

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

May 14, 1999

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of ALLEN HAMILTON,	:	
Petitioner	:	Docket No. WEST 99-107-DM
	:	
v.	:	
	:	Lime Mountain Quarry
RONDY'S INC. d/b/a IDAHO LIME, a:	:	
corporation,	:	
Respondent	:	

**ORDER DENYING MOTION TO DISMISS  
AND FOR SUMMARY DECISION**

Respondent filed a motion to dismiss this case on the grounds that: (1) the Secretary of Labor failed to notify Mr. Hamilton of her determination that Respondent violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("Mine Act"), within 90 days of receipt of Mr. Hamilton's complaint of discrimination, as required by section 105(c)(3); and (2) the Secretary of Labor failed to file a discrimination complaint with the Commission within 30 days after her written determination that a violation occurred, as required by 29 C.F.R. § 2700.41(a). In the alternative, Respondent argues that it is entitled to summary decision on the same grounds. The Secretary of Labor opposes the motion.

The essential facts are not in dispute. Mr. Hamilton filed his complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") on or about August 13, 1997. He filed this complaint within 60 days of the alleged act of discrimination, as required by section 105(c)(2). By letter dated October 29, 1998, counsel for the Secretary notified Respondent and Mr. Hamilton of MSHA's belief that Respondent had terminated Mr. Hamilton from his employment in violation of section 105(c). In the letter, counsel suggested that the parties attempt to settle the matter. The case did not settle and, after a change in the Secretary's counsel, a formal complaint of discrimination was filed with the Commission on or about January 22, 1999.

It is clear that the Secretary violated section 105(c)(3) of the Mine Act by failing to notify Mr. Hamilton of her "determination whether a violation ... occurred" within 90 days of receipt of his complaint. It is also clear that this time-frame is not jurisdictional. The legislative history of the Mine Act states that the deadlines imposed on the Secretary in section 105(c) are not jurisdictional and that the failure of the Secretary to meet them "should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the

failure of the Government to meet its time obligations.” S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624 (1978).

In interpreting the deadlines imposed on the Secretary in section 105(c), the Commission concluded that the “fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend itself against the claim.” *Secretary of Labor for Donald R. Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986). Accordingly, the Commission held that a discrimination complaint is subject to dismissal when the Secretary failed to meet the statutorily imposed deadlines “if the [mine] operator demonstrates material legal prejudice attributable to the delay.” *Id.* This test requires more than a mere allegation of prejudice.

The Secretary states that MSHA’s investigation of Mr. Hamilton’s complaint was not completed on time because: (1) Mr. Hamilton claims that he was exposed to toxic substances and MSHA needed to consult with an expert toxicologist; and (2) Mr. Hamilton was difficult to reach because he did not have a telephone. The Secretary states that the delay in this case was reasonable and that Mr. Hamilton’s discrimination claim should not be dismissed.

Respondent does not allege that it was materially prejudiced by this delay. There has been no showing that the Secretary’s failure to report its findings to Mr. Hamilton with 90 days has hindered the ability of Respondent to defend itself in this case. I agree with the Secretary that Respondent has not set forth adequate grounds to dismiss this case because of this delay.

Rule 41(a) of the Commission’s procedural rules provides that the Secretary shall file her discrimination complaint “within 30 days after his written determination that a violation has occurred.” 29 C.F.R. § 2700.41(a). Respondent contends that the letter it received from William Kates of the Office of the Solicitor on or about October 29, 1998, constitutes the Secretary’s written determination that a violation occurred. It contends that since the Secretary failed to initiate this proceeding within 30 days thereafter, the case should be dismissed.

The Secretary contends that Mr. Kates’ letter was written as a courtesy to open settlement negotiations. The Secretary maintains that this proceeding should not be dismissed because she attempted to initiate settle negotiations in good faith. She contends that the letter was not her “written determination” that a violation occurred. In addition, the Secretary argues that even if the letter is deemed to be her written determination of a violation, the case should not be dismissed because Respondent was not prejudiced by the delay.

For the reasons set forth above, Respondent has not set forth sufficient grounds to dismiss this case. Even if I assume that the October 29 letter was the Secretary’s written determination of a violation, there has been no showing that the delay has materially prejudiced Respondent. The parties were engaged in settlement negotiations during that period.

For the reasons set forth above, Respondent's motion to dismiss this proceeding or in the alternative for summary decision is **DENIED**. Dismissal is a harsh remedy and Mr. Hamilton should not have his case dismissed because the Secretary of Labor was not able to meet the deadlines set forth in the Mine Act or the Commission's rules in the absence of material legal prejudice.

Richard W. Manning  
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Fax and U.S. Mail)

Stephen C. Rice, Esq., Aherin, Rice & Anegon, P.O. Drawer 698, Lewiston, ID 83501-0698 (Fax and U.S. Mail)

RWM