

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**APR 07 2014**

**RICHARD M. ROBINSON and ROBERT  
DALE HABERLOCK,**  
Complainants,

v.

**VULCAN CONSTRUCTION  
MATERIALS, LP,**  
Respondent

**SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) O/B/O  
RICHARD M. ROBINSON,**  
Complainant,

v.

**VULCAN CONSTRUCTION  
MATERIALS, LP,**  
Respondent,

**SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) O/B/O  
ROBERT DALE HABERLOCK,**  
Complainant,

v.

**VULCAN CONSTRUCTION  
MATERIALS, LP,**  
Respondent,

**DISCRIMINATION PROCEEDING**

Docket No. KENT 2013-693-DM  
MSHA Case No. SE MD 12-19

Mine: Grand Rivers Quarry  
Mine ID: 15-00087

**TEMPORARY REINSTATEMENT  
PROCEEDING**

Docket No. KENT 2013-742-DM  
MSHA Case No. SE MD 13-19

Mine: Grand Rivers Quarry  
Mine ID: 15-00087

**DISCRIMINATION PROCEEDING**

Docket No. KENT 2013-836-DM  
MSHA Case No. SE MD 13-10

Mine: Grand Rivers Quarry  
Mine ID: 15-00087

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**DISCRIMINATION PROCEEDING**

Docket No. KENT 2013-917-DM  
MSHA Case No. SE MD 13-09

Mine: Grand Rivers Quarry  
Mine ID: 15-00087

**DISCRIMINATION PROCEEDING**

Docket No. KENT 2013-977-DM  
MSHA Case Nos. SE MD 13-18  
SE MD 13-19

Mine: Grand Rivers Quarry  
Mine ID: 15-00087

**DISCRIMINATION PROCEEDING**

Docket No. KENT 2013-987-DM  
MSHA Case No. SE MD 12-17

Mine: Grand Rivers Quarry  
Mine ID: 15-00087

## **ORDER DENYING VULCAN'S MOTION TO DISMISS**

This matter is before me on Respondent's September 16, 2013 Motion to Dismiss the Discrimination Proceeding docketed as KENT 2013-977-DM. This case involves two miners, Richard M. Robinson and Robert Dale Haberlock, and six dockets, and a fairly unique set of procedural facts. The dockets are as follows:

**1. KENT 2013-693-DM (§105(c)(3) Discrimination Proceeding)**

- a. Deals with SE-MD-12-19.
- b. Includes both Robinson & Haberlock regarding Respondent's alleged attempts to get them removed as Miners' Representatives. The Secretary is not a party to this case.
- c. Originally dropped by Robinson & Haberlock based on conversation with Inspector Smith. After obtaining counsel, Robinson & Haberlock attempted to re-open the case, but the Secretary refused to do so.
- d. Respondent filed a Motion to Dismiss stating that the issue was dead when the Secretary refused to re-open. The motion was denied without prejudice and the case was stayed pending receipt of the related dockets.

**2. KENT 2013-742-DM (Temporary Reinstatement Proceeding)**

- a. Deals with SE-MD-13-09 (same as KENT 2013-917-DM).
- b. Includes only Richard Robinson and filed on his behalf by MSHA. Proceedings relate to his lay-off following an MSHA inspection.
- c. The parties came to an agreement regarding economic re-instatement without going to hearing.
- d. The undersigned retains jurisdiction pending resolution of discrimination proceedings.

**3. KENT 2013-836-DM (§105(c)(2) Discrimination Proceeding)**

- a. Deals with SE-MD-13-10.
- b. Includes only Dale Haberlock and filed on his behalf by MSHA. Proceedings relate to his lay-off after he allegedly reported safety hazards.
- c. No related temporary-reinstatement case.

**4. KENT 2013-917-DM (§105(c)(2) Discrimination Proceeding)**

- a. Deals with SE-MD-13-09 (same as KENT 2013-742-DM).
- b. Includes only Richard Robinson and filed on his behalf by MSHA. Proceedings relate to his lay-off following an MSHA inspection and several alleged safety Complaints.
- c. Discrimination case directly related to earlier (and settled) temporary reinstatement.

