

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 1995

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 95-16
 :
DUNKARD MINING COMPANY :
 :

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) ("Mine Act"). On March 13, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Dunkard Mining Company ("Dunkard") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on November 10, 1994, or the judge's Order to Respondent to Show Cause of January 4, 1995. The judge assessed the civil penalties of \$1,949 proposed by the Secretary.

On March 17, 1995, the Commission received a letter from Karl-Hans Rath, Dunkard's general manager, in which Rath states that Dunkard had responded to the Secretary's penalty proposal on December 8, 1994. Dunkard identified its response as Docket No. PENN 95-6, the same docket number that had appeared on the Secretary's penalty proposal.¹ Rath states that Dunkard mailed a copy of its December 8 response to the Commission three days after it received the show cause order. Rath enclosed a copy of that response.

The judge's jurisdiction in this matter terminated when his decision was issued on March 13, 1995. 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 of its issuance. 30 U.S.C. ' 823(d)(2); 29 C.F.R. ' 2700.70(a). We deem Dunkard's March

¹ The correct docket number for this case is PENN 95-16.

17 letter to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Dunkard's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner