

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 13, 1995

KENNETH F. COLE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 94-548-D
	:	
U. S. STEEL MINING COMPANY,	:	PITT 94-03
Respondent	:	
	:	Cumberland Mine

DECISION

Appearances: Mr. Kenneth F. Cole, pro se, Morgantown,
R. Henry Moore, Esq., Buchanan Ingersoll,
Professional Corporation, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Maurer

This proceeding concerns a complaint of discrimination filed by the complainant (Kenneth F. Cole) against U. S. Steel Mining Company (U. S. Steel) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act).

On January 9, 1995, U. S. Steel filed a Motion for Summary Decision (which I am treating as a Motion to Dismiss), alleging, inter alia, that the instant complaint is barred by the statute of limitations and by laches. Subsequently, on June 29, 1995, the undersigned held a limited hearing for the complainant to explain why his complaint should not be dismissed because of his failure to timely file this belated section 105(c) complaint with the Mine Safety and Health Administration (MSHA). I also considered a related matter. That is, his failure to seek Commission review of an earlier identical complaint that had been rejected by MSHA back in March 1992.

A chronology of the significant events which gave rise to the instant complaint is as follows:

January 13, 1992 - Complainant is involved in an altercation at He alleges he was injured during the incident and requested that the company complete an

February 6, 1992 - Complainant filed a section 105(c) concerning the January 13, 1992, incident, but they refused. They also allegedly threatened to suspend him with the intention incident himself.

March 31, 1992 - After an investigation, MSHA notified the complainant that they had determined "no violation" of section 105(c) of the Mine Act had occurred. They also notified him that he had the right, within 30 days, to file his own action with the Commission. He did not do so, however, until now.

April 14, 1994 - Complainant refiles his original complaint

July 11, 1994 - MSHA once again notifies complainant that they have determined "no violation" of

August 10, 1994 - FMSHRC receives the complaint at bar.

The critical two dates for purposes of this motion are January 13, 1992, the date of the altercation, and April 14, 1994, the date the instant section 105(c) complaint was filed with MSHA.

As noted in the above chronology, complainant had earlier filed a timely complaint with MSHA on February 6, 1992; but when it was denied on March 31, 1992, he failed to follow through with filing his own appeal to the Commission by the end of April 1992.

As the respondent complains of in his motion, the complainant failed to follow through with his original 1992 complaint and only now has refiled his complaint with MSHA some 2 years and 3 months after the alleged discriminatory activity occurred.

In accordance with section 105(c)(2) of the Mine Act any miner who believes he has been discharged or discriminated against may, within 60 days of the alleged act of discrimination, file a complaint with the Secretary of Labor. The Secretary is then required to conduct an investigation and make a determination as to whether or not a violation of section 105(c) has occurred. If the Secretary determines that the miner's allegations of discrimination are valid and a violation has occurred, he is required to file a complaint on the miner's behalf with the Commission.

Pursuant to section 105(c)(3) of the Act, if the Secretary determines that a violation of section 105(c) has not occurred, he must so inform the miner, and the miner then has a right to file a complaint on his own behalf with the Commission within 30 days of notice of the Secretary's determination.

Ordinarily, when dealing with late-filings of a few days or even a few months, the Commission has determined that the time limits in sections 105(c)(2) and (3) "are not jurisdictional" and that the failure to meet them should not result in dismissal, absent a showing of "material legal prejudice." See, e.g., Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). However, in that same decision, the Commission also stated that "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay. . . ." Here, we are dealing with an extraordinarily late filing in excess of 2 years. At some point there has to be an outer limit, if the 60-day rule contained in the statute has any meaning at all.

In David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 9, 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984) (table), the Commission affirmed a dismissal of a miner's discrimination complaint filed 6 months after his alleged discriminatory discharge. The Commission stated that "timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation," 6 FMSHRC 24.

Mr. Cole's explanation for his failure to follow-up on the March 1992 rejection of his original complaint by MSHA was that he put it into the hands of one Mr. Brunsak, a union official, in early April of 1992. Both Mr. and Mrs. Cole were left with the impression that he (Brunsak) would file the appeal with FMSHRC for him. That appeal would have been timely taken only if filed on or before April 30, 1992. In fact, nothing was ever filed with FMSHRC and Mr. Brunsak denies he ever gave any such assurances to the Coles.

U. S. Steel's position is that the proper and appropriate procedural route for the complainant after receiving the Secretary's March 31, 1992, determination that no violation of section 105(c) occurred would have been the filing of a complaint with the FMSHRC within the 30 day time limit. Arguably, by failing to do that, complainant has waived his right to file any subsequent complaints with MSHA concerning the same incident. This is essentially what Mr. Cole did in this case. Rather than file an appeal of the Secretary's adverse determination with the Commission back in April of 1992, he refiled the same complaint with MSHA 2 years later, in April of 1994. That refiled complaint is now before me under section 105(c)(3) of the Act after a second adverse determination by MSHA.

In Herman v. IMCO Services, 4 FMSHRC 2135, 2138-2139 (December 1982), the Commission observed that the placement of limitations on the time periods during which a plaintiff may institute legal proceedings is primarily designed 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.

Under the circumstances, I conclude that complainant has not shown justifiable circumstances to excuse his seriously late-filed complaint. The refiled complaint was filed over 2 years out of time and alleges nothing that was not already considered and rejected by MSHA in the original complaint of discrimination filed shortly after the incident in 1992.

Accordingly, complainant's refiled complaint filed with MSHA on April 14, 1994, is found to be excessively stale and will be dismissed herein.

ORDER

In view of the foregoing, the complainant's refiled complaint is found to have been untimely filed and on that basis, the respondent's motion to dismiss this case is **GRANTED** and the complaint is **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Kenneth F. Cole, Route 10, Box 370, Morgantown, WV 26505
(Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, Professional
Corporation, 600 Grant Street, 58th Floor, Pittsburgh, PA
15219-2887 (Certified Mail)

dcp