

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

June 19, 2017

JASON FARMER,
Complainant
v.

SPARTAN MINING CO., LLC, AND
ALPHA NATURAL RESOURCES
HOLDINGS, INC.,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEVA 2017-343-D
MSHA No. PINE-CD-2017-01

Mine: Road Fork #51 Mine
Mine ID: 46-01544

ORDER DENYING SPARTAN MINING CO., LLC'S MOTION TO DISMISS

Before: Judge McCarthy

I. Statement of the Case

This matter is before me upon a discrimination complaint filed by Jason Farmer ("Farmer" or "Complainant") on April 19, 2017 pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act" or "Mine Act"). 30 U.S.C. § 815(c)(3). Respondent Alpha Natural Resources Holdings, Inc. ("Alpha") filed its Motion to Dismiss and Answer on May 12, 2017, and Respondent Spartan Mining Co., LLC ("Spartan") filed its Motion to Dismiss and Answer on May 15, 2017.

For the reasons set forth below, I **DENY** Spartan's Motion to Dismiss, and **GRANT** Farmer's request to withdraw his complaint against Alpha, rendering Alpha's Motion to Dismiss as moot.¹

II. Factual and Procedural Background

Beginning in 2006, Farmer worked for Spartan for approximately ten years. Compl. 1. On July 18, 2016, Farmer began to experience breathing difficulties, which ultimately rendered him unable to work for several weeks. *Id.* During this time period, Farmer learned that he had developed Coal Worker's Pneumoconiosis ("Black Lung"). *Id.* 1-2.

¹ Alpha is the ultimate parent holding company of Spartan. Alpha Mot. to Dismiss 2. As noted by Alpha in its Answer and Motion to Dismiss, "Alpha Holdings is many steps removed from Spartan in the corporate hierarchy. In fact, numerous partially and/or wholly-owned subsidiaries separate Alpha Holdings and Spartan." *Id.* In any event, Farmer has requested *judicial approval* for withdrawal of his complaint against Alpha pursuant to Commission Procedural Rule 11. 29 C.F.R. § 2700.11. Farmer Resp. to Mot. to Dismiss 1. As stated above, this request is granted.

On or about September 1, 2016, Farmer returned to work for Spartan, informed Spartan of his breathing difficulties, and requested to be moved away from the working face of the mine to a less-dusty area. *Id.* 2. Farmer also “informed the Respondents that he had recently filed for protection under 30 C.F.R. Part 90, that his Part 90 application was currently pending review,” and that “he had a positive x-ray showing that he was suffering from black lung disease.”² *Id.* Spartan denies that Farmer filed for Part 90 protection upon his return on September 1, 2016, but that Farmer had instead only “mentioned his intent to file.” Spartan Answer 2.

At Farmer’s request, he was subsequently reassigned to a position outby the face. Compl. 2. However, following his reassignment, Farmer alleges his hours were reduced and that he was still subjected to dusty conditions, which further aggravated his breathing difficulties. *Id.* 2-3. Spartan disputes any loss of Farmer’s income due a reduction in hours, or that the outby assignment “would be considered highly dusty or otherwise violate the appropriate respirable dust standard.” Spartan Answer 2-3. Further, Spartan “specifically denies the allegations related to aggravation of his breathing condition as no such complaints or issues were raised with management while Complainant worked with Spartan.” *Id.* 3.

Farmer alleges that on or about September 25, 2016, he notified Spartan via facsimile that “having already complained to the Respondents about excessive dust on numerous occasions – only to be misled into working in yet another highly dusty position [he] became unable to continue working his job.” Compl. 3. Spartan disputes this, and instead alleges that Farmer filed his 105(c)(2) discrimination complaint with MSHA on October 24, 2016 before reporting to work that day, and that Farmer then faxed his notice that he was unable to continue working in his job the next day, October 25, 2016. Spartan Answer 3.

The parties do not dispute that Farmer filed his 105(c)(2) discrimination complaint with the Mine Safety and Health Administration (“MSHA”) on October 24, 2016.³ Compl. 3. Farmer’s discrimination complaint states, in relevant part:

On July 18, 2016, I had begun struggling to breathe and became unable to work the next day. I was out till [sic] September 1, 2016. Severe breathing difficulty has caused me to request not to work in return air. Company requires roof bolt operators to bolt in return air multiple times per shift. I seek an injunction to keep me out of return air and dusty environments at all times. I filed for Part 90 and company officials told me that I had to continue working in dust. Since I filed for Part 90 and returned to work, I have lost wages and hours, and have been moved to a less desirable schedule that precludes me from honoring my family commitments. I have

² 30 C.F.R. § 90.1 provides coal miners who provide evidence of black lung the option to work in less dusty areas of a mine.

