

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

JUL 25 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEVA 2011-858
v.	:	WEVA 2011-2051
	:	WEVA 2011-409
RAW COAL MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 4, 2013, Administrative Law Judge William Steele issued a decision affirming the violations issued and penalties proposed by the Department of Labor’s Mine Safety and Health Administration to Raw Coal Mining Company, Inc. (“Raw Coal”). 35 FMSHRC __ (June 4, 2013) (ALJ). On July 15, 2013, the Commission received from Raw Coal a Motion for Leave to File Petition for Discretionary Review Out of Time or in the Alternative Motion to Reopen.

In its motion, Raw Coal states that Dick Johnson, Raw Coal’s Secretary and Treasurer, received the judge’s decision on June 19, 2013, 15 days after it had been issued, from the company’s representative in the case, James Bowman. Mr. Johnson attests that he did not take note of the date of the decision and assumed that it had been issued on the date he received it, thereby giving him 30 days from June 19 to file an appeal. Raw Coal asserts that the mine shut down shortly thereafter for a miners’ vacation from June 24 through July 8. Upon return, on July 11, Raw Coal claims that Mr. Johnson attempted to call Mr. Bowman to inform him of the company’s intent to appeal the judge’s decision, but was unable to reach him. The next day, on July 12, Raw Coal contends that Mr. Johnson unsuccessfully called Mr. Bowman again and also sent him an email, to which he received an automatic reply indicating that Mr. Bowman was on vacation from July 8 through July 20. Raw Coal explains that Mr. Johnson then contacted

counsel, who advised Mr. Johnson that its appeal was late and filed the instant motion seeking leave to file its petition for discretionary review out of time or to reopen these proceedings.

On July 23, 2013, the Commission received the Secretary's opposition to the operator's motion.

The judge's jurisdiction in this matter terminated when he issued his decision on June 4, 2013. 29 C.F.R. § 2700.69(b). 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 within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Thus, the petition here was due on July 5, 2013 (July 4 being a holiday).

The decision of the administrative law judge becomes the final decision of the Commission 40 days after its issuance unless the Commission has directed review of the decision during that period. 30 U.S.C. § 823(d)(1). Consequently, the judge's decision in this case became a final order of the Commission on July 15, 2013 (July 14 being a Sunday).

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"); *see also* 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.41 (3d ed. 2007); 11 Wright & Miller, *Federal Practice and Procedure* § 2858 (3d ed.).

We conclude, however, that Raw Coal is not entitled to such relief. Even if Raw Coal's assertions are accepted as true, it has not demonstrated that its failure to timely file a petition for discretionary review (and its need for an order granting it an extension of time because it had failed to do so) was due to anything other than the actions of its management and representative. Thus, the circumstances here are similar to those in *Haro v. Magma Copper Co.*, 5 FMSHRC 9 (Jan. 1983). In that case, where an operator filed a motion requesting that a complainant's petition be dismissed as untimely, the complainant stated that he first learned of the judge's decision approximately 35 days after it issued, and that his attorney did not file a petition because of a potential conflict of interest. *Id.* Construing these representations to be in effect a request for relief from a final order, pursuant to Fed. R. Civ. P. 60(b)(1), the Commission denied relief. We noted that Haro had made no representations that late filing "was due to factors outside of his control or that of his attorney." *Id.* at 10. We also emphasized that "[i]n view of the extraordinary nature of reopening final judgments, lack of sufficient information substantiating a request for relief can be fatal to such claims." *Id.*, citing 7 *Moore's* at § 60.22[2], p. 257.

The Ninth Circuit's decision in *Duval Corp. v. Donovan*, 650 F.2d 1051 (9th Cir. 1981), is also instructive. In that case, the Commission dismissed a petition for discretionary review as untimely because it was received 31 days after issuance of the judge's decision (and thus was one

day late). *Id.* at 1053. The operator filed a petition for reconsideration, which we denied, and the Court ruled that this did not constitute an abuse of discretion. *Id.* at 1054-55. *See also Brody Mining, LLC*, 32 FMSHRC 537 (June 2010) (dismissing as untimely petition received several days after 30-day filing deadline).

As in *Haro* and *Duval*, the rationale submitted here does not warrant relief. The manner in which the operator and its representative handled this appeal demonstrates that they did not take seriously the need to file a petition within the deadline permitted under the Mine Act and our procedural rules. Taking the assertions in the motion as true, the operator's representative waited 15 days (half of the 30-day filing period) before providing a copy of the decision to a management official at Raw Coal. Mot. at 2; Johnson Aff. at 1. The operator alleges that this official failed to understand that the decision had been issued on June 4 (although this date clearly appears at the top of the caption on the first page of the decision and also on the "Notice" which preceded the decision), and believed instead that it had been issued on June 19. He did not even attempt to contact the operator's representative until July 11,¹ and that effort was in vain, because the representative was on vacation. Mot. at 2, Aff. at 1.² This halfhearted effort does not justify reopening.

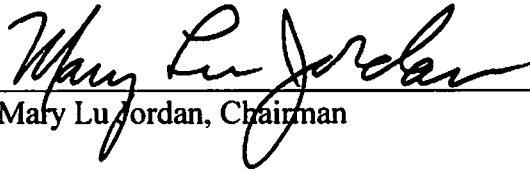
Raw Coal, which had representation, has availed itself of the opportunity to have this matter heard by a judge (who issued a 49-page opinion). Its assertions to the Commission do not establish an entitlement to relief, and accordingly the motion to reopen is denied.³

¹ Even under Raw Coal's assumed time frame, this initial contact was merely eight days before the deadline to file its petition.

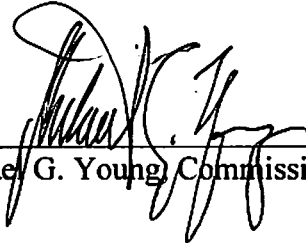
² The operator states that due to a miners' vacation, Raw Coal was idle from June 24, 2013 through July 8, 2013. Mot. at 2, Aff. at 1. Given the importance of the filing deadline, this did not excuse the lack of effort to contact the representative or to find other counsel, given that Raw Coal intended to appeal.

³ For similar reasons, we deny the operator's motion for leave to file petition for discretionary review out of time. *See Lakeview Rock Products, Inc.*, 17 FMSHRC 853 (June 1995) (denying motion for an extension of time to file a petition for discretionary review).

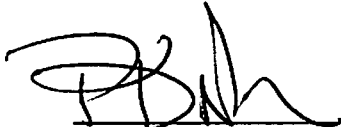
For the foregoing reasons, Raw Coal's motion to file its petition for discretionary review out of time or to reopen this proceeding is denied.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner

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