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MSHA V. WESTRICK COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 8, 1988

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

v. Docket No. PENN 88-119

WESTRICK COAL COMPANY

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

ORDER

BY THE COMMISSION:

Respondent, Westrick Coal Company, after requesting a hearing to contest an alleged violation, failed to respond to the administrative law judge's pre-hearing and show cause orders. On May 25, 1988 the administrative law judge issued a default decision. Respondent filed a Petition for Discretionary Review on June 24, 1988.

The record does not reveal the reasons for the Respondent's failure to respond to the judge's orders. We grant the petition and vacate the judge's default decision in order to allow this operator, who is apparently acting pro se an opportunity to present the reasons for these failures, and for the Secretary to interpose any objections to relief from the default decision. Should the judge determine that relief from default is appropriate, he should proceed with the civil penalty issues in this matter.

Commissioner Lastowka, dissenting:

In my opinion the administrative law judge properly entered an order of default in this proceeding. Indeed, the persistent failure of Westrick Coal Company to do anything to participate in the hearing process left the judge no choice. While I endorse the Commission's previously expressed preference for dispositions on the merits over procedural defaults, that policy cannot be without limits. I believe that to order further proceedings in the circumstances of this case exceeds appropriate bounds.

The Mine Act provides a mine operator with an opportunity for a hearing before this Commission on citations or orders issued by MSHA. Westrick exercised this right by requesting a hearing on citation number 269767. In order to obtain the requested hearing, however, Westrick was required to participate in the hearing process. Westrick ignored every request by the judge and the Secretary that it do so. On March 22, 1988, the judge issued an order directing that the parties confer and exchange information, and noting that failure to do so could lead to default. The record indicates that Mr. Westrick received this order. Westrick did not respond. On March 25 the Secretary sent a letter to Mr. Westrick indicating that attempts to contact him by phone had been unsuccessful and asking Westrick to call the Secretary for purposes of complying with the judge's order. Westrick did not respond. On April 11 the Secretary recited the above chronology in a motion filed with the judge requesting the issuance of a default judgment. Westrick did not respond. On April 21 the judge issued an order directing Westrick to comply by May 2 with his previous order or to show cause why it should not be held in default for failing to respond. The record shows that Mr. Westrick received this order. Westrick did not respond. Accordingly, on May 25 the judge issued a default order. Mr. Westrick's petition for discretionary review of the judge's default order offers no explanation whatsoever for Westrick's persistent failure to heretofore respond and participate in the hearing process. */

In these circumstances the judge committed no error in defaulting Westrick. The judge and the Secretary have followed the proper course in pursuing and resolving this proceeding, yet find themselves having to once again expend their time and resources in an attempt to provide a hearing to a party who declines to participate in the hearing process. Because I believe no error was committed below, I must respectfully dissent from the remand for further proceedings.

*/ Westrick's failure to offer any explanation for its failure to respond distinguishes this matter from other default situations where colorable claims of confusion over procedures or nonreceipt of served documents have been raised. See e.g., Rivco Dredging Corp., 10 FMSHRC 624 (May 1988); Perry Drilling Co., 9 FMSHRC 379 (March 1987); Patroit Coal Co., 9 FMSHRC 382 (March 1987); Doug Connelly Sand & Gravel, 9 FMSHRC 385 (March 1987).

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