³ Farmer’s 105(c)(2) complaint consists of two, one-page forms, MSHA 2000-123 and MSHA 2000-124. Compl. Ex. 1 at 1-2.

been constructively discharged by having to work in dust after my protests, Part 90 application, and my movement to another job outby. I have to shovel belt and operate a roof bolt machine outby after filing for Part 90. I request to be made whole for my losses of wages and hours, be restored to my former swing schedule, and be kept in low-dust working conditions.

Compl. Ex. 1, at 2. On Form 2000-123, Farmer alleged that the date of the discriminatory action was September 1, 2016. *Id.* at 1. Under Section E of the same form, Farmer indicated that a copy of all MSHA correspondence should be sent to his attorney, Samuel K. Petsonk. *Id.*⁴

On or about October 25, 2016, MSHA complaint processor Angela K. Thomas sent an acknowledgement letter to Farmer that his 105(c)(2) complaint had been assigned to special investigator Tim Brown. Farmer Resp. to Mot. to Dismiss Ex. A, at 1. There is no indication that a copy of the acknowledgment letter was sent to Petsonk, Farmer's attorney, as requested in Farmer's complaint. *Id.* Petsonk "continued representing Mr. Farmer by appearing along with him in front of special investigator Tim Brown, and at all other points of the investigation by MSHA District 12." Compl. 4.

On or about December 16, 2016, MSHA's Chief of the Technical Compliance and Investigation Office, Carolyn T. James, purportedly sent a standard *pro forma* determination letter to Farmer, with copy to Spartan, stating in relevant part:

Based on a review of the information gathered during the investigation, 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. For that reason, the Secretary of Labor will not file a discrimination case with the Federal Mine Safety and Health Review Commission ("the Commission") in this matter.

However, you continue to have the right to file a discrimination case on your own behalf with the Commission. If you decide to file your own case, you must do so within 30 days of this letter by sending a discrimination complaint to the Commission at the following address

Compl. Ex. 2, at 3. There is no evidence in the record indicating that a copy of the December 16, 2016 determination letter was sent to Petsonk, as per Farmer's request under Section E of his discrimination complaint. Compl. Ex. 1 at 1 and Ex. 2 at 3-4.

⁴ Section E of MSHA Form 2000-123 states: "[i]f you desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. Union representative, attorney, etc.) please give his/her name and address to the right." *Id.*

On February 17, 2017, Petsonk states that he “verbally contacted” MSHA to follow-up with the status of their investigation. Farmer Resp. to Mot. to Dismiss 3. On February 21, 2017, MSHA supervisory special investigator/conference litigation representative, Charles R. Bigley, emailed Petsonk, and stated the following:

The 105 you questioned, concerning the status, was closed on 12/16/2016. Records indicate the decision was made on 12/13/2016 that the evidence did not support a violation of 105c. The letter notifying the complainant of the decision was mailed from TCIO on 12/16/2016.

Compl. Ex. 2, at 1-2. On March 21, 2017, Petsonk responded:

I was registered as his representative from the time of the initial filing of the 123/124 forms, and I have never yet been sent a copy of the decision by TCIO. Accordingly, I believe that an effective final decision from TCIO has not yet issued in this matter of Jason Farmer v. Spartan Mining. Please advise.

Id. at 1. The next day, March 22, 2017, Bigley replied:

Attached is the decision letter from TCIO to Mr. Farmer copied from the case file. Likely just an oversight that a copy was not mailed to you the same day it was mailed to the complainant. Sorry for any inconvenience this may have caused.

Id. On April 19, 2017, and within 30 days of Petsonk’s receipt of the determination letter from TCIO, Petsonk filed a 105(c)(3) action on Farmer’s behalf with the Commission against Respondents Alpha and Spartan.

On May 12, 2017, Respondent Alpha Natural Resources Holdings, Inc. (“Alpha”) filed its Answer and Motion to Dismiss.

On May 15, 2017, Spartan filed its Answer, Affirmative Defenses, and Motion to Dismiss. In its motion, Spartan moved to dismiss Farmer’s complaint as untimely under section 105(c)(3) arguing that “MSHA’s Technical Compliance and Investigations Office (TICO) [sic] issued its decision on December 16, 2016, but Complainant did not file his Complaint until April 12, 2017, well outside the 30-day deadline.” Spartan’s Mot. to Dismiss 1.

On May 22, 2017, Farmer filed his response to Spartan, and requested judicial approval to withdraw his complaint against Alpha.

III. Principles of Law

A. The Act

Section 105(c)(3) of the Act provides that:

[w]ithin 90 days of receipt of a 105(c)(2) discrimination complaint, the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission

30 U.S.C. § 815(c)(3). The Act's legislative history instructs that the time limits imposed in 105(c) should not be considered jurisdictional:

In addition, under section [105(c)(3)], if the Secretary determines that no violation has occurred, the complainant has the right within 30 days of receipt of the Secretary's determination, to file an action on his own behalf before the Commission this thirty-day limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement.

