

CCASE:
KENNETH HOWARD V. B & M TRUCKING
DDATE:
19890407
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 7, 1989

KENNETH HOWARD

v. Docket No. KENT 89-2-D

B & M TRUCKING

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), Commission Administrative Law Judge Gary Melick issued an Order of Dismissal on February 27, 1989, finding that complainant Kenneth Howard had failed to respond to an earlier Order to Show Cause and dismissing Howard's discrimination complaint. Subsequently, the Commission received from the attorney representing Howard a Motion to Reinstate, asserting that the failure to respond to the show cause order was due to counsel's misunderstanding of that order. Under the circumstances presented, we deem this motion to constitute a timely petition for discretionary review, which we grant. We vacate the judge's dismissal order, and remand for further proceedings.

On October 3, 1988, Howard, by counsel, filed with the Commission a discrimination complaint alleging that he had been discriminatorily discharged by B&M Trucking ("B&M") in violation of section 105(c) of the Mine Act. 30 U.S.C. § 815(c). 1/ The complaint, as supplemented on October 7, 1988, alleges that Howard, a truck driver, was discharged because he had objected on safety grounds to operating a front end loader that he had not been trained to operate. The complaint requests backpay, reinstatement, punitive damages, and attorney's fees and costs.

1/ Under Commission Procedural Rule 40(b), 29 C.F.R. § 2700.40(b), as amended (52 Fed. Reg. 44882 (November 23, 1987)), a miner may file his own section 105(c)(3) complaint of discrimination for alleged violation of section 105(c) of the Mine Act only if the Secretary of Labor has made a prior determination that no violation of the Act has occurred. See also 30 U.S.C. §§ 815(c)(2) & (3).

~500

In an Order to Show Cause dated December 2, 1988, Commission Chief Administrative Law Judge Paul Merlin observed that Howard had not shown compliance with the Commission's requirements for filing a discrimination complaint pursuant to section 105(c)(3) of the Mine Act and ordered the complainant to file with the Commission a copy of a certified mail return receipt showing delivery of the discrimination complaint to the operator and a copy of the determination letter from the Department of Labor's Mine Safety and Health Administration ("MSHA") finding that a violation of the Mine Act had not occurred. The order directed Howard to send the complaint to the operator, if he had not already done so, along with a note to the operator stating that complainant disagreed with MSHA's determination and was requesting review and relief by the Commission. Howard was ordered to comply with the above requirements within 30 days of the date of the order or to show good reason for failure to do so.

On February 27, 1989, Judge Melick, to whom the matter had been assigned, issued an Order of Dismissal in which he found that complainant had failed to respond to the show cause order. Accordingly, the judge dismissed the discrimination complaint. On March 13, 1989, the attorney for Howard filed with Judge Melick a Motion to Reinstate the discrimination complaint.

Because Judge Melick's jurisdiction in this matter terminated when his dismissal order issued on February 27, 1989, 29 C.F.R. § 2700.65(c), he forwarded the Motion to Reinstate to the Commission's Docket Office, where it was received on March 14, 1989. B&M has not filed a response to this motion. Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here, the Motion to Reinstate is a request for relief from the judge's decision and, under the circumstances presented, we will treat it as a timely-filed petition for discretionary review. See, e.g., *Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

Judge Melick's dismissal of the complaint was based on complainant's default in not responding to the show cause order. The Commission has stated that "in general, if a defaulting party can make a showing of adequate or good cause for the failure to respond to an order, the failure may be excused and appropriate proceedings on the merits permitted." *M.M. Sundt Construction Co.*, 8 FMSHRC 1269, 1271 (September 1986), citing *Valley Camp Coal Co.*,

1 FMSHRC 791, 792 (July 1979). In assessing the existence of adequate cause, explanatory factors akin to those mentioned in Fed. R. Civ. P. 60(b)(1) -- mistake, inadvertence, surprise, or excusable neglect -- may be relevant. Valley Camp, supra, 1 FMSHRC at 792 & n. 3. The absence of bad faith on the part of the defaulting party is also a relevant concern. Easton Constr. Co., 3 FMSHRC 314, 315 (February 1981). An attempt to comply at least partially with the order in question may be a mitigating factor as well. Sigler Mining Co., 3 FMSHRC 30 (January 1981).

In this case, Howard's counsel states that the failure to comply with the show cause order was due to her own misunderstanding of the

~501

judge's order. The Motion to Reinstate alleges that the complaint was served on B&M within the period required by the show cause order, and the certified mail return receipt is attached to the motion. The complaint also outlines the relief requested. Thus, there is some indication on the record of complainant's attempts to comply with requisite filing requirements and with the show cause order. We are reluctant to impose default by attributing to a party the non-willful errors of its counsel. See, e.g., *Jackson v. Beech*, 636 F.2d 831, 835-37 (D.C. Cir. 1980).

Although there is not sufficient information on the record to permit us to rule finally on the substantive merits of Howard's motion at this time, we conclude that in the interest of justice, complainant should have the opportunity to present his position to the judge, who shall determine whether final relief from the default order is warranted. See *Kelley Trucking Co.*, 8 FMSHRC 1867, 1869 (December 1986). In connection with further proceedings before the judge, we note that Howard's attorney has not furnished the Commission with a copy of the letter from MSHA indicating its determination that no violation of the Act occurred, or with proof that Howard's supplemental statement filed on October 7, 1988, has been served on the operator.

Accordingly, review of the judge's order of dismissal is hereby granted, the order is vacated, and this matter is remanded for further appropriate proceedings. 2/

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission in this matter.