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MSHA V. J. R. THOMPSON  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
June 12, 1990

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

v. Docket No. CENT 89-161-M

J.R. THOMPSON, 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. (1988)("Mine Act"). On February 6, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent J.R. Thompson, Inc. ("J.R. Thompson") in default for its failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed J.R. Thompson civil penalties of \$2,485 as proposed by the Secretary. By letter dated April 27, 1990, addressed to Judge Merlin, the Secretary requests that this matter be reopened on the grounds that the parties have settled the case. For the reasons explained below, we deem the Secretary's submission to be one seeking relief from a final Commission decision, vacate the judge's default order, and remand for further proceedings.

On October 18, 1989, the Secretary filed with the Commission a Complaint Proposing Penalty, in which the Secretary proposed civil penalties for seven citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to J.R. Thompson at its Nunneley Quarry. When no answer to the penalty proposal was filed with the Commission, the chief judge, on December 19, 1989, issued an order

directing J.R. Thompson to file an answer within 30 days or show cause why it failed to do so. Judge Merlin entered an Order of Default on February 6, 1990, after J.R. Thompson failed to file an answer.

On May 1, 1990, the Commission received a letter addressed to Judge Merlin from the Secretary's counsel, requesting the judge's

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approval of a settlement of this case. Attached to the letter was a copy of a signed settlement agreement stating that the parties have agreed to the assessment of specified reduced penalties for the alleged violations, payable in monthly installments, and stating that J.R. Thompson answered the Secretary's civil penalty petition, but sent the answer to the Solicitor's Dallas, Texas, office rather than to the Commission.

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. The official record of this case does not contain an answer. However, the official record of Docket No. CENT 90-8-M contains a copy of a letter dated November 10, 1989, from Johnny R. Thompson, president of J.R. Thompson, to the Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, in which Thompson challenges the penalties proposed for the violations alleged in this case. The letter was forwarded to the Commission by counsel for the Secretary, but was referenced to Docket No. CENT 90-8-M rather than to the present case. The letter was therefore lodged in the official file of Docket No. CENT 90-8-M and Judge Merlin was unaware of its existence when he issued the show cause and default orders.

The judge's jurisdiction over the case terminated when his default order was issued on February 6, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a 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). Because the judge's decision has become final by operation of law, 30 U.S.C. § 823(d)(1), we can consider the merits of the Secretary's submission only if we construe it as a request for relief from a final Commission decision incorporating a petition for discretionary review. See 29 C.F.R. 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. Pro. 60(b) (relief from judgment or order).

J.R. Thompson appears to be a small company proceeding without benefit of counsel. In compliance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from final orders of the Commission where it appears the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence or mistake. See *Kelley Trucking Co.*, 8 FMSHRC 1867, 1868 (December 1986); *M.M. Sundt Construction Co.*, 8 FMSHRC 1269, 1270-71 (September 1986). Here, J.R. Thompson appears to have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. J.R. Thompson's letter answering the Secretary's civil penalty petition was apparently mailed to the Department of Labor's solicitor

within the time provided for a timely answer. Further, counsel forwarded the letter to the Commission on January 8, 1990, within the time provided for a response to the judge's show cause order, but, because of counsel's reference to an erroneous docket number, the letter did not come to the attention of the judge. Accordingly, we accept the Secretary's submission as a request for

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relief from a final order incorporating by implication a petition for discretionary review.

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. Here, where J.R. Thompson has proceeded without benefit of counsel, where the parties agree that J.R. Thompson filed an answer, but mistakenly filed it with the Solicitor's Office, where counsel for the Secretary inadvertently submitted a copy of the answer for inclusion in the official record of CENT 90-8-M, and where the parties may have subsequently settled the matter, we conclude that, in the interest of justice, the Secretary and J.R. Thompson should have the opportunity to present their positions to the judge, who shall determine whether final relief from the default order is warranted.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded for proceedings consistent with this order. J.R. Thompson is reminded to file further documents connected with this proceeding with the judge and to serve counsel for the Secretary with copies of its filings. 29 C.F.R. §§ 2700.5(b), 2700.7.