

CCASE:
SOL (MSHA) V. BIXLER MINING CO.
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SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 93-68
	:	
BIXLER MINING COMPANY	:	

BEFORE: Jordan, Chairman; Backley, Doyle, and Holen, 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 April 26, 1994, Administrative Law Judge Avram Weisberger issued a Default Decision to Bixler Mining Company ("Bixler") for failing to comply with a prehearing order or with the judge's April 4, 1994, Order to Show Cause. The judge assessed a civil penalty of \$50.

On May 27, 1994, the Commission received from the Secretary of Labor a Motion to Vacate Default Decision, Vacate Citation and Dismiss Civil Penalty Proceeding. In his motion the Secretary explains that, after the judge issued the default decision, but before the parties received it, the Secretary agreed with Bixler to vacate the citation and dismiss the civil penalty proceeding.

The judge's jurisdiction over this case terminated when his decision was issued on April 26, 1994. Commission Procedural Rule 69(b), 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); 29 C.F.R. 2700.70(a). The Commission received the Secretary's motion 31 days after the issuance of the judge's decision. The Commission did not act on the May 27 motion within the required statutory period for considering requests for 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, excusable neglect or other reasons justifying relief 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, deem the motion to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review, excuse its late

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filing and grant the petition. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1868-69 (December 1986).

The Commission has concluded that the Secretary has unreviewable authority to vacate or withdraw his own enforcement actions. RBK Construction, Inc., 15 FMSHRC 2099, 2101 (October 1993). Thus, sufficient reason has been presented to justify relief from default and we grant the Secretary's request for vacation of the citation and dismissal of the proceeding. We remind the Secretary, in the future, to file the appropriate stipulations of dismissal as explained in RBK, 15 FMSHRC at 2101 n.2. We note that, although the Secretary's motion was not signed by Bixler, the operator has not filed any opposition to the motion.

For the reasons set forth above, we reopen this matter, vacate the judge's default order and dismiss this proceeding.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner