CCASE:
MSHA V. A. H. SMITH STONE
DDATE:
19890508
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 8, 1989

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

v. Docket No. VA 88-44-M
A. H. SMITH STONE COMPANY

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982). On February 22, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent A. H. Smith Stone Company ("Smith Stone") in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's two subsequent orders to show cause. The judge assessed a civil penalty of $362 proposed by the Secretary for four violations of mandatory safety standards. By letter dated April 10, 1989, addressed to Judge Merlin, A. H. Smith Associates Limited Partnership ("Smith Associates"), on behalf of Smith Stone, requested that the order of default be removed from the proceeding and that the operator be allowed to contest the alleged violations. On May 1, 1989, the Secretary filed an opposition to the request. We deem the April 10 letter to constitute a request for relief from a final Commission order incorporating a late-filed petition for discretionary review, and, for the reasons set forth below, we grant review, vacate the judge's default order and remand for further proceedings.

On January 5 and 6, 1988, an inspector of the Department of

Labor's Mine Safety and Health Administration ("MSHA") issued to Smith

Stone four citations pursuant to section 104(a) of the Mine Act, 30 U.S.C. $ 814(a). On March 29, 1988, MSHA's Office of Assessments notified Smith Stone that it proposed a total civil penalty of $362 for the alleged violations. On May 4, 1988, Smith Stone filed its "Blue Card" request for a hearing before this independent Commission. On June 9, 1988, the Secretary filed a complaint proposing the assessment of civil penalties for the violations. The record reflects that Smith Stone did not file an answer to the complaint, which was served by first class mail on it at its Mitchell, Virginia, address.

On August 15, 1988, Judge Merlin issued a show cause order directing Smith Stone to answer the complaint within 30 days or be found in default. The order was sent via certified mail, return receipt requested, to Joseph McElfish, A. H. Smith Stone Company at the Mitchell, Virginia, address. The record reflects that the certified mail return receipt for the order was signed on August 22, 1988, by one Clyde Wayland as agent for Smith Stone. No response to the order appears in the official file.

On November 8, 1988, the judge's law clerk noted, via a memorandum to the file, that Mr. McElfish was no longer employed by Smith Stone and that service should be directed to a Ms. Pridgen at Smith Associates' corporate headquarters in Branchville, Maryland. On December 8, 1988, Judge Merlin issued a second order to show cause, directing Smith Stone to answer the complaint within 30 days, indicating that since "it has subsequently been learned that Mr. McElfish is no longer employed by the operator and ... the proper company officials may not have received the order.... the second show cause order is being issued [to Ms. Pridgen at the corporate headquarters of A. H. Smith Associates in Branchville, Maryland]." The certified mail return receipt for the second order was signed by one R. Bailey.

On February 22, 1989, Judge Merlin issued an Order of Default stating, inter alia, that the respondent had "failed to comply ... [with the second order to show cause]." The judge accordingly assessed the total civil penalty amount of $362.

By letter dated April 10, 1989, which encloses an answer to the complaint, Smith Associates' Director of Safety/Government Affairs essentially requested that the order of default be vacated and its right to contest the citations reinstated. The submission asserts that the delay in responding is attributable to the fact that the Secretary's complaint, the orders to show cause and the order of default were directed to persons no longer employed by

Smith Associates.

On May 1, 1989, the Secretary opposed the request on the grounds that the respondent's proffered excuses for its nonresponse to Commission orders are not persuasive.

The judge's jurisdiction in this matter terminated when his default order was issued on February 22, 1989. 29 C.F.R. $ 2700.65(c). Because the judge's decision has become final by operation of law, we can consider the merits of A. H. Smith Associates' request only if we construe it as a request for relief from a final Commission decision

incorporating a late-filed petition for discretionary review. See, e.g., Amber Coal Company, 11 FMSHRC 131, 132 (February 1989); Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269 (September 1986).

Smith Associates, proceeding without benefit of counsel, has raised what may be a colorable excuse for its nonresponse to the judge's orders. See, e.g., Columbia Portland Cement Co., 8 FMSHRC 1644 (November 1986)(nonresponse attributable to mistake or neglect of a former employee); Mohave Concrete and Materials, Inc., 8 FMSHRC 1646 (November 1986)(failure to respond attributable to mistake or neglect of a former bookkeeper); see also, Ten-A Coal Co., 10 FMSHRC 1332 (September 1988); Perry Drilling Co., 9 FMSHRC 370 (March 1987). 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, mistake, or excusable neglect. Amber, supra; Kelley, supra; Sundt, supra. Under these circumstances, we will accept Smith Associates' letter as a request for relief from a final Commission order incorporating by implication a petition for discretionary review. We accordingly grant the petition.

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. Sundt, 8 FMSHRC at 1271; Kelley, 8 FMSHRC at 1869. The Commission has recently noted that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default." Ten-A Coal Company, 10 FMSHRC 1132, 1133 (September 1988), quoting Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988); Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987)(emphasis supplied). Since we are unable, on the basis of the present record, to evaluate the merits of the respondent:s assertions, we will permit the parties to present their positions to the judge, who will determine whether sufficient grounds exist for excusing the failure to timely respond. Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987), citing Kelley, supra, 8 FMSHRC at 1869.

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order. Respondent is reminded to serve the Secretary of Labor with copies of all its correspondence and other filings in this matter. 29 C.F.R. $ 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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