5. **KENT 2013-977-DM (§105(c)(2) Discrimination Proceeding)**

- a. Deals with SE-MD-13-18 and SE-MD-13-19.
- b. Includes both Robinson and Haberlock and filed on their behalf by MSHA. Proceedings deal with largely the same facts as KENT 2013-693-DM. Specifically, Respondents alleged attempts to remove Robinson and Haberlock as Miners' Representatives.
- c. Currently a pending Motion to Dismiss filed by Respondent claiming that the filing was untimely and failed to allege a claim upon which relief could be granted.

6. **KENT 2013-987-DM (§105(c)(2) Discrimination Proceeding)**

- a. Deals with SE-MD-13-17.
- b. Includes only Robinson and filed on his behalf by MSHA. Concerns Respondent's alleged failure to contact Robinson so that he could accompany MSHA inspectors on safety inspections.

**I. Procedural and Factual Background:**

The relevant procedural and factual history of these dockets is as follows:

- **August 13, 2012 (on or about) -** Richard Robinson and Dale Haberlock alleged that they were lawfully designated as "Representatives of Miners" at the Reed Quarry under the Mine Act (30 C.F.R. Part 40).
  - Robinson alleged that in his capacity as Miners' Representative he reported hazardous conditions including running the plant without water to control dust, fly rock from belts, housekeeping, inoperative lights at the ready line, a truck overweight by 900 pounds, and worn out deck plates.
- **August 13-September 20, 2012 (dates unclear) -** Robinson & Haberlock alleged that Respondent was opposed to their designation as Miners' Representatives and began a course of conduct that interfered with their statutory right. These actions allegedly included:
  - Raising the idea with employees at the mine of removing Robinson and Haberlock as Miners' Representatives.
  - Expressing hostility to having Robinson & Haberlock act as Miners' Representatives and informing Vulcan employees ways in which they could have them removed.
  - Encouraging and/or allowing two hourly employees at the mine to circulate a petition seeking the removal of Robinson & Haberlock. Respondent allowed these workers to talk about and solicit signatures for the petition during "tailgate meetings" held by the company during work hours.

- Denying Robinson & Haberlock permission to circulate a counter-petition to stay on as Miners' Representatives.
- **September 20, 2012:** KENT 2013-693-DM –Robinson & Haberlock filed the Department of Labor's Discrimination Complaint form with MSHA for SE-MD-12-19 based on the Respondent's alleged conduct concerning their positions as Miners' Representatives.
- **October 9, 2012:** KENT 2013-693-DM (date unclear) –Robinson had a conversation with the MSHA investigator in this case in which the investigator allegedly indicated that Robinson did not suffer an "adverse action."
- **October 9, 2012:** KENT 2013-693—Robinson & Haberlock each executed a Discontinuation of Discrimination Complaint for Case No. SE-MD-12-19.
- **October 17, 2012:** KENT 2013-693-DM – Robinson & Haberlock received a letter from MSHA approving the Discontinuation and indicating that their discrimination Complaint in SE-MD-12-19 was closed as "satisfied." In that letter, MSHA acknowledged receipt of Robinson's letter waiving his discrimination Complaint.
- **November 2012:** KENT 2013-742 – MSHA received a Complaint about the mine and began an investigation. After they left, Maintenance Manager Scott Driver allegedly stated that whoever called MSHA was not a team player and Vulcan should get rid of them. Driver allegedly claimed that shutting down production for MSHA cost \$23,000.00.
- **December 20, 2012:** KENT 2013-836-DM – Haberlock was laid off. He was allegedly not given the opportunity to train in a new or previously performed job as other miners with less seniority were given. Haberlock's counsel cited the following actions as reasons for "intimidation and harassment":
  - Reporting hazardous berm, chocks covered in oil, dislodged pump line, and service truck overweight.
  - Traveling with MSHA inspectors.
- **December 22, 2012:** KENT 2013-742-DM – Robinson was laid off. When he was laid off, Respondent recalled 3 employees with less seniority.
- **January 2, 2013:** KENT 2013-987-DM – MSHA and Robinson created a procedure whereby Robinson would be informed about MSHA inspections so that he could follow the inspector as a Miners' Representative. This process was used on January 5, 8, and 9, 2013.
- **January 8, 2013:** KENT 2013-836-DM and KENT 2013-917-DM – Robinson & Haberlock filed Complaints with MSHA (SE-MD-13-09 & SE-MD-13-10) alleging that their inclusion in a 51-employee layoff was retaliation against them because they were Miners' Representatives.
  - KENT 2013-742-DM (related to KENT 2013-917-DM) – Robinson filed his discrimination claim alleging he was laid-off on December 20, 2012. The decision to lay-off Robinson allegedly occurred after a member of management stated that those who called MSHA were not team players

and should no longer work at the mine. Robinson also alleged the decision was related to his position as Miners' Representative.

