DISCRIMINATION – SO WHAT’S NEW?

105(C) CASES & DEVELOPMENTS

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OVERVIEW OF PRESENTATION

• What Section 105(c)(1) of the Mine Act says
• Interference Cases
• Claims against Individuals
• Time Bar Issues
• Protected Activity – some recent cases
WHAT § 105(C) OF THE MINE ACT SAYS...

“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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation...
WHAT § 105(C) OF THE MINE ACT SAYS...

... or because such miner ... is the subject of medical evaluations and potential transfer ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... of any statutory right afforded by this Act.”

30 U.S.C. § 815(c)(1) (emphasis added)
INTERFERENCE CASES

• § 105(c)(1) provides, “No person ... shall interfere with the exercise of the statutory rights of any miner…”

• There have been in an increase in claims filed under this discrimination theory

• As a result, recent Commission case law has developed the analysis to be used in interference claims
INTERFERENCE CASES
UMWA o/b/o Franks & Hoy v. Emerald Coal Resources, LP, PENN 2012-250-D

• 8/29/14 - Commission split as to whether claim constitutes discrimination or interference
• 8/29/15 - 3rd Circuit remanded to Commission
• 2/10/16 - Commission remanded to ALJ Miller for interference analysis
• 4/11/16 - ALJ Miller found interference
• 5/17/16 - Commission ultimately approved 50% penalty reduction (Alpha bankruptcy)
INTERFERENCE CASES


• Murray implemented “Safety and Production Bonus Plans” at six of its mines
• Miners alleged interference with their rights
• 12/30/15 – ALJ Miller denied Respondents’ Motion to Dismiss
• 5/2/16 - ALJ Miller found interference, ordered Respondents to pay $150,000 ($25,000 per mine)
INTERFERENCE CASES

- Murray power point requires miners with MSHA complaints to also report issues to company
- Miners alleged policy interferes with right to file anonymous complaints
- 11/18/15 - ALJ Miller found interference, fined each mine $30,000, and ordered Mr. Murray to personally speak at mines
- 2/10/16 - Commission stayed penalties and requirement for Mr. Murray to speak
INTERFERENCE CASES

Secretary o/b/o Pepin v. Empire Iron Mining Partnership, LAKE 2015-386-DM

- 6/6/16 - ALJ Barbour found supervisor’s remarks to Pepin (regarding MSHA’s negative finding on her complaint) constituted interference, assessed $8,000 fine
- Pepin was not actually prevented from exercising her rights, but ALJ Barbour found the remarks tended to instill “a fear of reprisal for exercising protected activity”
CLAIMS AGAINST INDIVIDUALS

• § 105(c)(1) provides, “No person shall discharge or in any manner discriminate against ... any miner...”

• Recent cases have included issues arising from claims asserted against individual miners (both hourly miners and management persons)
CLAIMS AGAINST INDIVIDUALS

Pendley v. Highland Mining Co. & James Creighton, KENT 2013-606-D

• 2/12/15 – ALJ Andrews found that Creighton, an hourly miner, had interfered with Pendley’s rights as a miners’ rep
• 10/27/15 - Applying penalty criteria set forth in Section 110(i) of the Act, ALJ Andrews assessed Creighton a $250 fine (reducing the fine from MSHA’s proposed $500 fine due to Creighton’s disability and inability to pay)
CLAIMS AGAINST INDIVIDUALS

Michael Wilson v. Jarrod Farris, et al.,
KENT 2015-672-D

• Wilson brought complaint against 3 hourly miners, claiming their inquiry to MSHA inspector (of how they could get Wilson removed as miners’ rep) was discrimination
• 1/12/16 - ALJ Moran denies Wilson’s motion for discovery, says no material fact at issue
• 2/3/16 – ALJ Moran grants Respondents’ Motion for Summary Decision, finds there is no adverse action, no discrimination
**CLAIMS AGAINST INDIVIDUALS**

*Michael Wilson v. Jim Browning, KENT 2016-0095-D*

- Wilson (a miners’ rep) brought complaint against Browning (an hourly miner) after Browning told Wilson to leave the mine
- 5/18/16 – on cross motions for Summary Decision, ALJ Miller finds there was no interference with Wilson’s rights as a miners’ rep, that this was merely an isolated incident between employees
TIME BAR ISSUES

- § 105(c)(2) provides that a miner must file a discrimination complaint with the Secretary within 60 days of the alleged discrimination.

- § 105(c)(3) provides that the Secretary shall notify miner within 90 days of the filing of the complaint of the Secretary’s determination of whether a 105(c) violation occurred.

- Recent cases have disregarded these time periods.
TIME BAR ISSUES

Secretary o/b/o Scoles v. Harrison County Coal Co., WEVA 2016-274-D

• Scoles filed his 105(c) complaint 20 days late after waiting for a final arbitration ruling
  – Complaint was filed 26 days after arbitration ruling, and 80 days after his suspension
  – Scoles said he thought he had to exhaust his other administrative remedies
• 5/10/16 – ALJ Andrews held the complaint was not time-barred since the Act’s 60 day filing period is not jurisdictional, and the company was not prejudiced
TIME BAR ISSUES

Secretary o/b/o Brewer v. Monongalia County Coal Co., PENN 2016-240-D

• Brewer filed his 105(c) complaint 29 days late after waiting for a final arbitration ruling
  – Complaint was filed 15 days after arbitration ruling, and 89 days after his suspension
  – Secretary also late in filing due to reassignment

• 7/21/16 – ALJ Andrews held complaint not time-barred since filing period not jurisdictional, the miner should not be penalized for attorney’s late filing, and no prejudice to company
TIME BAR ISSUES

Secretary o/b/o Michael Murray v. Mach Mining LLC, LAKE 2016-186-D

• 5/16/16 – ALJ Rae denied Mach Mining’s motion to dissolve temporary reinstatement to miner whose case had been under MSHA investigation for over 90 days
• ALJ Rae held 90 day deadline not jurisdictional, and miner should not be penalized for the government’s delay
PROTECTED ACTIVITY - PROFANITY

Secretary o/b/o Harrison v. Marion County Coal Co., WEVA 2015-811-D

• Harrison was terminated after he wrote profanity on a voided check received from the company’s bonus plan, posted it on Facebook, and then returned it to payroll
• 7/2/15 – ALJ Harner ordered temporary reinstatement, ruling that writing profanity on the voided check was a complaint to the bonus plan, and was protected activity
• 2/5/16 – reinstatement stands despite idled mine
NOT PROTECTED – MEDICAL ABSENCE

Mark Lujan v. Signal Peak Energy, LLC, WEST 2015-252-D

• 1/15/16 – ALJ Barbour ruled that Lujan’s medically-related absences for gout flare-ups was not a protected activity under § 105(c), but stated that work refusals for medical reasons could potentially be protected

• ALJ Barbour also held that Lujan’s 402-day-late filing was excusable since there was no material prejudice to company, and since Lujan failed to consult with counsel