

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 28, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 2000-63-M
	:	2000-78-M
ORIGINAL SIXTEEN	:	2000-195-M
to ONE MINE, INC.	:	

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

DIRECTION FOR REVIEW AND ORDER

BY: Verheggen, Chairman; Riley 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 November 26, 2001, the Commission received via facsimile from Original Sixteen to One Mine, Inc. (“Original Sixteen”) a letter challenging the decision issued on October 19, 2001 by Administrative Law Judge Michael Zielinski. In his decision, Judge Zielinski in part vacated and/or dismissed, affirmed, and approved the settlement of various citations alleging violations of mandatory safety standards. 23 FMSHRC 1158 (Oct. 2001) (ALJ).

The judge’s jurisdiction in this matter terminated when his decision was issued on October 19, 2001. 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). In accordance with the Commission’s procedural rules, the filing of a petition for discretionary review is effective upon receipt, and may be made by facsimile. 29 C.F.R. §§ 2700.5(d), 2700.70(a). Rule 70(d) 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). 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).

In its letter, Original Sixteen “petitions for review” of the judge’s decision, sets forth general grounds for requesting the review, and requests an extension of time to file necessary documentation. Letter from Original Sixteen to Commission of 11/26/01, at 1- 2. Original Sixteen explains that this case involves its first hearing and appeal and that it is unfamiliar with Commission procedure; that personnel instrumental in the preparation of appropriate documentation, including its president and corporate manager, have been unavailable after issuance of the judge’s decision; and that its response time has been decreased due to delays in mail service occurring after September 11, 2001. We construe Original Sixteen’s letter as a request to accept its late-filed petition for discretionary review. *See generally Kelley Trucking Co.*, 8 FMSHRC 1867, 1868 (Dec. 1986) (construing request for hearing as a request for relief from final order incorporating by implication a late-filed petition).

Original Sixteen filed its petition with the Commission on November 26, 2001, eight days past the 30-day deadline, but within the 40-day time period during which the Commission retains jurisdiction. Its 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. *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 (Oct. 1999), *citing Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992); *Dykhoff, Jr. v. U.S. Borax Inc.*, 21 FMSHRC 1279, 1280 (Dec. 1999). 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 conclude that Original Sixteen, which is not represented by counsel, has shown good cause for its late filing. *See generally Dykhoff*, 21 FMSHRC at 1280 (reconsidering previous order denying late-filed petition where pro se miner provided explanation of unfamiliarity with Commission procedure in motion for reconsideration).

Additionally, in the interests of justice, we conclude that Original Sixteen be afforded the opportunity to conform its petition to the requirements of the Mine Act and our Procedural Rules. *See Rostosky*, 21 FMSHRC at 1072-73. Therefore, upon consideration of Original Sixteen’s petition, it is hereby granted for the limited purpose of affording Original Sixteen an opportunity to amend its 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).

Original Sixteen must file any amended petition with the Commission, with service upon the Secretary of Labor, within 20 days. The Secretary may file an opposition to the amended petition within 10 days after service.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

Original Sixteen has failed to show good cause as to why its petition for discretionary review was filed eight days past the 30-day statutory time limit. Consequently, I would deny the petition as untimely.

Original Sixteen claims that slow mail delivery “due to the events of September 11, 2001” provided “short notice of response time.” However, the Commission’s docket office has verified that the October 19 decision was received by the operator on October 26, putting it on notice as of that date that any petition would have to be received at the Commission by the November 19 deadline. *See Duval Corp. v. Donovan*, 650 F.2d 1051 (9th Cir. 1981) (upholding Commission’s denial of petition for reconsideration of dismissal of petition received 31 days after issue of the ALJ’s decision when operator argued that it did not receive decision until six days after it was mailed).

Original Sixteen also claims that its “President was out of town on business . . . shortly after receiving the decision.” Similarly, it states that its corporate manager, who, it asserts, played an important role in preparation of MSHA-related paperwork, was out of the office due to surgery. These vague allegations, even if assumed to be true, do not, in my view provide good cause as to why Original Sixteen was unable to comply with the 30-day statutory time limit. Indeed, in neither case are we provided with information about the length of the absence; we do not know whether the company officials were away for one day or one month.

Although I am mindful of the difficulty encountered by pro se litigants, good cause must still be shown when a petitioner seeks review of a judge’s decision beyond the 30-day statutory time limit. In this case I would, for the foregoing reasons, deny the petition.

Mary Lu Jordan, Commissioner

Distribution

Michael M. Miller, President
Original Sixteen to One Mine, Inc.
P.O. Box 1621
Alleghany, CA 95910

Christopher B. Wilkinson, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson St., Suite 1110
San Francisco, CA 94105

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Michael Zielinski
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041