FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

April 26, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 99-24-M
SPROULE CONSTRUCTION CO., INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Marks, Riley, Verheggen, 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 March 15, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Sproule Construction Co., Inc. ("Sproule") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on December 11, 1998, or the judge's Order to Respondent to Show Cause issued on January 28, 1999. The judge assessed the civil penalties of $10,000.[1]

On March 25, 1999, the Commission received from counsel to Sproule a Motion to Vacate Any and All Defaults and for Leave to File Answer to Petition for Assessment. In the motion, counsel explains that Michael Sproule, Sproule's vice president, received a letter dated December 24, 1998, from the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding MSHA's policy on compliance assistance visits, and enclosing certain forms. Mot. at 2, ¶ 3. Counsel states that the operator mistakenly believed that the Show Cause Order and Order of Default were inapplicable in view of its response to the December 24 letter and involvement in the process of settling and resolving matters relating to the alleged violations. *Id.*, ¶ 4.

[1] The Secretary had proposed civil penalties in the amount of $10,600. The document setting forth the proposed penalties which was sent via facsimile to the Commission's Docket Office is nearly illegible.

On March 29, 1999, the Commission received an opposition to Sproule's motion from counsel in the Department of Labor's Regional Solicitor's Office in Chicago, Illinois. Counsel states that Sproule's motion should be denied because Sproule failed to show cause why the Default Order should be vacated. Resp. at 2. Counsel submits that the show cause order is written in plain language and the operator failed to follow the instructions. *Id.* at 1. On April 12, 1999, the Commission received a letter from the Appellate Litigation Division of the Office of the Solicitor confirming that the opposition filed by the Regional Solicitor's Office sets forth the Secretary's position.

The judge's jurisdiction in this matter terminated when his decision was issued on March 15, 1999. 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 Sproule's motion to be a timely filed petition for discretionary review, which we grant. *See*, *e.g.*, *Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Sproule's position. This point is made abundantly clear in the Chairman's dissent when she states she is "frankly mystified as to what actions Sproule took upon receipt of [the December 24] letter." Slip op. at 4. We are unwilling to, on one hand, say that we are unable to understand what Sproule did, but on the other hand, rule against the company without giving it the opportunity to explain its actions.[2] In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See General Road Trucking Corp.*, 17 FMSHRC 2165, 2166 (Dec. 1995) (deeming letter as timely filed petition for discretionary review, vacating default, and remanding to judge where pro se operator confused about Commission's procedural rules); *Amber Coal Co.*, 11 FMSHRC 131, 132-33 (Feb. 1989).

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[2] Commissioner Marks finds the above comments regarding Chairman Jordan's dissent to be both unnecessary and superfluous. He, therefore, disassociates himself from them.

Chairman Jordan, dissenting:

I respectfully disagree with my colleagues that, based on the present record, we cannot evaluate the merits of Sproule's position. Rather, it is clear to me from my review of the record that Sproule does not warrant relief in this case. Accordingly, I would affirm the order of default in this proceeding.

Sproule attempts to excuse its lack of response to the Order to Show Cause by relying on its actions generated by MSHA's letter of December 24. However, I am frankly mystified as to what actions Sproule took upon receipt of that letter. Sproule has alluded to them in only the most general of terms. It refers to its "action in tending to the letter of December 24." Mot. at 2, ¶ 4. It mentions that it "had undertaken the appropriate action in addressing issues" raised by the letter. *Id.*, ¶ 5. It provides no further information whatsoever.[1]

Moreover, the Secretary is absolutely correct that the subsequent Order to Show Cause was clearly written, and that Sproule simply failed to follow the judge's instructions. Resp. at 1, ¶ 3. The Order explained the need for an Answer, described its content, and verified that no Answer had yet been received. The judge ordered Sproule to submit an Answer within 30 days or to show good reason why it had failed to do so. He made clear that if Sproule did not, it would be placed in default and ordered to pay the penalty.

The judge's Order was precise and unambiguous. It put Sproule on the alert that action on its part was necessary in order to avoid a default order. Sproule took no action. Consequently, it should pay the penalty ordered by the judge.

Mary Lu Jordan, Chairman

[1] Although my colleagues in the majority suggest that Sproule has not yet had the opportunity to explain its actions (slip op. at 3), I believe that is the very purpose of the motion to vacate which Sproule submitted to us. The majority's willingness to remand this matter to the judge on the basis of this motion, which is bereft of any substantive rationale, appears to transform this process into a mechanical one, in which all a party need do in similar circumstances is request relief.

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