

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

October 29, 2020

THEODORE OESAU :  
 :  
 v. :  
 : Docket No. CENT 2019-0276-DM  
 ROGERS GROUP, INC. :

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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. (2018) (“Mine Act”). On September 3, 2020, Theodore Oesau, by counsel, filed a petition for discretionary review challenging a decision by a Commission Administrative Law Judge issued on August 4, 2020, dismissing the complaint of discrimination brought by Mr. Oesau. 42 FMSHRC 625 (Aug. 2020) (ALJ).

In his decision, the Judge noted that the Commission would not be monitoring incoming physical mail or facsimile transmissions and that parties were encouraged to submit all filings through the agency’s electronic filing system. *Id.* at 640 n.10. The Judge further noted that if a party was unable to file through the Commission’s electronic filing system, the party should email a copy, and the Commission would file the copy. *Id.* Contrary to the Judge’s instructions, Oesau’s counsel filed the petition by facsimile transmission only.

The judge’s jurisdiction over this case terminated when he issued his decision on August 4. 29 C.F.R. § 2700.69(b). Relief from a Judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Commission’s procedural rules do permit filing by facsimile transmission. 29 C.F.R. § 2700.5(c)(2). Thus, we find good cause for treating Oesau’s petition as timely filed. *See generally McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980).

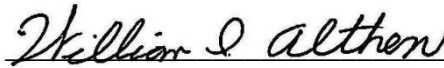
Due to exigencies created by the COVID-19 pandemic, the Commission has not been monitoring incoming mail and facsimile transmissions and did not act on the petition within the statutory period for considering requests for discretionary review. 85 Fed. Reg. 50825 (Aug. 18, 2020). The Judge’s decision became a final order of the Commission 40 days after its issuance by operation of section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply “so far as practicable” in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and consider the merits of the petition. *See North Star Contractors, Inc.*, 17 FMSHRC 886, 887 (June 1995).

Section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2), provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A). However, after consideration by the Commissioners, no two Commissioners voted to grant Oesau’s petition. Accordingly, this order reopening the case and denying relief on the merits now constitutes the Commission’s final order. The right to obtain review of Commission decisions in a United States court of appeals is set forth in 30 U.S.C. § 816(a)(1).



Marco M. Rajkovich, Jr., Chairman



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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