

CCASE:
MSHA V. RICKY DAVIS
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TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 8, 1991

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

v. Docket No. KENT 90-432

RICKY DAVIS, Employed by
WAMPLER BROTHERS COAL CO., 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 13, 1991, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Ricky Davis ("Davis"), employed by Wampler Brothers Coal Co., Inc., in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. Davis had been cited under section 110(c) of the Mine Act, 30 U.S.C. 820(c), for allegedly, knowingly ordering a violation of 30 C.F.R. 75.1701. The judge assessed the civil penalty of \$800 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On February 21, 1991, the Commission received correspondence from Davis in which he states that he had received a "letter" informing him that he had failed to respond to a "letter," and directing him to pay \$800. Davis asserts that he had mailed a response on December 17, 1990, to J. Philip Smith, an attorney with the Department of Labor's Regional Solicitor's Office in Arlington, Virginia. Mr. Smith has informed the Commission's Docket Office that his files do not contain a response from

Davis.

The judge's jurisdiction in this proceeding terminated when his default order was issued on February 13, 1991. 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, Davis's letter, received by the Commission on February 21, 1991, seeks relief from the judge's default order. We will treat it as constituting a timely petition for discretionary review. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1958).

The record discloses that upon preliminary notification by MSHA of the civil penalty proposed for his alleged violation, Davis filed a "Blue Card" request for a hearing before this independent Commission. On October 5, 1990, counsel for the Secretary served Davis with the Secretary's penalty proposal. When no answer to the penalty proposal was filed, the judge, on November 28, 1990, issued a show cause order directing Davis to file an answer within 30 days or show good cause for his failure to do so. As noted, Davis alleges that he mailed a response on December 17, 1990, to Smith in the Solicitor's office. Under the Commission's rules of procedure, the party against whom the penalty is sought must file an answer @with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. 2700.5(b) & .28.

It appears that Davis, proceeding without benefit of counsel, may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. It also appears that Davis may have timely responded, or attempted to respond, to the judge's show cause order. In accordance 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. See, e.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989).

On the basis of the present record, we are unable to evaluate the merits of Davis' position but we will permit Davis the opportunity to present his position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

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Accordingly, we vacate the judge's default order and remand this matter for further proceedings. Davis is reminded to file all documents and correspondence with the Commission, and to serve the Regional Solicitor's Office with copies of all such filings. 29 C.F.R. 2700.5(b) & .

Distribution

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