

CCASE:  
MSHA V. HICKORY COAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
June 18, 1990

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

v. Docket No. PENN 90-49

HICKORY COAL COMPANY

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 May 24, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Hickory Coal Company ("Hickory") 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 \$850 proposed by the Secretary. By letter to the Commission dated May 31, 1990, Hickory requests that this matter be reopened on the grounds that it mistakenly thought that it had filed its answer in this proceeding but, in fact, the answer applied to another Commission proceeding. We deem Hickory's May 31 letter a timely petition for discretionary review of the judge's default order, grant the petition, and remand this matter to the judge for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on May 24, 1990. 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,

Hickory's May 31 letter to the Commission seeks relief from the judge's default order and we will treat it 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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Hickory appears to be a small co.. company proceeding without benefit of counsel. It also appears from the record that Hickory may have raised a colorable explanation for its failure to respond to the judge's show cause order. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), 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 Hickory's position but, in the interest of justice, we will permit Hickory the opportunity to present its position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867 (December 1986).

Accordingly, we vacate the judge's default order and remand this matter for further proceedings. Hickory is reminded to serve the opposing party with copies of all its correspondence and other filings in the matter. 29 C.F.R. § 2700.7.

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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