FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 15, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2009-760-M
ADMINISTRATION (MSHA),	:	A.C. No. 41-00906-191553
	:	
v.	:	Docket No. CENT 2009-761-M
	:	A.C. No. 41-00906-191553
SHERWIN ALUMINA, LP	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 12, 2009, the Secretary of Labor filed two motions to approve settlement in these proceedings. The motions involved penalty assessments that had been issued to Sherwin Alumina, LP ("Sherwin") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2009-760-M and CENT 2009-761-M, both captioned *Sherwin Alumina, LP*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Although the Secretary submitted the two settlement agreements simultaneously, orders approving the settlements issued just over two months apart. In Docket No. CENT 2009-760-M, Chief Administrative Law Judge Robert J. Lesnick issued an order on May 27, 2010 that granted the Secretary's motion and ordered Sherwin to pay $3,238 in accordance with the terms of the settlement agreement.

Subsequently, on June 9, 2010, Sherwin, through counsel, moved to set aside the settlement agreement filed by the Secretary in Docket No. CENT 2009-761-M.[1] Sherwin alleges

[1] On December 9, 2009, the operator submitted a *pro se* letter to the Commission in which it took issue with the method by which the penalty had been lowered in Docket No. CENT 2009-761-M, though there is no indication that the letter was served on the Secretary. The

that it had not reviewed the agreement, and that it had not agreed to several of its provisions. On June 15, 2010, the Secretary filed a response in opposition to Sherwin's motion, and requested that, "if the Court grants the Respondent's Motion to Set Aside Settlement in CENT 2009-761-M[,] thereby accepting the Respondent's argument that no agreement was reached as to the settlement terms, then the Court must also set aside the settlement that was concurrently reached in CENT 2009-760-M." Sec'y Opp. at [9]. On June 16, 2010, Sherwin filed a response to the Secretary's reply.

On August 16, 2010, Chief Judge Lesnick issued an order granting the motion in Docket No. CENT 2009-761-M and ordering Sherwin to pay $85,532 in accordance with the terms of the settlement agreement in that docket, without addressing Sherwin's motion to set aside the agreement.

The judge's jurisdiction over these proceedings terminated when he issued his decisions approving settlement on May 27 and August 16, 2010. 29 C.F.R. § 2700.69(b). As to Docket No. CENT 2009-761-M, pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, and section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), on our own motion, we direct review of the August 16, 2010, decision of the judge on the ground that the decision may be contrary to law. Specifically, review is limited to the issue of whether the judge's decision approving settlement was made in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k), and Commission precedent.

As to Docket No. CENT 2009-760-M, under the Mine Act and the Commission's procedural rules, relief from a judge's order may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of an order's issuance, it becomes a final order of the Commission. 30 U.S.C. § 823(d)(1). The judge's order approving settlement became a final order of the Commission on July 6, 2010. In her opposition to Sherwin's motion to set aside the settlement agreement in Docket No. CENT 2009-761-M, the Secretary asserted that she conducted negotiations with Sherwin relating to both dockets, and that if the Commission were to set aside the settlement in Docket No. CENT 2009-761-M, it should do the same in Docket No. CENT 2009-760-M. We construe this statement by the Secretary as a request to reopen the proceedings in Docket No. CENT 2009-760-M.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). Having reviewed the record in Docket No. CENT 2009-760-M, we remand this matter so that the Commission Administrative Law Judge assigned to determine whether the

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operator also states that it filed a similar letter in Docket No. CENT 2009-760-M.

parties agreed to settle Docket No. CENT 2009-761-M may also consider whether the interests of justice require that Docket No. CENT 2009-760-M also be reopened to fully effectuate a settlement agreed upon by the parties, or to fully nullify a settlement approved by the Commission despite an absence of agreement by the parties.

The Commission has made clear that "[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act." *Tarmann v. Int'l Salt Co.*, 12 FMSHRC 1, 2 (Jan. 1990) (quoting *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986)). In this respect, the Commission has observed that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions." *Tarmann*, 12 FMSHRC at 2 (quoting *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)); *see also Wake Stone Corp.*, 27 FMSHRC 289, 290 (Mar. 2005) (vacating decision approving settlement where it was "unclear whether the parties achieved a true meeting of the minds").

On the record in these proceedings, Sherwin's motion to set aside the settlement in Docket No. CENT 2009-761-M asserts that the settlement agreement filed by the Secretary does not reflect a true meeting of the minds of the parties, and that the judge's order granting the Secretary's motion to approve settlement may have been based on a proffered agreement that had not been ratified by both parties. *See, e.g., Sec'y of Labor on behalf of Pendley v. Highland Mining Co*, 29 FMSHRC 164, 165-66 (Apr. 2007). The Secretary disputes this, but further suggests that if the settlement in Docket No. CENT 2009-761-M is set aside, the settlement in the other matter must also be set aside because the parties' agreements in both matters are complementary.

Accordingly, in the interests of justice, we vacate the judge's May 27 and August 16, 2010, orders and remand these matters to him for further proceedings consistent with this opinion. *See RBS, Inc.*, 26 FMSHRC 751, 752 (Sept. 2004).

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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