

CCASE:
MSHA V. VALLEY CAMP COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 9, 1979

SECRETARY OF LABOR, Docket No. MORG 78-46-P
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

VALLEY CAMP COAL COMPANY

DECISION

This is a review of a decision holding the operator, Valley Camp Coal Company, in default in a penalty proceeding.

On January 30, 1978, the Mining Enforcement and Safety Administration (MESA) filed a petition for assessment of civil penalty seeking a penalty of \$10,000 for an alleged violation of 30 CFR 75.400. The Company's answer was due on or before March 2, 1978. No answer was timely filed. The Company discovered its omission and on April 6, 1978, filed an answer with a cover letter explaining the delay. On April 13, 1978, the administrative law judge defaulted the Company. The order of default stated in pertinent part that:

Counsel for respondent "mistakenly took this docket number for MORG 78-26-P, which was another matter that had been previously settled and a dismissal order entered."

Respondent having failed to show cause why it should not be deemed to have waived its right to a hearing and contest of the penalty proposed, ... respondent ... is held in default ...

The Company filed a motion for reconsideration on May 3, 1978, and again described the circumstances surrounding its failure to file

a timely answer. Counsel for the Company characterized its omission as mistake, inadvertence and excusable neglect." In denying the motion for reconsideration, the judge stated:

The reasons for late filing set forth in Respondent's affidavit filed May 10, 1978 do not add materially to the excuse set forth in the letter of April 6, 1978 accompanying its Answer, and do not establish good cause for setting aside the Order of Default.

The Company timely filed a petition for discretionary review which the Commission granted on October 11, 1978.

The Company argues that the judge erred in failing to issue a show cause order in accordance with 43 CFR 4.544(a) and 29 CFR 2700.26 1/ prior to summarily imposing a penalty. The Company asserts that its failure to file a timely answer is excusable and that, therefore, it should be relieved of the consequences of a penalty based upon a procedural irregularity rather than on the merits of the case.

We find that the operator has shown adequate cause to excuse the late filing of its answer. 2/ Courts do vacate final orders for mistake, inadvertence, or excusable neglect. 3/ In its submissions to the judge, the Company explains that due to a change in personnel, the petition for assessment of civil penalty was forwarded to the Company's counsel without being marked as needing action. Since counsel had just settled a case with a very similar docket number, he erroneously assumed the document related to the settled case. When he discovered his error, counsel promptly filed an answer. We deem the mistake or neglect shown in this case to constitute cause justifying the failure to timely file an answer, particularly where, as here, no prejudice has been shown.

1/ The Board of Mine Operations Appeals' rules were in effect until March 8, 1978. The Company's answer was due on March 2, 1978. The judge's default order was entered after the interim rules (29 CFR 2700.01 et seq.) became effective, and accordingly his actions are governed by those rules.

29 CFR 2700.26 of the Commission's interim. rules provide:

(a) Where the respondent fails to file a timely answer to a petition for assessment of civil penalty, or fails to timely comply with any prehearing order of a Judge, the Judge may issue an order to show cause why (1) the respondent should not be deemed to have waived his right to a hearing and contest of the proposed penalty and (2) the proposed order of assessment should not be summarily entered as the final order of the Commission and not subject to further review by the Commission or a court.

(b) If the order to show cause is not satisfied as provided therein, the Judge may order that the respondent be held in default and issue a summary order imposing the proposed penalties as final and directing that such penalties be paid.

2/ Because we find on the facts of this case that justifiable cause exists to excuse the late filing, and because, in denying the motion

for reconsideration, the judge determined whether, in his opinion, such cause existed here, we do not reach the issue of whether 29 CFR 2700.26 required an order to show cause prior to the entry of a default decision. We note, however, that §2700.63 of the Commission's permanent Rules of Procedure (published in the Federal Register on June 29, 1979, at page 38232 do require a show cause order prior to entry of a default.

3/ See Rule 60(b), F.R. Civ. P.

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The decision holding the operator in default is reversed and the case is remanded for a hearing on the merits.