

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 8, 2007

LAWRENCE L. PENDLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2007-83-D
	:	MADI CD 2007-01
v.	:	
	:	
HIGHLAND MINING COMPANY, INC.,	:	Highland No. 9 Mine
Respondent	:	Mine ID 15-02709

ORDER OF DISMISSAL

Before: Judge Feldman

This matter arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”), 30 U.S.C. § 815(c)(3), after Lawrence L. Pendley filed a discrimination complaint with this Commission on his own behalf on December 7, 2006, against Highland Mining Company, Inc. (“Highland”). Pendley’s complaint followed a November 6, 2006, determination by the Mine Safety and Health Administration (MSHA) that its investigation of Pendley’s complaint, filed with MSHA on October 17, 2006, did not disclose facts that constitute a violation of section 105(c) of the Mine Act.

The statutory scheme pertaining to the discrimination provisions of the Mine Act were recently discussed by Chairman Duffy in his concurring opinion in *Speed Mining, Inc.*, 28 FMSHRC 773 (September 2006):

[In section 105(c)] Congress authorizes the Commission to entertain discrimination complaints brought by miners when the Secretary has declined to do so. Under section 105(c), a miner is allowed to file a discrimination complaint if he believes an operator has retaliated against him for the exercise of his safety rights under the Act. The miner first files the complaint with the Secretary who, upon finding discriminatory conduct, files a complaint for relief with the Commission. If, however, on preliminary investigation, the Secretary determines that no discriminatory practice has occurred, the miner retains the right to bring a complaint on his own behalf before the Commission.

28 FMSHRC at 785.

Although MSHA initially, advised Pendley on November 6, 2006, that its investigation did not reveal evidence of discriminatory conduct of Highland, the November 6, 2006, determination was superceded by MSHA's December 12, 2006, determination that it was reopening its investigation into Pendley's complaint. Consequently, on January 12, 2007, Highland filed a motion to dismiss Pendley's 105(c)(3) complaint filed on his own behalf as premature because it lacks the jurisdictional predicate of an MSHA finding, upon investigation, that no discrimination occurred. Pendley has not opposed Highland's motion.

Highland is correct. The Secretary's decision to reopen her MSHA investigation renders Pendley's 105(c)(3) complaint defective because it negates the finding by MSHA that no discrimination occurred which is a prerequisite to the filing of a valid 105(c)(3) complaint. Accordingly, **IT IS ORDERED** that Pendley's discrimination complaint **IS DISMISSED**, without prejudice, as defective. In other words, Pendley may refile his complaint on his behalf under section 105(c)(3) if the Secretary ultimately concludes that her MSHA investigation failed to reveal evidence of discrimination. Alternatively, if the Secretary finds evidence of discrimination, she shall file a discrimination complaint with this Commission on Pendley's behalf pursuant to section 105(c)(2) of the Mine Act.

Jerold Feldman
Administrative Law Judge

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