

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

February 6, 1995

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
: :
v. : Docket No. LAKE 94-191-M
: :
HOLST EXCAVATING, 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 November 14, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Holst Excavating, Inc. ("Holst") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's August 16, 1994, Order to Respondent to Show Cause. The judge assessed civil penalties of \$995.

In a letter to the judge dated December 12, 1994, Holst's office manager states that, on September 13, 1994, Holst contacted an attorney in the Office of the Department of Labor's Regional Solicitor in Chicago, Illinois, and subsequently sent copies of Holst's "bankruptcy filings" to him as requested. She states that Holst is still awaiting a reply and that she has tried to contact that attorney by telephone to no avail.

The judge's jurisdiction over this case terminated when his default order was issued on November 14, 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). The filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. ' 2700.5(d). Holst's December 12 letter was received by the Commission on December 16, more than 30 days after issuance of the default order. Thus, the judge's default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. ' 823(d)(1).

The filing of a petition in bankruptcy does not automatically stay the instant proceeding or foreclose the entry of judgment against Holst. 11 U.S.C. ' 362(b)(4); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.* 12 FMSHRC 1521, 1530 (August 1990) (citations omitted). However, 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 absence of applicable Commission rules). *E.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Holst, proceeding without benefit of counsel, asserts that, within 30 days after issuance of the show cause order, it informed the Solicitor's Office of its bankruptcy proceedings. Holst may have assumed that filing a petition in bankruptcy stayed the instant proceeding and relieved it of its obligation to file an answer.

On the basis of the present record, we are unable to evaluate the merits of Holst's position. In the interest of justice, we reopen the proceeding, treat Holst'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., Bentley Coal Co.*, 12 FMSHRC 1197-98 (June 1990); *Westrick Coal Co.*, 10 FMSHRC 853 (July 1988). 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

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