FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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LESLIE A. PRIDE Complainant v. HIGHLAND MINING COMPANY, L.L.C. Respondent	DISCRIMINATION PROCEEDING Docket No. KENT 2010-0318-D MSHA Case No. MADI CD 2009-11 Mine: Highland 9 Mine Mine ID: 15-02709

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Gill

This case is before me upon a complaint of discrimination, brought under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("Act"). Discrimination proceedings are governed by procedural rules found at 29 C.F.R. Part 2700, Subpart E (Complaints of Discharge, Discrimination or Interference). The complainant, Leslie A. Pride ("Pride"), filed an appeal to this court on December 3, 2009. The operator, Highland Mining Company, L.L.C. ("Highland"), filed a motion for summary decision on June 29, 2011. After reviewing the pleadings and the record, I find that Highland is not entitled to judgment as a matter of law and deny Highland's motion.

Facts

Pride began working for Highland on February 23, 2006. *Pride V.S.* ¶ 1. Pride injured his back while attempting to lift a 70-pound tank of acetylene during his work at Highland in August, and again in May, 2006. *Id.* at 2. After each incident, Pride requested that Highland write an accident report, and Highland refused on the grounds that the injury was due to a pre-existing condition and thus was not work-related. *Id.*

Following an examination in October, 2006, Pride's physician determined that his injury was work-related, and that he should not continue working. *Exhibit A*. Pride ceased working in October, 2006. *Id.* at 5. Highland offered Pride payment for sickness and accident benefits beginning in October 2006, with the stipulation that he would have to pay those benefits back

should he obtain worker's compensation benefits. *Id.* at 11. On October 19, 2007, Highland notified Pride of his suspension with the intent to discharge. *Exhibit D.* [1]

On April 14, 2009, MSHA contacted Pride due to ongoing investigations about Highland's repeated failure to issue safety reports, and encouraged him to file a discrimination complaint. *Pride V.S.* ¶ 9. Following the investigation, MSHA cited Highland for repeated violations of Title 30 Code of Regulations for failure to issue safety reports. *Exhibit D.*

Because he does not have an injury report on file, Pride has been denied worker's compensation benefits. *Pride V.S.* ¶ 7. Pride has also experienced delays in receiving UMWA pension, health card, and social security benefits. *Id.* at 8.

Discussion of Relevant Law

When considering a motion for summary decision, the standard is set out in Commission Procedural Rule 67, which states that a motion for summary decision shall be granted only if, on the basis of the entire record, there is no genuine issue of material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). The Commission "has long recognized that '[s]ummary decision is an extraordinary procedure,"' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary decision is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

To establish a *prima facie* case of discrimination under Section 105(c) (1)[2] of the Act, Pride bears the burden of establishing that he engaged in protected activity and that the adverse

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[1] In 2007, Pride was charged with, and ultimately convicted for, trafficking over five pounds of marijuana. Pride objects to and contests the admission of any information related to such charges on the grounds that it is irrelevant to his discrimination claim. Commission rule § 2700.63 states that "relevant evidence... that is not unduly repetitious or cumulative is admissible." *See also* 5 U.S.C. 556 (exclusion of irrelevant, immaterial, or unduly repetitious evidence). I conclude that the evidence concerning Pride's marijuana charge is irrelevant for the purposes of determining whether his discrimination claim survives summary decision. Such evidence may be relevant at a hearing on the merits.

[2] Section 105(c) (1) of the Act, 30 U.S.C. § 815(c) (1) states in relevant part:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section

action complained of was motivated by that activity. *Sec'y of Labor Ex Rel. Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (Apr.1981) (quoting *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981)). A *prima facie* case thus requires evidence sufficient to support a conclusion that (1) the individual engaged in activity protected under the Act, (2) the individual suffered adverse action, and (3) the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2786; *Robinette*, 3 FMSHRC at 817.

The burden of proof for a prima facie case "is lower than the ultimate burden of persuasion." *Turner v. Nat'l Cement of CA*, 33 FMSHRC 1059, 1065 (May 2011). Factors considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Sec'y of Labor on behalf of Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011). The *prima facie* case may be rebutted by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Robinette*, 3 FMSHRC at 818, n. 20.

