

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 21, 1997

LENDON SHEPHERD, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. KENT 97-51-D
 : BARB CD 96-18
v. :
 : Wiley Surface Mine
CONSOL OF KENTUCKY, INC., : Mine ID 15-17664
Respondent :

DECISION

Appearances: Lendon Shepherd, Hueysville, Kentucky, pro se;
Elizabeth Chamberlin, Esq., Consol, Inc.,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by Lendon Shepherd under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act," alleging that he was discharged by Consol of Kentucky, Inc. (Consol) in violation of Section 105(c)(1) of the Act.¹ In a Motion to Dismiss and

¹ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or

Amended Motion to Dismiss Consol notes that the Complainant was admittedly discharged on October 20, 1995, and did not file a complaint with the Mine Safety and Health Administration (MSHA) alleging that he was unlawfully discharged until September 5, 1996. Consol argues therefore that the complaint should be dismissed as untimely.

In relevant part, Section 105(c)(1) of the Act prohibits the discharge of a miner for filing a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation. *fn 1 Supra*. If a miner believes that he has been discharged in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation and in accordance with Section 105(c)(2) of the Act.² The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (January 1984); *Herman v. Imco Services*, 4 FMSHRC 2135 (December 1982). In those decisions the Commission cited the Act's legislative history relevant to the 60-day time limit:

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

has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of
Footnote 1 Continued

miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

² After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this 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 shall so inform the miner, and the miner then may file his own complaint with the Commission under Section 105(c)(3) of the Act.

misunderstands his rights under the Act. (citation omitted).

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

At hearings, Mr. Shepherd testified that he and his brother, Gordon, visited the Hazard, Kentucky office of the Mine Safety and Health Administration (MSHA) in November 1995, around the tenth of the month. According to Shepherd, he met with MSHA Special Investigator Maurice Mullins who wrote what he told him on a "yellow piece of scratch paper". Shepherd further described what occurred at this alleged meeting in the following colloquy:

Q. All right. And what did you tell Mr. Mullins at that time?

A. I told him that I had been terminated after being off with an injury.

Q. You had been terminated after being off with an injury?

A. With a work-related injury. And still under a doctor's care. Not released to go back to work by that doctor.

Q. Is there anything else you told him?

A. Yeah. That the one treating physician that I had been seeing --

Q. I'm sorry. You'll have to speak up.

A. The one treating physician that I had been seeing had released me to go back to work. Another treating physician, my primary treating physician, does physicals for Consol of Kentucky, as well. And he would not release me to go to work. He told me that I was not able to return to work at that time.

Q. All right. Anything else you told him?

A. I was put through a regular pre-hiring physical, pre-employment physical, after 14 years of employment.

Q. This is what you told Mr. Mullins, you're saying?

A. Yes, sir.

Q. All right.

A. And I was told that I came to work on drugs. And fired for that reason.

Q. I'm sorry?

A. And fired for that reason.

Q. You said you were put through a prework physical?

A. A pre-employment physical.

Q. And what happened?

A. I was terminated.

Q. As a result of that physical?

A. They said, yeah, they told me that I came to work on drugs.

Q. Okay. And in response to that, what did Mr. Mullins tell you?

A. That he would investigate it, look into it, and get back with me.

Q. He would what?

A. He would investigate it and get back with me. Get back, contact me.

Q. And is that all that occurred then at the office at that time?

A. Yeah. During that time, the federal government shut down, is what I was told. I inquired with MSHA on several occasions, and I was told that the federal government had shut down and he was not working at that time. That's the reason for my late filing. Because I didn't sign a piece of paper or anything. You know, he said he was going to investigate this thing.

Q. Well, did Mr. Mullins get back to you at all?

A. No, sir.

According to Shepherd, Mullins never again contacted him so he filed the instant complaint in the Martin, Kentucky MSHA

office on September 5, 1996. Shepherd further testified that after his discharge he conferred with 20 attorneys in 1995 alone.

The record shows that an attorney for the Appalachian Research and Defense Fund, Christine Heatley, acting on behalf of Mr. Shepherd, requested on December 4, 1995, information from Consol pertaining to Complainant's positive drug tests. (Exhibit R-1). Shepherd also filed applications for unemployment insurance, worker's compensation, and for benefits under the Americans With Disabilities Act regarding his October 20 discharge.

At hearing Lendon Shepherd's brother, Gordon Shepherd, testified that he accompanied Lendon to the Hazard offices in November 1995. Gordon Shepherd testified that his brother, in fact, went into Mr. Mullins's office and Mullins took notes on a note pad and said that he would investigate the complaint.

At continued hearings Maurice Mullins, the Special Investigator for the Hazard, Kentucky MSHA office, testified that he had served in that capacity since 1982. In 1995 he was the only investigator handling "Section 105(c)" cases out of the Hazard MSHA office. According to Mullins, if a person came into the MSHA office to file a complaint under Section 105(c), they were referred to "complaint processors" in the office who would type up the complaint. The complaint processor would then call the Barbourville, Kentucky MSHA office and obtain a case designator number. At that point a copy of the complaint would be retained in the office and copies would be mailed to the Complainant and to the Operator. Mullins had checked the office records and found no complaint filed by Mr. Shepherd in 1995. Mullins testified that he took a statement from Mr. Shepherd on September 16, 1996, pursuant to the instant complaint filed on September 5, 1996, and that he therefore now can identify Mr. Shepherd. He has no recollection of ever having met Shepherd prior to September 16, 1996.

I find Mr. Mullins' testimony credible regarding the standard procedures followed in the Hazard MSHA office in receiving discrimination complaints, that there was no record of Mr. Shepherd having filed any complaint with his office in 1995 and that he had no recollection of having ever met Shepherd prior to his taking his statement on September 16, 1996. Under the circumstances I do not find Shepherd's claims that he had filed his complaint in November 1995, to be credible. He does not claim that he was ignorant of the filing requirements but only that he had filed within the 60-day time-frame set forth in the

Act. Under the circumstances the complaint he filed on September 5, 1996, regarding his discharge on October 20, 1995, is untimely and cannot be excused for any "justifiable circumstance". Consol's Motion to Dismiss is accordingly granted.

ORDER

Discrimination Complaint, Docket No. KENT 97-51-D, is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Lendon Shepherd, 1625 Salyer Branch Road, Hueysville, KY 41640
(Certified Mail)

Elizabeth S. Chamberlin, Esq., Consol, Inc., 1800 Washington
Road, Pittsburgh, PA 15241 (Certified Mail)
(Certified Mail)

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