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MSHA V. AMBER COAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
February 1, 1989

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

v. Docket No. KENT 88-136  
AMBER COAL COMPANY

BEFORE: Ford, Chairman, Backley, Doyle, 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), Chief Administrative Law Judge Paul Merlin issued an Order of Default on November 21, 1988, finding Amber Coal Co. ("Amber") in default and ordering Amber to pay a civil penalty of \$8,500. The default order was issued because Amber had failed to respond to an earlier Order to Show Cause. Subsequently, the Commission received from Amber a copy of a letter that Amber apparently had sent in response to the show cause order but had misdirected to the Department of Labor. For the reasons set forth below, we deem this letter to constitute a request for relief from a final Commission order, vacate the judge's default order and remand for further proceedings.

On November 12, 1987, following an investigation of a fatal roof fall accident at Amber's No. 7 mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Amber a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 75.200, the mandatory roof control standard for underground coal

mines. On May 20, 1988, MSHA's Office of Assessments, under the special assessment procedures of 30 C.F.R. § 100.5, notified Amber that it proposed a civil penalty of \$8,500 for the alleged violation. On May 26, 1988, Amber filed its "Blue Card" request for a hearing before this independent Commission. On June 24, 1988, the Secretary of Labor filed a complaint proposing the assessment

of a civil penalty for the violation. The record indicates that Amber did not file an answer to the complaint with the Commission.

On September 8, 1988, approximately two and one-half months after the Secretary's complaint was filed, Judge Merlin issued a show cause order directing Amber to answer the complaint within 30 days or be found in default. When no answer was filed by November 21, 1988, Judge Merlin issued an Order of Default against Amber, directing it to pay the \$8,500 civil penalty proposed by the Secretary. See 30 C.F.R. § 2700.63 (summary disposition of Commission proceedings).

On December 1, 1988, the Commission received from Amber a copy of a letter dated September 15, 1988, addressed to the sub-regional office of the Solicitor of the Department of Labor, Nashville, Tennessee and signed by Amber's safety director. (The letter begins "[t]his is respectfully submitted as an answer to why we disagree with the penalty levied against us," and sets forth Amber's defense to the citation. Amber's submission, on its face, raises the possibility that Amber's letter to the Department of Labor was meant as a response to the judge's show cause order but was erroneously filed with the wrong agency.

The judge's jurisdiction in this matter terminated when his default order was issued on November 21, 1988. 29 C.F.R. § 2700.65(c). Because the judge's decision has become final by operation of law, 30 U.S.C. § 823(d)(1), we can consider the merits of Amber's submission only if we construe it as a request for relief from a final Commission decision incorporating a petition for discretionary review. See 29 C.F.R. 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. P. 60(b) (relief from judgment or order).

Amber appears to be a small coal company proceeding without benefit of counsel. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from final orders of the Commission where it appears that the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence or mistake. See Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269 (September 1986). Here, Amber may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. Amber's letter was apparently sent to the Department of Labor's Solicitor shortly after the judge issued the show cause order and well within the time provided for a response.

Under these circumstances, we will accept Amber's submission as a request for relief from a final order incorporating by implication a petition for discretionary review.

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 the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. Kelley, 8 FMSHRC at 1869; Sundt, 8 FMSHRC at 1271. Although Amber's submission raises the possibility of a misdirected communication, we cannot make a determination with certainty on the basis of the present record. In the

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interest of Justice, we conclude that Amber should have the opportunity to present its position to the judge, who shall determine whether final relief from the default order is warranted. See Kelley, 8 FMSHRC at 1869.

Accordingly, the default order is vacated, and the matter is remanded for proceedings consistent with this order. Amber is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

#### Distribution

Theresa Ball, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
2002 Richard Jones Road, Suite B-201  
Nashville, TN 37215

Keith Akers  
Amber Coal Company, Inc.  
29501 Mayo Trail  
Catlettsburg, KY 41129