FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-102
SAN JUAN COAL COMPANY	:	

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 February 8, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") received from San Juan Coal Company ("San Juan Coal") the "green card" notice that the operator was requesting a hearing on five alleged violations for which MSHA had proposed penalties. On March 26, 2001, the Secretary of Labor filed a petition for assessment of civil penalties against San Juan Coal. The operator failed to answer the Secretary's petition as required by 29 C.F.R. § 2700.29. On May 25, 2001, Chief Administrative Law Judge David F. Barbour issued an Order to Respondent to Show Cause, directing San Juan Coal to file an answer within 30 days. On July 16, 2001, noting that no answer had been filed, Judge Barbour issued an Order of Default, entering judgment in favor of the Secretary and ordering San Juan Coal to pay civil penalties in the sum of $36,000.

On August 2, 2001, San Juan Coal filed a petition for discretionary review and motion, seeking relief in the form of an order vacating the Order of Default, reopening the proceedings, and granting it additional time in which to respond to the petition for assessment of civil penalties. It states that it has not completed its investigation into why it did not respond to the penalty assessment petition and show cause order. PDR at 2. It notes, however, that, when it sent its notice of contest to MSHA, it designated in-house counsel Charles Roybal as the appropriate company official to contact. *Id.* at 2 and Ex. C. It contends that, although it received

the petition for assessment of civil penalties and the show cause order, the documents were not sent to Roybal but to other company personnel. *Id.* at 3. It asserts that the person responsible for forwarding such information assumed in error that Roybal had already received copies of the documents and did not forward them to him. *Id.* It contends that Roybal only became aware of the penalty assessment petition and the show cause order after the judge issued the default order. *Id.*[1]

It appears from the record that the penalty assessment petition and the show cause order were sent to Carolyn Durga, senior safety advisor at San Juan Coal. Her name appears in the operator's address (which is printed by MSHA) on the MSHA form used to contest penalty proceedings. Attach. Ex. C. This information is generally obtained by MSHA from operators pursuant to the requirements of one of its "notification of legal identity" regulations. 30 C.F.R. § 41.11.

The judge's jurisdiction in this matter terminated when his decision was issued on July 16, 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 that San Juan's petition for discretionary review was timely filed and we grant it.

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 the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). On the basis of the present record, including San Juan Coal's statement that it has not completed its investigation into why it did not respond to the petition for assessment of civil penalties and the show cause order, we are unable to evaluate the merits of its position. We are particularly puzzled about why, when Durga received the order to show cause (which indicated that no answer had been filed responding to the Secretary's penalty petition), she did not contact Roybal to be sure he had received the relevant documents.

In the interest of justice, we vacate the default order and remand this matter to the judge to determine whether relief from the final order is appropriate.[2] *See Middle States Res., Inc.*, 10 FMSHRC 1130, 1130-31 (Sept. 1988) (remanding where show cause order was allegedly sent to

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[1] No affidavits were included with San Juan Coal's petition for discretionary review and motion.

[2] The judge, if he reopens the proceedings, should determine whether to grant San Juan Coal's motion for additional time to respond to the penalty assessment petition.

a former corporate agent even though MSHA had allegedly been given notice of the change in agent); *Agronics, Inc.*, 21 FMSHRC 475, 475-77 (May 1999) (remanding where the default order was allegedly sent to the wrong company official).

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here. San Juan Coal received a penalty proposal and timely contested it, identifying Charles Roybal as the person on whom further papers should be served. PDR ¶ 3 and Ex. C (Roybal's name entered after the words "Company Official To Contact" on form). Roybal was San Juan Coal's in-house counsel. PDR ¶ 3. But MSHA failed to serve its penalty petition on Roybal. *Id.* and Ex. B at 4. As a result, and because of internal confusion at San Juan Coal (PDR ¶ 3), the company failed to file a timely Answer to the penalty petition, which in turn resulted in Judge Barbour issuing the default order at issue.

It is clear from the record that but for MSHA's failure to serve the penalty petition on San Juan Coal's in-house counsel, the company would have filed an Answer to the petition in a timely fashion. Given that MSHA is partly responsible for the company being held in default, it would be patently unjust to fail to grant San Juan Coal the opportunity to proceed with its contest of the proposed penalty. *Cf. Stillwater Milling Co.*, 19 FMSHRC 1021 (June 1997) (reopening proceeding in which operator mistakenly paid penalty because MSHA failed to serve proposed penalty on operator's attorney of record).

Our colleagues, however, inexplicitly prolong this proceeding by ordering a remand. It is obvious what the judge will do – reopen the case based on the very facts we have before us. A remand here is an utter waste of time and this Commission's resources. Nevertheless, in order to avoid the effect of an evenly divided decision – i.e., the unjust result of the default order being affirmed in result – we reluctantly 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 disposition from which appeal has been sought).

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Theodore F. Verheggen, Chairman

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James C. Riley, Commissioner

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