

CCASE:
MSHA V. WASTE COAL MANAGEMENT
DDATE:
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TTEXT:
March 25, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. KENT 91-75

WASTE COAL MANAGEMENT, INC.

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 20, 1991, finding respondent Waste Coal Management, Inc ("Waste Coal") 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 civil penalties of \$273 as proposed by the Secretary. For the reasons that follow, we vacate the Order of Default and remand this case for further proceedings.

On March 9, 1992, the Commission received a letter dated February 29, 1992, addressed to Judge Merlin, in which the president of Waste Coal requests the judge to dismiss the Secretary of Labor's Motion for Default Judgment. Apparently, neither the Secretary nor Waste Coal is aware that Judge Merlin, had held Waste Coal in default and had ordered it to pay the Secretary's proposed penalties by order dated June 20, 1991. Counsel for the Secretary filed the Motion for Default Judgment on November 19, 1991, and advised the president of Waste Coal, by letter dated February 11, 1992, that the motion had not been ruled upon by the judge. The Commission's records indicate that the judge's Order of Default was sent to the parties by certified mail. The Postal Service never returned the return receipt cards to the Commission, however, suggesting that the orders may not have been received.

The judge's jurisdiction over this case terminated on June 20, 1991, when his Order of Default 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). Waste Coal 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 order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. • 823(d)(1).

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Under the circumstances of this case, we deem the February 29 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 or excusable neglect. See, e.g., *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). It appears from the record that Waste Coal filed a "Blue Card" request for a hearing in response to the Secretary's initial notification of proposed penalties and offered to settle this matter for \$125 at that time. It further appears that Waste Coal is proceeding without benefit of counsel. We are unable on the basis of the present record to evaluate whether Waste Coal has offered a cognizable explanation for its failure to respond to the judge's show cause order. Consequently, in the interest of justice, we will permit Waste Coal to present its position to the judge, who shall determine whether final relief from default is appropriate. See, e.g., *Blue Circle Atlantic, Inc.*, 11 FMSHRC 2144, 2145 (November 1989). Accordingly, we grant Waste Coal's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner