

CCASE:

SOL (MSHA) & B.D. WISE V. CONSOLIDATION COAL
SOL (MSHA) & R.N. TRUEX V. CONSOLIDATION COAL

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May 17, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
BILLY DALE WISE, AND
LEO E. CONNER,
COMPLAINANTS
v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
RICHARD N. TRUEX,
Complainant
v.

CONSOLIDATION COAL COMPANY,
Respondent

DISCRIMINATION PROCEEDINGS
Docket No. WEVA 85-148-D
MSHA Case No. MORG CD 84-16
Docket No. WEVA 85-149-D
MSHA Case No. MORG CD 84-19
Ireland Mine

DISCRIMINATION PROCEEDINGS
Docket No. WEVA 85-151-D
MSHA Case No. MORG CD 85-2
McElroy Mine

DECISION DENYING MOTION TO DISMISS

APPEARANCES: Covette Rooney, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia,
Pennsylvania, for Complainants;
Karl T. Skrypak, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Melick

These proceedings are before me upon Motions to Dismiss filed by the Consolidation Coal Company (Consol) in which it is alleged that the complaints in these cases were filed untimely with this Commission. Preliminary hearings were held in accordance with Rule 12(d) of the Federal Rules of Civil Procedure upon the request by Consol for disposition of the motions before trial on the merits. At hearing Consol

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amended its motion to request summary decisions under Commission Rule 64. 29 C.F.R. 2700.64. The facts underlying the issues before me are not in dispute.

DOCKET NO. WEVA 85-148-D

The individual Complainant in this case, Billy D. Wise, filed a timely complaint of discrimination with the Secretary of Labor on July 30, 1984, based upon his allegation of a discriminatory loss of pay on July 16, 1984. The Secretary did not however file his complaint with this Commission on behalf of Mr. Wise until March 26, 1985, nearly 8 months later. The Secretary informed Mr. Wise of that filing by letter dated April 24, 1985.

The Secretary acknowledges that he did not file the complaint in a timely manner but sets forth circumstances to explain that untimeliness. Counsel for the Secretary proffered without contradiction that the Philadelphia Regional Solicitor's Office (which represents the Secretary in this matter) did not receive the case file from the Mine Safety and Health Administration (MSHA) for its legal determination until September 28, 1984. Inasmuch as the case purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. That opinion, to proceed with the case before this Commission, was issued on December 10, 1984 and was received by the Regional Solicitor's Office on December 20, 1984.

The designated trial attorney in the Regional Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b), 29 C.F.R. 2700.42(b). The requested evaluation was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 26, 1985. There was an admitted breakdown in procedures within the Department of Labor in failing to give written notice to Mr. Wise upon the Secretary's final determination (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-149-D

The individual Complainant in this case, Leo E. Conner, filed a timely complaint of discrimination with the Secretary of Labor on August 16, 1984, based upon his allegation of a discriminatory loss of pay on July 19, 1984. The

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Secretary did not file his complaint with this Commission on behalf of Mr. Conner until March 28, 1985, more than 7 months later. The Secretary informed Mr. Conner of that filing by letter dated April 24, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proffered that the Philadelphia Solicitor's Office did not receive the case file from the MSHA for its legal determination until September 25, 1984. Since this also purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. A response was obtained from that office on December 20, 1984 in which final authorization was received to proceed with the case before this Commission.

The designated trial attorney in the Philadelphia Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 28, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Conner by letter upon the final determination by the Secretary's representative (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-151-D

The individual Complainant in this case, Richard Truex, filed a timely complaint of discrimination with the Secretary of Labor on October 10, 1984, based upon his allegation of a discriminatory loss of pay on August 28, 1984. The Secretary did not however file his complaint on behalf of Mr. Truex with this Commission until April 2, 1985, nearly 6 months later. The Secretary informed Mr. Truex of that filing by letter dated April 11, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proffered that the Philadelphia Solicitor's Office did not receive the case file from MSHA for its legal determination until December 20, 1984. That office decided on

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January 8, 1985 to proceed with this case before this Commission and forwarded the case file to the Office of Assessments for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 18, 1985 and the complaint at bar was filed with this Commission on April 2, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Truex by letter upon the final determination by the Secretary (on January 8, 1985) that discrimination had occurred.

Analysis

Consol argues that the Secretary's delays in filing these complaints with this Commission violates the provisions of section 105(c) of the Act. Section 105(c)(3) provides in part that "within 90 days of the receipt of a complaint filed [under section 105(c)(2)] the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred." Section 105(c)(2) provides that upon the Secretary's determination that section 105(c) has been violated "he shall immediately file a complaint with the Commission, with service upon the alleged violator, and the miner, applicant for employment, or representative of miners alleging such discrimination [emphasis added]." Consol also alleges that these filing delays were in violation of Commission Rule 41(a), 29 C.F.R. 2700.41(a), which requires that a complaint of discrimination "shall be filed by the Secretary within 30 days after his written determination that a violation has occurred." Consol concedes that it did not suffer any legal prejudice as a result of the cited delays but nevertheless asserts that the cases should be dismissed for untimely filing.

The Secretary admits the filing delays but suggests that these delays were attributable to the heavy caseload in his office and a manpower shortage. He also claims that some of the delays were attributable to the procedures now required by amended Commission Rule 42, 29 C.F.R. 2700.42. Commission Rule 42 as amended on February 2, 1984 requires the Secretary to include in his complaint filed with the Commission a specific proposed civil penalty and the reasons in support thereof. The Secretary represents that he is now studying various methods for shortening his procedures for proposing civil penalties in discrimination cases. The Secretary argues that for the above reasons the delays in these cases were excusable.

