

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW SUITE 9500 WASHINGTON, DC 20001

August 22, 2003

SECRETARY OF LABOR, :

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

Docket Nos. WEST 2000-480-R

v. : WEST 2002-131

:

TWENTYMILE COAL COMPANY

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

## ORDER AND DIRECTION FOR REVIEW

## BY THE COMMISSION:

This consolidated contest and 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 July 14, 2003, Chief Administrative Law Judge David Barbour issued a decision in part affirming the allegations of violation set forth in Order No. 7618153. *Twentymile Coal Co.*, 25 FMSHRC 373, 389 (July 2003) (ALJ). On August 18, 2003, the Commission received from Twentymile Coal Company ("Twentymile") a Motion to Excuse Late Filing of Petition for Discretionary Review.

In its motion, Twentymile states that on August 8, 2003, it sent its petition for discretionary review challenging the judge's July 14, 2003, decision to the Commission by Federal Express, and served trial and appellate counsel for the Secretary of Labor by certified mail, return receipt requested. Mot. at 2. It further states that, according to the return receipts, the Secretary's counsel received the petition on August 11 and August 13, 2003. *Id.* Twentymile explains that on August 15, 2003, it was informed by the Secretary's appellate counsel that the Commission had not received Twentymile's petition for discretionary review. *Id.* Twentymile submits that upon further inquiry, it discovered that Federal Express had attempted to deliver the copy of the petition addressed to the Commission to an incorrect address. *Id.* at 3. It states that Federal Express did not attempt to contact Twentymile to reveal that delivery to the Commission

had not been accomplished. *Id.* Twentymile attached to its motion a copy of a Federal Express Air Bill, a copy of the petition for discretionary review, and a copy of its counsel's letter conveying the petition.

On August 19, 2003, the Commission received the Secretary's response to the operator's motion. The Secretary states that because of the unique circumstances surrounding the misdelivery of Twentymile's petition for discretionary review, she believes that the Commission has jurisdiction to consider the petition. S. Resp. at 2. As to the merits of the petition, the Secretary argues that the petition should not be granted because the judge's decision is supported by substantial evidence. *Id.* at 2-3.

On August 20, 2003, Federal Express delivered Twentymile's petition for discretionary review to the Commission. The Federal Express envelope reveals that the petition was mailed on August 8, 2003; that the petition was mailed priority overnight mail; and that the petition was to be delivered by August 11, 2003.

The judge's jurisdiction over these proceedings terminated when he issued his decision on July 14, 2003. 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)(A)(i); 29 C.F.R. § 2700.70(a). Filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. § 2700.5(d). 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). Here, Twentymile was required to file its petition for discretionary review with the Commission by August 13, 2003. The Commission received Twentymile's petition past the 30-day deadline, but before the judge's decision had become a final order of the Commission.

The Commission has 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) (vacating judge's order of dismissal and finding good cause where petitioner was pro se during part of the proceedings, subsequently-retained counsel obtained judge's decision only 10 days prior to deadline for petition, and petition was mailed on the 30th day). We conclude that Twentymile has shown good cause for its late filing.

Accordingly, we excuse the late filing and accept Twentymile's petition for discretionary review as filed on this date. Furthermore, upon consideration of the merits of Twentymile's petition for discretionary review, it is hereby granted.

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