

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 2004

RONALD R. COLE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2004-442-DM
v.	:	WE MD 2004-08
	:	
NEWMONT MIDAS OPERATION,	:	Newmont Midas Mine
Respondent	:	Mine ID 26-02314

## ORDER OF DISMISSAL

Before: Judge Barbour

Section 105(c)(2) of the Mine Act (30 U.S.C. §815(c)(2)) requires a miner who believes he or she has been discharged or otherwise discriminated against to file a complaint with the Secretary within 60 days of the alleged discriminatory act. Here, the complainant, Ronald R. Cole, alleges his December 11, 2003, termination contravened the Act. Mr. Cole filed his complaint with the Secretary on April 28, 2004. The time within which he was to have filed expired on February 9, 2004. Mr. Cole's complaint was 79 days late.

The Secretary's Mine Safety and Health Administration (MSHA) investigated the complaint and on July 22, 2004, advised Mr. Cole it believed the facts did not constitute a violation of Section 105(c). On August 19, 2004, Mr. Cole lodged a complaint with the Commission. As part of its answer to the complaint, Newmont noted that it was "untimely" filed with the Secretary and asserted it should be dismissed.

On September 22, 2004, I ordered Mr. Cole to state why his complaint was late-filed and Newmont to state what, if any, prejudice it suffered due to the delay. I noted that although the Commission repeatedly has held the time limit for filing a complaint is not jurisdictional, to withstand dismissal, the miner must establish justifiable circumstances for the late filing, or to be granted the dismissal, the operator must show it has suffered material prejudice (Order 1 (citing Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (January 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984 (table))).

In responding to the order Mr. Cole stated, "The reason for the delay . . . is due to the fact that I was unaware that MSHA was available to assist. I was recently told by Kevin Hirsch of MSHA about this service to protect miner's rights. I spoke to Kevin approx. April 13"

(Attachment to Letter to Judge (October 5, 2005)).<sup>1</sup> For its part, Newmont maintained the delay was prejudicial because of the negative impact it had on the memories of those who witnessed the events preceding Mr. Cole's termination. Newmont asserted that several persons it would call now work at other Newmont facilities and, "Their recollection about . . . [the events leading to Mr. Cole's discharge] will not be as strong as . . . if Mr. Cole had complied with the time limit to file a complaint" (Newmont's Response 5). In addition, another witness, a former crew member, is no longer employed by Newmont (Id.). Finally, Newmont stated that during the delay, Mr. Cole contacted potential witnesses and attempted to get them to change their recollections of an event that directly preceded Mr. Cole's termination (Newmont Response 3-4).

Newmont also expressed its belief that Mr. Cole was very much aware of his section 105(c) rights and of the 60-day time limit for filing a complaint in that he was specifically trained in the topics (Newmont Response 3). Moreover, Newmont stated that it provided Mr. Cole with a copy of the MSHA pamphlet explaining miners' rights under the Act and identifying the 60-day filing deadline (Id.). The company further noted that Mr. Cole had over 20 years' experience in underground mining, including both supervisory and non-supervisory positions. For these reasons, the company contended that Mr. Cole either knew, or should have known, about his rights under the Act, including the fact that he was entitled to file a complaint with MSHA, and that he had to do so within 60 days of the company's allegedly discriminatory act (Id.).

### **THE LAW**

When ruling on a motion or other request to dismiss a late-filed complaint, the Commission's judges are required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" (Hollis, 6 FMSHRC at 24). In the past, several factors that have been considered in determining whether to excuse a delay (see William T. Sinnott, II v. Jim Walter Resources, Inc., 16 FMSHRC 2445 (December 1994) (ALJ) (considering complainant's capacity or ability to pursue a remedy under the Act); Secretary of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc., 18 FMSHRC 278 (February 1996) (ALJ) (considering complainant's awareness of his or her rights under the Act)). It has also been held that whether the delay has caused prejudice to the operator is relevant (Hollis, supra).

### **RULING**

Turning first to Newmont's claims of prejudice, I do not find the assertions of faded memories regarding the events leading to Cole's discharge to be persuasive. The complaint was approximately two and one half months late, a delay whose length reasonably would not be

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<sup>1</sup> Because Mr. Cole did not indicate he served counsel for Newmont with a copy of the letter and attachment, I have sent counsel the necessary copies.

expected to engender memory lapses. Nor is it prejudicial that two of Newmont's potential witnesses no longer work at the mine site. They still work for Newmont, and their testimony presumably can be obtained. Moreover, although Newmont maintains that another witness no longer works for Newmont – a situation that might make his or her testimony inconvenient to obtain – the company does not assert the testimony is unavailable. As for Newmont's contention that Mr. Cole attempted to intimidate some of those who might testify against him during the time between his termination and the filing of his complaint, even assuming intimidation occurred and was prejudicial to Newmont's case, I cannot conclude the prejudice was caused by the delay since the intimidation might have taken place even if Mr. Cole had filed his complaint in a timely manner.

