

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

June 20, 1995

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEST 94-720-M  
 :  
WISER CONSTRUCTION, L.L.C. :  
 :

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). On March 13, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Wisser Construction, L.L.C. ("Wisser") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalties or the judge's January 4, 1995, Order to Respondent to Show Cause. The judge assessed civil penalties of \$4300.

In a letter to the judge dated March 16, 1995, Wisser's managing member states that, on January 1, 1995, Wisser had responded to the Secretary's penalty proposal but that it had inadvertently mailed its response to an attorney in the Office of the Department of Labor's Regional Solicitor in Denver, Colorado. He enclosed a copy of that letter, which is dated January 9, 1995.

The judge's jurisdiction over this case terminated when his default order was issued on March 13, 1995. 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). Due to clerical oversight, the Commission did not act on the March 16 letter within the statutory period for considering petitions for discretionary review. The judge's default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. ' 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. ' 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991).

In the interest of justice, we reopen this proceeding and treat Wisser's March 16 letter as a timely filed petition for discretionary review, which we grant. *See Cedar Lake Sand & Gravel Co.*, 15 FMSHRC 2253, 2254 (November 1993). On the basis of the present record, we are unable to evaluate the merits of Wisser's position. We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner