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MSHA V. FLIPPY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 28, 1990

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

v. Docket No. VA 90-8

FLIPPY COAL COMPANY, INC.

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), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on March 9, 1990, finding Flippy Coal Company, Inc. ("Flippy") in default for failure to answer the Secretary of Labor's civil penalty petition and the judge's order to show cause. The judge assessed civil penalties in the amount of \$1,486 as proposed by the Secretary of Labor. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On March 14, 1990, Flippy's bookkeeper wrote a letter to this Commission stating that an attached letter explaining why "there should be no penalty" had been sent to the wrong address. The attachment, a letter from Flippy's president dated February 15, 1990, and addressed to the Department of Labor's "MSHA Civil Penalty Compliance Office" in Arlington, Virginia, contains a short and plain statement of the reasons why Flippy disagrees with a roof support violation and a roof plan violation alleged by the Secretary. Flippy's letter of March 14, 1990, was received by the Commission on March 16, 1990.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). We are treating Flippy's March 14 letter as a timely filed petition for discretionary review because it was received within 30 days of the judge's decision. E.g. Patriot Coal Co., 9 FMSHRC 382 (March 1987). The petition is granted.

The record discloses that on July 11, 1989, and on August 4 and 10, 1989, inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued seven citations and one order to Flippy alleging violations of various safety regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Flippy's president filed a "Blue Card" request for a hearing before this independent Commission. On December 12, 1989, counsel for the Secretary filed a proposal for penalty assessments, which was served by mail on Flippy. When no answer to the penalty proposal was filed, the judge, on January 22, 1990, issued a show cause order directing Flippy to file an answer within 30 days or show good reason for the failure to do so. As noted, Flippy's president mailed an answer to the Secretary on February 15, 1990. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the proposal for penalty. 29 C.F.R. § 2700.5(b) & .28.

Flippy 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 where it appears that the party's failure to respond to a judge's order and the party's default are due to inadvertence or mistake. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); Patriot Coal Co., 9 FMSHRC 382 (March 1987). Flippy may have confused the roles of this independent Commission and the Department of Labor in this adjudicatory proceeding. As noted, Flippy's Answer was apparently sent to the Department of Labor within the time provided in the judge's order to show cause. In light of these considerations, we believe that the operator should have the opportunity to present its position to the judge. E.g., Amber Coal Co., 11 FMSHRC 131-32 (February 1989).

~393

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether final relief from default is appropriate. See, e.g., *Doug Connelly Sand & Gravel*, 9 FMSHRC 385 (March 1987).

Distribution

Ruby H. Cyphers
Flippy Coal Company
106 Suffolk Avenue
Richlands, Virginia 24641

Javier I. Romanach, Esq.
Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006