

CCASE:  
MSHA V. PETERS & GARMAN  
DDATE:  
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TTEXT:  
February 11, 1992  
SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

Docket No. WEST 91-87-M

PETERS & GARMAN CONSTRUCTION

BEFORE: Ford, Chairman; Backley, Doyle, Holen, and Nelson, Commissioners  
ORDER

BY THE COMMISSION:

In this 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 respondent Peters & Garman Construction ("P&G") in default for failure to answer the civil penalty petition filed by the Secretary of Labor and the judge's order to show cause. The judge assessed the civil penalty of \$227 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On January 28, 1992, the Commission received a letter dated January 22, 1992, in which counsel for the Secretary requests, on behalf of both parties, that Judge Merlin rescind the previously issued default order and enter an order confirming the settlement agreement negotiated between the parties. Counsel for the Secretary explains that he was delayed in submitting the settlement agreement because respondent's counsel was temporarily out-of-state. The judge's jurisdiction over this case terminated on June 17, 1991, when his decision was issued. 29 C.F.R. • 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. • 823(d)(2); 29 C.F.R. • 2700.70(a). P&G did not file a timely petition for discretionary review within the 30-day period, nor did the Commission direct review on its own motion. 30 U.S.C. • 823(d)(2)(B). Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. • 823(d)(1).  
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Under these circumstances, we deem the January 22 letter to be a request for relief from a final Commission decision and to incorporate a late-filed petition for discretionary review. See J.R. Thompson, Inc., 12 FMSHRC 1194, 1195-96 (June 1990). Relief from a final judgment is available to a movant

under Fed. R. Civ. P. 60(b)(1) on the basis of mistake, inadvertence, surprise  
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or excusable neglect. See, e.g., *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). It appears that an explanation for P&G's failure to respond to the judge's order to show cause may have been raised and that the parties have been engaged in settlement negotiations. We are unable to evaluate the merits of the explanation on the basis of the present record. We will afford P&G the opportunity to present its position to the judge. See, e.g., *Blue Circle Atlantic, Inc.*, 11 FMSHRC 2144, 2145 (November 1989). If the judge determines that final relief from default is appropriate, he shall also take appropriate action with respect to the parties' settlement agreement. 30 U.S.C. • 820(k). Accordingly, we vacate the judge's default order and remand this matter for proceedings consistent with this order.