

CCASE:
SOL (MSHA) V. C & B MINING
DDATE:
19931025
TTEXT:

October 25, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 92-531
	:	
C&B MINING COMPANY	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq (1988) ("Mine Act"). On May 25, 1993, Administrative Law Judge David F. Barbour issued a decision concluding that C&B Mining Company ("C&B") had violated section 103(a) of the Mine Act, 30 U.S.C. 813(a). C&B did not file a timely petition for discretionary review of the judge's decision.

The judge's jurisdiction over this case terminated when his decision was issued on May 25, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. 2700.69(b)(1993). Because C&B did not file a timely petition for discretionary review of the judge's decision and the Commission did not direct review on its own motion within the 30-day period prescribed by the Mine Act, the judge's decision became final 40 days after its issuance. See 30 U.S.C. 823(d)(1), (2)(A), & (2)(B).

On August 23, 1993, the Commission received a letter from Gary Lorenz, an owner of C&B, stating that he had called Judge Barbour on the day he received the judge's decision and had been transferred to another office for "paperwork" to appeal the decision. Lorenz further asserts that, as of August 16, 1993, he still had not received the paperwork but would like to appeal the decision. It appears from the record that the Commission's list of instructions for filing a petition for discretionary review was attached to the copy of the decision mailed to Lorenz.

We deem C&B's letter to be a request to reopen a final Commission decision and for an enlargement of time to file 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., Wayne C. Turner v. New World

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Mining, Inc., 14 FMSHRC 76, 77 (January 1992). Here, it appears that C&B, proceeding without benefit of counsel, may have believed that it would receive additional materials for appeal. Accordingly, we will reopen the case and allow C&B to file a petition for discretionary review, as explained below.

A petition for discretionary review must state one or more of the following as grounds for appeal:

- (1) A finding or conclusion of material fact is not supported by substantial evidence;
- (2) A necessary legal conclusion is erroneous;
- (3) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission;
- (4) A substantial question of law, policy or discretion is involved;
- (5) A prejudicial error of procedure was committed.

See 30 U.S.C. 823(d)(2)(A)(ii). Each issue must be separately numbered, plainly and concisely stated, and supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or authorities relied upon. 30 U.S.C. 823(d)(2)(A)(iii). Except for good cause shown, no assignment of error shall rely on any question of fact or law upon which the judge had not been afforded an opportunity to pass. Id.

C&B's petition for discretionary review must be filed and received by the Commission at the above-noted address by November 24, 1993. 29 C.F.R. 2700.70(a). If C&B fails to file its petition for discretionary review by that date, this case shall be closed. If C&B files its petition for discretionary review in the manner described in this order, the Commission shall then consider whether to grant C&B's petition.

~2098

For the foregoing reasons, this case is reopened, and C&B is granted leave to file its petition for discretionary review.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner