filed a response to the motion on June 4, 2015.[2]

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[1] As of the date of this order, Mr. Lujan has been unable to secure representation.

[2] In an email to the parties dated May 20, 2015, the court allowed Mr. Lujan an extension of time to file a response even though the deadline had passed, as the Commission favors giving *pro se* claimants procedural leeway.

Summary Decision

Commission Rule 67(b) provides that a "motion for summary decision shall be granted only if the entire record, including the pleading, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission has explained that summary decision is an extraordinary procedure, and, in reviewing the record, the judge should do so in the light most favorable to the non-moving party. *Energy West Mining* Co., 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Here, after review of the entire record in the light most favorable to Mr. Lujan, the court finds that there are genuine issues as to material facts and that Signal Peak has not met its burden as the moving party to establish its right to summary decision as a matter of law.

Facts

Mr. Lujan charges that on June 18, 2013, he was fired by Signal Peak and that his termination was a "direct result of discrimination . . . for [his] medical condition." Letter of Mark L. Lujan to U.S. Department of Labor, Mine Safety and Health Administration, Colorado District Office (September 23, 2014). The medical condition to which Mr. Lujan refers is gout, a condition he claims Signal Peak knew of when it hired him, and a condition which caused him to miss several days of work. MSHA Discrimination Complaint 1.

Mr. Lujan states that prior to April 19, 2013, he was suspended and given "verbal warnings" because he missed work due to flare ups of gout, and around April 19, he missed another day of work because of his medical condition. As a result, on April 19, 2013, he was suspended again from work for "mismanagement of days." MSHA Discrimination Complaint 1. Mr. Lujan alleges that his condition was such that he could not walk and he had to take gout and pain medication. Mr. Lujan maintains that he "would have been a safety risk to even enter the mine" and that his then supervisor, Ryan Stahl, likewise was suspended on April 19 for giving him permission to stay home. *Id.* According to Mr. Lujan, Mr. Stahl stated that Mr. Lujan would have been "to [sic] big of a risk to work." *Id.*

The parties agree that Mr. Lujan's employment with the company ended on June 18, 2013, during a meeting involving Mr. Lujan and company officials. The company asserts that Mr. Lujan resigned during the meeting after being confronted by company personnel about discrepancies between Mr. Lujan's time sheets and the company's employee tracking system. Answer to Pro Se Complaint of Discrimination 2-3. The discrepancies involve several dates when Mr. Lujan claimed to have worked overtime hours. *Id.* Because the company believed that Mr. Lujan falsified his time cards and violated Signal Peak's Discipline and Time Reporting Policies, the company asserts that it had a legitimate business reason to take disciplinary action against him. *Id,* Memorandum of Points and Authorities in Support of Respondent's Motion for Summary Decision 5. Mr. Lujan responds that the allegations at the June 18 meeting were "false" and that "[he] was terminated but not for the reasons given." Commission Discrimination

Complaint 3. Instead, Mr. Lujan alleges, "Signal Peak ultimately terminated my employment due to my medical condition. I was never reasonably accommodated." *Id.*

Issues

Signal Peak argues that Mr. Lujan's discrimination complaint should be dismissed for his failing to state a claim for relief recognized under section 105(c) of the Mine Act. Specifically, the company argues that Mr. Lujan failed to allege that he engaged in activity protected under the Act, that he did not suffer any adverse action as the result of engaging in protected activity, and that he would have been disciplined for unprotected activity alone. The first two arguments attempt to rebut Mr. Lujan's prima facie case for prohibited discrimination, while the latter argument functions as an affirmative defense. Additionally, the company argues that Mr. Lujan's complaint is untimely, as it was filed 462 days after his employment ended, and he has failed to allege that he suffered any adverse employment action within 60 days of the date he filed his complaint.

Analysis

Section 105(c) of the Mine Act protects miners from discrimination motivated by their protected activity. Protected activity includes filing or making complaints under or related to the Act or exercising any other statutory right afforded by the Act. 30 U.S.C. § 815(c)(2). Additionally, while the Act does not expressly state that miners have the right to refuse work under conditions involving health or safety dangers, "the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger." *Dykhoff v U.S. Borax, Inc.*, Jr., 22 FMSHRC 1194, 1198 (Oct. 2000).

