

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 10, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEST 2001-260-M
	:	
CENTRAL MOUNTAIN MATERIALS	:	

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

ORDER

BY: Jordan 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 1, 2001, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) received from Central Mountain Materials (“Central Mountain”) the “green card” notice that the operator was requesting a hearing on eight alleged violations for which MSHA had proposed penalties. On April 16, 2001, the Secretary of Labor filed a Petition for Assessment of Penalty. The operator failed to answer the Secretary’s petition as required by 29 C.F.R. § 2700.29. On June 5, 2001, Chief Administrative Law Judge David F. Barbour issued an Order to Respondent to Show Cause, directing Central Mountain to file an answer within 30 days. On August 1, 2001, noting that no answer had been filed, Judge Barbour issued an Order of Default, entering judgment in favor of the Secretary and ordering Central Mountain to pay civil penalties in the sum of \$777 proposed by the Secretary.

On August 27, 2001, the Commission received from Central Mountain a request for relief from the judge’s default order. Mot. Central Mountain, appearing pro se, asserts that, upon receiving the citations, it sent in a response on a form, disputing all of the pending citations. *Id.*

The judge’s jurisdiction in this matter terminated when his decision was issued on August 1, 2001. 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 Central Mountain’s motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). It appears that Central Mountain may have mistakenly believed that, after having returned the green card, it was not required to file an answer to the Secretary's petition for assessment of penalty. *See* 29 C.F.R. §§ 2700.26 and 2700.29. On the basis of the present record, we are unable to evaluate the merits of Central Mountain's position. In the interest of justice, we vacate the default order and remand this matter to the judge to determine whether relief from default is appropriate. *See Gen. Rd. Trucking Corp.*, 17 FMSHRC 2165, 2165-66 (Dec. 1995) (deeming letter as timely filed petition for discretionary review, vacating default, and remanding where pro se operator confused about Commission's procedural rules). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here, because the operator has offered a sufficient explanation for its failure to timely file an answer to the penalty petition, it has been administratively determined that the Secretary does not oppose the operator's request, and no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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