

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**1730 K STREET, N.W., Room 6003**

**WASHINGTON, D. C. 20006-3868**

**Telephone No.: 202-653-5454**

**Telecopier No.: 202-653-5030**

August 13, 2002

JERRY POLLY,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
v.	:	Docket No. KENT 2002-253-D
	:	
POWELL MOUNTAIN COAL	:	BARB-CD-2002-04
COMPANY, INC.,	:	
Respondent	:	Mine: Kentucky Wallins Mine

**ORDER DENYING MOTION TO DISMISS**  
**ORDER TO RESPONDENT TO FILE AN ANSWER**

**Before: Judge Barbour**

On July 17, 2002, the Respondent, Powell Mountain Coal Company, Inc. ("Powell"), filed a motion to dismiss the above captioned discrimination case. In support of the motion, Powell asserts the Complainant, Jerry Polly, failed to file a discrimination complaint with the Commission within 30 days notice by the Mine Safety and Health Administration ("MSHA") that no violation occurred under Section 105(c) of the Mine Act ("the Act"). Resp. Mot. at 1. Powell argues that Polly was required to file a complaint with the Commission by May 15, 2002, but Polly did not mail the complaint until June 4, as shown by a copy of the envelope. Mot. at 2; Resp. Exhibit 4.

Section 105(c)(3) of the Act states in pertinent part: "[i]f the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

The record indicates, as Powell correctly states in its motion, that MSHA's letter is dated April 15, 2002, and, therefore, Polly had until May 15, 2002, to file a complaint with the Commission. However, Powell is mistaken in asserting that Polly did not timely file a complaint. My office received Polly's complaint on May 13, 2002, two days before the deadline. Subsequently, on May 14, 2002, I sent a letter to Polly - as is normal practice - instructing him to file additional information, within 30 days, including a copy of the return receipt indicating he had sent a copy of the complaint to Powell. If Polly had not already sent a copy of the complaint to Powell, I instructed him, in the alternative, to do so via certified mail, return receipt requested. My office timely received the required information on June 14, 2002.

Thus, the record clearly indicates that Polly was in compliance with MSHA's April 15

letter and my May 14 letter. Polly timely filed his documents with my office. Polly's apparent error was in failing to timely serve Powell with a copy of the complaint, an error that likely was the root of Powell's belief that Polly did not timely file a complaint. Commission Rule 7(a) (29 C.F.R. § 2700.7(a)) requires all documents filed with the Commission to be served on all parties. However, Polly, who is appearing pro se, may have been unaware of the rule. He is now, and I expect him to fully comply in the future.

In light of the foregoing, Powell's motion to dismiss is **DENIED**.

Further, Powell is **ORDERED** to file an answer to the complaint within 30 days of the date of this order.

David F. Barbour  
Chief Administrative Law Judge

Distribution:

Jerry W. Polly, HC 61, Box 199, Pineville, KY 40977 (Certified Mail)

Marco M. Rajkovich, Jr., Esq., Melanie J. Kelpatrick, Esq., Noelle M. Holladay, Esq., Wyatt, Tarrant & Combs, LLP, 1600 Lexington Financial Center, Lexington, KY 40507 (Certified Mail)

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