In order to establish a *prima facie* case of discrimination, a complainant need only present evidence "sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Sec. of Labor obo David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980); *Sec. of Labor obo Donald E. Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 989, (Sept. 1999). Additionally, the Commission has explained that in a *pro se* discrimination proceeding under section 105(c)(3) of the Act, a complainant's pleadings should be held to a less stringent standard than those prepared by attorneys when ruling on a motion to dismiss. *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996); *see also Ribble v. T & M Dev. Co.*, 22 FMSHRC 593 (May 2000). As in a motion to dismiss, the court concludes that a *pro se* complainant should be held to a more lenient standard as the non-moving party in a motion for summary decision. Moreover, the Act's legislative history provides guidance that section 105(c) is to be "construed expansively" to guarantee miners the ability to exercise their rights under the Mine Act. S. Rep. No. 95-11, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res,. *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)).

In reviewing the record, the court views the facts in this case in the light most favorable to the non-moving party, Mr. Lujan. Mr. Lujan alleges that he was terminated due to his work absences resulting from his medical condition and Signal Peak's failure to provide reasonable

accommodation instead of the company's alleged reasons regarding falsified timecards and unexcused absences. Since there is a legitimate factual dispute on this material issue, the court cannot grant summary decision on the basis of the company's arguments that Mr. Lujan was or would have been disciplined for unprotected activity.

The more difficult and fundamental question is whether Mr. Lujan has alleged any protected activity. Mr. Lujan is effectively asserting that he engaged in a protected work refusal under section 105(c) of the Mine Act by staying home because his gout flare ups would have made working conditions unsafe and that Signal Peak took adverse actions in suspending him and terminating his employment motivated at least in part by his work refusals.

Signal Peak, in its brief in support of its motion for summary decision, cites several decisions wherein the Commission and its Administrative Law Judges have strongly signaled that work absences based on medical conditions particular to an individual may not be protected by section 105(c). *See* Memorandum of Points and Authorities in Support of Respondent's Motion for Summary Decision 5-8, citing *Dykhoff*, 22 FMSHRC at 1199; *Perando v. Metiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988); *Price v. Monterey Coal*, 12 FMSHRC 1505 (Aug. 1990); *Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129 (Mar. 2003)(ALJ). However, none of the language that the company cites to from these decisions is binding precedent that compels the court to dismiss Mr. Lujan's complaint as a matter of law.

The court notes that the Commission's holding in *Bjes v Consolidation Coal Co.*, 6 FMSHRC 1411, 1417-18 (Jun. 1984), that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations" has never explicitly been overturned. In *Dykhoff*, a case in which three out of four Commissioners affirmed an Administrative Law Judge's dismissal of a section 105(c) complaint on the basis that the complainant had not alleged a protected work refusal, the Commission nonetheless rejected the ALJ's conclusion that "'idiosyncratic physical impairments' cannot serve as the basis for a protected work refusal" and reaffirmed its holding in *Bjes*. *Dykhoff*, 22 FMSHRC at 1199, 1205. A plurality of Commissioners in *Dykhoff* found error in the ALJ's reliance on Commissioner Doyle's concurrence in *Price v. Monterey Coal*, 12 FMSHRC 1505 (Aug. 1990). *Dykhoff*, 22 FMSHRC at 1201 n.11. In her *Price* concurrence, Commissioner Doyle rejected the notion that "Congress intended to give miners the right to refuse work on the basis of problems that are totally idiosyncratic to the miner and over which the operator has no control" and found no protected activity on that basis. *Price*, 12 FMSHRC at 1519-20 (Doyle concurring).[3] Although Signal Peak has cited Commissioner Doyle's concurrence in *Price* in support of its motion for summary decision, this court may only treat it as persuasive authority at best. Moreover, while Signal Peak quotes language in *Dykhoff* suggesting that medically-related absences cannot be protected work refusals, and that to hold otherwise would "stretch[] the work refusal doctrine far beyond its contours as heretofore recognized by the Commission," 22

[3] The majority in *Price* found the complainant's work refusal to be unprotected on the narrower grounds that it was unreasonable to believe that a hazard existed under the specific facts of that case. *Id.* at 1515.