Analysis

Pride claims that the discrimination occurred when Highland refused to file the injury reports in violation of Title 30 of the Code of Federal Regulations. He argues that this resulted in an unjust denial of his worker's compensation benefits.

Highland argues that Pride's claim should be dismissed as a matter of law for four reasons: that Pride filed his discrimination complaint in an untimely manner; that he did not engage in any protected activity; that he did not suffer an adverse employment action; and that his complaint does not seek a remedy available to him under 105(c).

The dispositive questions are whether, viewing all of the evidence in the light most favorable to Pride, there are genuine issues of material fact, and whether Highland is entitled to judgment as a matter of law. For reasons outlined below, I hold both that there are genuine issues of material fact, and that Highland is not entitled to judgment as a matter of law.

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101 or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

I. Untimeliness

Highland argues that because Pride filed his request approximately two and a half years after the statutory time period had elapsed, and nearly five years after the alleged discrimination occurred, his complaint should be dismissed for untimeliness.

Section 105(c)(2) of the Act states, "any miner... who believes that he has been... discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

The Commission has held that this 60-day time limit may be extended given a showing of "justifiable circumstances." *Herman v. IMCO Services*, 4 FMSHRC 2135, 2137 (Dec. 1982); *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984). There is no bright-line standard for determining whether justifiable circumstances exist. Circumstances that could establish justifiable circumstances include the miner bringing the complaint to the attention of another agency or to his employer within the 60-day period, or the miner failing to meet the time limit because he is misled about, misunderstands, or is ignorant of his rights. *Hollis* at 24.

Pride does not contend that there were justifiable circumstances that would excuse his delay in filing. However, even if there are no such circumstances, Highland is not entitled to judgment as a matter of law for untimeliness because it has not provided evidence that it has suffered material legal prejudice due to Pride's delay in filing his discrimination complaint.

A complaint may be dismissed, even if justifiable circumstances are shown, where the mine operator can show prejudice such as loss of critical evidence or unavailability of a witness. *Fulmer v. Mettiki Coal Corp.*, 30 FMSHRC 523, 525 (June 2008) (ALJ). The Commission has held that evidence of prejudice is a primary consideration in determining whether to grant an extension. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1387 (Dec. 1999). The Commission has likewise held that, "absent a showing of material legal prejudice," a complaint should not be dismissed for untimeliness. *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2215 (Nov. 1994); *see also Sec'y of Labor on behalf of Hale v. 4-A Coal Company, Inc.*, 8 FMSHRC 905, 909 (June 1986) (prejudice is the "requisite foundation" for a dismissal based on untimeliness); *Sec'y of Labor v. Salt Lake County Road Department*, 3 FMSHRC 1714, 1716 (July 1981) ("basic principle of administrative law that substantive agency proceeding, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice").

Here, Highland has failed to show prejudice. The operator has not shown a loss of critical evidence, nor has it shown the unavailability of any key witnesses. Highland argues that prejudice is inherent in a delay of over 2 years, and that prejudice could be "reasonably inferred" from the extensive delays in prosecuting the case. *Sec'y of Labor v. Curtis Crick*, 15 FMSHRC 735 (Apr. 1993) (ALJ). However, the principle in *Crick* is not applicable in this case. For one,

Pride has filed a pro se complaint. Additionally, and more importantly, *Crick* does not involve a discrimination complaint, but rather concerned a civil penalty involving equipment defects. For these reasons, I find the principle in *Fulmer* – that while memories may have faded, Denison must show "concrete prejudice attributable to delays" – controlling in this case. 30 FMSHRC at 530. Thus, Pride's complaint should not be dismissed for untimeliness.

II. Protected Activity

As outlined above, a *prima facie* case requires that Pride show he engaged in an activity protected by the Act. Section 105(c) (1) enumerates five rights protected under the Act: (i) filing a complaint related to the act, including a complaint notifying the operator of an alleged danger or safety or health violation; (ii) being subject to medical evaluations and potential transfer under standards published pursuant to Section 101; (iii) instituting or causing to be instituted any proceeding related to the Act; (iv) testifying in any proceeding related to the Act; and (v) exercising any statutory right afforded by the Act.

Pride does not allege that he engaged in any of the enumerated activities listed above. Rather, Pride argues that he suffered discrimination because he was refused injury reports from his accident.

