

CCASE:
MSHA V. JAMES McMILLEN
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

May 23, 1991

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

v. Docket No. WEVA 90-200-M

JAMES D. McMILLEN,
Employed by Shillelagh
Mining Company

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

ORDER

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" or "Act"). The case involves the Secretary of Labor's allegations pursuant to section 110(c) of the Mine Act, 30 U.S.C. 820(c) that James D. McMillen, as an agent of the corporate mine operator, Shillelagh Mining Company ("Shillelagh"), knowingly authorized or carried out nine violations of mandatory standards at the Shillelagh mine. On October 19, 1990, Commission Chief Administrative Law Judge Paul Merlin entered an Order of Default against Mr. McMillen for failure to answer the Secretary's Petition for Assessment of Civil Penalty and the judge's Order to Show Cause. The judge assessed the civil penalty of \$6,000 proposed by the Secretary. The Commission has received a letter from McMillen's counsel requesting reopening of this matter. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On May 30 and June 1, 1989, the Department of Labor's Mine Safety and Health Act ("MSHA") issued one citation and eight withdrawal orders to Shillelagh, pursuant to section 104(d) of the Act, 30 U.S.C. 114(d), for nine alleged violations of mandatory standards at its mine, one involving a fatal roof fall accident. On April 30, 1990, MSHA issued McMillen a notification of a proposed civil penalty of \$6,000 for the nine violations,

alleging that, as Shillelagh's agent, he had personally authorized or carried out the violations. McMillen filed a "Blue Card" request for a hearing. However, he did not file an answer to the Secretary's subsequent civil penalty petition, nor did he respond to the judge's August 3, 1990 Order to Show Cause.

On May 6, 1991, some six months after the judge's default order, the Commission received from McMillen's counsel a letter seeking the reopening of this matter. Counsel requests that the Commission treat the letter as a petition for discretionary review. The letter indicates a number of serious personal problems that allegedly led to McMillen's failure to file timely responsive pleadings in this matter and requests relief from default.

The judge's jurisdiction in this matter terminated when his default order was issued on October 19, 1990. 29 C.F.R. 2700.65(c). McMillen 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. 523(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 Act, 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 McMillen's submission to be a request for relief from a final Commission order, incorporating a late-filed petition for discretionary review. See, e.g., *Transit Mixed Concrete Co.*, 13 FMSHRC 175, 176 (February 1991). We conclude that the record supports the reopening of this matter, and we proceed to consider McMillen's request for substantive relief.

Relief from a final Commission judgment on the basis of mistake, inadvertence, surprise, or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1) & (6). 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). In appropriate circumstances, a party's personal problems may form the basis for relief under Rule 60(b). Here, it is asserted that McMillen's serious personal problems adversely affected his ability to comply with his filing responsibilities in this matter. It appears that for a period of time in this matter McMillen also may have proceeded without benefit of counsel. The filing delay is serious but we are mindful of the consideration that this is a section 110(c) proceeding involving the proposed assessment of civil penalties against McMillen personally.

We conclude that McMillen may have set forth a colorable excuse for his failure to respond in a timely manner to the Secretary's civil penalty petition and the judge's Order to Show Cause. We are unable to evaluate the ultimate merits of McMillen's assertions on the basis of the present record, but will permit McMillen 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 Co.*, 11 FMSHRC 2146, 2147 (November 1989).

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Accordingly, we grant the Petition for Discretionary Review, vacate the default order, and remand this matter for proceedings consistent with this order.

Distribution

J. Randolph Query, Esq.
5130 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

J. Philip Smith, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety and Health Review Commission
1730 K Street NW, 6th Floor
Washington, D.C. 20006