

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 94-198-M
	:	
F.W. CONTRACTORS, INC.	:	

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 December 30, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to F.W. Contractors, Inc. ("F.W.") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's show cause order of October 27, 1994. The judge assessed civil penalties of \$2,700.

In a letter to the Commission dated January 6, 1995, F.W.'s safety director seeks relief from the default order. He asserts that F.W. had answered the Secretary's petition for assessment of civil penalty on October 20, 1994, in a letter to the Office of the Department of Labor's Regional Solicitor in Dallas, Texas.

The judge's jurisdiction over this case terminated when his default order was issued on December 30, 1994. 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). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. ' 823(d)(1). F.W.'s letter was received by the Commission on February 13, after the judge's default order had become a final decision of the Commission.

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). *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 F.W.'s position. In the interest of justice, we reopen the proceeding, treat F.W.'s 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

TALLY SHEET

F.W. Contractors, Inc., Docket No. CENT 94-198-M

Commissioner

Date

_____ Reopen and remand to the judge (order to that effect attached).

_____ Other:

Comments:

Please return to Lynne Bowman