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MSHA V. BOB SHERMAN
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 14, 1991

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

Docket Nos. WEST 90-110-M

v.

BOB SHERMAN, Employed by
BLACKHAWK

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 July 18, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Bob Sherman ("Sherman"). employed by Blackhawk, in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. Sherman had been cited for violating the Mine Act's mandatory standards prohibiting smoking. 30 U.S.C. 877(c). The judge assessed the civil penalty of \$250 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on July 18, 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). On August 2, 1990, the Commission received a letter from Sherman, addressed to Judge Merlin, in which Sherman explained that he had failed to timely respond

to the judge's show cause order because he had been hospitalized until July 19, 1990. Sherman also expressed his belief that the penalty assessed against him was in the amount of \$25.00 and sent that sum in payment. Under the circumstances, we deem Sherman's letter to

from the judge's default order and assessment of the \$250 penalty. See, e.g., *Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

It appears from the record that Sherman filed a "Blue Card" request for a hearing in this matter in response to the Secretary's initial notification of proposed penalty. It further appears that Sherman, proceeding without benefit of counsel, may have raised an explanation for his failure to timely 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 has generally afforded relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., *Hickory Coal Company*, 12 FMSHRC 1201, 1202 (June 1990). We are unable on the basis of the present record to evaluate the merits of Sherman's position but, in the interest of justice, we will permit Sherman the opportunity to present his position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., *A.H. Smith Stone Company*, 11 FMSHRC 2146, 2147 (November 1989).

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