

CCASE:
SOL (MSHA) V. CG&G TRUCKING, INC.
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February 1, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
: :
v. : Docket No. KENT 92-574
: :
CG&G TRUCKING, INC. :

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

ORDER

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act"). Chief Administrative Law Judge Paul Merlin issued an Order of Default on November 19, 1992 to CG&G Trucking, Inc. ("CG&G") for failure to answer the Secretary of Labor's proposal for penalty and the judge's subsequent order to show cause. The judge assessed a civil penalty of \$400 as proposed by the Secretary. On December 28, 1992, the Commission received a letter from CG&G dated December 19, requesting that the Commission vacate the default order. In support of its request, CG&G states that, in response to the Secretary's notification of proposed penalty, it filed a "Blue Card" request for a hearing but heard nothing further about the matter until it received the default order. For the reasons that follow, we reopen this proceeding, vacate the default order, and remand this case for further proceedings.

It appears from the record that CG&G, a small operator acting without counsel, filed a Blue Card request for a hearing in this matter in response to the Secretary's notification of proposed assessment of penalty. However, CG&G did not file an answer to the Secretary's subsequent proposal for penalty as was required in order to contest that penalty proposal. See 29 C.F.R. 2700.28. Accordingly, on September 10, 1992, Judge Merlin issued an Order to Respondent to Show Cause, directing CG&G to file an answer or be found in default. CG&G did not respond to the show cause order, which was returned to the Commission unclaimed.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought within 30 days of its issuance by filing a petition for discretionary review with the Commission. 30 U.S.C. 823(d)(2)(A); 29 C.F.R. 2700.70(a). CG&G did not file a timely petition for discretionary review within the 30-day period, nor did the Commission

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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).

Under these circumstances, we deem CG&G's letter of December 19 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 Commission judgment or order on the basis of mistake, inadvertence, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). See 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). See, e.g., *Danny Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508 (April 1989). See also *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991).

The Commission has indicated that "under appropriate circumstances, a genuine problem in communication or with the mail may justify relief from default." *Middle States Resources, Inc.*, 10 FMSHRC 1130, 1131 (September 1988), quoting *Con-Ag, Inc.*, 9 FMSHRC 989, 990 (June 1987). See also *Ten-A-Coal Company*, 10 FMSHRC 1132, 1133 (September 1988). The record does not contain sufficient information to permit us to rule with respect to CG&G's claim. CG&G has, however, offered a cognizable explanation of its failure to respond to the judge's show cause order. In the interest of justice, we will permit CG&G the opportunity to present its position to the judge, who shall determine whether final relief from default is appropriate under the circumstances presented. Cf. *Perry Drilling Co.*, 9 FMSHRC 379, 380 (March 1987).

Accordingly, we reopen this matter, vacate the judge's default order, and remand this matter for proceedings consistent with this order. CG&G is reminded to serve counsel for the Secretary with copies of its filings in this proceeding. 29 C.F.R. 2700.7(a).

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner