

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 11, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos: CENT 97-154-M
	:	CENT 97-155-M
v.	:	CENT 97-156-M
	:	CENT 97-157-M
BLUE CIRCLE, INC.	:	CENT 97-158-M
	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This consolidated civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994). On April 16, 1998, the Secretary of Labor and Blue Circle, Inc. (Blue Circle) filed a Joint Motion for Modification of Settlement Agreement with the Commission's Office of Administrative Law Judges. For the reasons discussed below, we reopen this proceeding, treat the motion as a late-filed petition for discretionary review, and remand the matter to the judge.

On January 15, 1998, the Secretary of Labor and Blue Circle filed with Administrative Law Judge Gary Melick a Motion to Approve Disposition/Settlement. In the motion, the parties requested approval of their agreement that Blue Circle pay \$7035.00 and that the proceeding be dismissed. Mot. at 2, 12. In addition, the parties requested in the motion that the judge sever Citation No. 7855673 from the proceeding and consolidate it with Citation No. 4454558 in Docket No. CENT 97-194-M, and incorporated by reference a Motion to Sever and Consolidate, which was purportedly filed separately. Id. at 12. On February 10, 1998, Judge Melick issued a Decision Approving Settlement, ordering Blue Circle to pay a penalty of \$7035.00. The judge did not address the parties' Motion to Sever and Consolidate.

On April 16, 1998, the Secretary and Blue Circle filed the present motion requesting that the Commission modify the penalty amount payable to the Secretary. Counsel explain that on March 18, 1998, counsel for the Secretary received a telephone call from the assessment office at the Secretary of Labor's Mine Safety and Health Administration (MSHA) stating that the amount contained in the final settlement agreement was incorrect. Jt. Mot. at 2. Upon review, Secretary's counsel discovered that she had failed to include the settlement amount for

CENT 97-158-M in her calculations, resulting in a \$1771.00 shortfall in the final settlement amount. *Id.* Accordingly, the parties request that the Commission add the penalty amount for CENT 97-158-M, so that the total penalty assessed C \$8806.00 C would reflect the settlement reached by the parties. *Id.*

Our review of the record does not make certain that the penalty amount payable to the Secretary according to the settlement agreement equals the sum of \$8806.00. Also, the present motion does not discuss whether Citation No. 7855673 was severed as the parties had previously requested. We have determined administratively that a separate Motion to Sever and Consolidate was never filed in these proceedings or in Docket No. CENT 97-194-M. Moreover, it appears that Citation No. 7855673 has not been severed and consolidated with Citation No. 4454558 in Docket No. CENT 97-194-M. Furthermore, on February 11, 1998, Judge Melick issued an order approving a settlement agreement in Docket No. CENT 97-194-M.

The judge's jurisdiction over this case terminated when his decision approving the settlement was issued on February 10, 1998. 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). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. ' 823(d)(1). The parties' motion was received by the Commission after the judge's decision had become a final decision of the Commission.

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. Fed. R. Civ. P. 60(b)(1);<sup>1</sup> *see also* 29 C.F.R. ' 2700.1(b) (Federal Rules of Civil Procedure apply as far as practicable in the absence of applicable Commission rules); *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). We are unable to evaluate the merits of the parties' position on the basis of the present record. In the interest of justice, we reopen the proceedings, treat the parties' motion as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (Dec. 1986); *see also General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

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<sup>1</sup> Rule 60(b) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ."

We remand the matter to the judge, who shall dispose of the parties' motion and modify his decision as appropriate. *Cf. General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996) (amending judge's dismissal order); *Martin Marietta Aggregates*, 16 FMSHRC 189, 190 (Feb. 1994) (amending judge's decision approving settlement to reflect agreement reached by parties). The judge may afford the parties an opportunity to further amend their motion.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

Distribution

Mary K. Schopmerer, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
525 South Griffin St., Suite 501  
Dallas, TX 75202

C. Gregory Ruffenach, Esq.  
Ruffenach Law Offices  
1675 Broadway, Suite 1800  
Denver, CO 80202

Administrative Law Judge Gary Melick  
Federal Mine Safety and Health Review Commission  
Office of the Administrative Law Judges  
2 Skyline, 10<sup>th</sup> Floor  
5203 Leesburg Pike  
Falls Church, VA 22041