

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

August 6, 2001

DANIEL C. HOWELL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 2000-80-DM
v.	:	NE MD 00-03
	:	
CAPITOL CEMENT CORPORATION,	:	Martinsburg Plant
Respondent	:	Mine ID 00-03

**ORDER**

Capital Cement filed a Motion to Dismiss the above-captioned discrimination complaint on August 1, 2001, on the grounds that “Complainant failed to file a charge of discrimination ... almost four months after the time period for filing such a charge had expired.”

Section 105(c) sets forth the time limitation applicable to filing a complaint under the Mine Act by requiring that “Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against in violation of this subsection may within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

The Commission has held that the 60-day time limitation in section 105(c) is not jurisdictional and that justifiable circumstances may excuse non-compliance. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). In *Herman*, the Commission found a “prolonged hesitation” of nine months to constitute “extraordinary delay” in filing, and explained the primary objective of imposing time limitations for instituting legal proceedings as assuring 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.

*Id.* at 2138-39, quoting *Bennett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1995), quoting *R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

There are several cases that examine whether untimely filing is excusable, by considering factors such as: Complainant's capacity or ability to initiate and pursue such a remedy, *see William T. Sinnott, II v. Jim Walters Resources, Inc.*, 6 FMSHRC 2445 (1994) (ALJ); Complainant's awareness of his rights under the Act, *id.*; *Hollis, supra*; *Secretary of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (1996) (ALJ) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act, filing of substantially identical allegations in workman's compensation and employment discrimination claims, and absence of prejudice to Respondent); *Secretary of Labor on behalf of Smith v. Jim Walters Resources, Inc.*, 21 FMSHRC 359 (1999) (ALJ) (ten month delay excused by filing within 61 days of first learning of section 105(c) and no claim of prejudice by Respondent); *Secretary of Labor on behalf of Gay v. Ikard-Bandy Co.*, 18 FMSHRC 341 (1996) (ALJ) (three month delay excused by filing one day after first learning of section 105(c) rights and no claim of prejudice); and the length of delay and whether it has resulted in prejudice to a Respondent, *see Sinnitt, supra* (delay of over three years "inherently prejudicial"). Consequently, the lengthier the delay, the more substantial the justification required to overcome it. *See Roland A. Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997) (ALJ) ("very special circumstances" required to justify delay of over two years). Concrete demonstrable prejudice may also occur, e.g., unavailability of witnesses or documents. Factors such as these, pertinent to the particular circumstances of each case, must be weighed in order to determine whether delay has been justified. *Hollis, supra*; *Herman, supra*.

In the instant matter, Howell was discharged on October 19, 1999 and filed his discrimination complaint on April 17, 2000, almost four months past the December 20, 1999 deadline for filing. Howell seeks to have delayed filing excused by stating that he lacked knowledge of the procedure by which discrimination complaints are filed, sought information from Capitol Cement and the Department of Labor to no avail, and was not directed to MSHA until he contacted the National Labor Relations Board in March 2000. Crediting Howell's statement that he became aware of his right to file with MSHA in March, filing his complaint on April 17 does not constitute inordinate delay. Moreover, Capitol Cement's claim of prejudice does not appear to amount to any more time and expense than that which would have been required in defending against this action had it been timely filed.

Accordingly, Daniel C. Howell's delay in filing his complaint of discrimination with MSHA was justified and is, therefore, excused, and Capitol Cement's Motion to Dismiss is hereby **DENIED**.

Jacqueline Bulluck  
Administrative Law Judge  
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Distribution: (Certified Mail)

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