

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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FALLS CHURCH, VIRGINIA 22041

OCT 11 1984

HOMER W. DAVIS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 84-118-D
v.	:	
	:	HOPE CD <b>84-2</b>
ARMCO STEEL CORPORATION,	:	
Respondent	:	No. 8 Mine

## DECISION AND ORDER OF DISMISSAL

Before: Judge Lasher

This proceeding, which was initiated by the filing with the **Federal** Mine Safety and Health Review Commission of a complaint of discrimination by Mr. Homer W. Davis on February 1, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), hereinafter "the Act".

By letter dated January 23, 1984, the Complainant had been notified that his complaint of discrimination (filed December 15, 1983) before the Mine Safety and Health Administration (MSHA) had been investigated and the determination made that "a violation of section 105(c) had not occurred." Under the Act, a complaining miner has an independent right to bring a complaint before this Commission and this proceeding is based on that right.

On April 17, 1984, the Respondent filed a Motion to Dismiss alleging inter alia that:

1. The Complaint was not timely filed, i.e. not filed within 60 days "after the alleged October 31, 1980 discriminatory act of Respondent."
2. The Complaint fails to state a claim recognizable under the Act.

A preliminary hearing to determine the two issues raised by the motion to dismiss was held on the record in Charleston, West Virginia, on June 21, 1984, at which Respondent was represented by counsel and Complainant appeared pro se.

The reliable and probative evidence of record indicates that the Complainant was employed by Respondent, Armco Steel Corporation (ARMCO), from October 18, 1979 (Tr. 38) through November 15, 1979, on which latter date he voluntarily quit

to take care of "personal business" in California. On or about October 15, 1979, Respondent had received a "Pre-employment" Chest X-ray, the results of which were reported by J. Dennis Kugel, M.D. (Exhibit R-1), and the pertinent portion of which provided as follows:

PA CHEST: The projection is somewhat under-exposed. There appears to be a fine nodular fibrosis in fairly prominent amount throughout the lung fields so that if there is a proper history of exposure an Occupational pneumoconiosis should be considered of a UICC-p 2/3 all six lung zones. A repeat chest study is suggested with some increase in penetration. 1/

Whether the report of Dr. Kugel indicates occupational pneumoconiosis depends on Complainant's having an appropriate history of exposure (Tr. 10, 27). This question which goes to the merits of the complaint was not resolved in the preliminary hearing which was limited to the 2 issues raised in the motion to dismiss. However, as noted subsequently, a Workmen's Compensation claim filed by Complainant in 1982 was turned down because he had insufficient exposure.

Sometime in May of 1980, Complainant discussed re-employment with Terry E. Whitt, Respondent's Personnel Relations Representative, and on May 19, 1980, he filed an employment application. He was not rehired. 2/

At unspecified times during the period May 1980 into the autumn of 1980, conversations took place between Complainant and MSHA officials in which it appears that Complainant had discussed with MSHA possible discrimination by Respondent in not rehiring him (Tr. 20-23).

Although not clearly articulated, Complainant's contention of discrimination appears to be that he was not rehired in the Spring of 1980 (Tr. 54) because he had pneumoconiosis. He became aware that he had pneumoconiosis on or about October 23,

1/ The face of the X-Ray report shows it was taken on 10-12-79, and "Received" on 10-15-79. Since it was part of Complainant's Pre-employment examination, I infer that it is unlikely that Complainant would have gone on the payroll prior to Respondent's being aware of it.

2/ At the prehearing conference, Mr. Whitt gave the following explanation why Complainant was not rehired:

"Basically he was under consideration for hire. We had several other employees, applicants that we had. Mr. Davis worked for us for approximately three weeks, and I wasn't quite sure whether or not his family problems were through and did not know if he was stable or not." (Tr. 17, 18).

1981 (Tr. 46, 56). Complainant contends that sometime during the period July 26, 1982 - August 9, 1982, he first became aware that when he went to work for Respondent in 1979 that Respondent had evidence that he had pneumoconiosis (Tr. 57, 58). On January 27, 1983, Complainant's claim against the West Virginia Workmen's Compensation Fund for pneumoconiosis was turned down because he had insufficient exposure to the hazards of "occupational pneumoconiosis" during the pertinent 10-year and 15-year periods. (Court Exhibit 1). The claim itself was filed by Complainant on July 26, 1982. In approximately October 1981, Complainant sought employment with Kanawha Coal Company. He was rejected on the basis of an X-Ray report dated October 23, 1981, which indicated pneumoconiosis (Tr. 55). Sometime in 1982, Complainant filed with MSHA a discrimination complaint against Kanawha Coal Company which Complainant testified was later withdrawn for reasons which were not delineated at the hearing (Tr. 61-68).

The complaint herein was filed on December 15, 1983 (Tr. 43).

There is no question but that the complaint was not timely filed with the Secretary within the 60-day period prescribed in section 105(c)(2) of the Act.

The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit 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. No. 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) (emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

Here, Respondent's failure to rehire Complainant occurred in October 1980, but his complaint of discrimination with the Secretary was not filed until December 15, 1983, more than 3 years beyond the statutory filing deadline. Accepting the relevant time factors as presented by Complainant, it appears that at least by the end of 1982, he was aware (1) that he had pneumoconiosis, (2) that Respondent might have had evidence when he was first hired and also when he was subsequently refused re-employment that he had pneumoconiosis (whether or not "occupational" pneumoconiosis), and (3) of his right to bring- and the procedure for bringing-a discrimination complaint under the Act against Respondent (Tr. 22, 23).

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, 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 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. Where, as here, the filing delay is remarkably prolonged, it seems a fair proposition to require a proportionately strong and clear justification therefor.

The lengthy time lapse and sequence of events here mandates the conclusion that Complainant's delay in filing his complaint 3/ was not justified and that the complaint was not timely filed. 4/

#### ORDER

Respondent's motion to dismiss is granted and this proceeding is dismissed.

*Michael A. Lasher Jr.*  
Michael A. Lasher, Jr.  
Administrative Law Judge

3/ Cf. Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984) (31-day delay).

4/ In view of this holding, - the question of whether the complaint states a cause of action under the Act is not reached.

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