

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

May 3, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. SE 91-97, etc.
	:	
FAITH COAL CO.	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On August 28, 1995, the Commission granted the cross-petitions for discretionary review filed by Faith Coal Company (“Faith”) and the Secretary of Labor. Pursuant to Commission Procedural Rule 75, 29 C.F.R. § 2700.75 (1995),<sup>1</sup> Faith’s opening brief was due to be filed by September 27, 1995. Faith, however, failed to file its brief.

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<sup>1</sup> Rule 75 provides, in part:

(a) *Time to file.* (1) *Opening and response briefs.* Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. . . .

On January 26, 1996, the Secretary filed a Motion to Dismiss for Want of Prosecution pursuant to Commission Procedural Rule 75(e), 29 C.F.R. § 2700.75(e).<sup>2</sup> The Secretary states that Faith failed to file its opening brief or designate its petition as such. Mot. at 1. The Secretary notes that he has not been able to reach Faith by telephone, facsimile, or mail. *Id.* at 2 & n.2. He asserts that no injustice would result from the dismissal of Faith's petition. *Id.* at 2-3. The Secretary requests that the petition be dismissed with prejudice. *Id.* at 3. Faith has not filed an opposition to the motion.

On March 14, 1996, the Commission issued an order directing Faith to show cause within 14 days why its appeal should not be dismissed. The file contains the return receipt showing that Faith received the show cause order on April 1, 1996, 18 days after its issuance. On April 8, 1996, Faith filed a response to the show cause order stating that, as a *pro se* operator, it was unaware that a written statement was required to designate the petition as its brief. Faith requests that the Commission accept its late correspondence as its motion to designate the petition as such. Faith also states that it opposes the Secretary's motion to dismiss because it "should not be penalized nor denied the privilege of due process of appeal because of financial poverty and lack of knowledge" of the Commission's rules. The Secretary has not filed an opposition to Faith's motion to designate the petition as its brief.

Whether the Commission vacates its direction for review due to a petitioner's failure to file an opening brief in accordance with Rule 75 is a matter within the Commission's discretion. *See* 29 C.F.R. § 2700.75(e). Faith has proffered a reason for its failure to file its brief, i.e., as a *pro se* operator, Faith was unaware of the filing requirement. Under the circumstances, we excuse Faith's late-filed response to the show cause order and grant its motion to designate the petition as its brief.

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<sup>2</sup> Rule 75(e) provides:

*Consequences of petitioner's failure to file brief.* If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

For the foregoing reasons, we deny the Secretary's motion.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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