

CCASE:  
SOL (MSHA) V. CEDAR LAKE SAND & GRAVEL  
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November 30, 1993

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| SECRETARY OF LABOR,      | : |                         |
| MINE SAFETY AND HEALTH   | : |                         |
| ADMINISTRATION (MSHA)    | : |                         |
|                          | : |                         |
| v.                       | : | Docket No. LAKE 93-64-M |
|                          | : |                         |
| CEDAR LAKE SAND & GRAVEL | : |                         |
| COMPANY, INC.            | : |                         |

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

ORDER

BY THE COMMISSION:

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"). On August 27, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cedar Lake Sand & Gravel Co., Inc. ("Cedar Lake") for failing to answer the civil penalty proposal filed by the Secretary of Labor or the judge's June 24, 1993, Order to Show Cause. The judge assessed a civil penalty of \$100 as proposed by the Secretary. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

In a letter to the judge dated September 1, 1993, Cedar Lake sought relief from the default order. It asserted that it had timely responded to the judge's show cause order that it had sent a letter on June 29, 1993, to Office of the Regional Solicitor of the Department of Labor. Cedar Lake enclosed a copy of that letter.

The judge's jurisdiction over this case terminated when his decision was issued on August 27, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. 2700.69(b)(1993). Due to clerical inadvertence, the Commission did not act on Cedar Lake's letter of September 1, 1993, within the required statutory period for considering requests for discretionary review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(1). On November 3, 1993, Cedar Lake again wrote to the judge seeking relief from the default order.

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. 2700.1(b)(Federal Rules of

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Civil Procedure apply "so far as practicable" and "as appropriate," in absence of applicable Commission rules). Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). We reopen this proceeding and consider Cedar Lake's September 1 letter as a timely filed Petition for Discretionary Review, which we grant.

On the basis of the present record, we are unable to evaluate the merits of Cedar Lake's position. In the interest of justice, we remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order and remand this matter for further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner