FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 27, 1996

CLYDE PERRY	:	
	:	
v.	:	Docket No. WEST 96-64-DM
	:	
PHELPS DODGE MORENCI, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 26, 1996, former Commission Administrative Law Judge Arthur Amchan granted the motion to dismiss of Phelps Dodge Morenci, Inc. ("Phelps Dodge"), concluding that complainant Clyde Perry failed "to state a claim upon which relief may be granted" under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 18 FMSHRC 643, 646-47 (April 1996) (ALJ). The Commission granted Perry's petition for discretionary review. For the reasons that follow, we vacate the judge's dismissal order and remand for further proceedings.

I.

Factual and Procedural Background

On February 16, 1993, Perry injured his right foot at Phelps Dodge's Morenci Branch Mine. 18 FMSHRC at 643. When he returned to work a month later, he was assigned "light duty" work. *Id*. During October 1993, Perry began working as a truck driver. *Id*. After driving trucks for several months, Perry asked to be reassigned to other work because his foot injury was interfering with his ability to operate a truck by causing him pain in his foot, back, and knee. *Id*. He was not reassigned. *Id*.

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

At some point, Perry complained to his superiors at Phelps Dodge that it was unsafe for him to operate heavy equipment because of his medical condition, after which Perry was harassed continually. Compl. at 1; Am. Compl. at 1.[2] During the early morning hours of January 28, 1995, Perry experienced chest pains while working the graveyard shift. Compl. at 4. He went to the hospital, but could not be treated because he was unable to produce a urine specimen which a doctor requested after Perry told him he (Perry) was taking an over-the-counter medicine. *Id*. Perry subsequently tested negative for drugs and alcohol based on the results of a test performed that evening. *Id*. at 7. On February 3, 1995, Perry was fired "pending arbitration." Perry Br. at 3. Apparently he was fired because, according to Phelps Dodge, he tested positive for drugs or alcohol after being in an area where an accident occurred. Compl. at 8.

Perry filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") on September 14, 1995. On November 6, MSHA notified Perry that, in the agency's opinion, Phelps Dodge had not violated section 105(c) of the Mine Act in its treatment of Perry. 18 FMSHRC at 644. On November 17, Perry filed a complaint with the Commission under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). *Id.*; Compl. at 2. In its answer, filed on February 20, 1996, Phelps Dodge moved that Perry be ordered to provide a more definite statement of his claim. 18 FMSHRC at 644. The judge granted Phelps Dodge's motion and ordered Perry to provide a more definite statement of his claim, including a description of his protected activities and when they occurred, the basis for his belief that Phelps Dodge discriminated against him, the nature of the alleged discrimination and when it occurred, and the relief he sought. *Id.*; Order to Show Cause and To Provide a More Definite Statement (February 29, 1996). Perry filed his amended complaint on March 22, 1996. Phelps Dodge replied to the amended complaint on April 25, 1996, and included in its reply a motion to dismiss on the grounds that Perry failed to properly allege that he had engaged in any protected activity, and that he failed to file his complaint within the 60-day limit set forth in section 105(c).

The judge dismissed Perry's complaint in an order dated April 26, 1996. 18 FMSHRC at 647. Without citing Rule 12(b)(6) of the Federal Rules of Civil Procedure, but using its terminology, the judge dismissed Perry's for failure to state a claim upon which relief may be granted.[3] *Id*. The judge found that Perry had "not alleged that he engaged in any activities

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[2] Because this case is before us on an appeal of an order entered pursuant to a motion to dismiss, Perry's allegations are treated as true. *Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776, 1777 (November 1985). Perry's complaint consists of a cover note, a copy of MSHA's letter to Perry regarding its investigation of his complaint, a copy of Perry's original complaint to MSHA, and a note sent to Phelps Dodge informing it that a complaint had been filed. Perry's amended complaint consists of a cover letter, a statement in support of claim, and several attachments. Page references to the complaint and amended complaint are to the documents assembled in the order above.

[3] Rule 1(b) of the Commission's Procedural Rules provides: "On any procedural question not regulated by [these] Rules . . . the Commission and its Judges shall be guided so far as

protected by the [Mine] Act," and that being injured on the job, inability to perform one's tasks, and refusal to take a drug test or testing positive are not protected activities. *Id*. at 646. The judge also found that Phelps Dodge did not violate section 105(c) when it declined to provide Perry alternative employment after he complained that his continued operation of a truck in his condition posed a threat to himself and others. *Id*.

II.

