

CCASE:  
MSHA V. MUSTANG FUELS  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
July 18, 1991

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

v. Docket No. KENT 91-100

MUSTANG FUELS CORPORATION

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (1988), (the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an order of default on June 17, 1991, finding Mustang Fuels Corporation ("Mustang") in default for failure to respond to his April 23, 1991, order to show cause. The judge assessed a civil penalty of \$450.00. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On June 25, 1991, the Commission received an undated letter from Mustang that contains a statement of the reasons why Mustang disagrees with the civil penalty proposed by the Secretary of Labor in this case. The judge's jurisdiction over the case terminated when his decision was issued on June 17, 1991. 29 C.F.R. 2700.65(c). Under the circumstances presented, we deem Mustang's letter to be a timely petition for discretionary review of the judge's default order. E.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). The petition is granted.

The record discloses that on June 19, 1990, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA")

issued Mustang a citation pursuant to section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. 77.807.1, and an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act, alleging that sufficient clearance from a high-voltage cable was not provided in an area in which a dozer was being operated. Mustang filed a "Blue Card" request for a hearing before this Commission. When no answer to MSHA's Proposal for Assessment of Civil Penalty was filed, Judge Merlin issued an order directing Mustang to file an answer within 30 days or show good cause for its failure to do so. When no response was received, Judge Merlin issued an order finding Mustang in default for failure to answer the Secretary's civil penalty proposal and the show cause order, and assessing the \$450 civil penalty proposed by the Secretary.

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On June 25, 1991, the Commission received a letter from Donna Johnson, the secretary and treasurer of Mustang, in which Ms. Johnson alleges that John Kerr, the president of Delta Fuels Corporation ("Delta"), hired Mustang as the "underground miner" for the mine, and hired another company as its "surface mine contractor." Johnson explains that surface mining operations were being conducted by the other contractor when the subject citation and order were issued on June 19, 1990, but that Mustang "never ran any coal at any time" out of the mine' and had no control over the surface mine contractor. It appears that both the citation and the order of withdrawal were issued for conditions present on the surface. She further states that Mr. Kerr assured Mustang that the "citations would be taken care of," and that, subsequently, Kerr left the country.

Ms. Johnson also attached to her letter a separate undated letter addressed to MSHA from Mustang stating that the mine "has been and will be permanently aban[doned]. This was effective on August 1, 1990." The subject citation and order were issued at the mine on June 19, 1990, and terminated on July 5, 1990.

Mustang appears to be a small company proceeding without benefit of counsel. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from default upon a colorable showing of inadvertence, mistake, or excusable neglect. E.g., A.H. Stone Company, 11 FMSHRC 2146, 2147 (November 1989). Here Mustang asserts that it failed to respond to the judge's order because it relied upon Kerr's alleged representation that the citation "would be taken care of," and that it believed that it was not the party responsible for any violative conduct. On the basis of the present record, we are unable to evaluate the merits of Mustang's assertions, but, in the interest of justice, we will permit Mustang to present its position to the judge, who shall determine whether relief from the default order is warranted.

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

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holden, Commission

L. Clair Nelson, Commissioner

