

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

August 15, 2007

VURNUN EDWURD JAXUN

v.

ASARCO, LLC

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Docket No. WEST 2006-416-DM

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Duffy, Chairman; and Young, Commissioner

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (the “Mine Act”), raises the question of whether Commission Administrative Law Judge Jacqueline Bulluck erred in requiring Vurnun Edwurd Jaxun, a miner pursuing a discrimination claim under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3),<sup>1</sup> to obtain representation or to risk dismissal of his complaint. After a series of orders, the Judge dismissed without prejudice Jaxun’s discrimination complaint, noting that

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<sup>1</sup> Section 105(c)(1) of the Mine Act , 30 U.S.C. § 815(c)(1), provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), provides in part:

If the Secretary [of Labor], upon investigation, determines that the provisions of [section 105(c)(1)] have not been violated, the [C]omplainant shall have the right within 30 days of notice of the Secretary’s determination, to file an action in his own behalf before the Commission.

the Complainant had failed to respond to a show cause order directing him to provide contact information for his representative or to show good reason for his failure to do so. Unpublished Order dated Nov. 28, 2006 (ALJ). The Commission granted Jaxun's petition for discretionary review challenging the Judge's dismissal. For the reasons that follow, the Judge's order dismissing Jaxun's complaint without prejudice stands as if affirmed.

## I.

### Factual and Procedural Background

On March 15, 2006, Jaxun filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA investigated the complaint and issued a letter to Jaxun on May 3, 2006, stating that the facts disclosed during the investigation did not reveal discrimination in violation of section 105(c)(1) of the Mine Act. The letter also informed Jaxun of the procedure for filing a complaint on his own behalf with the Commission under section 105(c)(3) of the Mine Act.

On May 24, 2006, Jaxun filed a complaint with the Commission. In the complaint, Jaxun stated that he had been hired as a heavy truck driver for Asarco, LLC ("Asarco") and received training on February 14 through 16, 2006. Complaint at 2. Jaxun further stated that on February 18, 2006, he had mailed to Asarco a safety-related suggestion regarding loading heavy haul trucks. *Id.* at 5. Jaxun asserted that, on February 22, 2006, he was assigned to clean up a spill of "concentrate," which he believed was hazardous, without proper equipment or training and without supervision. *Id.* at 4, 5. Jaxun submitted that he expressed safety concerns to management and was removed from the mine property on February 23. *Id.* at 8 (MSHA Form 2000-124).

Asarco answered Jaxun's complaint. The case was assigned to Judge Bulluck, and Asarco initiated discovery.

In August 2006, the parties filed pleadings and correspondence with the Judge that revealed difficulties in communication. On August 10, 2006, Asarco sent correspondence to the Judge requesting a teleconference with Jaxun and Judge Bulluck because Jaxun had failed to meet a discovery deadline. It appears that the teleconference occurred on August 15, 2006. Mot. for Summ. Dec. at 2. During that call, the Judge allegedly advised Jaxun to seek to retain counsel. *Id.* In addition, Jaxun allegedly replied that he was having trouble finding an attorney because this case did not involve a "whistleblower" action. *Id.* Jaxun further stated that MSHA mistakenly believed that he was suing Asarco for discrimination rather than for a training violation of 30 C.F.R. § 48.7. *Id.* On August 16, 2006, Jaxun faxed a letter to the Judge noting his reservations about considering his action a claim alleging discrimination rather than an action for a training violation under 30 C.F.R. § 48.7.

On August 18, 2006, Asarco filed a Motion for Summary Decision seeking dismissal of Jaxun's discrimination action with prejudice. Mot. at 3. Asarco argued that, given Jaxun's statements, Jaxun did not intend to assert a claim under section 105(c) of the Mine Act. *Id.* at 2-3. It further stated that no private right of action exists to enforce MSHA's regulations and that, even if Jaxun had a private right of action against Asarco with regard to section 48.7, the Judge would lack jurisdiction over the action. *Id.*

On August 21, 2006, Jaxun sent a letter to the Judge stating in part that he had no intention of withdrawing his section 105(c) complaint. Jaxun further stated that he had recently been "assigned" an attorney but that the attorney required a retainer which Jaxun could not afford. Jaxun stated that he would seek another attorney, but if there were no means for legal aid or a court-appointed attorney, he would be proceeding pro se. On that same day, Jaxun sent a second letter to the Judge setting forth a chronology of events that had occurred on February 22 and 23, 2006.

Rather than ruling on Asarco's Motion for Summary Decision, on August 24, 2006, the Judge issued an order, staying the case. The Judge ordered the parties to complete discovery, engage in settlement negotiations, and report on the status of the case by October 2, 2006.