S. Rep. No. 95-181, 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. Hist. of the Fed. Mine Safety and Health Act of 1977* at 37 (1978). This interpretation is consistent with "the primary objective of [the] Act," which is "to assure the maximum safety and health of miners." *Id* at 46.

B. Commission Precedent

The Commission similarly interprets 105(c) time limitations as non-jurisdictional. *E.g.*, *Sec'y of Lab. o/b/o Clayton Nantz v. Nally & Hamilton Enter., Inc.*, 16 FMSHRC 2208, 2215 (Nov. 1994) (internal citation omitted); *Ronny Boswell v. Nat'l Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992) (internal citations omitted). Accordingly, 105(c) time limitations are treated as a statute of limitations period subject to equitable tolling. *N. Assoc. Coal Co.*, 8 IBMA 164 (Sept. 1977).⁵ Ultimately, however, the decision to permit or reject an untimely 105(c) filing is determined on a case-by-case basis, "taking into account the unique circumstances of each

⁵ The Commission's interpretation was recently upheld by the Tenth Circuit. *Olson v. Fed. Mine Safety & Health Review Comm'n*, 381 F.3d 1007, 1012 (10th Cir. 2004) ("[T]he Commission's interpretation of the Mine Act to permit equitable tolling is supported by both the background presumptions against which the Act was written and the Act's legislative history the Commission's interpretation is reasonable and deserves deference.").

situation.” *Robinson v. Vulcan Constr. Materials, LP*, 36 FMSHRC 1084, 1093–94 (April 2014); *see also Boswell*, 14 FMSHRC at 257; *Clyde Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996) (internal citation omitted).

One relevant factor in a 105(c) timeliness analysis is a good-cause showing of “justifiable circumstances” for a late filing in order to prevent stale claims brought by one who has “knowingly slumbered on his rights.” *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230–31 (May 1991); *Herman v. Imco Servs.*, 4 FMSHRC 2135, 2137–38 (Dec. 1982); *Cf. Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 at 25 (Jan. 1984). Justifiable circumstances have been found in instances of “ignorance, mistake, inadvertence, and excusable neglect.” *Perry*, 18 FMSHRC at 1921–22 (citation omitted); *see also Boswell*, 14 FMSHRC at 257. A good-cause showing must then be weighed against any demonstration of material legal prejudice by the operator. *Hale, v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). Legal prejudice is “material” when it affects “issues necessary to a meaningful opportunity to defend,” and can include instances of “serious delay” by Complainant. *Farmer*, 13 FMSHRC at 1231 (citation omitted).⁶ The Commission has held that an operator’s demonstration of material legal prejudice is a “primary consideration” in the timeliness analysis. *Lujan v. Signal Peak Energy, LLC*, 38 FMSHRC 78, 95 (2016) *citing Hale*, 8 FMSHRC at 908-09; *see also Boswell*, 14 FMSHRC at 257.

IV. Analysis

It is undisputed that Farmer filed his discrimination complaint with MSHA within the 60-day time-frame allotted under 105(c)(2). At issue here is the timeliness of Farmer’s subsequent 105(c)(3) complaint, which was filed three months after Farmer, but not his counsel, received TCIO’s determination that MSHA would not prosecute his complaint. For the following reasons, I find dismissal on the basis of untimeliness to be unwarranted.

A. Justifiable Circumstances

On his 105(c)(2) discrimination complaint, Farmer listed counsel Petsonk’s name and address under Section E of MSHA Form 2000-123. Compl. Ex. 1, at 1. Section E of said form instructs: “If you desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. Union representative, attorney, etc.) please give his/her name to the right.” *Id.* Although the record indicates that MSHA’s determination letter was sent to Complainant Farmer on December 16, 2016, it appears that a copy was not provided to Petsonk

⁶ Regarding material prejudice, the Commission has recognized that “[w]hile the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated” and that more relevant examples of material legal prejudice include “tangible evidence that has since disappeared, faded memories, or missing witnesses.” *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984) (citing *Herman*, 4 FMSHRC at 2139). Moreover, “material legal prejudice means more than merely being required to defend a case that could have been avoided if failure to file on time were treated as a jurisdictional defect.” *Farmer*, 13 FMSHRC at 1231 (citing *Schulte*, 6 FMSHRC at 13). Regardless, “any delay is a potentially serious matter.” *Id.*

until March 21, 2017. When Petsonk asked MSHA about the status of the investigation and learned that MSHA had informed Complainant Farmer that it was not pursuing the matter, Petsonk asked why he had not been notified as Farmer's counsel. Compl. Ex. 2, at 1-2. MSHA stated in an email reply to Petsonk that it was "[l]ikely just an oversight that a copy was not mailed to you the same day it was mailed to the complainant. Sorry for any inconvenience this may have caused." *Id.* at 1.⁷

