

CCASE:
SOL (MSHA) V. REMP SAND & GRAVEL
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March 14, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 93-295
	:	
REMP SAND & GRAVEL	:	

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 December 20, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Remp Sand & Gravel ("Remp Sand"), for its failure 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 \$390. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the Commission dated January 14, 1994, and received on January 21, 1994, Raymond H. Remp, owner of Remp Sand, asserts that he was not aware that the citations Remp Sand received during a one day inspection by the Department of Labor's Mine Safety & Health Administration ("MSHA") were in different dockets. He further asserts that he has tried to resolve the matter on several occasions with the Department of Labor's Office of the Solicitor in Denver.

The judge's jurisdiction over this case terminated when his decision was issued on December 20, 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). The Commission received Mr. Remp's letter 32 days after the issuance of the judge's decision. Because Mr. Remp has proceeded without benefit of counsel, we will treat his letter as a timely filed Petition for Discretionary Review.

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.

Due to clerical inadvertence, the Commission did not act on the January 14 letter 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). 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 Commission rules). Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and deem the January 14 letter to be a Petition for Discretionary Review, which we grant.

It appears from the record that MSHA may have proposed penalties in more than one docket and that confusion may have arisen over the citations and docket numbers. On the basis of the present record, however, we are unable to evaluate the merits of Remp Sand'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