

CCASE:

WILLIAM HARO V. MAGMA COPPER

DDATE:

19830128

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

January 28, 1983

WILLIAM A. HARO

v.

Docket No. WEST 81-365-DM

MAGMA COPPER COMPANY

ORDER

William A. Haro has petitioned for discretionary review pro se of a decision of an administrative law judge issued on November 1, 1982. Magma Copper has filed a motion requesting that the petition be dismissed as untimely. For the reasons that follow, the petition is dismissed as untimely.

The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., provides that "any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision." 30 U.S.C. § 823(d)(2)(A)(i) (emphasis added). Rules 5(d) and 70(a) of the Commission's rules or procedure provide that "filing of a petition for discretionary review is effective only upon receipt," 29 C.F.R. §§ 2700.5(d), 70(a). The decision of the administrative law judge becomes the final decision of the Commission 40 days after its issuance unless the Commission has directed review of the decision during that period. 30 U.S.C. § 823(d)(1).

The administrative law judge's decision in this case was issued on November 1, 1982. The fortieth day following the issuance of the judge's decision was December 11, 1982. The petition for discretionary review was not mailed until December 22, 1982. It was not received, and therefore filed, at the Commission until December 27, 1982, fifty-six days after the issuance of the judge's decision. Accordingly, the petition for discretionary review was not filed until after the decision of the judge became a final order of the Commission by operation of law. 30 U.S.C. § 823(d)(1).

In the petition, Haro states that he first learned of the judge's decision on December 6, 1982, and that the attorney who represented him in the proceedings before the judge can confirm the date of his notification of the judge's decision. Haro also states that the attorney did not petition for review of the judge's decision because

of a potential conflict of interest with Magma Copper Company. We construe these

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representations to be in effect 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).

We have reviewed Haro's representations concerning the late filing of the petition against the standards set forth in Fed. R. Civ. P. 60(b)(1). 1/ *Boone v. Rebel Coal Company*, 4 FMSHRC 1232 (1982). See 7 Moore's Federal Practice § 60.22[2]; 11 Wright & Miller, Federal Practice and Procedure § 2858. Even if Haro's assertion that he first learned of the decision on December 6 is accepted as fact, Haro has not made any representations that his late receipt of the decision was due to factors outside of his control or that of his attorney. The potential conflict of interest that allegedly prevented Haro's attorney, who represented him at the hearing and filed a post-hearing brief on his behalf, from filing a petition with the Commission is not explained. In view of the extraordinary nature of reopening final judgments, lack of sufficient information substantiating a request for relief can be fatal to such claims. 7 Moore's at § 60.22[2], p. 257. Moreover, Haro waited more than two weeks after December 6 to prepare and mail a petition two paragraphs in length. This delay does not demonstrate diligence under the circumstances. Haro has had two previous cases before the Commission and should be familiar with its procedures. 2/

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).

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Accordingly, we grant Magma's motion to dismiss the petition as untimely.

L. Clair Nelson, Commissioner

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