FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 21, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEVA 95-53
COAL PREPARATION SERVICES, INC.	:	

ORDER

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) (AMine Act@ or AAct@). The hearing in this proceeding was originally set in an April 27 Notice of Hearing by Administrative Law Judge Todd T. Hodgdon for July 13. The case was subsequently transferred to Administrative Law Judge Avram Weisberger. Pursuant to a telephone conference call on June 26, the hearing was rescheduled for July 12. On June 27, Judge Weisberger issued a Notice of Hearing setting forth the location of the hearing as well as the date, which was received by Coal Preparation Services, Inc. (ACPS@) on July 5.[1] Order of Dismissal (AOrder@) at 1. When CPS failed to attend the hearing, Judge Weisberger issued an Order to Show Cause. CPS=s president, Sam Hood, responded by stating AI went to the hearing on Thursday, 7-13 and nobody was there.@ *Id.* at 2. CPS attached a copy of the April 17 Notice of Hearing to its response to the Show Cause Order. On August 4, Judge Weisberger issued an Order of Dismissal because of CPS=s failure to show good cause why a default order should not be entered based on its failure to appear at the hearing. Judge Weisberger=s Order instructed CPS to pay a civil penalty of $162 within 30 days.

On September 5, the Commission received a letter from CPS stating that it wished to appeal Judge Weisberger=s August 4 Order. In its letter, CPS, appearing pro se, states that it was confused as to the date of the hearing and appeared at the hearing site on the wrong day. CPS is appealing the Order Abecause of an error in procedure.@

The judge=s jurisdiction in this matter terminated when his decision was issued on August 4. 29 C.F.R. ' 2700.69(b). 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

[1] Judge Weisberger states in his Order of Dismissal that CPS=s return receipt for the June 27 Notice of Hearing was postmarked July 12.

of its issuance. 30 U.S.C. ' 823(d)(2); 29 C.F.R. ' 2700.70(a). The Commission deemed CPS=s letter to be a timely filed petition for discretionary review and granted it. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988). The Commission also stayed briefing.

We note that the Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989), *citing Kelley Trucking Co.*, 8 FMSHRC 1867, 1869 (December 1986); *M. M. Sundt Construction Co.*, 8 FMSHRC 1269, 1271 (September 1986). It appears from the present record that CPS was confused as to the date of the hearing. CPS is appearing pro se and has been diligent in the pursuit of its right to a hearing. Accordingly, in the interest of justice, we vacate the judge=s Order and remand this matter to the judge, who shall set the case for hearing.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

Chairman Jordan, dissenting:

The record in this case shows that the respondent participated in a telephone conference call on June 26, 1995, during which he agreed to the rescheduling of the hearing on his contest from July 13 to July 12. On June 27, the judge issued a notice of hearing setting forth the date and location of the hearing. No location for the hearing had previously been communicated to the respondent. A return receipt indicates that the respondent received the notice on July 5, well in advance of the scheduled hearing. The judge and an attorney from the Solicitor=s office traveled from the Washington, D.C. area to Huntington, West Virginia to attend the hearing. But the respondent failed to show up.

Commission Procedural Rule 66 states:

> (b) *Failure to attend hearing*. If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

29 C.F.R. ' 2700.66(b). Notwithstanding Rule 66's contemplation of entry of default without the necessity of issuing an order to show cause, the judge issued such an order, in effect giving the respondent an opportunity to explain why he failed to appear at the hearing. The respondent claimed that he appeared on July 13 and Anobody was there.@ The judge concluded that the respondent had not established good cause for failing to attend the hearing, and entered a default decision. In its request to the Commission for relief from default, the respondent states:

> I was given incorrect information and showed up for the hearing at the right time, but it was wrong I guess because they met another day. I wasn=t able to tell our side. I think their lawyer intentionally confused me, they=ll do that you know.

I agree with my colleagues that defaults are not favored. However, unlike the cases cited by the majority, which all involve respondents who, following entry of default, offered their explanations for the first time when they petitioned the Commission for relief, in the present case the judge issued his default decision only after reviewing the reason proffered by the respondent for his failure to appear. In reviewing the judge=s determination that the respondent=s excuse did not pass muster, we may not substitute our judgment for that of the trial judge. AAn application . . . to set aside a default . . . is addressed to the sound discretion of the [trial] court. The judge=s determination normally will not be disturbed on appeal unless he has abused his discretion or the appellate court concludes that he was clearly wrong.@ Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d ' 2693 (footnotes and internal quotation marks omitted).

On this record, I see no basis for concluding that the judge abused his discretion. Accepting at face value the respondent=s claim that he appeared at the appointed place a day late,

he must have consulted the notice of hearing, the only document containing the location of the hearing. That notice plainly indicated that the hearing was on July 12, confirming the telephone conversation in which the respondent agreed to appear on that date. Under these circumstances, I cannot conclude that the judge abused his discretion in determining that the respondent=s justification did not amount to good cause. On the contrary, in my view the judge=s decision is faithful to the provisions of Rule 66. I fear that, by granting the relief sought here, the Commission is rewarding behavior which has already caused unwarranted expense to the Commission and the Secretary.

For the foregoing reasons, I respectfully dissent.

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Mary Lu Jordan, Chairman