

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 6, 1999

LOUIS W. DYKHOFF, JR., :
 :
 v. : Docket No. WEST 99-26-DM
 :
 U.S. BORAX INCORPORATED :

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

ORDER

BY: Marks, Verheggen and Beatty, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On August 16, 1999, the Commission’s Office of Administrative Law Judges received from Louis W. Dykhoff, Jr. a petition for discretionary review of a decision issued by Administrative Law Judge Jerold Feldman on July 7, 1999. In his decision, Judge Feldman dismissed a discrimination complaint brought by Dykhoff under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). 21 FMSHRC 791 (July 1999) (ALJ). Dykhoff’s petition was forwarded and received by the Commission’s Docket Office on August 17.

The judge’s jurisdiction over these cases terminated when his decision was issued on July 7, 1999. 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). Dykhoff’s petition was received by the Commission’s Office of Administrative Law Judge’s on the fortieth day, August 16, ten days past the 30-day deadline. Because the Commission did not sua sponte direct review of the case, Judge Feldman’s decision became a final order of the Commission.

On September 30, 1999, the Commission issued an order denying Dykhoff’s petition as untimely filed. 21 FMSHRC 976, 978 (Sept. 1999). The Commission explained that Dykhoff had availed himself of the opportunity to bring his case before a judge, and had offered no explanation for his failure to timely submit a petition for discretionary review. *Id.* at 977.

On October 12, 1999, the Commission received Dykhoff’s Motion for Relief from Default and/or Reconsideration. In the motion, Dykhoff declares “under penalty of perjury” that he did not offer an explanation for his late filing because he mistakenly believed that he had 40

days following issuance of the judge's decision, rather than 30, to file his petition. Mot. at 1. He further states that he has been unrepresented since the time that Judge Feldman issued his decision because he can no longer afford counsel. *Id.* In the memorandum attached to his motion, Dykhoff states that U.S. Borax, which was represented by counsel throughout the proceedings, failed to comply with procedural time limits on at least three occasions, without negative repercussions. Memo. Dykhoff stated that, as an "unschooled miner," he should receive as much "leeway" as U.S. Borax with respect to timeliness issues. *Id.* Dykhoff also attached to his motion various orders documenting in part his allegations that U.S. Borax failed to timely file pleadings.

On November 12, 1999, the Commission received from U.S. Borax an opposition to Dykhoff's motion for reconsideration. In its opposition, U.S. Borax states that the Commission should deny Dykhoff's motion because, in its September 30 order, the Commission stated that it need not invite Dykhoff to provide an explanation for the late filing. Opp'n at 2. Second, it notes that denial of Dykhoff's motion will not result in a default because Dykhoff has availed himself of the opportunity to have his case heard before a judge. *Id.* at 3. Third, U.S. Borax sets forth reasons for denying Dykhoff's petition for discretionary review on the merits. *Id.* at 3-4. Finally, U.S. Borax asserts that the motion was untimely filed. *Id.* at 4.

Relief from a final Commission judgment or order is available to a party in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Dykhoff, on his own initiative, has adhered to the Commission's procedural rules for filing a motion for reconsideration, offering an explanation in the form of an affidavit that, as an unrepresented miner, he mistakenly believed that he had 40 rather than 30 days to file his petition for discretionary review.¹ The Commission has previously reopened final Commission orders under Fed. R. Civ. P. 60(b)(1) when parties' counsel misunderstood the Commission's filing requirements for petitions for discretionary review. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (finding sufficient allegation that counsel misinterpreted deadline for filing petition); *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982) (finding sufficient allegation that operator's counsel failed to adhere to instructions to file petition). In addition, the Commission has recognized that it has held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 & n.2 (Oct. 1999).

¹ Contrary to U.S. Borax's assertions, Dykhoff timely filed his motion for reconsideration. Although the Commission received the motion on October 12, Dykhoff filed the motion by registered mail on October 8, within 10 days of the Commission's September 30 order. *See* 29 C.F.R. §§ 2700.78(a) ("A petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission."); 2700.5(d) ("When filing is by mail, filing is effective upon mailing.").

Under these circumstances, we reopen the proceedings for consideration by the Commission of whether to grant Dykhoff's petition for discretionary review.

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Riley, dissenting:

We would deny Dykhoff's motion for reconsideration. It is significant that the Commission's September 30 order did not result in placing Dykhoff in default, since he had already availed himself of the opportunity to bring his case before a judge. In addition, as we noted in the September 30 order, Dykhoff attached to his petition for discretionary review a copy of section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2), which sets forth the deadline for filing a petition for discretionary review. 21 FMSHRC at 977 n.1. Accordingly, we find his assertion that he believed he had 40 days following issuance of the judge's decision to file his petition unpersuasive, and not a sound basis on which to grant this motion.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Distribution

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