

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 23, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2000-168-M
ADMINISTRATION (MSHA)	:	A.C. No. 24-02070-05503
	:	
v.	:	Docket No. WEST 2000-470-M
	:	A.C. No. 24-02070-05504
JOHN RICHARDS CONSTRUCTION	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Beatty, Commissioner

On October 30, 2001, the Commission received from John Richards Construction (“Richards Construction”) a request for relief from part of a final Commission decision on the merits issued by Administrative Law Judge Richard W. Manning on September 13, 2001. 23 FMSHRC 1045 (Sept. 2001) (ALJ). The judge’s jurisdiction in this matter terminated when his decision was issued on September 13, 2001. 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).

Richards Construction failed to file a timely petition for discretionary review of Judge Manning’s decision within the 30-day deadline. Because the Commission did not direct review on its own motion, the judge’s decision became a final decision of the Commission 40 days after its issuance. Under these circumstances, we construe Richards Construction’s request as a motion for relief from a final Commission decision. See *Tunnelton Mining Co.*, 8 FMSHRC 1142, 1142 (Aug. 1986) (construing request filed after 40-day deadline as request for relief from final Commission decision).

When considering whether relief from a final Commission decision is appropriate, the Commission has found guidance in, and has applied “so far as practicable,” Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Richards Construction’s request for relief was sent to the Commission by John Richards, the mine owner. Mot. at 1-3. Richards, apparently proceeding pro se, alleges that Richards Construction did not file a timely petition for discretionary review because of a delay in his receipt of the judge’s decision. *Id.* at 2. He claims that the decision was sent by certified mail to him at an apartment complex in Arizona and that office personnel at the apartment complex signed for the certified mail without his permission on October 16, 2001. *Id.* He claims he received the copy of the judge’s decision several days later. *Id.* The judge’s decision indicates that it was sent by certified mail to Richards at an address in Montana, the same address that was listed as Richards’ contact address on the Proposed Assessment of Civil Penalties. 23 FMSHRC at 1069.

Because of confusion in the record, we are unable to evaluate Richards Construction’s request. The following information is needed before this case can proceed:

1. A full and clear explanation of why the operator allegedly received a copy of the judge’s decision only after the 30-day time limit to file a petition for discretionary review had expired. The explanation should be accompanied by any available supporting documentation, such as mail receipts and affidavits.
2. Supporting evidence that the decision was sent, as Richards alleges, to him at an apartment complex in Arizona rather than to the Montana address listed for him on the judge’s decision.

Upon consideration of Richards Construction’s request, it is hereby granted for the limited purpose of affording the operator an opportunity to provide the Commission with the above information. Accordingly, it is ordered that within 30 days from the date of this order, Richards Construction either provide the Commission and the Secretary with the above

information or show good reason for its failure to do so. Otherwise, an order will be entered denying Richards Construction's request for relief. The Secretary may file a response with the Commission to the additional information provided by Richards Construction within 10 days after her receipt of the information.

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Theodore F. Verheggen, Chairman

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Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

The Mine Act and the Commission's procedural rules require that a petition for discretionary review be filed within 30 days of the issuance of a judge's decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Although the judge in this case issued his decision on September 13, 2001, the Commission did not receive the petition from John Richards Construction ("Richards Construction") until October 30, 2001, approximately two weeks past the statutory deadline.

John Richards, the mine owner, attempts to excuse this late filing by claiming that the judge's decision was sent to him in Arizona, but that someone at his apartment complex there signed for it, so he did not receive it until several days thereafter. Mot. at 2. Although at times we have, in accordance with Rule 60(b)(1) of the Federal Rules of Civil Procedure, afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake, Richards' excuse for this late filing does not meet these criteria.

Contrary to Richards' assertion that the decision was sent to him at an Arizona address, the judge's decision shows that it was sent by certified mail to him at a post office box address in Montana, the same address listed as Richards' contact address on the Proposed Assessment of Civil Penalties. 23 FMSHRC 1045, 1069 (Sept. 2001) (ALJ). In addition, I take notice of the fact that the Commission's logbook of mailing by certified mail indicates that on September 13, 2001, the day the decision was issued, a mailing was sent by certified mail to Richards at his address in Montana. I also take notice of the fact that the certified mail receipt indicates that the decision was sent to Richards' mailbox address in Montana.

Commission records thus decisively indicate that the judge's decision was mailed to Richards in Montana. Other than his assertion that the decision was sent to Arizona, Richards has submitted nothing to prove otherwise, and he has offered no theory - much less any evidence - to indicate how the decision got to Arizona. His claim is completely inconsistent with the Commission's documents, and he offered nothing to cause me to refrain from relying on the Commission's records.

Moreover, Richards Construction has already availed itself of the opportunity to defend its case before a judge. *See Knock's Bldg. Supplies*, 21 FMSHRC 483, 484 (May 1999) (request for relief from final Commission decision denied when operator offered no explanation for failure to timely submit a petition for discretionary review). Nothing it has submitted gives me reason to believe I should disturb the finality of the judge's decision. *See Duval Corp. v.*

*Donovan*, 650 F.2d 1051 (9th Cir. 1981) (upholding Commission's denial of petition for reconsideration of dismissal of petition for discretionary review received 31 days after issuance of ALJ decision). Accordingly, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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