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VICTOR MCCOY V. CRESCENT COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
June 23, 1980

VICTOR McCOY

v. Docket No. PIKE 77-71

CRESCENT COAL COMPANY

DECISION

The issue in this case is whether the administrative law judge erred in finding Victor McCoy in default and dismissing his application for review of discharge. We find that he did err, and we therefore reverse the order of dismissal and remand the case for further proceedings.

McCoy initiated this case on May 10, 1977, by filing an application for review of discharge under section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969. 1/ McCoy asserted that he was dismissed from employment at Crescent Coal Company because he invoked his rights under the 1969 Coal Act by refusing to ride a beltline he believed to be unsafe.

On March 27, 1979, the chief administrative law judge ordered Crescent Coal to show cause why it had not answered McCoy's application for review of discharge. Crescent Coal asserted on April 4, 1979, that it had been mistakenly informed that McCoy had withdrawn his application, but could not recall or furnish any evidence substantiating that belief or the source thereof. It then filed an answer.

On May 1, 1979, the administrative law judge assigned to the case found good cause for Crescent Coal's late filing of its answer. He ordered the parties to meet on or before May 15th to discuss a settlement and, if unable to settle, to agree on a time and place for

a hearing.

1/ 30 U.S.C. §801 et seq. (1976 & Supp. I 1977).

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The parties were instructed to report the results of their discussion to the judge by June 1, 1979. McCoy's counsel informed the judge in a letter dated May 23, 1979, that he was withdrawing from the case. The parties did not meet, and on June 6th the judge issued a notice of hearing. The notice scheduled the hearing for July 16-17, 1979. The notice also contained various prehearing requirements. 2/ The copy of this notice addressed to McCoy was returned to the judge marked "unclaimed" and "addressee unknown." On June 26th the administrative law judge issued an order to McCoy to show cause why he had not complied with the prehearing matters in the June 6th notice of hearing. McCoy received this order and an attached copy of the notice of hearing. On July 9th the judge received a letter from an attorney requesting an extension of time so that McCoy could obtain counsel in order to fulfill the prehearing requirements. 3/ The judge issued an order confirming the hearing and directing McCoy to comply immediately with the prehearing requirements.

McCoy appeared pro se at the hearing. He stated he had been unable to find a lawyer and asked for more time to find one. Crescent Coal's counsel moved for an order finding McCoy in default for failure to comply with the judge's June 26th order. The administrative law judge granted the motion. In his written order of August 8, 1979, the judge stated McCoy was found in default because he "unjustifiably failed to comply with ... the prehearing requirements contained in the Notice of Hearing dated June 6, 1979." The order also noted the judge's personal efforts to locate McCoy and inform him of the hearing and prehearing requirements.

McCoy obtained counsel following the dismissal and, through counsel, filed a petition for discretionary review. Although the petition was untimely because we received it more than 30 days after the issuance of the order of dismissal 4/, we do not deem this to bar review in this case.

2/ Part B required McCoy to furnish an address by June 11, 1979. Part C ordered each party to file by July 3, 1979, a list of witnesses, summaries of their testimony, a list of exhibits, all motions, and a precise statement of the issues.

3/ The letter stated that the attorney was not acting as counsel for McCoy, but merely was attempting to preserve McCoy's rights.

4/ See 30 U.S.C. §823(d)(2)(A)(i) (Supp. II 1978); 29 C.F.R. §2700.70 (1979); 29 C.F.R. §2700.5(d) (1979).

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In deciding whether late petitions can be accepted, we look to the purposes behind the enactment of the 30-day time limit within which petitions for discretionary review must be filed. Decisions of administrative law judges become final decisions of the Commission 40 days after issuance, unless directed for review. The 10 day interim between the last day for the filing of a petition and the date when the decision of the judge becomes the final decision of the Commission is intended to allow the Commission time to evaluate a petition's merits. The 30-day deadline was established to enable the Commission to give adequate consideration to the petitions it receives. Consequently, in extraordinary circumstances, as in this case, we are prepared to extend the 30 day deadline and accept a petition that is filed late.

In this case McCoy appeared Pro se at the hearing and did not succeed in obtaining counsel until after his case had been dismissed. His counsel requested a copy of the order of dismissal from the administrative law judge, and obtained it only 10 days before the petition for discretionary review was due. The petition was mailed on the 30th day after the administrative law judge's decision. Under these circumstances, we find good cause for the late filing and accept the petition for discretionary review. 5/

The issue in the case is whether the judge erred in defaulting McCoy and dismissing his application for review. McCoy had failed to respond to a prehearing order, and had failed to answer a show cause order. Three days after certain prehearing requirements should have been fulfilled, McCoy requested an extension of time within which to obtain a new attorney and respond. 6/ McCoy repeatedly stated his need for an attorney at the brief hearing. The 1969 Coal Act is a remedial statute and should be construed liberally to further its purposes. 7/

5/ Cf. Sunbeam Coal Company, 2 FMSHRC 775 (1980) [untimely petition dismissed where good cause for lateness was neither claimed nor shown].

6/ There is no indication or allegation that McCoy was at all responsible for his original attorney's withdrawal shortly before the hearing in the midst of the prehearing process.

7/ See Phillips v. IBMOA, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975).

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One of its purposes is the prevention of discrimination or retaliation for the exercise of rights guaranteed by the Act. It is consistent with that purpose to encourage hearings on claims of discrimination. In view of this and the particular circumstances of this case, we hold that the administrative law judge's use of the severe sanction of dismissal was error. 8/ Accordingly, the order of dismissal is reversed and the case is remanded.

8/ The judge was rightly concerned with expediting what had become an unduly protracted proceeding. However, we note that McCoy was not the sole cause for delay. Crescent Coal failed to answer McCoy's application for 22 months. We also note that Crescent Coal did not claim that it would be prejudiced by a further delay while McCoy sought counsel.

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