

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 26, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2001-247-M
v.	:	A.C. No. 03-01232-05523
	:	
CARROLL COUNTY STONE, INC.	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On October 17, 2001, Chief Administrative Law Judge David F. Barbour issued an Order of Default dismissing this civil penalty proceeding for the failure of Carroll County Stone, Inc. (“Carroll County Stone”) to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on June 25, 2001, or the judge’s Order to Respondent to Show Cause issued on August 14, 2001. The judge assessed a civil penalty of \$122 proposed by the Secretary.

On October 30, 2001, the Commission received from Randall Bailey, president of Carroll County Stone, a request to vacate the judge’s default order. Mot. Bailey, apparently proceeding without counsel, asserts that, after receiving the penalty assessment petition, he was contacted by Goldie Smith¹ about the possibility of settling the case. *Id.* Bailey maintains that after he explained his company’s position to Smith, she said she would investigate the matter and get back to him. *Id.* Bailey states that Smith did not subsequently contact him. *Id.*

¹ The record indicates that Smith is a paralegal with the Department of Labor. Sec’y Pet. for Assessment of Penalty at 3.

The judge's jurisdiction in this matter terminated when his decision was issued on October 17, 2001. 29 C.F.R. § 2700.69(b). 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). We deem Carroll County Stone's request to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, we are unable to evaluate the merits of Carroll County Stone's position. In particular, it is unclear from the record how the alleged communication with the Department of Labor about possible settlement terms would excuse the operator from its requirement to timely respond to the penalty assessment petition and the judge's show cause order. Thus, in the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Cent. Mountain Materials*, 23 FMSHRC 907, 908-09 (Sept. 2001) (vacating default and remanding to judge where pro se operator may have mistakenly believed that, having returned green card, it was not required to answer Secretary's petition); *Gen. Rd. Trucking Corp.*, 17 FMSHRC 2165, 2165-66 (Dec. 1995) (vacating default and remanding where pro se operator apparently confused about Commission's procedural rules). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the request for relief made here by Carroll County Stone, Inc. It is a matter of record that the company returned the green card in this matter, and we find it had ample grounds to delay filing an answer. We also note that the company is appearing pro se, and that the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. See *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Therefore, we disagree with our colleagues' conclusion that the merits of Carroll County Stone's position cannot be evaluated. Slip op. at 2.

Nevertheless, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case. See *Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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