On August 31, 2006, Asarco sent a letter to the Judge requesting assistance in obtaining responsive answers to discovery from Jaxun. Asarco explained that it was making the request in lieu of filing a motion to compel. Jaxun replied by a letter to Asarco dated September 12, 2006, and challenged the assertion that his discovery answers had been non-responsive on the basis that, according to the dictionary's meaning of "responsive," he had, in fact, responded.

The Judge issued three orders, ultimately leading to the dismissal of Jaxun's discrimination complaint. First, on September 27, 2006, the Judge issued an order requiring Jaxun to obtain representation within 30 days of the order. The Judge explained that she believed Jaxun's written and verbal communications had been confusing and sometimes incomprehensible, and that Jaxun was either unable or unwilling to engage in meaningful discovery and settlement negotiations, and that, as a result, he could not receive the full and fair hearing that he was entitled to by law. The Judge noted that, during a teleconference on September 21, she had informed Jaxun of her decision that he obtain a representative and that the failure to do so might result in the dismissal of his discrimination complaint.

On November 2, 2006, the Judge issued a second order directing Jaxun to provide in writing the contact information for his representative within 14 days of the order or to show good reason for his failure to do so. The Judge stated that, otherwise, Jaxun's discrimination complaint would be dismissed.

Finally, on November 28, 2006, the Judge issued an order dismissing Jaxun's discrimination complaint without prejudice. The Judge reasoned that the purpose of the November 2 show cause order had not been punitive but had been to afford Jaxun a fair hearing.

She noted that because Jaxun had failed to coherently address the elements of his case and was non-responsive during discovery, Asarco had been deprived of its right to due process of law.

Jaxun filed a petition for discretionary review with the Commission, which Asarco opposed. On January 5, 2007, the Commission granted the petition and stayed briefing pending further order by the Commission.

On January 17, 2007, the Commission issued an order directing the parties to address three specific issues in their briefs. Those issues included whether the Judge was authorized to require Jaxun to obtain representation or risk having his complaint dismissed; whether the Judge properly dismissed the complaint because Jaxun failed to respond to a show cause order; and whether the record supports the Judge's determination that Jaxun failed to address the elements of his case and thereby deprived Asarco of its due process rights. On February 12, 2007, Jaxun filed a motion requesting an extension of time until March 7 to file his brief. In the motion, Jaxun also requested a copy of a compact disk which he had previously provided in response to a discovery request and mailed to the Commission. The Commission provided a copy of the disk to Jaxun and granted the request for an extension of time.

Jaxun did not file a brief addressing the issues set forth in the Commission's briefing order. Rather, on March 2, Jaxun filed a motion requesting that he be provided with transcriptions of all the telephone conferences involving the Judge, Asarco and Jaxun that had taken place. The Commission issued an order, denying Jaxun's motion and stating that the Commission does not record or transcribe telephone conferences. On March 7, Jaxun filed a motion requesting that the Commission's January 17 order be set aside, that the case identification "remain the same," and that the Chief Administrative Law Judge assign the case to another Judge for further proceedings, or preside over the case himself. *Mot. to Set Aside* at 3.

Asarco filed a brief requesting that the Commission affirm the Judge's dismissal order. *A. Br.* at 8. Asarco addressed the three issues identified by the Commission in the briefing order, asserting, in essence, that Jaxun had failed to coherently address the elements of his case, and that the Judge properly exercised her discretion by dismissing the case in order to preserve the due process rights of Jaxun and Asarco. *Id.* at 3-8.

## II.

### Disposition

Jaxun's March 7, 2007 motion requested that we set aside our January 17 order, allow the case identification to "remain the same," and return the case to the Chief Administrative Law Judge to reassign the case to another Judge or to preside over the matter himself. In short, Jaxun's March 7 motion appears to be a request that we terminate our appellate review. Jaxun filed no brief and made no attempt to correlate the facts in the record to legal authority or to advance any cognizable legal argument on the issues before us. Thus, Jaxun provided no basis

for the Commission to continue its review of this proceeding. *Cf.* 29 C.F.R. § 2700.75(e) (“If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.”); *Turner Bros., Inc.*, 6 FMSHRC 805, 806 (April 1984) (dismissing operator’s challenge for lack of prosecution).

Accordingly, we construe Jaxun’s March 7 motion as a motion to vacate the Commission’s direction for review dated January 5, 2007. We hereby grant Jaxun’s motion and vacate our direction for review. This proceeding returns to the posture that it had on January 4, 2007.<sup>2</sup>

Although we are vacating the direction for review in this case, we believe that it is appropriate to provide guidance regarding a miner’s ability to represent himself or herself in Commission proceedings. For approximately 30 years, the Commission has facilitated the participation of parties appearing pro se, or not represented by counsel, in Commission proceedings. Such facilitation is apparent in Commission practice and in the Commission’s procedural rules. *See, e.g., Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (noting special considerations for pro se litigants); 29 C.F.R. §§ 2700.3(b), 2700.4 (permitting participation in Commission proceedings without counsel).

