

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

June 8, 1995

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket Nos. WEST 94-308-M
 : WEST 94-309-M
v. :
 :
LAKEVIEW ROCK PRODUCTS, INC. :

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

ORDER

BY THE COMMISSION:¹

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act"). On March 2, 1995, the Commission received from Lakeview Rock Products, Inc. ("Lakeview") a request for a 30-day extension of time to file a petition for discretionary review contesting a decision issued by Administrative Law Judge Arthur Amchan on January 30, 1995. 17 FMSHRC 83 (January 1995) (ALJ). Lakeview's counsel states that he was unable to turn to the decision when he received it on February 6, that mining law materials were not readily available in local libraries, and that Lakeview's decision-makers were temporarily out of state. In opposition to Lakeview's motion, the Secretary of Labor argues that the Commission lacks subject matter jurisdiction. In reply to the Secretary's opposition, Lakeview states that the notice it received from the Commission indicates that an operator may seek an extension for good cause shown. It also requests that the Commission consider its request for an extension as its petition. The Secretary opposes treating Lakeview's request as its petition.

Under the Mine Act and the Commission's Procedural Rules (29 C.F.R. Part 2700), 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) ("Rule 70(a)"). Lakeview did not

¹ The Commissioners agree, in result, to deny Lakeview's request for an extension of time to file its petition for discretionary review, but differ as to the rationale for that determination. The portion of the decision upon which all Commissioners agree is followed by the opinions of Chairman Jordan and Commissioner Marks and of Commissioner Doyle and Commissioner Holen, respectively, setting forth their separate views.

file a timely petition, nor did the Commission direct review on its own motion within the 30-day period. 30 U.S.C. ' 823(d)(2)(B). Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. ' 823(d)(1).

The Commission denies Lakeview's motion for an extension of time and rejects Lakeview's request to treat the motion as its petition for discretionary review. Under the Mine Act and the Commission's Procedural Rules, a party must set forth the grounds for appeal in its petition. 30 U.S.C. ' 823(d)(2); 29 C.F.R. ' 2700.70(c). Lakeview's request did not set forth those grounds. Indeed, Lakeview stated in its request that it needed additional time to evaluate the merits of an appeal, suggesting that a petition might not be forthcoming. Accordingly, upon consideration of Lakeview's motion, it is denied.

Separate opinions of Commissioners follow:

Chairman Jordan and Commissioner Marks:

The Commission has strictly enforced the 30-day time limit for filing petitions for discretionary review, accepting petitions filed late only where the accompanying motion to excuse the late filing has shown good cause for the delay. *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1203-04 (June 1980); *see also Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981). In *McCoy*, the Commission explained that adherence to the 30-day time limit is essential because the Commission has only 10 days, between the last day for filing a petition and the date the judge's decision becomes final, during which to evaluate the merits of a petition. 2 FMSHRC at 1204. Here, we deny Lakeview's request because Lakeview has failed to show good cause for delay in filing a petition for discretionary review.

We need not decide whether the Commission's procedural rule pertaining to extensions of time, 29 C.F.R. ' 2700.9 ("Rule 9"), applies to requests for extensions for filing petitions for discretionary review. Assuming, however, that Rule 9 applies, we conclude that Lakeview's request was untimely. A request for an extension must "be filed *before* the expiration of the time allowed for the filing or serving of the document." Rule 9 (emphasis added). The Commission has applied unique filing requirements to petitions, establishing that filing is effective only upon

receipt. 29 C.F.R. ' 2700.5(d) ("Rule 5(d)") & Rule 70(a).² Lakeview's petition, to be timely, should have been *received* by the Commission within 30 days after the judge's decision, by March 1, 1995. Consequently, pursuant to Rule 9, Lakeview's request for an extension should have been filed within that 30-day period as well.

Our general filing rule, Rule 5(d), provides that pleadings other than petitions for discretionary review are considered filed on the date of mailing, while petitions are considered filed only upon receipt. We view the filing requirement for a motion to extend time for filing a petition in the light of Rule 5(d)'s provision that a petition itself is effectively filed only upon receipt. Interpreting Rule 5(d) to permit Lakeview's request to be filed on the date of mailing, rather than upon its receipt, would undermine the unique filing requirements for review petitions. Construing Rules 5, 9, and 70(a) together, we would disallow as untimely any request for an extension to file a review petition received by the Commission after expiration of the 30-day period for filing that petition. *See generally, e.g., Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (in interpreting single enactment, courts should give "the most harmonious, comprehensive meaning possible") (citations omitted). Although Lakeview has certified that it mailed its request for an extension on March 1, the request was filed out of time because it was *received* by the Commission on March 2, one day after the expiration of the 30-day period.³

Mary Lu Jordan, Chairman

² Lakeview received, as an attachment to Judge Amchan's decision, a notice that provided: "PETITION FOR DISCRETIONARY REVIEW MUST BE RECEIVED BY THE COMMISSION WITHIN THIRTY (30) CALENDAR DAYS AFTER THE ISSUANCE DATE OF THE DECISION TO BE CONSIDERED [29 C.F.R. ' 2700.5(d) and .70(a)]." (Emphasis in original).

³ Given our disposition, we need not reach the Secretary's argument that the Commission lacks subject matter jurisdiction to entertain Lakeview's motion.

Marc Lincoln Marks, Commissioner

Commissioner Doyle and Commissioner Holen:

There is no provision in the Mine Act for extension of the time to file a petition for discretionary review ("PDR"). Nor do the Commission's Procedural Rules, 29 C.F.R. Part 2700, provide for such an extension. Therefore, we conclude that the Commission is without authority to entertain such a motion and, accordingly, we deny the operator's motion for an extension of time to file its PDR.

Lakeview's reliance on 29 C.F.R. ' 2700.9 ("Rule 9") is misplaced. The Commission's Procedural Rules, including those under which parties may seek Commission review, are set forth in Subpart H--Review by the Commission. Rule 70, entitled "Petitions for discretionary review," provides in part:

Any person adversely affected or aggrieved by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days after issuance of the decision or order.

29 C.F.R. ' 2700.70(a). Subpart H makes no provision for extensions of time to file PDRs. Further, the notice attached to the judge's decision (the "Notice") gave Lakeview actual notice of the 30-day requirement. It states:

PETITION FOR DISCRETIONARY REVIEW MUST BE RECEIVED
BY THE COMMISSION WITHIN THIRTY (30) CALENDAR DAYS AFTER THE
ISSUANCE DATE OF THE DECISION TO BE CONSIDERED [29 C.F.R.
' 2700.5(d) and .70(a)].

Notice at 1 (emphasis in original). Reference in the Notice to other procedural rules relevant to the review process does not overcome either Rule 70 or the clear statement in the Notice of the filing requirements for PDRs. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (January 1992).

We note that the Commission has, in appropriate circumstances, accepted late-filed petitions for review. Such relief has been granted pursuant to Fed. R. Civ. P. 60(b)(1) & (6), on the basis of mistake, inadvertence, surprise, excusable neglect or other reasons justifying relief.⁴ *E.g.*, *Turner*, 14 FMSHRC at 77-78; *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982). Motions to excuse late filing have been granted only where good cause for the delay has been shown. *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1203-04 (June 1980); *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981). We conclude that, even if the Commission had, as Lakeview asked, treated its request for an extension of time as a late-filed PDR, good cause for such late filing has not been shown.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

⁴ The Commission's Procedural Rules incorporate, as appropriate, the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule).