

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

September 11, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 95-114
	:	
OPPORTUNITY TRUCKING, 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) (Mine Act or Act). On August 2, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Opportunity Trucking, Inc. (Opportunity) for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on March 17, 1995, or the judge's Order to Respondent to Show Cause issued on May 15, 1995. The judge assessed the civil penalties of \$256 proposed by the Secretary.

On September 1, 1995, the Commission received from Opportunity a Motion to Set Aside Default. Opportunity's counsel states that Opportunity's owner and president believed he had filed his answer with counsel for the Secretary. The official file does not contain a copy of such answer. On September 7, the Commission received the Secretary's opposition to the motion, in which he asserts that Opportunity failed to set forth grounds justifying relief under Fed. R. Civ. P. 60(b).

The judge's jurisdiction in this matter terminated when his decision was issued on August 2, 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). If the Commission does not receive a petition or direct review on its own motion within the 30-day period, the judge's decision becomes a final decision of the Commission 40 days after its issuance.

30 U.S.C. ' 823(d)(1).

The Commission has looked to Fed. R. Civ. P. 60(b) in evaluating whether relief from a final Commission order is appropriate. *See, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991); 29 C.F.R. ' 2700.1(b) (Federal Rules of Civil Procedure apply also far as practicable in the absence of applicable Commission rules). Here, Opportunity's motion was received within the 30-day time period. We deem Opportunity's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988). Accordingly, the judge's order has not become a final Commission decision, and we do not consider whether Opportunity's request justifies relief under Fed. R. Civ. P. 60(b).

On the basis of the present record, we are unable to evaluate the merits of Opportunity's position. In the interest of justice, we vacate the judge's default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner