

CCASE:  
MSHA V. NORTH AMERICAN COAL  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, DC

July 21, 1980

SECRETARY OF LABOR	Docket Nos. LAKE 79-118
MINE SAFETY AND HEALTH	LAKE 79-214
ADMINISTRATION (MSHA)	LAKE 79-263
	LAKE 80-64

v.

THE NORTH AMERICAN COAL CORPORATION	Docket Nos. LAKE 79-262
	LAKE 80-61

Docket Nos. LAKE 79-266
LAKE 80-65

QUARTO MINING COMPANY,	Docket Nos. VINC 79-124-P
	LAKE 79-228
	LAKE 79-265
	LAKE 80-31
	LAKE 80-32

Docket Nos. LAKE 79-229
LAKE 80-95
LAKE 80-96

THE NACCO MINING COMPANY Docket No. LAKE 79-230  
ORDER

The Secretary seeks discretionary review of a February 12, 1980 decision of the administrative law judge. In that decision, the judge dismissed 17 civil penalty cases. The petitions in these cases alleged 26 violations of the respirable dust standard, 30 CFR §70.100(b), and 9 violations of various other standards. Each of the cases contained at least one alleged violation of 30 CFR §70.100(b). In his February 12, 1980 decision, the judge dismissed the 17 cases on the grounds 30 CFR §70.100(b) was invalid and unenforceable. 1/ On February 22, 1980, the Secretary filed a motion requesting that the judge reconsider his order vacating the 9 citations that did not allege violations of 30 CFR §70.100(b). On March 7, 1980, the judge corrected the decision. He withdrew the 9 citations and ordered that they be incorporated in new cases. The judge cited Commission Rule 65(c), 29 CFR §2700.65(c)(1979), which provides that the jurisdiction of the judge terminates when his decision is issued, but permits a judge to correct inadvertent and clerical mistakes in a decision after it is issued.

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1/ On the same day, the judge also issued a decision in MSHA v. Alabama By-Products, SE 79-110 in which he found that 30 CFR •100(b) was invalid and unenforceable. The Secretary petitioned for review of that decision. The Commission granted the petition on March 6, 1980. ~1695

The Secretary's petition for discretionary review seeks review of a single issue: Whether the judge erred in ruling that there is no presently enforceable respirable dust standard. The petition was filed on April 3, 1980, 51 days after the issuance of the judge's decision. The respondents oppose the petition on the grounds it is untimely.

The Act requires that a petition for discretionary review be filed within 30 days after the issuance of the judge's decision. 2/ Commission Rule 5(d), 29 CFR •2700.5(d)(1979), states that "filing of a petition for discretionary review is effective only upon receipt." The Secretary urges us however, to regard his petition, filed 51 days after the judge's February 12 decision, as timely. He argues that his motion to correct the decision tolled the running of the 30 day period until such time as the judge acted upon the motion. Citing Commission Rule 1(b), 29 CFR •2700.1(b)(1979), which provides that we be guided "so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure", he states that his motion to correct the decision is equivalent to a motion to alter or amend a judgment filed under Fed.R.Civ.P 59(e). He states that the courts have held that a Rule 59(e) motion tolls the appeal period until such time as the judge rules on the motion. Since the judge granted his motion to correct the decision on March 7, 1980, he argues that his petition for discretionary review was timely.

We disagree. Commission Rule 65(c) explicitly provides that the jurisdiction of the judge terminates when his decision has been issued by the Commission's Executive Director. Section 113 of the Act requires that petitions for discretionary review be filed within 30 days after the issuance of the judge's decision. Read together, these provisions indicate that the 30 day period for filing a petition for review runs from the date that a judge's decision is issued by the Executive Director. Because a judge has no jurisdiction to alter a decision that has been issued except to correct inadvertent and clerical errors, we hold that the correction of such errors does not toll the period for filing a petition for review. 3/ Cf. Capitol Aggregates, Inc., 2 FMSHRC 1040(1980).

We note in addition that allowing the filing of motions to correct to toll the period for filing a petition could threaten the smooth functioning of the Commission's review process. The statutory scheme contemplates that the period for filing petitions and directing review will run from the date of the issuance of a decision of a judge

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2/ Section 113(d)(2)(A)(i), 30 U.S.C. •823(d)(2)(i)(Supp. II 1978).

3/ Commission Rule 1(b) permits resort to the provisions of the Federal Rules of Civil Procedure "on any procedural question not regulated by the Act, these Procedural Rules or the Administrative Procedure Act". 29 CFR •2700.1(b)(1979). Because Commission Rule 65(c) and the Act addresses the issue in this case, we do not believe that resort to Fed.R.Civ. p. 59(e) on this issue is appropriate.

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which constitutes his final disposition of the proceedings. 4/  
Altering those periods when a motion to correct is filed could create confusion about the deadlines for filing and granting petitions and the exercise by the Commission of its power to direct review on its own motion.

Moreover, our holding should not hamper the parties in preparing petitions for discretionary review. Motions to correct errors due to inadvertent mistakes do not affect the substance of the judgment nor the standing of a party and thus have no bearing upon the merits of an appeal. The principle is aptly demonstrated by this case. The removal of the 9 citations from the decision and the order to reinstate them in other cases left the substance of the judge's decision -- as to which the Secretary was aggrieved -- undisturbed, did not affect the Secretary's standing, and had no bearing upon the arguments set forth in the petition for review.

Accordingly, the petition is dismissed as untimely filed.

Richard V. Backley, Commissioner

Frank J. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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4/ Section 113(d)(1) provides:

An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission . . . assigned to such administrative law judge . . ., and shall make a decision which constitutes his final disposition of the proceedings.

The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission . . .

[Emphasis added.]

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