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MSHA V. TRANSIT MIXED CONCRETE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

February 7, 1991

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

v. Docket No. WEST 90-72-M

TRANSIT MIXED CONCRETE COMPANY

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners

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 October 11, 1990, Commission Administrative Law Judge John J. Morris issued a decision in this matter approving settlement between the Secretary of Labor and respondent Transit Mixed Concrete Company ("TMC"). The Secretary now requests that the judge's decision be amended or that a supplemental decision approving settlement be issued. The Secretary asserts that the parties' settlement agreement inadvertently omitted one of the citations involved in this case and that the parties have now settled that matter as well. For the reasons explained below, we reopen and remand this matter to the judge for further proceedings.

In relevant part, the record discloses that on August 24, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration issued to TMC two citations at its Azusa plant in Los Angeles County, California. Citations No. 3466441 and No. 3466442 allege defective brakes on, respectively, a mobile sweeper and fork lift in violation of 30 C.F.R. 56.14101.

TMC filed a "Blue Card. notice of contest of the Secretary's proposed civil penalty assessment for the two alleged violations. On

January 26, 1990, the Secretary filed with the Commission a civil penalty petition proposing penalties of \$600 for each violation. By letter to the Commission dated February 14, 1990, TMC indicated that it "accept[ed] citation #3466442 and [was] in the process of sending [penalty] payment" but that it still wished to contest Citation No. 3466441.

On July 30, 1990, the Secretary filed with the judge a motion for approval of a settlement with respect to Citation No. 3466441. The motion

stated that TMC had agreed to pay a civil penalty of \$400 but without admission of the violation. On October 11, 1990, Judge Morris issued his Decision Approving Settlement ordering TMC to pay the agreed to penalty of \$400.

By letter to Judge Morris dated January 16, 1991, the Secretary requests the judge to amend his October 11, 1990 decision approving settlement. The Secretary's letter acknowledges that it was the parties' "error" not to have included Citation No. 3466442 in the original motion to approve settlement. The letter asserts that TMC has paid the proposed civil penalty of \$600 for Citation No. 3466442. A copy of a check for \$600 dated December 7, 1990, from TMC to the order of the U.S. Department of Labor is attached. On the statement accompanying the check, there is handwriting indicating "Citation #03466442." Judge Morris has forwarded the Secretary's letter to the Commission.

The judge's jurisdiction in this matter terminated when his Decision Approving Settlement was issued on October 11, 1990. The Secretary did not file a timely petition for discretionary review of the Judge's decision within the 30-day period prescribed by the Mine Act (30 U.S.C. 823(d)(2)(A)(i). See also 29 C.F.R. 2700.70(a)). Nor did the Commission direct review on its own motion within this 30-day period (30 U.S.C. 823(d)(2)(B)). Thus, under the statute, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(2)(B)). Thus, under the statute, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(1). Under these circumstances, we deem the Secretary's submission to be a request for relief from a final Commission order, and to incorporate by implication a late-filed petition for discretionary review. 29 C.F.R. 2700.1(b)(Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in absence of applicable Commission rules); Fed. R. Civ. P. 60(b) (Relief from Judgment or Order). See, e.g., *Danny Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508 (April 1988); *Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (December 1986). Accordingly, we reopen this matter and proceed to consider the Secretary's substantive request for relief.

Relief from a final judgment or order on the basis of mistake, inadvertence, surprise or excusable neglect is available to a movant under Fed. R. Civ. P. 60(b)(1) & (6). The record suggests that the Secretary's original motion for settlement approval erroneously and inadvertently failed to present to the judge a complete settlement agreement addressing Citation No. 3466442. Now the Secretary has proffered, in effect, an amended settlement approval motion addressing that citation. We conclude

that this matter should be remanded to the judge, who shall conduct appropriate proceedings necessary for final disposition of Citation No. 3466442.

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For the foregoing reasons, this case is remanded to the judge for appropriate proceedings.

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