In a case involving complaints about the issuance of an inaccurate report following a miner's accident, the evidence established that the complainant was seeking to establish his right to an additional ten percent increase in payments under his workman's compensation benefits, and that the inaccuracy of the report constrained him from doing so. *Mooney v. Sohio Western Mining Co.*, 4 FMSHRC 440, 444 (Mar. 1982) (ALJ). The judge held that if the complaints were "motivated by a sincere belief ... that such matters were related to safety and health conditions of the mine, it would constitute protected activity." *Id.* On review, the Commission upheld the decision of the ALJ, but specifically declined to "address whether the judge erred in determining that Mooney's complaints upon his return to work were not protected simply because of their monetary basis." *Mooney v. Sohio Western Mining Co.*, 6 FMSHRC 510 (Mar. 1984).

This case can be distinguished in several ways. First, the operator in *Mooney* issued an inaccurate injury report, whereas here Highland failed to issue two injury reports. A failure to issue a report has a much stronger bearing on the health and safety of the mine than a complaint that is largely accurate with regard to health and safety conditions. Additionally, in its investigation of Highland's mine, MSHA noted 13 prior instances of Highland failing to report on-the-job injuries, which support a reasonable inference that a genuine health and safety issue exists there. *Exhibit D.* Finally, the decision in *Mooney* was written after a full hearing, and was based on a credibility judgment with regard to the complainant's motive. Such a determination would be inappropriate here, at the summary decision stage. My role in the summary decision phase is to determine whether a factual dispute exists, not to resolve it. That determination is

reserved for hearing, where the parties can present their evidence, and I can the make the credibility determinations required for a factual determination of these issues.

A reasonable fact-finder could find that Pride was motivated, in whole or in part, by a concern for health and safety. However, assuming *arguendo* that Pride was solely motivated by monetary concerns, in light of the fact that Highland outright refused to issue an injury report at all, and in light of the repeated instances of Title 30 violations, Pride's activity could be protected even if it was solely motivated by pecuniary concerns. The complainant's motive is relevant, if not necessarily controlling, for the purposes of determining whether he has made a *prima facie* case of discrimination. Pride's motive must at least be considered before I can determine whether his activity is considered protected activity. Thus, based on the available evidence, I cannot make a conclusive determination with regard to whether Pride engaged in protected activity.

III. Adverse Action

Highland contends that a refusal to issue safety reports does not constitute adverse action as understood under Section 105(c) (1) of the Act. Adverse action is defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010). However, the Commission has also recognized that while "discrimination may manifest itself in subtle or indirect forms of adverse action," nevertheless, "an adverse action 'does not mean any action which an employee does not like.'" *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984) (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981). The Commission has held that the test articulated by the Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006), should be applied in Mine Act cases to ascertain whether adverse action has occurred. *Sec'y of Labor on behalf of Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012). Under the *Burlington* standard, adverse action consists of action that would have been "materially adverse to a reasonable employee." *Id.* This means "that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.*

Here, Pride explicitly states in his complaint that he was not fired, suspended, or laid off as a result of his request for an accident report. *Exhibit B.* Indeed, Pride actually argues that he should have been laid off from employment per Highland's company policy of automatic termination for employees that cannot return to work after 52 weeks of sick leave. *Pride V.S.*, 3. Instead, Pride asserts that the adverse action taken against him by Highland consisted of a refusal to issue accident reports.

On the basis of the record, viewing the evidence in the light most favorable to the complainant, I conclude that Highland's refusal to issue a safety complaint constitutes adverse action. Highland's actions go beyond mere action that an employee does not like. Rather, Pride

has presented evidence that Highland has engaged in a pattern of denying injury reports to miners in violation of Title 30. *Exhibit D.* The legislative history of the Mine Act, in relevant part, states:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.

S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977).

I conclude that a refusal to issue injury reports falls under the penumbra of the "more subtle forms of interference." One of the major purposes of the discrimination protections contained in the Mine Act is to encourage miners to take an active role in enforcement of the Act. "[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." *Id.* Taking an active role in enforcement certainly includes requesting injury reports, as the judge in *Mooney* admits. 4 FMSHRC at 444. Repeated refusal to issue injury reports interferes with this right, and discourages miners from requesting those reports in the future.

