

CCASE:
WAYNE TURNER V. NEW WORLD MINING
DDATE:
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TTEXT:
WAYNE C. TURNER

v. Docket No. VA 90-51-D

NEW WORLD MINING, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"). On March 28, 1991, Commission Administrative Law Judge Avram Weisberger entered a

decision finding that respondent New World Mining, Inc. ("New World") had not discriminated against complainant Wayne Turner ("Turner") in violation of section 105(c) of the Mine Act, 30 U.S.C. • 815(c). 13 FMSHRC 503 (March 1991)(ALJ). The Commission did not receive from Turner a timely petition for discretionary review of the judge's decision. Turner's counsel has filed papers that are, in essence, a request to reopen this case. For the reasons that follow, we grant the request to reopen so that the Commission may consider whether to direct review of the judge's decision.

The record reflects that on May 1, 1991, the Commission's Office of Administrative Law Judges received a letter with an attachment from Turner's counsel dated April 29, 1991, addressed to Judge Weisberger. The letter identifies the attachment as a "brief" to be filed in this case. The Commission's Docket Office personnel treated these papers as the filing of a brief with the judge and not as a petition for discretionary review. No direction for review was issued by the Commission and, by operation of the statute, the judge's decision became a final order of the Commission 40 days after its issuance. 30 U.S.C. • 823(d)(1).

On August 5, 1991, a letter dated August 2, 1991, with attachments, from Turner's counsel was received by the Commission's Docket Office. Turner's counsel stated that he was forwarding a "Petition for Review" in response to a conversation with Commission Docket Office personnel, in which he learned that the Commission had not received Turner's petition for discretionary review of the judge's decision. Attached to the letter was a document entitled "Petition for Appeal," which had not been attached to the April 29 letter.

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On August 29, 1991, the Commission entered an order that afforded Turner and New World the opportunity to address whether Turner's petition for discretionary review was timely filed and whether this case should be

reopened. In response, New World asserted that the case should not be reopened because Turner's petition for discretionary review, which New World received on May 1, 1991, had not been timely filed and because the allegations made by Turner in his petition were not supported by the evidence. Turner's counsel asserted that he had received the judge's decision on April 2, 1991, and had filed Turner's petition for discretionary review on April 29, 1991. The judge's jurisdiction over this case terminated when his decision was issued on March 28, 1991. 29 C.F.R. • 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review in the Commission's Docket Office within 30 days of the decision's issuance. 30 U.S.C. • 823(d)(2); 29 C.F.R. □ 2700.5(b) & .70(a). The Commission has recognized this 30 day time limit and has dismissed petitions for discretionary review filed outside this period. See, e.g., North American Coal Corp., 2 FMSHRC 1694, 1695 (July 1980); Haro v. Magma Copper Co., 5 FMSHRC 9, 10 (January 1983). The Commission's procedural rules expressly provide that the filing of a petition for discretionary review is effective only upon receipt. 29 C.F.R.

•• 2700.5(d) & .70(a). In addition, the copies of the judge's decision sent to the parties included a document that provides: "PETITIONS FOR DISCRETIONARY REVIEW MUST BE RECEIVED BY THE COMMISSION WITHIN THIRTY (30) CALENDAR DAYS AFTER THE ISSUANCE DATE OF THE DECISION TO BE CONSIDERED ... If you mail the

petition, you should therefore allow enough time for delivery by the thirtieth day." (Emphasis in the original.) The record reflects that such a notice was sent to, and received by, Turner's counsel's office.

The thirtieth day after issuance of the judge's decision was Saturday, April 27, 1991. In order for Turner's petition for discretionary review to be timely filed, it had to have been received in the Commission's Docket Office no later than Monday, April 29, 1991. 29 C.F.R. • 2700.5(b), .8(a), .70(a) (1991). Turner's brief was not received by the Commission until May 1, 1991, was not filed in the Docket Office, and was not clearly identified as a petition for discretionary review.

In accordance with Fed. R. Civ. P. 60(b)(1), the Commission has afforded relief from final judgments upon a showing of mistake, inadvertence, surprise or excusable neglect. See, e.g., Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It appears from Turner's counsel's statements in response to the Commission's August 29 order that Turner's counsel may have mistakenly believed that a petition for discretionary review had to be filed within 30 days following receipt of the judge's decision. The Commission is aware of the existence of a possible excuse, and will afford Turner relief from final judgment. We will reopen the case for a determination of whether Turner's late-filed petition for discretionary review should be granted. See generally

Patriot Coal Co., 9 FMSHRC 382, 383 (March 1987).

We note, however, that the Commission's relevant procedural rules are clear, that Turner's representative is an attorney, that explicit directions

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for appeal had been forwarded to him by the Commission's Docket Office, and that Turner's counsel waited several months before contacting the Commission to determine the status of his appeal. Under these circumstances, and primarily out of concern that complainant Turner not be denied the opportunity to present his petition for review to the Commission, we reopen this case. We advise counsel to adhere carefully to all procedural requirements in practice before this Commission. See generally 29 C.F.R. • 2700.80(a).

For the foregoing reasons, this case is reopened for consideration by the Commission of whether to grant Turner's petition for discretionary review.