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MSHA V. BLUE CIRCLE ATLANTIC
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 20, 1989

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

v. Docket No. YORK 89-45-M

BLUE CIRCLE ATLANTIC, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka 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) ("Mine Act"). On October 26, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Blue Circle Atlantic, Inc. ("Blue Circle") in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed the civil penalty of \$900 proposed by the Secretary. By letter dated November 13, 1989, addressed to Judge Merlin, Blue Circle requests that this matter be reopened on the grounds that a settlement has been negotiated with the Secretary reducing the civil penalty to \$600. Attached to the letter is Blue Circle's Motion to Reopen Default and to Approve Settlement. We deem Blue Circle's November 13th letter and attached motion to constitute a timely petition for discretionary review of the judge's default order, we grant the petition, and we remand this matter to the judge for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on October 26, 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(a). Here, Blue Circle's November 13 letter to Judge Merlin and accompanying motion seek vacation of, and relief from, the judge's default order and we will treat them as constituting a timely filed petition for discretionary review. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

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It appears from the record that Blue Circle may have raised a colorable explanation for its failure to respond to the judge's show cause order in that the parties have been engaged in settlement negotiations. The Commission will afford relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989).

We are unable, on the basis of the present record, to evaluate the merits of Blue Circle's assertions but, in the interest of justice, we will permit Blue Circle to present its position to the judge, who shall determine whether appropriate grounds exist for excusing its failure to timely respond. E.g., Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987). If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. 820(k).

Accordingly, we grant Blue Circle's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.

Joyce A. Doyle, Commissioner

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