

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

DEC 14 2015

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. SE 2014-403

v.

KOPPER GLO MINING, LLC

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

ORDER

BY: Cohen, Nakamura, and Althen, Commissioners

A petition for discretionary review was filed by the Secretary of Labor on December 2, 2015. This petition was filed pursuant to section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2). That section 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).

A threshold issue in this case is whether the petition was timely filed. See 30 U.S.C. § 823(d)(2)(A)(1) (petition for discretionary review must be filed within 30 days after issuance of a Judge’s decision). The Judge’s decision was initially issued on October 29, 2015. Any petition for discretionary review was due 30 days thereafter, on November 30, 2015.¹ Although the Judge issued an amended decision on November 2, 2015, correcting a clerical error, Commission Procedural Rule 69(c) states that the issuance of an amended decision correcting a clerical error shall not toll the time for filing a petition for discretionary review of the Judge’s decision on the merits. 29 C.F.R. § 2700.69(c). Thus, in this case, the 30-day time limit for filing the petition, started to run from October 29 (the date of the initial decision) rather than from November 2 (the date of the amended decision).

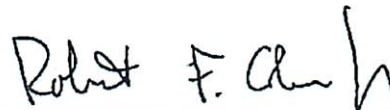
Nonetheless, the Commission may consider a late-filed petition for review for good cause shown. See *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980). We find that the Secretary had good cause for believing that the Judge’s decision was issued on November 2, 2015, and thus had good cause

¹ Because the thirtieth day after October 29 was Saturday, November 28, the thirtieth day for purposes of the filing deadline was Monday, November 30. See Commission Procedural Rule 8(c), 29 C.F.R. § 2700.8(c).

for filing the petition on the day he reasonably believed it was due, i.e., December 2. Good cause for the late filing is supported by the fact that the Judge did not title the November 2 decision as an "Amended Decision." More importantly, the Secretary relied on an email which the Commission docket office sent to counsel with the November 2 decision. The email stated that the appeal period commenced with the date on the attached decision (November 2). Sec'y's Reply to Kopper Glo Mining, LLC's Statement in Opp'n to Pet., Ex. A. Therefore, although the petition was filed out of time, we find good cause to consider it.

Pursuant to 30 U.S.C. § 823(d)(1), a Judge's decision becomes the final decision of the Commission 40 days after its issuance unless within such period the Commission directs review. We recognize that the fortieth day from October 29 was December 8 and, therefore, this Order is beyond the fortieth day from the date of the decision. Recognizing the possibility of delay, the Secretary, in the alternative, moved that we reopen the case to consider the PDR. Sec'y's Reply to Kopper Glo Mining LLC's Statement in Opp'n to Pet. at 4. To avoid any questions of timing should the Secretary appeal, we grant the motion to reopen.

Having considered the petition, no two Commissioners voted to grant the petition or to otherwise order review under 30 U.S.C. § 823(d)(2)(B).² Consequently, the petition for discretionary review is denied, and the decision of Administrative Law Judge Margaret A. Miller is final. 30 U.S.C. § 823(d)(1).



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

² Commissioner Cohen voted to grant review of the petition.

Chairman Jordan, concurring in part and dissenting in part:

Without addressing the issue of whether the Commission has jurisdiction to entertain petitions for discretionary review filed 30 days after a Judge's decision has issued or whether, once a Judge's decision has been deemed a final order of the Commission pursuant to 30 U.S.C. § 823 (b)(2)(d)(1), the Commission can reopen it, I conclude that the issuance date for the Judge's decision in this case was November 2, and that therefore the petition was timely filed. My reasoning in large part is the same as the majority's rationale for finding good cause for what it considers the late filing of the petition. Notably, the Commission circulated the November 2 decision in an attachment to an email that read in pertinent part: "The date of issuance is stamped or typed on the Decision, and it is the effective date of the document for purposes of computing the deadline for an appeal." Sec'y's Reply to Kopper Glo Mining, LLC's Statement in Opp'n to Pet., Ex. A. In addition, I find it relevant that the November 2 decision was not titled "Amended Decision." I would therefore hold that the petition for discretionary review was timely filed. However, I join the majority in denying review of the petition.


Mary Lu Jordan, Chairman

Commissioner Young, concurring:

I join Chairman Jordan in result, but would base my decision on our ability to construe our own procedural rules. While our rules hold that the issuance of a decision correcting clerical error does not toll the period for filing a petition for discretionary review, we should hold that the period should be tolled in the unique circumstances of this case. *See* 29 C.F.R. § 2700.69(c) (“nor the issuance of an order or amended decision correcting a clerical error[] shall toll the time for filing a petition for discretionary review”). This would recognize the fact that an earlier decision was issued, while also reflecting the miscommunication from the Commission and the reasonable misunderstanding arising from it.


Michael G. Young, Commissioner

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