

CCASE:
MSHA V. PERRY DRILLING
DDATE:
19870320
TTEXT:

FMSHRC-WDC
March 20, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PENN 86-273

PERRY DRILLING COMPANY

BEFORE: Ford, Chairman; Backley, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on February 11, 1987, finding Perry Drilling Co. ("Perry Drilling") in default for failing to respond to a show cause order and assessing a civil penalty of \$500. Six days after the default order issued, the judge's law clerk received a telephone call from Richard C. Perry of Perry Drilling in which Mr. Perry asserted, according to a memorandum placed in the official file by the law clerk, that the company had not received the Secretary of Labor's penalty proposal or the show cause order. The clerk suggested that Perry advise the Commission in writing of these assertions. On February 26, 1987, the Commission received a letter from Perry stating that the company "never received the initial fine." We consider Perry's letter to constitute a timely petition for discretionary review, vacate the order of default, and remand for further proceedings.

We have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or

good cause for failing to respond, the failure may be excused and appropriate proceedings on the merits permitted. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986); M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1271 (September 1986). Here, Perry Drilling filed a timely "Blue Card" request for a hearing in connection with the Secretary's proposed assessment of a civil penalty for one alleged violation of a mandatory safety standard. In response, the Secretary filed with the Commission a petition for assessment of civil penalty. When no answer to the petition was received, the judge, on November 26, 1986, ordered Perry Drilling to send an answer or show cause for failure to do so. The show

~380

cause order was mailed to Perry Drilling by certified mail, return receipt requested. The return receipt in the official file, dated December 2, 1986, bears the signature, "Richard C. Perry."

We are unable on the basis of the present record to evaluate the credibility of Perry's assertions. We note that the Secretary attached a certificate of service to his petition for assessment of civil penalty stating that a copy of the petition was mailed to Richard C. Perry. Further, the signature "Richard C. Perry" appears on the return receipt of the judge's show cause order. We will permit Perry Drilling to present its position to the judge, who will determine whether sufficient grounds exist for excusing the failure to timely respond. E.g., *Kelley Trucking, supra*, 8 FMSHRC at 1869.

For the foregoing reasons, the judge's default order is vacated and this matter is remanded for proceedings consistent with this opinion. Perry Drilling is reminded to serve the Secretary with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7. 1/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Commissioner Doyle believes that, given the return receipt to the show cause order bearing Perry's signature and there being no assertion in Perry's letter of February 26 that he never received that order, the default order should not be vacated.

~381

Distribution

Richard C. Perry
Perry Drilling Company
Box 26
Frostburg, PA 15740

Therese I. Salus, Esq.
Office of the Solicitor
U.S. Department of Labor
14480 Gateway Bldg.
3535 Market St.
Philadelphia, PA 19104

Ann Rosenthal, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
730 K Street, N.W., Suite 600
Washington, D.C. 20006