

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 23, 2000

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

v.

EARL BEGLEY, employed by
MANALAPAN MINING COMPANY,
INCORPORATED

Docket No. KENT 99-233

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

ORDER

BY: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On May 25, 2000, the Commission received via facsimile transmission a petition for discretionary review from Earl Begley, employed by Manalapan Mining Co., Inc., challenging a decision issued by Administrative Law Judge Avram Weisberger on April 19, 2000. In his decision, Judge Weisberger found that Begley had violated section 317(c) of the Mine Act, 30 U.S.C. § 877(c), by carrying smoking materials underground, and ordered Begley to pay a civil penalty of \$250. 22 FMSHRC 537, 540-43 (Apr. 2000) (ALJ).

The judge’s jurisdiction in this matter terminated when his decision was issued on April 19, 2000. 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); 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). Begley’s petition was received by the Commission on May 25, 2000, six days past the 30-day deadline. Under the Commission’s Procedural Rules, the filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. § 2700.70(a).

On May 30, 2000, the Commission issued an order denying Begley’s petition for discretionary review as untimely. 22 FMSHRC 629, 631 (May 2000). The Commission explained that Begley, who was represented by counsel, had availed himself of the opportunity to

bring his case before a judge, and had offered no explanation for his failure to timely submit a petition for discretionary review. *Id.* at 630. Commissioner Marks dissented, stating that he would have granted Begley's petition. *Id.* at 631.

On June 14, 2000, the Commission received from Begley, by counsel, a petition for reconsideration. In his petition, Begley asks the Commission to grant his previously denied petition for discretionary review. Pet. Recons. at 1. Begley explains that, although the judge issued his decision in this case on April 19, 2000, he subsequently issued an order on May 5, 2000, amending his April 19 decision and correcting clerical errors. *Id.* Begley asserts that the deadline for filing a petition for discretionary should run from May 5, and that his petition for discretionary review filed on May 25 was timely. *Id.*

Since the Commission issued its order denying his petition for discretionary review on May 30, 2000, the Commission's Procedural Rules required that any petition for reconsideration of this denial be filed within 10 days, or by June 9, 2000. *See* 29 C.F.R. §§ 2700.78(a) ("A petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission."); 2700.5(d) ("When filing is by mail, filing is effective upon mailing."). Begley's petition for reconsideration, however, was filed on June 14, 2000, 5 days after this filing deadline. Begley has offered no explanation for the late filing of his petition for reconsideration.

In any event, even if Begley's petition for reconsideration had been timely filed, we would not depart from our prior holding that Begley's petition for discretionary review was untimely. The Commission has held that clerical corrections made subsequent to the issuance of a judge's decision do not toll the period for filing a petition for discretionary review of the judge's decision on the merits. *North American Coal Corp.*, 2 FMSHRC 1694, 1695 (July 1980) (rejecting argument that motion to correct a judge's decision tolls the period for filing a petition for discretionary review, and holding that a petition for discretionary review must be filed within 30 days of the judge's decision on the merits); *see also Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980) (holding that once a judge issues his decision, his jurisdiction terminates, and he cannot stay the effect of his decision or reconsider it). The Commission's holding is consistent with federal practice in that a motion to correct non-substantive clerical errors does not toll the period for filing an appeal. *See Harmon v. Harper*, 7 F.3d 1455, 1457 (9th Cir. 1993); *In re Cobb*, 750 F.2d 477, 479 (5th Cir. 1985) ("Corrections under Rule 60(a) [to correct clerical mistakes] do not affect the underlying judgment, and consistent therewith, do not affect the time for filing a notice of appeal.").

Based on the foregoing, we deny Begley's petition for reconsideration as untimely.¹

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

¹ Commissioner Marks would accept Begley's petition for reconsideration, and grant Begley's petition for discretionary review.

Distribution

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