

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

JUL 21 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JEFFREY S. BREWER,
Complainant,

v.

MONONGALIA COUNTY COAL
COMPANY,
Respondent,

DISCRIMINATION PROCEEDING

Docket No. PENN 2016-240-D
MSHA Case No.: MORG-CD-2016-14

Mine: Monongalia County Mine
Mine ID: 46-01968

ORDER DENYING RESPONDENT'S MOTIONS 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. §2700.40, the Secretary of Labor ("Secretary") on June 3, 2016, filed a Complaint on behalf of miner Jeffrey S. Brewer ("Complainant"), alleging that Brewer was discriminated against in violation of his rights under the Mine Act. On July 8, 2016, Secretary filed a First Amended Complaint on behalf of Brewer, attaching Exhibit A, which was omitted from the original complaint, and adding in the penalty assessment, with corresponding Exhibit B. Respondent filed respective Answers and Defenses to the Complaints.

On July 5, 2016, Respondent filed a Motion to Dismiss Complaint based on the miner's and Secretary's untimely filing of discrimination complaints, and on July 15, 2016, Respondent filed a Motion to Dismiss First Amended Complaint for the same reasons. 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 89 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. Respondent also argues that the Secretary failed to timely file a discrimination complaint on behalf of Brewer, within the 120-day filing period.

The Secretary responded by arguing that Brewer was unaware of his rights under the Mine Act, as well as filing requirements contained in the Act. Furthermore, the delay was relatively short, and Respondent alleged no material prejudice. Additionally, the Secretary argues

its failure to timely file occurred because of an unexpected resignation and reassignment of the case in the Solicitor's office, which should not prejudice the Complainant. Therefore, the Secretary argues that the matter should not be dismissed.

As Judge Miller has noted,

[t]he Commission's procedural rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission judges addressing similar motions have been guided by Federal Rules of Civil Procedure 12(b)(6) and 12(c) and treated those filings as motions for summary decision. *See e.g., Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ).

Mona Kerlock v. Asarco, LLC, 36 FMSHRC 2404, 2405 (Aug. 27, 2014).

Commission Procedural Rule 67 sets forth the grounds for granting summary decision and requires that it shall be granted only if the entire record 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. 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).

I. Complainant's Failure to Timely File His Discrimination Complaint

The relevant facts in this matter are that Brewer was suspended with intent to discharge on October 16, 2015. Brewer grieved the matter, and on December 30, 2015, following an arbitration hearing, the suspension with intent to discharge was upheld. Brewer filed a discrimination complaint with MSHA on January 14, 2016—89 days after his initial suspension and 15 days after the arbitration decision. This was 29 days past the 60-day statutory filing period.

Any miner who believes he has been discriminated against due to protected activity has the right under the Act 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 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)). Further, the legislative history plainly states that discrimination filing periods are not meant to be jurisdictional.¹ A miner is not

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.

time barred from a discrimination claim when a miner has “justifiable circumstances” for a delay in filing. *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). Justifiable circumstances are evaluated on a case-by-case basis. *Id.* An example of a justifiable circumstance is when a “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).

In the Secretary’s Motion, it states that Brewer did not understand what type of violation “could trigger the time limit under the Act and erroneously believed that the arbitrator’s decision was an adverse discriminatory act.” Sec’y Resp. to Resp’t Mot. to Dismiss at 5. Further, Brewer mistakenly believed, with his union’s guidance, that prior to filing a §105(c) complaint he had to first exhaust other remedies, including arbitration. *Id.* at 4. Therefore, Brewer first brought his complaint to his employer and arbitrated the issue. *Id.*

Respondent argues that Brewer was aware of his rights under the Mine Act and failed to timely file his discrimination complaint. Respondent also argues that Brewer clearly knew of his Mine Act rights because he previously filed a 105(c) complaint, 103(g) complaints with MSHA, and made safety complaints to mine management. Mem. of Law. in Supp. of Resp’t First Mot. To Dismiss at 7. I find that any previous experience Complainant has filing 105(c) complaints does not necessarily relate to the circumstances of this case. Complainant’s prior instance of filing a discrimination or 103(g) complaint did not by necessity grant him an understanding of the filing deadlines and exceptions under the Act. Furthermore, Respondent fails to provide any material prejudice caused by the untimely filing of the discrimination complaint.