- **January 9, 2013:** KENT 2013-987-DM – At a close-out conference with mine management present, Robinson stated that he would not hesitate to call MSHA with any safety concerns. After he made that statement, the operator allegedly failed to notify Robinson of MSHA presence at the mine on March 14, March 27, April 2, and April 3, 2013.
- **February 15, 2013:** Robinson received a letter regarding his claim of discriminatory lay-off from MSHA, which stated that the Secretary determined no discrimination occurred and that he had 30 days to file a discrimination Complaint on his own.
- **February 22, 2013:** Haberlock received a letter regarding his claim of discriminatory lay-off from MSHA, which stated that the Secretary determined no discrimination occurred and that he had 30 days to file a discrimination Complaint on his own.
- **February 25, February 26, or March 6, 2013:** Robinson was discharged. Other employees with less seniority were recalled during the same time period. Robinson alleged that the discharge dealt with his protected activity.
- **March 14, March 27, April 2, and April 3, 2013:** KENT 2013-987-DM – Respondent allegedly failed to inform Robinson about MSHA's presence at the mine, which effectively denied him an opportunity to accompany the inspectors during their inspection.
- **March 25, 2013:** KENT 2013-693-DM – Robinson requested, through counsel, that SE-MD-12-19 be reopened by MSHA for a new investigation. Robinson argued that the investigator who told him to drop his claim was mistaken.
- **March 27, 2013:** KENT 2013-693-DM – Carolyn T. James, Assistant Director, Technical Compliance and Investigation Office, sent an e-mail to Robinson's counsel requesting more information on the alleged wrongdoing by the Inspector in SE-MD-12-19. Robinson's attorney responded the same day with the requested information.
- **April 6, 2013:** The Secretary filed an Application for Temporary Reinstatement on behalf of Robinson with respect to SE-MD-13-09 and docketed as KENT 2013-724-DM
- **April 17, 2013:** Robinson filed a Complaint, Case No. SE-MD-13-17, alleging interference with the exercise of his rights as a Miners' Representative.
- **April 23, 2013:** KENT 2013-693-DM – Carolyn T. James sent a letter to Robinson's counsel explaining that no evidence of wrongdoing on the part of the Inspector in SE-MD-12-19 was present. However, she stated that the evidence from this case will be included in other Complaints by Robinson & Haberlock.
- **April 24, 2013:** KENT 2013-693-DM - Robinson & Haberlock filed a Complaint of Discrimination through counsel for SE-MD-12-19.
  - The Complaint alleged that Vulcan engaged in discrimination in attempting to have Robinson & Haberlock removed from their positions as

- “Representative of Miners” at the quarry, including encouraging and/or allowing the circulation of a petition to remove them from that position.
  - Documentation showed that this Complaint was also filed with Carolyn James.
- **May 9, 2013:** KENT 2013-742-DM – Robinson filed an application for Temporary Reinstatement under the Act.
- **May 14, 2013-May 20, 2013:** KENT 2013-742-DM –Respondent filed an opposition to Robinson’s Application for Temporary Reinstatement.
  - Respondent alleged that the application was not proper as it was first rejected by the Secretary and then re-opened. It also argued that the claim was frivolous.
- **May 23, 2013:** KENT 2013-693-DM – Respondent filed a Motion to Dismiss with respect to SE-MD-12-19.
  - Respondent argued that Robinson & Haberlock conflated a denial of a request to re-open an investigation with a determination by the Secretary that discrimination did not occur. It argued that as no determination had been made by the Secretary, the Section 105(c)(3) Complaint was premature.
- **May 29, 2013:** KENT 2013-742-DM – The parties filed an Agreement regarding the economic reinstatement of Robinson for SE-MD-13-09.
- **June 5, 2013:** KENT 2013-742-DM – Judge Andrews issued an Order Approving Economic Reinstatement Agreement for SE-MD-13-09.
- **June 10, 2013:** KENT 2013-836-DM – The Secretary filed a Discrimination Complaint against Respondent in SE-MD-13-10 regarding Haberlock.
  - The Complaint alleges that Respondent discriminatorily laid off Haberlock for performing his duties as a Miners’ Representative.
- **June 14, 2013:** KENT 2013-693-DM – Robinson & Haberlock filed an Opposition to the Motion to Dismiss with respect to SE-MD-12-19.
  - Robinson & Haberlock argued that MSHA’s denial of their request to re-open this matter constituted an action triggering their rights under 105(C)(3).
- **June 19, 2013:** KENT 2013-693-DM – Respondent filed a Reply to Robinson & Haberlock’s Opposition to the Motion to Dismiss.
- **June 22, 2013:** KENT 2013-693-DM – An Order Denying Motion to Dismiss without prejudice pending the assignment of all related cases was issued.
- **July 3, 2013:** KENT 2013-836-DM – Respondent filed an Answer to the Secretary’s Discrimination Complaint in KENT 2013-836-DM.
  - Respondent denied all of the substantive claims by Robinson & Haberlock.