Additionally, Pride seeks unemployment, social security, and medical card benefits, which he cannot obtain without an injury report on file. If true, this suggests that the action taken has grave impacts on the quality of Pride's life. Thus, although Highland's actions do not fall under the umbrella of common forms of discrimination, they fall within the penumbra of the "more subtle forms of discrimination," because a reasonable finder of fact could determine that Highland is effectively using its denial to issue an injury report as a tool to inflict harm upon Pride.

In light of the purpose of the Act, the negative effects of the action on Pride, and the potential effect it could have on future injury reports by other miners, I conclude that Highland's actions constituted adverse action.

IV. Causal Nexus

In addition to establishing protected activity and adverse action, a *prima facie* case requires evidence that the adverse action was motivated, in whole or in part, by the protected activity.

The sufficiency of the motivation element of its *prima facie* case depends on inferences that can be reasonably drawn from the record. The Commission has frequently stressed the importance of inferential evidence when making out a *prima facie* case, because it is unlikely that there will be direct evidence of discrimination when it has occurred: "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The court in *Chacon* identified several characteristic marks of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complaint. *Id.* at 2510. Additionally, with regard to motivation, "circumstantial evidence... and reasonable inferences drawn thereof may be used to sustain a prima facie case." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510). It would therefore be inappropriate to grant summary decision, where multiple mutually incompatible interpretations could reasonably be drawn from agreed-upon facts in a case. *Empire Electronics Co v. U.S.*, 311 F.2d 175, 180 (2d. Cir. 1962); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4 (Jan. 2007). "When the inferences which the parties seek to have drawn deal with questions of motive," the issue of multiple possible inferences becomes particularly important. *Empire Electronics*, 311 F.2d at 180.

Here, there is sufficient evidence for a reasonable fact-finder to conclude that Highland's refusal to issue the injury reports was motivated by Pride's request for issuance of the injury reports. A coworker has averred that Pride informed both his immediate supervisor and the safety director, James Allen, of his injury. *Roper Aff.* A reasonable fact-finder could infer that Highland was aware of Pride's request for the injury report. Additionally, the refusal followed almost immediately after the complaint, and Highland maintained its refusal to issue the injury report several times after the initial request, supporting an inference of coincidence in time between the protected activity and alleged discrimination. Finally, there is evidence that Highland has refused to issue injury reports to several miners over an extended period of time which allows for a potential inference of animus towards the requests for injury reports. On these facts, a reasonable fact-finder could infer that Highland's refusal to issue the injury reports was motivated, in whole or in part, by Pride's request for the injury report.

V. Remedy

Pride seeks specific performance as his remedy: he requests that the Commission order Highland to issue the injury report. Highland contends that this is not a remedy afforded to miners under section 105(c) of the Act, and that he is not seeking "tangible relief."

The Commission has held that, "so long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances." *Sec'y of Labor v. Azko Nobel Salt Inc.*, 19 FMSHRC 1254 (July 1997) (quoting *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982) (vacation pay and hearing expenses in addition to back pay)) (restoration of prior position following a discriminatory demotion). This notion is supported by the text of Section 105(c)(2) which states, in relevant part:

> The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation *as the*

Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

30 U.S.C. § 815(c) (2). (emphasis added)

Pride seeks neither reinstatement nor back pay. His request for relief is unique, and presents a case of first impression. I hold that, in line with the discretion afforded to judges under Section 105(c) (2) in providing appropriate remedies, the remedy Pride seeks is appropriate. While it may not fully "make him whole" with regard to the alleged discrimination, it would at least partially ameliorate the harm Pride has suffered. Were it not for the alleged discrimination, Pride readily admits that he would have been terminated after a maximum of 52 weeks of sick leave, but he would have benefitted from UMWA and medical benefits starting from that point onwards. Issuing the injury reports would allow Pride to enjoy future benefits, even if it does not make him whole with respect to past benefits. Thus, I conclude that Pride has not sought relief that necessitates dismissal as a matter of law.

Because Highland is not entitled to judgment as a matter of law, I will deny the motion, and the case will proceed to hearing.

WHEREFORE, the motion for summary decision is **DENIED**.

L. Zane Gill
Administrative Law Judge

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