FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 5, 1997

ROLDAN A. AVILUCEA,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 97-103-DM
	:	
PHELPS DODGE CORPORATION,	:	SC MD 97-01
Respondent	:	
	:	Chino Mine

DECISION

Before: Judge Fauver

This is a discrimination action under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq.

Complainant alleges acts of discrimination occurring from October 28, 1993 through May 5, 1994. His complaint to the Mine Safety and Health Administration (MSHA), United States Department of Labor, is dated October 4, 1996. In his letter of that date to Special Investigator David J. Haupt of MSHA, Complainant stated that he had not filed a complaint with MSHA earlier for the following reasons:

> I have not filed a complaint with the Mine Safety and Health Administration because I have become increasingly ill with depression due to the injustice that the Phelps Dodge Corporation meted out to me. It was just recently that I was able to listen to the tape records and, as a result, discover the transaction, the bribe, that the Phelps Dodge Corporation made with Mr. C. Chester Brisco, the arbitrator.

Section 105(c)(2) provides that a miner Awho believes that he has been discharged . . . or otherwise 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 latest act of discrimination in the complaint is an allegation that Respondent bribed an arbitrator on May 5, 1994, based upon statements tape-recorded when Complainant accidentally left his tape recorder on during a recess in an arbitration hearing concerning his discharge by Respondent.

On April 29, 1997, a Show Cause Order was entered requiring Complainant to show cause why this action should not be dismissed for failure to file a complaint with MSHA within the 60-day limitation provided in section 105(c)(2) of the Act.

On May 5, 1997, Respondent filed a motion for summary decision under the Commission=s Rules of Procedure, 29 C.F.R. ' 2700.67, on the ground that the complaint is untimely.

On May 19, 1997, Complainant filed a response to the Show Cause Order. Complainant states that when he was notified by the Company, on November 3, 1993, that he was terminated effective that date, he was Aemotionally devastated@ and Abecame depressed.@ His response states further in part:

> At that time I was the sole breadwinner for my family. As soon as I found buyers for my tools and other possessions that had taken me and my wife years to acquire, I would sell them. The Christmas Season was upon us, and, at that time, my oldest son was 14 years old, my next oldest son was 12 years old, and my youngest one was 9 years old. I had no other choice but to sell what I could. While I was selling what I could, I was also trying to find employment, but, at that time, no one was hiring.
>
> *** The only option that was left for me was to continue to sell all that was left and move somewhere else. This realization further added to my already growing depression.
>
> On February 3, 1994, I went to see Dr. Fed M. Fox, M.D., at the La Cienega Family Practice to see if he could help me with my depression and headaches that I had started to have since the shoving incident of October 28, 1993 .... Dr. Fox recommended that I continue seeing him but due to my financial situation I could not afford to.
>
> I can=t recall the exact date, but sometime in May of 1996, I began to listen to the tape recording that I had made of the Arbitration Hearing of May 5, 1994. While doing so I discovered the portion where Mr. Gurtler, the Technical Services Supervisor for the Phelps Dodge Corporation, had offered the bribe to the arbitrator, Mr. C. Chester Brisco.
>
> After having made this discovery, I became increasingly ill with depression and vomiting spells, but somehow I managed to contact Mr. David Estrada, an employee of the Mine Safety and Health Administration from the Arizona district on June 1, 1996.

> Mr. Estrada gave me the following telephone number to call: 1-602-649-5452. I called that number and spoke to Mr. Cole, also an employee for [MSHA]. Mr. Cole then transferred me to Mr. Fink and Mr. Fink transferred me to Mr. Haupt in Dallas, Texas. Mr. Haupt then assigned my case to Mr. Mesa and Mr. Mesa transferred my case to Mr. Dennis Rayn in Arlington, VA. I complained to all of the above mentioned men about the discovery that I had made. In other words, I complained [to] MSHA.
>
> What I am saying is that as soon as I discovered the bribe I reported it to the Mine Safety and Health Administration.

On January 10, 1997, MSHA notified Complainant that its investigation revealed no violation of section 105(c). On March 27, 1997, Complainant filed this action.

DISCUSSION WITH FINDINGS AND CONCLUSIONS

Under section 105(c)(2) of the Act, if a miner believes that he has been discharged in violation of section 105(c)(1), and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with MSHA within 60 days after the alleged violation. After investigation of the complaint, the Secretary is required to file a discrimination complaint with the Commission on the miner=s behalf if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he must inform the miner, and the miner may then file his own complaint with the Commission.

The purpose of the 60-day time limit is to avoid stale claims, but a miner=s late filing may be excused on the basis of Ajustifiable circumstances.@ *Herman* v. *IMCO Services*, 4 FMSHRC 2135 (1982); *Hollis* v. *Consolidation Coal Company*, 6 FMSHRC 21 (1984).

The legislative history relevant to the 60-day time limit states:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would 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.

S. Rep. 181, 95th Con., 1st Sess. 36 (1977), reprinted in Senate Subcommittee 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).

The imposition of a time limit for instituting legal proceedings is primarily designed to to assure fairness to the opposing party by:

> . . . preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Burnett v. *N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965), quoting *R.R. Telegraphers* v. *REA*, 321 U.S. 342, 348-349 (1944).

I do not find justifiable circumstances that excuse the delay of over 2 years in instituting this action. The tape cassette that triggered Complainant=s decision to bring this action was in his possession and control from May 5, 1994, onward. He could have listened to it at any time, and his access to the tape was not interfered with by any act of Respondent. The depression attributed to Complainant=s discharge on November 3, 1993, may explain his distraction and lack of interest or motivation to listen to the tape recording of his arbitration case for over 2 years. However, it did not prevent him from listening to the tape. The shortness of the time limit Congress set for bringing actions under section 105(c) indicates that a delay of over 2 years would require very special circumstances to justify the delay. I find that the response to the Show Cause Order does not carry that burden.

ORDER

WHEREFORE IT IS ORDERED that the Motion for Summary Decision is **GRANTED**, and this proceeding is **DISMISSED.**

William Fauver
Administrative Law Judge

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