The Commission has ruled that a miner cannot file a 105(c)(3) discrimination complaint until they have received the Secretary's determination that there is insufficient evidence that a violation has occurred. *Gilbert v. Sandy Fork Mining Co., Inc.* 9 FMSHRC 1327, 1336 (Aug. 1987). Thus, the 105(c)(3) 30-day time period commences with notice of the Secretary's determination. S. Rep. No. 95-181 at 37; *Boswell*, 14 FMSHRC at 257 ("The statute makes clear that the time for filing begins to run upon 'notice' of the Secretary's action."); *Keys, Jr. v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1128 (Oct. 1999) (ALJ) ("the 30 day time period prescribed in section 105(c)(3) of the Act and Commission Rule 2700.412 commences with receipt of the determination, not the purported mailing date") (footnote omitted). Absent any showing to the contrary, the record indicates that Petsonk first became aware that a determination letter had been issued on February 21, 2017, and first received a copy of said letter from MSHA on March 21, 2017. If March 21, 2017 is taken as the date of written notice to Complainant's legal representative that MSHA was not pursuing Farmer's complaint, then the complaint was timely filed within the requisite 30-day period. In any event, Farmer has made a good-cause showing that an inadvertent administrative oversight was a circumstance justifying Farmer's delayed 105(c)(3) filing.⁸

B. Seriousness of Delay

If proper notice of MSHA's determination letter had been issued to Farmer's counsel on December 16, 2016, the 30-day limit would have tolled on January 15, 2017, and Farmer's subsequent filing on April 19, 2017 would constitute a delay of just over three months. While there is no absolute barometer for how far beyond the 30-day period a complaint can be filed before it is considered to constitute serious delay, it appears that a three-month delay under the instant circumstances is permissible. *See Boswell*, 14 FMSHRC at 257 (12-day delay *de minimis* and resulting "at least in part, from mistake, inadvertence, or excusable neglect."); *Schulte*, 6 FMSHRC at 13 (31-day delay excusable under the circumstances); *see also Jones v. Dee Gold*

⁷ MSHA's Special Investigations Procedures Handbook similarly instructs that Section E "[s]hould be completed if Complainant desires copies of correspondence forwarded to another party." MSHA Special Investigations Procedures Handbook PH05-I-4, Chapter 2-1, at 3 (2005).

⁸ It is unclear to what extent this oversight was exacerbated by Petsonk's delay in following-up with MSHA. The record shows that Petsonk learned of the final determination letter via Bigley's February 21, 2017 email. Petsonk waited 28 days after receipt of the email to respond. Petsonk contends that during this time he was "investigating the records and confirming that MSHA had not sent any notice of the Dec. 16, 2016 decision to the Complainant's representative." Farmer Resp. to Mot. to Dismiss 4. In these circumstances, I find that Complainant did not sleep on his rights. *Farmer*, 13 FMSHRC at 1230.

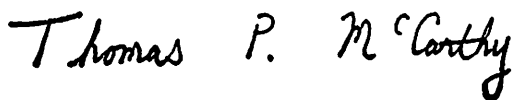
Mining Co., 9 FMSHRC 1631, 1634 (Sept. 1987) (ALJ) (five-month delayed filing excusable under the circumstances); *Hale*, 8 FMSHRC at 909 (Jun. 1986) (two-year delay attributable to Secretary's delay excusable under the circumstances); *Sinnott v. Jim Walter Resources, Inc.*, 16 FMSHRC 2445, 2446 (1994) (ALJ) (denying three-year delay as extraordinarily late).

C. Material Legal Prejudice

Although the Complainant bears the burden of demonstrating a good-cause showing of justifiable circumstances for a late filing, the operator bears the burden of demonstrating material legal prejudice. *Schulte*, 6 FMSHRC at 13. Here, Spartan alleges no material legal prejudice arising from Farmer's delayed filing.

V. Order

Complainant has made a good-cause showing of justifiable circumstances for his late filing. The length of delay for the late filing is negligible and resulted from an inadvertent administrative oversight by MSHA. Respondent Spartan has demonstrated no material legal prejudice from the delay. Accordingly, I **DENY** Spartan's Motion to Dismiss, and **GRANT** Farmer's request to withdraw his complaint against Alpha, thus rendering Alpha's motion to dismiss as moot.



Thomas P. McCarthy
Administrative Law Judge

Distribution:

Samuel K. Petsonk, Esq., Mountain State Justice, 1031 Quarrier Street, Ste. 200, Charleston, West Virginia, 25301

Eric L. Silkwood, Esq., Hardy Pence PLLC, 500 Lee Street, East, Suite 701, Charleston, WV 25301

/cmc