

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

April 26, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. YORK 94-73-M
	:	
CONSTRUCTION MATERIALS	:	
CORPORATION	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, 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 January 5, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Construction Materials Corporation ("Construction") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's October 24, 1994, Order to Respondent to Show Cause. The judge assessed civil penalties of \$645.

In an April 7, 1995, letter to the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"), received by the Commission on April 17, Construction states that it had responded to MSHA's enforcement actions in two letters addressed to Judge Merlin, dated November 20, 1994, and January 10, 1995. In the November 20 letter, Construction requested reconsideration of the proposed penalty. In the January 10 letter, Construction stated that it had timely responded to the show cause order by its November 20 letter, a copy of which it attached. The Commission received the January 10 letter, and its attachment, on January 17.

The judge's jurisdiction over this case terminated when his default order was issued on January 5, 1995. 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). Due to clerical oversight, the Commission did not act on the January 10 letter within the statutory period for considering requests for discretionary review. The judge's default order 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 is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). On the basis of the present record, we are unable to evaluate the merits of Construction's position. In the interests of justice, we reopen the proceeding, treat Construction's April 7 letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See, e.g., Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (December 1986). We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner