

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 1999

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 99-73
 : A.C. No. 36-01555-03507
ROSTOSKY COAL COMPANY :

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

DIRECTION FOR REVIEW AND ORDER

BY: Marks, 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 October 5, 1999, the Commission’s Office of Administrative Law Judges received a petition for discretionary review from Joseph Rostosky challenging a decision issued by Administrative Law Judge Jacqueline Bulluck against Rostosky Coal Company (“Rostosky”) on September 3, 1999. 21 FMSHRC 1017 (Sept. 3, 1999) (ALJ). Rostosky is not represented by counsel but by its co-owner, Joseph Rostosky. In her decision, Judge Bulluck affirmed a citation and an order issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), ordered Rostosky to pay a civil penalty of \$2,000, and directed that the case be dismissed upon receipt of payment. *Id.* at 1023.

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); 29 C.F.R. § 2700.70(a). Rule 70(d) of the Commission’s Procedural Rules also requires that in a petition for discretionary review, “[e]ach issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon.” 29 C.F.R. § 2700.70(d); *see also* 30 U.S.C. § 823(d)(2)(A)(iii).

The Commission received Rostosky's petition for filing on October 5, 1999, 1 day past the 30-day deadline.¹ His petition also fails to meet the requirements of Rule 70(d). The Commission, however, has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). The Commission has also entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980) (finding good cause where counsel for previously pro se complainant only obtained judge's decision 10 days prior to deadline for filing petition, and mailed petition on 30th day). In keeping with these principles, we believe that since Rostosky was not represented by counsel, we should not dismiss this petition because it was 1 day late.²

Additionally, in the interests of justice, we conclude that Rostosky be afforded the opportunity to conform his petition to the requirements of the Mine Act and our Procedural Rules. Therefore, upon consideration of Rostosky's petition, it is hereby granted for the limited purpose of affording Rostosky an opportunity to amend his petition to comply with the requirements of section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). Any such amended petition must include a statement of issues identifying those portions of the judge's decision that he believes were wrongly decided.

¹ Although, Rostosky's petition was mailed on October 1, 1999, within the 30-day deadline for filing, it was received by the Commission's Office of Administrative Law Judges on the 31st day, October 5. Rule 70(a) of the Commission's Procedural Rules specifies that "[f]iling of a petition for discretionary review . . . is effective upon receipt." 29 C.F.R. § 2700.70(a).

² In *Dykhoff v. U.S. Borax Inc.*, 21 FMSHRC 976 (Sept. 1999), the Commission denied a petition for discretionary review as untimely filed. Commissioners Marks and Beatty dissented from the majority's order dismissing the pro se miner's petition on timeliness grounds. *Id.* at 979. Commissioner Verheggen notes that he would have denied Dykhoff's petition notwithstanding its untimeliness because it was based on facts that did not serve as the basis for his original complaint and attempted to advance an alternative theory of discrimination not raised before the judge. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992). To the extent that *Dykhoff* could be read to stand for the proposition that untimely petitions for discretionary review made by pro se litigants be routinely denied, Commissioner Verheggen rejects such a reading.

Rostosky must file any amended petition with the Commission, with service upon the Secretary, within 20 days. The Secretary may file an opposition to the amended petition within 10 days after service.³

Mark Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

³ Chairman Jordan and Commissioner Riley would deny the petition for review as untimely, since it was received after the thirty-day deadline and included no explanation for the late filing. Administrative law judge decisions sent to parties routinely include a notice that a party seeking review must make sure that his or her petition for review is received by the Commission within thirty days after the date of issuance of the administrative law judge's decision.

They also are mindful of the difficulty encountered by the pro se litigant, and note that, upon reasonable explanation, they have shown flexibility towards late-filed petitions. However, they also note that Rostosky offers no explanation for his late filing, nor states any basis for appellate review in his letter. They believe that granting even limited review under such circumstances makes a nullity of the Commission's procedural rules.

Distribution

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