

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

October 11, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 2000-64-M
	:	A.C. No. 33-00168-05520
SHELLY MATERIALS, INCORPORATED	:	

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

ORDER

BY: Jordan, Chairman; Riley 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 August 7, 2000, Chief Administrative Law Judge David Barbour issued an Order of Default to Shelly Materials, Inc. (“Shelly”) for failing to answer the petition for assessment of penalties filed by the Secretary of Labor on May 18, 2000, or the judge’s Order to Respondent to Show Cause issued on June 28, 2000. The judge assessed a civil penalty of \$7,000, proposed by the Secretary.

On August 21, 2000, the Commission received a motion to reopen from Shelly, along with an answer and its motion to approve settlement. Shelly contends that the case file for this matter did not reach its counsel until after the default order was received. Mot. Shelly asserts that the Secretary does not oppose its motion to reopen and that the parties have reached a settlement in this case. *Id.* In the answer, Shelly admits the allegations in the citation at issue in this proceeding and contends that the violation has been abated. Answer. In the motion to approve settlement, Shelly alleges that the parties have reached a settlement and agreed to reduce the penalty to \$4,300. Mot. to Approve Settlement. Shelly requests the Commission to reopen this matter. Mot.

On August 24, 2000, the Secretary filed a response to Shelly’s motions, indicating that she does not oppose Shelly’s motion to reopen. S. Letter dated Aug. 24, 2000. The Secretary clarifies that the parties have not reached a settlement, but that trial counsel for the Secretary has stated to Shelly’s counsel that, if the case is reopened, the Secretary will be willing to discuss settlement. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on August 7, 2000. 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). On September 18, 2000, the Commission issued a direction for review, construing Shelly's motion to reopen as a petition for discretionary review. On September 26, 2000, an order was issued staying briefing in this matter pending the Commission's consideration of Shelly's request for relief.

On the basis of the present record, we are unable to evaluate the merits of Shelly's position and would remand the matter for assignment to a judge to determine whether relief from default is warranted.<sup>1</sup> See *Fielding Hydroseeding*, 16 FMSHRC 2399, 2400 (Dec. 1994) (remanding to judge where operator failed to answer Secretary's penalty proposal due to a change in address and misunderstanding in mail pickup); *Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990) (remanding to judge where operator mistakenly believed that it timely filed answer). Shelly has failed to provide any explanation for the asserted delay in the receipt of the case file in this matter by its counsel or to offer any affidavits to support its position. Cf. *Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 18-19 (Jan. 2000) (granting operator's request to reopen where operator claimed it failed to timely file hearing request due to inexplicable delays in postal service and provided an affidavit and copy of signed and dated green card to support its allegations). Accordingly, 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.

---

Mary Lu Jordan, Chairman

---

James C. Riley, Commissioner

---

Robert H. Beatty, Jr., Commissioner

---

<sup>1</sup> In view of the fact that the Secretary does not oppose Shelly's motion to reopen this matter for a hearing on the merits, Commissioner Verheggen concludes that the motion should be granted.

Distribution

Paul D. Rice, Esq.  
Shelly Materials, Inc.  
600 Shepherd Avenue  
Cincinnati, OH 45215

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Chief Administrative Law Judge David Barbour  
Federal Mine Safety & Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006