

CCASE:
SOL (MSHA) V. WAGNER SAND & STONE
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February 23, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
:
v. : Docket No. SE 93-114-M
:
WAGNER SAND & STONE, INC. :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

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 October 22, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Wagner Sand & Stone, Inc. ("Wagner Sand"), for failing to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's August 20, 1993, Order to Show Cause. The judge ordered the payment of a civil penalty of \$294. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the judge dated January 14, 1994, William Wagner, President of Wagner Sand, asserts that the parties had agreed to settle this proceeding. Wagner attached a copy of a Joint Motion to Approve Settlement and to Dismiss ("Joint Motion"), dated October 7, 1993.(Footnote 2)

Wagner further asserts that after the October 22, 1993, default order was issued, the Secretary's counsel conceded that a mistake had been made and advised him that it would be corrected. Wagner states that no correction has been made and he seeks relief from default.

1 Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

2 The Joint Motion, however, references two citation numbers in another proceeding involving Wagner Sand (Docket No. SE 93-115-M); the judge subsequently issued an order approving settlement of the citations in that docket. The Joint Motion is silent as to the citations in this proceeding.

The judge's jurisdiction over this case terminated when his decision was issued on October 22, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. 2700.69(b)(1993). 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 within 30 days of its issuance. 30 U.S.C. 823(d)(2); 29 C.F.R.

2700.70(a). Wagner Sand did not file a timely petition for discretionary review within the 30-day period and the Commission did not sua sponte direct this case for review. Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(1). Under these circumstances, we deem the January 14, 1994, letter to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See, e.g., Island Creek Coal Co., 15 FMSHRC 962, 963 (June 1993).

Under Fed. R. Civ. P. 60(b)(1) & (6), the Commission has afforded relief from final judgments on the basis of inadvertence, mistake, and other reasons justifying relief. See, e.g., Klamath Pacific Corp., 14 FMSHRC 535, 536 (April 1992). It appears from the record that Wagner Sand and the Secretary may have attempted to settle the citations in this proceeding, as well as those in another, and that confusion may have arisen over the citation and docket numbers. On the basis of the present record, however, we are unable to evaluate the merits of Wagner Sand'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