Disposition

Appearing pro se, Perry alleges that Phelps Dodge "retaliated against me because I gave them a lost time accident and, also, for filing a complaint under the [Mine] Act." Perry Br. at 2. He asserts that, on February 16, 1993, he was seriously injured and, thereafter, complained that it was unsafe for him to operate heavy equipment because of his medical condition. *Id*. at 2-3. Although he resumed his duties as a truck driver, "[e]ver since my accident and the complaint I made, I've been harassed, discriminated against, and almost terminated." *Id*. at 3. Perry further asserts that on January 28, 1995, he was discharged pending investigation following an anxiety attack at work and his subsequent inability to produce a urine sample for drug and alcohol testing. *Id*. He states that on February 3, 1995, he was discharged pending arbitration. *Id*. Phelps Dodge asserts that the judge properly dismissed the complaint because Perry failed to allege that he engaged in protected activity and that, in addition, he failed to file his complaint within the time limit imposed by section 105(c). P.D. Br. at 4-6.

A. The Judge's 12(b)(6) Ruling

It is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 5A Wright & Miller, Federal Practice & Procedure: Civil § 1357 (2d ed. 1990). The Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Additionally, we hold the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (August 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). In cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts. *Heckler v. Campbell*, 461 U.S. 458, 470-73 (1983) (Brennan, J., concurring).

Here, Perry was obligated to provide the Commission with "a short and plain statement of the facts, setting forth the alleged . . . discrimination . . . and a statement of the relief requested." 29 C.F.R. § 2700.42. This he did. The judge's finding that Perry failed to allege that he engaged

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practicable by the Federal Rules of Civil Procedure . . ." 29 C.F.R. § 2700.1(b).

in any protected activity is erroneous. Perry alleged that he complained to Phelps Dodge that, because of medical problems arising from an earlier on-the-job accident, his operation of a truck posed a safety hazard to himself and others. Am. Compl. at 1. Such complaints are activities protected under the Mine Act. *Smith v. Kem Coal Co.*, 14 FMSHRC 67, 71 (January 1992); *cf. Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984) ("a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations"). Perry also alleged that after he complained, he was continually harassed and ultimately fired on grounds that were "made up" by Phelps Dodge. Compl. at 1. According to Perry, Phelps Dodge actually fired him because of his complaints "that it [was] unsafe operating heavy equipment under [his] condition." *Id*. Additionally, Perry alleged that when he complained, Phelps Dodge refused to give him light duty work such as he was given after his earlier injury, despite the fact that others similarly situated were routinely assigned such duty. *Id*. at 4.

When the judge ordered Perry to provide the basis for his belief that Phelps Dodge discriminated against him, he essentially required Perry to begin proving his prima facie case at a stage in the proceedings when Perry was simply obligated to meet the Commission's minimal pleading requirements. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981), and *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981) (a miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity). To go beyond the pleading requirements of Rule 42 at so early a stage in a case is particularly inappropriate in view of the complainant's burden to establish discriminatory motive. We have often acknowledged the difficulty of establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991), and cases cited therein.

This case demonstrates the difficulty of establishing all the relevant facts strictly on the basis of a pro se complainant's pleadings. But on the record before us, Perry has more than met his burden of alleging discrimination actionable under section 105(c). Accordingly, we vacate the judge's dismissal order and remand the case for further evidentiary proceedings.

B. The Timeliness of Perry's Complaint

We find unpersuasive Phelps Dodge's argument that Perry's complaint should be dismissed because it was filed at least seven and a half months beyond the time limit set forth in section 105(c). Section 105(c) provides that a discrimination complaint may be filed "within 60 days after [a] violation occurs." A miner's late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and excusable neglect. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-13 (January 1984); *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230-31 (August 1991). Even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require

dismissal. *Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 9 FMSHRC 905, 908 (June 1986). In general, timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (January 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984).

Here, on the question of timeliness, Perry never responded to Phelps Dodge's allegations. In this respect, the case presents a question analogous to one we addressed in *Farmer v. Island Creek* (a case also involving a pro se claimant), where we stated:

> Given complainants' silence below in the face of the operator's motion to dismiss, this case arrives at the Commission in virtually the same posture as a default. As in any default case, the defaulted party has failed to speak at some crucial juncture.

13 FMSHRC at 1232. After noting "a pro se party's general lack of understanding of appropriate Mine Act and Commission procedure," we held:

> We conclude that good cause [for the complainant's delay] has been shown to the extent that, in the interests of justice, the matter should be remanded to the judge so that complainants' explanations can be placed before him for his resolution. At that time, the operator will have the opportunity to present evidence of the material legal prejudice, if any, resulting from such delay.

Id. Following the Commission's reasoning in *Farmer*, we remand this matter for the additional purpose of allowing the judge to determine in the first instance whether appropriate circumstances exist to excuse Perry's allegedly late filing of his discrimination complaint.[4]

[4] Given our disposition, we deny Phelps Dodge's motion for a more definite statement and its motion to dismiss.

III.

Conclusion

For all of the foregoing reasons, we vacate the judge's dismissal order and remand this matter to the Chief Administrative Law Judge for assignment to a judge for further evidentiary proceedings consistent with this opinion.[5]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[5] Judge Amchan has since transferred to another agency.