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JOSEPH HERMAN V. IMCO SERVICES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 15, 1982
JOSEPH W. HERMAN

v. Docket No. WEST 81-109-DM

IMCO SERVICES

DECISION

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). In his decision below, the administrative law judge held that the discrimination complaint giving rise to this proceeding was not timely filed and, therefore, he dismissed the complaint. 4 FMSHRC 1540 (August 1982)(ALJ). The judge proceeded, however, to discuss and make further findings concerning the merits of the complaint. For the reasons that follow, we affirm the dismissal. Accordingly, we find it unnecessary to consider or address the question of whether a violation of section 105(c) occurred.

Complainant Joseph W. Herman was employed as a senior project engineer at IMCO Services's Mountain Springs Plant near Battle Mountain, Nevada. Herman's duties encompassed field engineering and supervision of the construction of facilities at the Mountain Springs Plant to increase the production of barite. 1/ In the period of March-April 1979, work on the expansion project had progressed to the stage where a barite storage bin was to be erected. Based on his experience and information available to him, Herman believed that a serious safety problem existed due to the design of the bin and its intended use. To put it simply, Herman believed that the weight of the bin itself, the weight of the amount of barite that could be stored in the bin, and the relevant stress factors to which the structure would be

1/ From the record it appears that IMCO's operations involved three interrelated stages and facilities. Barite ore was extracted from an open pit mine, subjected to a process to up-grade the ore, and then further processed through a grinding operation. There is no dispute that the facility at which Herman worked falls within the coverage of the Mine Act. As an employee working at this facility, Herman was a "miner" within the meaning of the Act. 30 U.S.C. § 802(g).

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subjected, would prove too great a load for the bin's designed support system, resulting in a collapse of the entire structure. 2/ The evidence also indicates that, at the time that the expansion project had progressed to the barite bin erection stage, IMCO was concerned with cost-overruns and budget constraints. In any event, on or about April 9, 1979, Herman and his superior in Houston, Texas communicated by telephone. Whatever else was said in this conversation, it is at least clear that Herman was advised that his phase of the project was to be halted and that he and others involved would be terminated. 3/

On April 11, 1979, representatives of MSHA visited the site, at the request of Herman, to discuss the storage bin project. Other company personnel attended this meeting. 4/ As a result of this meeting, a report was prepared by MSHA's Denver Technical Support Center concerning the bin design. This report concluded that on the basis of available information the storage bin should be redesigned. The report, however, was not issued until after Herman had been terminated.

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

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 such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a ... mine, or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise of such miner ... of any statutory right afforded by this Act.

2/ The record reveals that Mr. Herman's concerns were well-founded. Each of IMCO's witnesses testified that they became aware of the problem with the bin design. Although memories were vague as to exactly how each of the witnesses became aware of the problem, it is clear that the problems were known to these company personnel while Herman was still employed by IMCO.

3/ When Herman's termination actually became effective is unclear. He continued working to phase out construction until April 13, 1979. He may have been carried on the payroll until April 20th.

4/ Precisely when company personnel who did not attend the meeting

learned that the meeting was to occur, "or had occurred, is disputed. In any event, shortly thereafter it was common knowledge that MSHA became involved at Herman's request.

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Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), further provides: Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination. ****

At the hearing, after Mr. Herman had completed presentation of his case-in-chief, counsel for IMCO made a motion to dismiss Herman's complaint on the basis that it was not timely filed under section 105(c)(2). Herman made a statement in opposition and testified against the motion. The administrative law judge took the motion under advisement and IMCO proceeded with its case. In his final decision the judge addressed the timeliness issue and concluded that Herman's complaint should be dismissed. We agree.

Section 105(c)(2) of the Mine Act, quoted previously requires that complaints of discrimination under the Act be filed within 60 days after such violation occurs" (emphasis added). The legislative history relevant to this filing provision states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances.

Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)("Legis. Hist.")(emphasis added).

The events that form the basis of Herman's complaint of discrimination occurred in April 1979. However, the first action that Herman took relative to filing any complaint concerning those events did not occur until March 3, 1980. ^{5/} Thus, the discrimination complaint in

^{5/} On this date Herman apparently mailed a letter to the Nevada

Employment Security Department. Although this letter is not in evidence, a March 11, 1980, letter from the Nevada Department of Occupational Safety and Health to Herman, informing him that his inquiry had been referred to it, is of record. In this letter,

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this case was filed 11 months after the incidents complained of had occurred, and 9 months after the expiration of the time period specified in the statute regarding the filing of such complaints.

We conclude that the record does not reveal "justifiable circumstances" for this extraordinary delay. Legis. Hist. at 624. In essence, Mr. Herman's testimony and statements of record indicate that he did not file any complaint before March 1980 simply because he did not want to do so. He had been more concerned with the safety of the bin than with his discharge. However, after mulling his situation over for some time (during which time he allegedly discussed his situation with various unidentified safety officials), and after he "kind of took a walk in the park one night" (Tr. 152), he concluded that he had been wronged and that he desired to be vindicated.

Consequently, in March 1980, Herman finally took his first official step by complaining to the Nevada Employment Security Department.

We conclude on the basis of the entire record that Herman's prolonged hesitation in filing a discrimination complaint cannot be attributed to his being misled as to or a misunderstanding of his rights under the Act. Rather, the record reveals that he had direct contact with MSHA officials during the period that the events now complained of occurred, as well as after his termination. Quite simply, he had abundant opportunity and the ability to go forward with his complaint in a more timely fashion, if he had then desired to do so. Although the record reveals confusion on Herman's part concerning the procedure for processing his complaint once it had been filed, these misunderstandings are not relevant to the reasons for his delay in filing a complaint and, hence, they do not excuse the late-filing. The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:

fn. 5/ continued

Nevada OSHA forwarded an employee complaint form to Herman. Herman subsequently filed a completed complaint with Nevada OSHA, dated April 4, 1980. By letter dated April 29, 1980, Herman was informed that this complaint had been referred to the U.S. Department of Labor's Mine Safety and Health Administration (MSHA). This letter notified Herman that an MSHA special investigator had been appointed. (An April 25, 1980 letter from the special investigator to Herman is

also in evidence.) By letter dated September 3, 1980, MSHA informed Herman that it had determined that illegal discrimination under the Act had not occurred. See 30 U.S.C. § 815(c)(2) & (3). Herman thereafter instituted this proceeding before the Commission in his own behalf pursuant to 30 U.S.C. § 815(c)(3).

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... 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.

Burnett v. N.Y. Central R.R. Co., 380 U.S. 424, 428 (1965), quoting R.R. Telegraphers v. REA, 321 U.S. 342, 348-49 (1944). We find that the record in the present case underscores the above concerns.

Although the operator was able to present testimony and documentary evidence in support of its position, the record is replete with examples of faded memories as well as the unavailability of potentially relevant evidence. To be balanced against this policy of repose, however, are considerations of whether "the interests of justice require vindication of the plaintiff's rights" in a particular case. Burnett, supra, 380 U.S. at 428. As discussed previously, we do not find justifiable circumstances excusing Herman's egregious delay in instituting this proceeding.

For these reasons, we affirm the dismissal of the complaint as untimely filed. 6/

6/ In light of our conclusion we do not reach the judge's "alternative" discussion of the merits of the discrimination claim. Because the judge had decided that the complaint must be dismissed, his further discussion regarding whether under the circumstances discrimination occurred constitutes unreviewed dicta. Also, in light of our decision, other pending motions of the operator are denied.

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