

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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March 23, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2004-185-M
v.	:	A.C. No. 31-02071-26994
	:	
WAKE STONE CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act” or “Act”). On January 13, 2005, Administrative Law Judge Avram Weisberger issued an unpublished decision in which he granted the motion of the Secretary of Labor for summary decision with regard to a violation of 30 C.F.R. § 56.14132(a) by Wake Stone Corporation (“Wake Stone”) and denied Wake Stone’s motion for summary decision. Dec. at 3. The judge also stated that the record did not contain sufficient evidence to allow him to assess a civil penalty and ordered the parties either to file a statement setting forth stipulations as to the factors in section 110(i) of the Act, to file evidence with regard to any contested factor, or to request an evidentiary hearing on any contested factor. *Id.* On February 4, 2005, the Secretary’s Conference and Litigation Representative filed an Answer to Judge’s Summary Decision Motion for Part 110(i). In that pleading, the Secretary stated that the parties “have discussed and agreed upon a settlement under [section] 110(i), in this case, to be the original fine of \$60.00. Wake Stone would like it noted that the amount of the fine was never an issue.” In that document, the Secretary also moved that the settlement be approved by the judge. On February 14, 2005, the judge issued an unpublished Decision Approving Settlement in which he granted the motion for approval of settlement and ordered that Wake Stone pay a penalty of \$60 within 30 days of the order.

On March 14, 2005, the Commission received from Wake Stone correspondence which we construe to be a timely petition for discretionary review. In that petition, Wake Stone seeks

to challenge the rulings contained in the judge's decision of January 13, 2005.

The judge's jurisdiction over this case terminated when he issued his decision approving settlement on February 14, 2005. 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). We deem Wake Stone's correspondence to be a timely filed petition for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

It appears from the record that the judge's decision granting the Secretary's motion to approve settlement may have been based on a misunderstanding between the parties regarding what they agreed should be settled and/or a misunderstanding by the judge regarding what agreement, if any, the parties had reached. Although the February 14 Decision Approving Settlement indicates that the parties had agreed that the case should be settled *in toto*, that \$60 was an appropriate penalty, and that the case should be dismissed, Wake Stone's petition seems premised on the assumption that there remains a live controversy between the parties and that the settlement agreement involved only the amount of any penalty that might be imposed, not whether Wake Stone had committed a violation in the first instance. Moreover, the Answer to Judge's Summary Decision Motion for Part 110(i) filed by the Secretary on behalf of the parties is ambiguous in key respects. In short, it is unclear whether the parties achieved a true meeting of the minds in their response to the January 13 decision and whether the February 14 decision reflects any settlement that the parties had mutually agreed upon.

Based on the present record, it appears that the judge may have prematurely dismissed the proceeding. In the interest of justice, we vacate the judge's February 14 decision and remand this matter to the judge for further proceedings as appropriate. *See RBS, Inc.*, 26 FMSHRC 751 (Sept. 2004).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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