However, the complaint still may be dismissed if Mr. Cole has failed to provide a justifiable excuse for the late filing, and I conclude that Mr. Cole's excuse for the delay – essentially that he was unaware of his rights or, as he put it, “that MSHA was unavailable to assist [me]” – does not pass scrutiny. Newmont points out through the affidavit of its Health, Safety and Loss Prevention Manager, Lee Morrison, that Mr. Cole underwent annual refresher training for underground miners in March, 2001 (Newmont Response, Affidavit 2). Mr. Morrison was among those who conducted the training for the then owner of the mine, Dynatec. The training included a discussion of miner's rights and responsibilities (*Id.*). Mr. Morrison states in his affidavit that in addition to discussing miners' rights, the participants in the training, including Mr. Cole, received a copy of a MSHA pamphlet entitled A Guide To Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act 1977.<sup>2</sup> Page 3 of the pamphlet contains a section entitled, “Your Rights Under the Mine Act.” The section includes a subsection entitled “Protection Against Discrimination: Section 105(c)” and the statement: “It is not legal for you to be fired . . . or otherwise lose job benefits for exercising your rights under the Act.” Page 4 of the pamphlet states “A discrimination complaint . . . should be promptly filed with [MSHA]” and cautions, “We [i.e., MSHA] may not be able to pursue a claim unless it is filed *within 60 days* of the act of discrimination”(*Id.*, Attachment B). Page 4 goes onto explain, *inter alia*, that MSHA may ask the Commission to order a complainant's temporary reinstatement and that MSHA may file a complaint on the complainant's behalf (*Id.*). On March 9, 2001, Mr. Morrison and Mr. Cole signed a certificate showing that Mr. Cole attended the training

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<sup>2</sup> To support Mr. Morrison's statement, the company has submitted an outline of the refresher training course. Standing alone, the outline is ambiguous regarding the pamphlet given to the miners. The outline indicates that during the training two topics were discussed between 4:00 p.m. and 4:45 p.m.: “Rights and Responsibilities of Miners” and “Explosive Handling” (Newmont Response, Affidavit 2, Exhibit A at 4). The instruction “Hand out new pamphlet & discuss” is listed under “Explosive Handling”, not under “Rights & Responsibilities of Miners” (*Id.*). However, Mr. Morrison's sworn affidavit eliminates the ambiguity. Mr. Morrison states: “Exhibit A [is] the course outline for the training program. As page 4 [of Exhibit A] indicates, one of the items discussed was miner's [sic.] rights. As the outline indicates, we handed out to the miners attending this program what was at the time MSHA's new pamphlet concerning miner's rights” (*Id.*).

(Id., Attachment C).

In a resume submitted on August 21, 2001, to another previous owner of the mine, Normandy Midas Operations, Inc., Mr. Cole stated that he had been employed by various companies in underground mining since 1979 and that he had held both rank and-file and management (shift boss) positions. He also indicated he is a high school graduate (Newmont Response, Affidavit 2, Exhibit D).

Given Mr. Cole's educational background, his long experience in underground mining and the annual refresher training he received in March, 2001, I conclude that Mr. Cole either knew or should have known about the time limit within which to file his complaint. His statement that he missed the deadline because he did not know he was entitled to assistance from MSHA until he spoke with an MSHA representative on April 13 is simply not credible.

Mr. Cole worked for many years in the underground mining industry both for labor and for management. It defies belief that during these years he did not learn that MSHA may represent a miner who claims he or she has been discriminated against for safety-related reasons. In addition, Mr. Cole as the holder of a high school diploma is presumed to understand what he hears and reads.<sup>3</sup> He was trained in miners' rights under the Act. He received the MSHA publication explaining both the need to file within 60 days and how MSHA investigates a complaint and otherwise acts on behalf of a complainant. To find that Mr. Cole's had no knowledge of these matters until approximately April 13, 2004, would infer that Mr. Cole was oblivious of the milieu in he which worked and lacked the most elementary comprehension abilities. The record does not support such inferences.

There are times when a person must be accountable for his or her omissions as well as commissions. This is such a time. Letting Mr. Cole's claim proceed in the face of his incredible excuse, would render virtually meaningless the 60-day limit of section 105(c)(2).

The complaint is **DISMISSED**.

David F. Barbour  
Administrative Law Judge  
(202) 434-9980

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<sup>3</sup> Although Mr. Cole claims ignorance of Mine Act's discrimination provisions, he seems to have been knowledgeable about his rights under other statutes. In an affidavit, Newmont's Human Resources Representative states, inter alia, that after his discharge, Mr. Cole filed for unemployment benefits and filed a Worker's Compensation Claim against Newmont (Newmont Response, Exh. 1 at 2-3).

Distribution: (Certified Mail)

Ronald R. Cole, 7800 Grass Valley Road, Winnemucca, NV 89445

Andrew W. Volin, Esq., Sherman & Howard, LLC, 633 Seventeenth Street, Suite 3000, Denver, CO 80202

Joe Driscoll, Tom Kerr, Newmont Midas, Operations, HC 66, Box 125, Midas, NV 89414-9801