

CCASE:  
MSHA V. JET CONCRETE  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
March 7, 1991

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

v. Docket No. WEST 90-47-M

JET CONCRETE, INC.

BEFORE: Backley, Acting Chairman; Doyle, Holen 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 14, 1991, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Jet Concrete, Inc. ("Jet") 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 Jet a civil penalty of \$3,000, as proposed by the Secretary. For the reasons explained below, we vacate the judge's default order and remand for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on February 14, 1991. 29 C.F.R. 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has been 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). By letter to Judge Merlin, filed February 25, 1991, Jet asserts that it filed its answer with Commission Administrative Law Judge John Morris. Under the circumstances, we deem Jet's February 25th letter to constitute a timely petition for review, requesting relief from the judge's default order.

See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

The record discloses that an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Jet ten withdrawal orders alleging violations of various safety regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Jet filed a "Blue Card" request for a hearing before this independent Commission. On October 15, 1990, counsel for the Secretary filed a proposal for civil penalty assessments. When no answer to the penalty proposal was filed, Judge Merlin issued a show cause order on November 28, 1990, directing Jet to file an answer within 30 days or show good reason for the failure to do so. Under the Commission's rules of procedure, the party

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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.

In its February 25th letter Jet states that, in fact, it filed an answer which was dated December 19, 1990, and addressed to Judge Morris. Jet submits that this case was assigned to Judge Morris in an order dated November 1, 1990, and, thus, that it believed all correspondence was to be sent to Judge Morris. However, the order of assignment to Judge Morris referred to by Jet does not involve Docket No. WEST 90-347-M, the present proceeding, but rather an unrelated proceeding involving Jet, Docket Nos. WEST 90-273-M and WEST 90-274-M.

It appears that Jet, proceeding without benefit of counsel, may have confused the roles of Judge Merlin and Judge Morris in this proceeding. It also appears that Jet may have responded, or attempted to respond in a timely manner, to Judge Merlin's show cause order. The Commission has generally afforded a party relief from default where it appears that the party's actions were due to inadvertence, mistake, or excusable neglect. See, e.g., Amber Coal Company, 11 FMSHRC 131, 132 (February 1989). In light of these considerations, we conclude that the operator should have the opportunity to present its position to the judge, who shall determine whether ultimate relief from default is warranted. See, e.g., Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

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For the foregoing reasons, we grant Jet's petition for discretionary review, vacate the judge's default order and civil penalty assessment, and remand this matter to the judge for appropriate proceedings. Jet is reminded to file documents connected with this proceeding with the judge and to serve counsel for the Secretary with copies of any of its filings. 29 C.F.R. 2700.5(b). 2700 7.

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