FMSHRC at 1200, the language Signal Peak quotes is not dispositive because it is contained in a plurality opinion.[4]

Further, *Perando*, which Signal Peak also cites, was decided on the grounds that the complainant failed to effectively communicate to her employer a refusal to work and had not alleged any other protected activity. 10 FMSHRC at 494-95. Under the relaxed pleading standards afforded to *pro se* litigants in 105(c) cases, there appears to be sufficient evidence in Mr. Lujan's complaints to conclude that he clearly communicated his refusal to work based on health or safety concerns, and although the *Perando* decision contains language suggesting that had the Commission found that the complainant clearly communicated a work refusal based on safety concerns related to her medical condition, it would not have found the refusal to be protected, the court views the language as nonbinding dicta.

The cumulative effect of the referenced decisions is to strongly suggest that medical-related absences cannot form the basis of a protected activity claim. However, the court concludes the issue remains unsettled as a matter of law. Given the Commission's long-standing policy on *pro se* complainants and Congress's intent that section 105(c) be read expansively to protect miners' rights, the court finds that summary dismissal of this proceeding is inappropriate. Mr. Lujan may yet be able to prove a claim of protected activity at hearing. The Commission has explained in regard to the scope of the work refusal doctrine, "The mine is an interactive environment involving human beings, equipment, and the mine's physical setting itself. The human factor cannot be ignored in the evaluation of hazards." *Bjes*, 6 FMSHRC at 1417. This language suggests that a protected work refusal claim involving a miner's own physical conditions or limitations is fact-specific. A hearing is necessary for Mr. Lujan to develop the relevant facts.

At the hearing, Mr. Lujan will have the burden of proving both the good faith and the reasonableness of his belief that a hazard existed, whether due to his condition or to other considerations in his work environment. *See Sec'y of Labor on behalf of Robinette v. U.S. Castle Coal Co.*, 3 FMSHRC 803, 809-12 (Apr. 1981). A good faith belief "simply means honest belief that a hazard exists." *Id.* at 810. The company may then rebut the case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Id.* at 818 n.20. As a final option, the company may affirmatively defend itself by proving that it would have taken the adverse action for unprotected activity alone. *Id.* at 817-18.

Finally, the court rejects Signal Peak's argument that it is entitled to summary judgment as a result of Mr. Lujan's untimely filing. The Commission has stated that in deciding whether to excuse the late filing of a miner's 105(c) complaint, a judge should review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation." *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), aff'd mem, 750 F.2d 1093 (D.C. Cir. 1984). Further, "a miner's genuine ignorance of applicable time limits may excuse a late filed

[4] Commissioner Doyle wrote separately in her concurrence affirming the dismissal of the complaint on the narrower grounds that "Dykhoff's absences did not result from any decision or choice on his part" and that therefore the complainant had not engaged in any activity at all, let alone protected activity. *Dykhoff*, 22 FMSHRC at 1204 (Doyle concurring).

discrimination complaint." *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984). Mr. Lujan claims he was ignorant of his section 105(c) rights and any applicable time limits until he started to explore his legal options for discrimination and contacted the Equal Employment Opportunity Commission. Letter of Mark L. Lujan to U.S. Department of Labor, Mine Safety and Health Administration, Colorado District Office (September 23, 2014). The company has responded that this is not true, as Signal Peak holds annual refresher training on miners' rights. Memorandum of Points and Authorities in Support of Respondent's Motion for Summary Decision 10-11. Once again, this is a factual dispute on a material issue that must be resolved at hearing. Signal Peak's motion is therefore **DENIED**.

In view of this holding, the parties are advised the hearing will go forward in Denver, Colorado, beginning at 8:30 am on June 30, 2015. The hearing will be held at the following locations:

June 30
U.S. District Court
Alfred A. Arraj Courthouse
901 19th Street
Courtroom No. 702
Denver, Colorado 80294

July 1, 2015
U.S. Custom House
721 19th Street
Courtroom No. 443, 4th Flr.
Denver, Colorado 80202

David F. Barbour
Administrative Law Judge

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