- **July 10, 2013:** KENT 2013-917-DM – Robinson filed a Discrimination Complaint under SE-MD-13-09 (meaning it was associated with KENT 2013-742-DM).
  - Robinson again alleged that, in his capacity as Miners’ Representative, he reported hazardous conditions including running the plant without water to control dust, fly rock from belts, housekeeping, inoperative lights on a loader, an overweight truck, worn out deck plates, broken guards on equipment, a broken handrail on a belt, and holes on the crusher deck.
- **July 31, 2013:** KENT 2013-917-DM – Respondent filed an Answer to Respondent’s Complaint in SE-MD-13-09.
  - Respondent denied all of the substantive claims by Robinson & Haberlock.
- **August 6, 2013:** KENT 2013-977-DM – The Secretary filed a Discrimination Complaint marked SE-MD-13-18 and SE-MD-13-19. The alleged discrimination included the following:
  - Raising the idea with employees at the mine that they remove Robinson & Haberlock as Miners’ Representatives.
  - Expressing hostility at having Robinson & Haberlock as Miners’ Representatives.
  - Informing employees of ways in which they may get Robinson & Haberlock removed as Miners’ Representatives.
  - Encouraging and/or allowing two hourly employees at the quarry to circulate a petition seeking the removal of Robinson & Haberlock as the Miners’ Representatives during work hours.
  - Allowing miners to talk about the petition and solicit signatures for the petition during company safety meeting during work hours.
  - Denying Robinson & Haberlock’s request to circulate a counter-petition in support of keeping them as Miners’ Representatives.
  - Attempting to intimidate Robinson by asking him to agree with the operator’s position in any potential disputes between the operator and MSHA.
- **August 12, 2013:** KENT 2013-693-DM – Respondent filed an Answer to the Complaint in SE-MD-12-19.
  - Respondent denied all of the substantive claims by Robinson & Haberlock.
- **August 12, 2013:** KENT 2013-987-DM – The Secretary filed a Discrimination Complaint on behalf of Robinson in SE-MD-12-17.
  - The Complaint alleged that Respondent failed to notify Robinson of MSHA inspections and effectively interfered with his ability to act in the capacity of Miners’ Representative.



- **September 3, 2013:** KENT 2013-693-DM – Secretary filed a motion to Amend Complaint to reflect the civil penalty amount.
- **September 6, 2013:** KENT 2013-917-DM - Secretary filed a motion to Amend Complaint to reflect the civil penalty amount.
- **September 6, 2013:** KENT 2013-977-DM – Respondent filed a motion to Dismiss with respect to SE MD-13-18 and SE-MD-13-19.
  - Respondent claimed that the Secretary’s Complaint was untimely and failed to state a claim upon which relief could be granted.
- **September 9, 2013:** KENT 2013-987-DM – Respondent filed an answer to the Complaint in SE-MD-12-17.
  - Respondent denied all of the substantive claims by Robinson & Haberlock.
- **November 18, 2013:** KENT 2013-977-DM – Secretary filed a Response to Respondent’s Motion to Dismiss.
- **November 20, 2013:** KENT 2013-977-DM – Robinson & Haberlock filed Response to Respondent’s Motion to Dismiss.
- **November 25, 2013:** KENT 2013-977-DM – Secretary filed Amended Response to Respondent’s Motion to Dismiss.

