

CCASE:  
SOL (MSHA) V. HAROLD MITCHELL  
DDATE:  
19931222  
TTEXT:

December 22, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. VA 92-180
	:	
HAROLD MITCHELL, Employed by	:	
H B & B EQUIPMENT COMPANY	:	

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). On May 20, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Harold Mitchell, employed by H B & B Equipment Company, for failing to answer the proposal for assessment of civil penalty filed by the Secretary of Labor or the judge's February 24, 1993, Order to Show Cause. The judge assessed a civil penalty of \$2,000. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the judge dated May 26, 1993, counsel for Harold Mitchell asserted that Mitchell had responded to the judge's show cause order in a letter to the Commission dated March 18, 1993. Counsel attached a copy of Mitchell's March 18 letter and, on the basis of that response, sought relief from the default order.

The judge's jurisdiction over this case terminated when his decision was issued on May 20, 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 oversight, the Commission did not act on the May 26 letter within the required statutory period for considering requests for discretionary review. The judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(1).

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 Civil Procedure apply "so far as practicable" in the absence of applicable

~2459

Commission rules). Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and deem the May 26 letter to be a Petition for Discretionary Review, which we grant.

On the basis of the present record, we are unable to evaluate the merits of Mitchell's position. 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