Respondent relies primarily on *Hollis* to support its argument that Complainant did not timely file a discrimination complaint. *Hollis v. Consolidation Coal*, 6 FMSHRC 21 (Ja. 1984). However, *Hollis* is distinguishable from this case. In *Hollis*, an evidentiary hearing was held, and the ALJ found the miner’s claim of ignorance concerning his rights under the Act were not credible. *Hollis v. Consolidation Coal Co.*, 4 FMSHRC 1974 (Nov. 12, 1982) (ALJ Melick). “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.” *Sec’y on behalf of Scoles v. Harrison County Coal Co.*, 2016 WL 2956692 at *2 (May 2016)(ALJ) citing *Hollis*, 6 FMSHRC at 24-25.

In the instant case, there was no factual evidence brought forth demonstrating that Brewer knew of the time limitations or his rights under §105(c) of the Act. Brewer’s delay in filing was

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).

also only 29 days. Moreover, recent case law has indicated that miners who alleged ignorance of their Mine Act rights and filed shortly after the 60-day filing period are not time barred from asserting their discrimination complaints when there is no evidence of material prejudice for Respondent. 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 Roco 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).

II. The Secretary’s Failure to Timely File a Discrimination Complaint on behalf of Complainant

Respondent also argues the Secretary failed to timely file a discrimination complaint within 120 days of receiving Complainant’s discrimination complaint. In *Sec’y on behalf of Howard v. Cave Spur Coal, LLC*, the court cited *Secretary, ex rel. Donald R. Hale v. 4-A Coal Company*, 8 FMSHRC 905 at 908 (June 1986), stating:

‘... we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission “immediately” thereafter -- i.e., within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. Cf. *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 23-25 (January 1984), *aff’d mem.*, 750 F.2d 1093 (D.C. Cir. 1984) (table); *Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8, 12-14 (January 1984).’

Sec’y on behalf of Howard v. Cave Spur Coal, LLC, 25 FMSHRC 471,487 (Aug. 2003)(ALJ).

Therefore, in a case where the Secretary untimely files a discrimination complaint, “without a showing that the delay prejudiced the Respondents, dismissal is not warranted.” *Id.* This is in line with the legislative history, which makes clear that a Complainant should not be penalized for the Government’s failure to timely file a discrimination complaint. S. Rep. 95-181 at 36.

The Secretary filed its first complaint 21 days after the 120 day time period expired. The Secretary attributes this short delay to the reassignment of this case to another attorney after the unexpected resignation of an attorney in the Solicitor’s Office. Sec’y Resp. to Resp’t Mot. to Dismiss at 9. This delay was for a short period of time after the filing time period, and Respondent failed to show that the delay caused any material prejudice. Further, the Complainant should not be penalized because of the Secretary’s failure to timely file.

Consequently, the miner's justifications for filing his complaint 29 days late appear reasonable, and Respondent has not alleged that it has been prejudiced by the delay in filing. The Secretary's justifications for filing a complaint and amended complaint on behalf of Brewer 21 days late also appear reasonable and have not caused material prejudice for the Respondent. Accordingly, the Motions to Dismiss are **DENIED**.



Kenneth R. Andrews
Administrative Law Judge

Distribution:

Pilar Castillo, Esq., U.S. Department of Labor, Office of the Regional Solicitor, The Curtis Center, Suite 630E, 170S. Independence Mall West, Philadelphia, PA 19106

Philip K. Kontul, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One PPG Place, Suite 1900, Pittsburgh, PA 15222

/ktw