The Mine Act, the Administrative Procedure Act (“APA”), and the Commission’s Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation. More specifically, section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, “the [C]omplainant shall have the right . . . to file an action in his own behalf before the

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<sup>2</sup> On January 4, the posture of this proceeding was that it had been dismissed without prejudice. When a case has been dismissed without prejudice, the Complainant retains the right to re-file the initiating pleading with the Commission. The opportunity to re-file is afforded under some circumstances in order to allow the Complainant the opportunity to remedy the procedural defects that led to the dismissal. Thus, although we have vacated our order granting appellate review, Jaxun retains the opportunity to “continue [the] case litigation” before the Commission’s administrative law judges by re-filing his complaint. If Jaxun were to refile his complaint, he would have the opportunity to cure the procedural defects (the filing of incomprehensible and non-responsive documents) that ultimately led to the dismissal of his complaint. Unlike our dissenting colleague (slip op. at 8 n.2), we see no obstacle based on timeliness grounds to Jaxun refile his complaint. Congress clearly indicated, as acknowledged in Commission precedent, that the time-frames in section 105(c) of the Mine Act are not jurisdictional and may be waived under “justifiable circumstances.” *See* S. Rep. No. 95-181 at 37, 38 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625, 626 (1978); *Sec’y of Labor on behalf of Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 907-08 (June 1986); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-14 (Jan. 1984). Such justifiable circumstances would clearly appear to exist in this case.

Commission, charging discrimination.” 30 U.S.C. § 815(c)(3). The APA, which in part governs the requirements for the opportunity for a hearing under section 105(c)(3) (*see* 30 U.S.C. 815(c)(3)), provides that a party may appear at a hearing without representation, although the party is entitled to obtain representation. 5 U.S.C. § 555(b) (“A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.”). Finally, under the Commission’s procedural rules, a miner who has filed a complaint with the Commission under section 105(c)(3) is accorded party status and, as such, may represent himself. *See* 29 C.F.R. §§ 2700.3(b)(1), 2700.4(a).

Although the Judge was not authorized to require Jaxun to secure representation, we can appreciate her frustration with the lack of coherence in the Complainant’s presentation of his claim of discrimination. We also agree with the Judge that Jaxun’s claim would have been best served had Jaxun sought outside counsel. Legal counsel or a non-legal representative could have assisted Jaxun in articulating his position in timely and responsive pleadings. Nonetheless, in proceedings such as this in which a pro se litigant has filed unintelligible or non-responsive pleadings, the Commission’s Procedural Rules provide appropriate avenues for Judges to protect the integrity of the Commission’s hearing process and parties’ due process rights.<sup>3</sup>

### III.

#### Conclusion

For the foregoing reasons, we grant Jaxun’s March 7 motion and vacate the Commission’s direction for review.

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Michael F. Duffy, Chairman

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Michael G. Young, Commissioner

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<sup>3</sup> For instance, if a pro se litigant were being evasive in providing answers to requests for admissions, the opposing party could file a motion to compel in accordance with 29 C.F.R. § 2700.59. Thereafter, if the pro se litigant failed to comply with an order compelling discovery, a Judge would have wide discretion to regulate proceedings, including “deeming as established the matters sought to be discovered.” 29 C.F.R. § 2700.59. Moreover, if the opposing party believed that a litigant failed to allege or establish the elements of a prima facie case, that party could file a motion for summary decision under 29 C.F.R. § 2700.67 making such an argument.

Commissioner Jordan, dissenting:

For the reasons cogently stated by my colleagues, I agree with their conclusion that the judge in this case was not authorized to require Vurnun Jaxun to secure legal representation in his discrimination case before the Commission. However, I disagree with their ultimate decision to vacate the direction for review and, in effect, dismiss this proceeding.

The majority's vacature of the direction of review is based in large part on the following language in Jaxun's March 7, 2007 motion:

I hereby request that the January 17th order [the Commission's briefing order] be set aside, the case identification WEST 2006-416-DM remain the same, Chief Administrative Law Judge Lesnick assign WEST 2006-416-DM to another administrative law judge or preside over the case himself.

Mot. to Set Aside at 3.