## **II. Contentions of the Parties:**

The Respondent argues that Robinson and Haberlock’s Discrimination Complaints should be dismissed as untimely. *Resp. Mot. To Dismiss*, 3-6. The Respondent asserts that the Complainants’ April 2013 filings for events that occurred between August-September 2012 exceeded the 60-day statutory time limit. *Id.* at 5. While conceding that the statutory timeframes are not jurisdictional, the Respondent argues that the Complainants delays were unexcused, and should be dismissed. *Id.* at 3-6. The Respondent further argues that cases SE-MD-13-18 and SE-MD-13-19 should be dismissed on the grounds that allowing §105(c)(2) and §105(c)(3) cases that are based on the same sets of facts to proceed would cause “prejudice, confusion, and a waste of judicial resources.” *Id.* at 7.

The Secretary responded that the Complainants were misled, and therefore their delay was justifiable. *Sec. Resp. to Resp.’s Mot. to Dismiss*, 6. Furthermore, the Secretary argues that Respondent suffered no actual prejudice as a result of the delay. *Id.* at 7.

Additionally, the Complainants, through counsel, responded to the Motion to Dismiss by arguing that Vulcan was not prejudiced by the late filing because the Complainants filed the original Discrimination Complaint soon after the alleged conduct occurred. *Resp. of Robinson & Haberlock in Opp. To Vulcan’s Mot. to Dismiss*, 5-6. It was only after they were misinformed by MSHA that they withdrew and refiled. *Id.* The Complainants argue that the Motion to Dismiss should be denied and the various §105(c)(2) and §105(c)(3) actions should be consolidated. *Id.* at 8-9.

### III. Analysis:

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). In the instant matter, the Respondent allegedly interfered with Robinson and Haberlock's rights as miners' representatives in August and September 2012. Robinson and Haberlock proceeded to file *pro se* discrimination complaints with the Secretary on September 20, 2012, well within the 60-day period stated in the Act. However, based on the request and recommendation of the MSHA special investigator assigned to the case, Robinson and Haberlock signed a Department of Labor withdrawal form on October 9, 2012.

Respondent engaged in a series of additional alleged discriminatory against Robinson and Haberlock, leading to additional filings of discrimination complaints, which are detailed *supra*. On March 25, 2013, the Complainants through counsel requested that the Secretary reopen their original discrimination complaints because the withdrawal was based on misinformation from the special investigator. MSHA refused to reopen the discrimination complaint, so the Complainants filed the instant case, based on the same facts as their September 20, 2012 discrimination complaint.

All parties in this case have noted that the Commission has consistently held that the 60-day period for filing a discrimination complaint is not a jurisdictional requirement. *See e.g. Sec'y of Labor ex rel. Nantz v. Nally & Hamilton Enterprises*, 16 FMSHRC 2208, 2215 (Nov. 1994). Indeed, even the legislative history stated this point explicitly.<sup>1</sup> 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),

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<sup>1</sup> 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., 1<sup>st</sup> Sess. 24 (1977), *reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Legislative History of the Federal Mine Safety and Health Act of 1977*, 3401, 2436 (1978).

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 instant case, Robinson and Haberlock filed their discrimination complaints in a timely fashion, and only withdrew after they were misinformed by the MSHA special investigator. The later refiling, which led to the instant §105(c)(2) proceeding is largely based on the same set of facts as the original filing. These self-same circumstances were considered by the drafters of the Mine Act as circumstances warranting a late filing.

Furthermore, there is no evidence of prejudice to the Respondent as a result of the late filing, a matter that is a "primary consideration" for the Commission in such cases. *Morgan*, 21 FMSHRC at 1387. In its Motion to Dismiss, the Respondent offers no evidence of actual prejudice. Indeed, Vulcan concedes that it had notice of the miners' complaints after the initial filings, meaning that it was not surprised by the facts alleged in this similar later filing.

Based on the foregoing facts, the Respondent's Motion to Dismiss is hereby **DENIED**.



Kenneth R. Andrews  
Administrative Law Judge

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