

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

December 23, 2003

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEVA 2004-18-R
	:	
McELROY COAL COMPANY	:	

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

ORDER AND DIRECTION FOR REVIEW

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On November 21, 2003, Administrative Law Judge David Barbour dismissed the proceeding based on McElroy’s withdrawal of “its request for an expedited proceeding.” Order dated Nov. 21, 2003. On December 18, 2003, the Commission received a petition for discretionary review from McElroy Coal Company (“McElroy”) asserting that Judge Barbour’s dismissal of the proceeding was in error due to a misunderstanding. PDR at 1, 3-4. For the following reasons, we grant McElroy’s petition, vacate the judge’s order, and remand for further proceedings.

On November 4, 2003, MSHA issued Order No. 4705247 to McElroy pursuant to section 104(b) of the Mine Act alleging a violation of 30 C.F.R. § 62.130(a). On November 12, 2003, McElroy filed a notice of contest of Order No. 4705247 and sought expedited proceedings. A hearing was scheduled for November 20, 2003. On November 18, 2003, after receiving notice of a pending modification of the order, McElroy notified Judge Barbour that it was withdrawing its request for an expedited hearing, but reserving its right to renew its request.

In the dismissal order, Judge Barbour concluded that the “modification of the order, presumably to a section 104(a) citation, ha[d] eliminated the primary basis for McElroy’s contest of the order” and dismissed the contest without prejudice to the company. The judge noted that

“[t]he company retains the right to re-file a contest and to request an expedited proceeding should that be necessary.” *Id.*

In its PDR, McElroy contends that it intended to withdraw its request for an expedited proceeding, but not its contest of the underlying violation. PDR at 1. It asserts that contrary to the judge’s assumption, the order was not modified to a section 104(a) citation. *Id.* at 3; Ex. B. It explains that subsequent to the judge’s dismissal, it sent the judge a letter explaining that it still intended to pursue its contest of the order. *Id.* at 4; Ex. C. McElroy requests that the Commission grant review of its petition, grant relief from the judge’s dismissal order, and remand the proceeding to the judge for further proceedings. *Id.* at 5.

On December 19, 2003, the Secretary submitted a response to the Commission agreeing with the representations McElroy made in its PDR and agreeing that the Commission should grant review and remand the case to the judge for further proceedings. Letter from the Secretary of Labor dated Dec. 19, 2003.

The judge’s jurisdiction in this matter terminated when his order of dismissal was issued on November 21, 2003. 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). McElroy’s petition for discretionary review was timely filed, and we grant it.

Based on the present record, it appears that the judge misconstrued McElroy's withdrawal of its request for an expedited proceeding. The Secretary does not oppose McElroy's petition or its request for relief. In the interest of justice, we vacate the judge's dismissal order and remand this matter to the judge for further proceedings as appropriate. *See REB Enter., Inc.*, 18 FMSHRC 311, 313 (Mar. 1996).

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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