Noting, in addition, that Jaxun failed to file a brief, the majority "construe[s] Jaxun's March 7 motion as a motion to vacate the Commission's direction for review" and proceeds to "grant" it. Slip op. at 4-5. Although my colleagues know full well that terminating appellate review results in a dismissal of Jaxun's discrimination case, *id.* at 5 & n.2, they suggest that they are simply granting Jaxun's request. However, nowhere in his motion does Jaxun ask that his appeal be withdrawn. Indeed, Jaxun entitled his submission "Motion to Set Aside the FMSHRC Order Dated January 17, 2007 and Continue Case Litigation" (emphasis added). To treat Jaxun's request that a different judge hear his case as a "voluntary" dismissal "exalt[s] artifice above reality." *See Upton v. SEC*, 75 F.3d 92, 97 (2nd Cir. 1996).<sup>1</sup>

The Commission "has generally held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys." *Tony M. Stanley, emp. by Mgt. Consultants, Inc.*, 24 FMSHRC 144, 145 n.1 (Feb. 2002); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (pro se litigant's complaint held to less stringent standard than formal pleadings drafted by lawyers). In *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992), cited by the majority, slip op. at 5, the Commission also noted that "[i]n general, courts take into account the 'special

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<sup>1</sup> To its credit, Asarco's characterization of Jaxun's motion is a much more accurate reading of Jaxun's submission. *See Asarco Br.* at 3 ("In his motion, Jaxun does not address the issues outlined by the Commission, but asked for the Commission to set aside Judge Bulluck's order dismissing the case because the phone communications between the undersigned [counsel for Asarco], Jaxun, and Judge Bulluck were not recorded.").

circumstances of litigants who are untutored in the law.’” By construing Jaxun’s motion as a request for dismissal of his appeal, the majority turns its back on this concept.<sup>2</sup>

The majority’s dismissal is also based in part on Jaxun’s failure to file a brief, slip op. at 4-5. Jaxun’s brief was due on March 7; indeed, on that date, he submitted a pleading to the Commission. He entitled it a “motion,” rather than a brief. Ironically, had he simply called this document a “brief,” instead of a motion, this rationale for the dismissal of his appeal might no longer exist.

In any event, the Commission’s rules (Commission Procedural Rule 75(a)(1), 29 C.F.R. § 2700.75(a)(1)) provide that a party who files a petition for discretionary review (“PDR”) may choose not to file an opening brief. Instead, the party must notify the Commission that its petition is to constitute its brief. Thus, our rules contemplate that we may decide an appeal without the benefit of any additional substantive information from an appellant beyond its PDR. Granted, Jaxun did not send the requisite notice designating his PDR as his brief. Nonetheless, his failure to submit such a notice does not warrant the draconian sanction of dismissing his appeal. The Commission could have issued a show cause order asking Jaxun to explain why he did not file a brief or designate a PDR as his brief. *See Broken Hill Mining*, 18 FMSHRC 291 (Mar. 1996); *Faith Coal Co.*, 18 FMSHRC 294 (Mar. 1996).

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<sup>2</sup> The majority insists that Jaxun has the right to continue his case before the judge, although it acknowledges that he would need to re-file his discrimination complaint with the Commission and “remedy the procedural defects that led to the dismissal.” Slip op. at 5, n.2. In Jaxun’s case, the “procedural defect” leading to the dismissal was his failure to provide the judge contact information for his legal representative. Slip op. at 1-2. The Commission has now held that the judge was not authorized to require Jaxun to secure such representation. Slip op. at 6. Thus, if he were to successfully re-file his discrimination complaint, he should be able to proceed by representing himself in the litigation.

However, I believe that if Jaxun refiles his complaint, he may face a challenge that his filing is untimely. The majority’s ruling returns his case to the posture that it was in on January 4, 2007, the day before he filed his petition for discretionary review. At that time his case had been dismissed without prejudice. Slip op. at 5 & n.2. A dismissal without prejudice leaves a party in the same legal position as if no suit had been filed, and consequently, the statute of limitations is not tolled by the filing of the original suit. 8 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 41.50[7][b] ((3d ed. 2002); *see also Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co.*, 5 FMSHRC 1406, 1410-11 (Aug. 1983) (dismissal without prejudice could cause possible time limitation problems in compensation case).



I would decide this case on the merits of the issue before us and hold that the judge erred in dismissing Jaxun's case because he failed to retain an attorney. I would vacate the judge's decision and remand for further proceedings.<sup>3</sup> Thus, because I cannot accede to the majority's ruling in this matter, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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<sup>3</sup> I concur with my colleagues' acknowledgment of the difficulties the judge faced in understanding Jaxun's claims, slip op. at 5-6, and agree with them that she has procedural mechanisms at her disposal to alleviate this problem. *Id.* at 6 n.3.

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