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MSHA V. L & L GRAVEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 30, 1989

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

v. Docket No. CENT 89-2-M

L & L GRAVEL

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

DIRECTION FOR REVIEW AND 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 April 20, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent L & L Gravel ("L&L") in default for failing to answer the Secretary of Labor's Proposal for Penalty and the judge's Order to Show Cause. On May 22, 1989, the Secretary filed with the Commission a Motion to Correct Order of Default seeking reduction of the penalty amount by \$20, on the basis that one of the underlying citations for which penalties had been proposed had been vacated. For the reasons set forth below, we deem this motion to constitute a Petition for Discretionary Review, which we grant, and we vacate the judge's default order and remand for further proceeding.

The Secretary asserts that one of the underlying citations, based on an alleged violation of 30 C.F.R. § 56.14010 (safety devices on hand-held power tools), was vacated on October 14, 1988, and that the penalty of \$20 assessed in connection with that citation should also be vacated.

The judge's jurisdiction in this matter terminated when his default order was issued on April 20, 1989. 29 C.F.R. § 2700.65(c). 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 Secretary's motion is a request for revision of, and a form of relief

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from, the judge' decision and we will treat it as a petition for discretionary review. See, e.g., Secretary on behalf of DeLisio v. Mathies Coal Co., 9 FMSHRC 193, 194 (February 1987).

The Secretary's motion, in effect, questions the factual basis upon which the judge's decision penalty assessment rests. Under the circumstances, we deem it appropriate to remand this matter to the judge, who shall take appropriate action with respect to the Secretary's request for correction of his original decision. Cf. Camp Fork Fuel Co., 11 FMSHRC 496, 497-98 (April 1989).

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order.

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

Richard Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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