

CCASE:
GERALD D. BOONE V. REBEL COAL
DDATE:
19820716
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 16, 1982
GERALD D. BOONE

v.

Docket No. WEVA 80-532-D

REBEL COAL COMPANY

ORDER

On June 1, 1982, counsel for Rebel Coal Company filed a petition for discretionary review and a "Motion to Permit Late Filing of a Petition for Discretionary Review." We construe the latter to be a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief from Judgment or Order). Cf *Marshall v. Monroe & Sons*, 615 F.2d 1156 (6th Cir. 1980); *J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981). On July 8, 1981, a Commission administrative law judge issued a decision in which he concluded that Gerald D. Boone was discharged by Rebel Coal Company in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. In that decision the judge ordered the parties to engage in further proceedings to determine the amount of specific damages due Boone. 3 FMSHRC 1751 (July 1981)(ALJ). The Commission dismissed as premature Rebel Coal Company's Petition for Discretionary Review of the judge's decision. The Commission concluded that, in view of further proceedings ordered by the judge, his decision was not a reviewable "final decision" within the meaning of the Act and the Commission's rules. 3 FMSHRC 1900 (August 1981). On January 11, 1982, the judge issued a decision and order awarding damages and costs to Boone. 4 FMSHRC 37 (January 1982)(ALJ). No petition for discretionary review of the judge's decision was filed and forty days after its issuance it became a final order of the Commission by operation of law. 30 U.S.C. § 823(d)(1). In its request for relief from this final order, the operator details the procedural history of this case including the fact that review of the judge's finding of discrimination had been sought, albeit prematurely. The operator further states that previously-retained counsel "were under continuous instruction to appeal any decision directing [the operator] to reemploy Complainant [miner]," but "[f]or some unknown reason" prior counsel did not file a

petition for review of the judge's final decision of January 11, 1982.
~1233

We have reviewed present counsel's request for permission to file a petition for discretionary review at this time against the standards set forth in Fed. R. Civ. P. 60(b)(1). 1/ See 7 Moore's Federal Practice § 60.22[2]; 11 Wright & Miller, Federal Practice and Procedure § 2858. Although the claims of previous counsel's omission and the operator's ignorance of the status of the litigation are not supported by affidavit, in the particular circumstances of this case, we accept the operator's representations as being made in good faith. We note that the judge's final decision was served on previous counsel, but not on the operator itself, and that the request for relief was filed within a reasonable time after the operator learned of the present posture of the case. Further, although counsel for the miner opposes the granting of any relief at this time, no showing has been made that the claims made by the operator are untrue. 2/ Accordingly, in the circumstances of this case, we grant the operator's request for permission to file its late-filed petition for discretionary review. 3/

Rosemary M.
Collyer, Chairman
Richard V. Backley,
Commissioner
Frank F. Jestrab,
Commissioner
A. E. Lawson,
Commissioner

1/ Fed. R. Civ. P. 60(b)(1) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect...

2/ The present situation is not analogous to that involved in *Duval Corp. v. Donovan & FMSHRC*, 650 F.2d 1051 (9th Cir. 1981). In *Duval* the operator's petition for discretionary review was filed on the thirty-first day after the issuance of the administrative law judge's decision. Thus, although the petition for review was untimely filed under the Act and the Commission's rules, the judge's decision had not become a final order of the Commission because 40 days had not passed since its issuance. 30 U.S.C. & 823(d)(1). In a *Duval* situation, the inquiry is whether good cause for the untimely filing has been established. *Valley Rock & Sand Corp.*, WEST 80-3-M (March 29, 1982); *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202 (June 1980). In the present

case, however, the judge's decision became a final order of the Commission and, therefore, the request for relief is appropriately addressed under Fed. R. Civ. P. 60(b).

3/ In this order we have not considered whether to grant the petition for discretionary review. We only rule that the petition may be filed at this time so that the Commission may proceed to review the issues raised and act upon the petition. 30 U.S.C. § 823(d)(2).

~1234

Distribution

Larry Harless, Esq.

United Mine Workers of America

1300 Kanawha Blvd., E.

P.O. Box 1313

Charleston, West Virginia 25325

Douglas D. Wilson, Esq.

Gardner, Moss, Brown & Rocovich, P.C.

P.O. Box 13606

Roanoke, Virginia 24035

Michael McCord, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Administrative Law Judge Gary Melick

Fed. Mine Safety & Health Rev. Commission

5203 Leesburg Pike, 10th Floor

Falls Church, Virginia 22041