

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

December 12, 2003

LARRY E. MULLINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. VA 2003-129-D
	:	NORT CD 2002-06
	:	
JEWELL SMOKELESS COAL CORP.,	:	
	:	
Respondent	:	Heavy Equipment Shop
	:	Mine ID 44-07058

**ORDER RESCINDING ORDER GRANTING MOTION TO DISMISS /  
NOTICE OF RESCHEDULED HEARING**

\_\_\_\_\_At hearings on December 10, 2003, an order was issued granting the Respondent's Motion to Dismiss. That motion was based upon the argument that the Complainant failed to file his complaint of discrimination with the Secretary in compliance with Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. The bench decision granting the motion was based upon a finding of a lack of justifiable circumstances for the late filing. See *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 1 (January 1984). Upon further analysis of the relevant caselaw I conclude that even where justifiable circumstances are not found that is not necessarily the end of the analysis. The Commission stated in this regard in *Herman v. Imco Services*, 4 FMSHRC 2135 (December 1982) as follows:

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.

*Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965), quoting *R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

The Commission concluded therein that "[t]o be balanced against this policy of repose, however, are considerations of whether 'the interests of justice require vindication of the Plaintiff's rights' in a particular case. *Burnett*, supra, 380 U.S. at 428."

In the case at bar, the delay beyond the 60-day time limit was not significant (44 days) and the Respondent failed to produce any evidence of prejudice from the delay. More recent Commission decisions, *e.g.*, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (December 1999) also seem to suggest that the failure to meet the time limits in Section 105(c)(2) should not, in any event, result in dismissal absent a showing of “material legal prejudice.”

Under the circumstances the December 10, 2003, Order Granting Respondent’s Motion to Dismiss is hereby rescinded and this case is rescheduled for hearings on the merits at **9:00 a.m., on Tuesday, January 27, 2004, in Abingdon, Virginia.** The assigned courtroom will be designated at a later date.

Gary Melick  
Administrative Law Judge  
(202) 434-9977

Distribution: (By Facsimile and Certified Mail)

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