

CCASE:
SOL (MSHR) V. HIGMAN SAND & GRAVEL
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May 25, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 93-18-M
	:	
HIGMAN SAND & GRAVEL, INC.	:	

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

ORDER

BY: Holen, Chairman; Backley, and Doyle, Commissioners

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"). Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on April 22, 1993, finding respondent Higman Sand & Gravel, Inc. ("Higman") in default for failure to answer the civil penalty proposal of the Secretary of Labor ("Secretary") and the judge's February 24, 1993, Order to Show Cause. The judge assessed the civil penalty of \$362 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On April 30, 1993, Higman filed a letter with the Commission, which stated, in essence, that Higman believed it had done everything necessary to obtain a hearing. A letter dated March 19, 1993 was attached, which Higman alleges it mailed to the Department of Labor's Mine Safety and Health Administration ("MSHA") Civil Penalty Compliance Office in Arlington, Virginia.

The judge's jurisdiction in this proceeding terminated when his decision was issued on April 22, 1993. 29 C.F.R. 2700.69(b). 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). We will treat Higman's letter as a timely filed petition for discretionary review of the decision. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

On July 15, 1992, an MSHA inspector issued to Higman a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging a violation of

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30 C.F.R. 56.14132(a), a mandatory audible warning device standard for surface metal and nonmetal mines. On October 6, 1992, MSHA's Office of Assessments, under the regular assessment procedures of 30 C.F.R. 100.3, notified Higman that it proposed a civil penalty of \$362 for the alleged violation. On October 21, 1992, Higman filed its "Blue Card" request for a hearing before this independent Commission. On December 18, 1992, the Secretary filed a complaint proposing the assessment of a civil penalty for the violation. Under the Commission's rules of procedure, the party against whom a penalty is sought was obligated to file its answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. 2700.5(b) & .29. The record indicates that Higman did not file an answer to the complaint with the Commission. When no answer to the penalty proposal was filed, the judge, on February 24, 1993, issued an order directing Higman to file an answer within 30 days or to show good cause for its failure to do so.

It appears that Higman, proceeding without benefit of counsel, may have confused the roles of the Commission and MSHA in this adjudicatory proceeding and may have attempted to respond to the judge's show cause order by sending its response to MSHA. We are unable, on the basis of the present record, to evaluate the merits of Higman's position. Because Higman has asserted an attempt to respond, we will, in the interest of justice, permit Higman the opportunity to present its position to the judge, who shall determine whether relief from default is warranted. Therefore, we vacate the default order. Higman is reminded that it must file all documents and correspondence with the Commission, and serve the Secretary with copies of all of such filings. 29 C.F.R. 2700.5(b) & .7.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner