

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

November 20, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2001-413-M
v.	:	A.C. No. 24-02087-05502
	:	
CONCRETE MATERIALS OF	:	
MONTANA, LLC	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, 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. (1994) (“Mine Act”). On October 16, 2001, Chief Administrative Law Judge David F. Barbour issued an Order of Default dismissing this civil penalty proceeding for the failure of Concrete Materials of Montana, LLC (“Concrete Materials”) to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on June 22, 2001, or the judge’s Order to Respondent to Show Cause issued on August 20, 2001. The judge assessed civil penalties in the sum of \$5,369.<sup>1</sup>

On November 8, 2001, the Commission received from Concrete Materials a request to vacate the judge’s default order. Mot. In its request, Concrete Materials contends that it failed to timely respond to the Secretary’s penalty assessment petition and the judge’s show cause order because the relevant correspondence was sent to the wrong address. *Id.* It maintains that on September 11, 2000, pursuant to 30 C.F.R. § 56.1000, it informed the Department of Labor’s Mine Safety and Health Administration (“MSHA”) that it was closing its South Boulder Grazing

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<sup>1</sup> The penalties set forth in the Secretary’s Petition for Assessment of Penalty equal the sum of \$5,377.

Association Pit. *Id.* In addition, Concrete Materials contends that on November 27, 2000, it informed MSHA that it was opening its Medina Pit and provided the mine's new mailing address. *Id.* Concrete Materials asserts that, shortly after its Medina Pit opened, the mine was inspected and cited by MSHA. *Id.* It further contends that, after the inspection, all correspondence from MSHA pertaining to the citations and the judge's show cause order were mistakenly sent to the mailing address for its South Boulder Grazing Association Pit. *Id.* Concrete Materials maintains that this mailing error caused a delay in the Medina Pit manager receiving the relevant correspondence and, as a result, Concrete Materials failed to timely respond to the Secretary's penalty petition and the judge's show cause order. *Id.* Concrete Materials attached to its request the notices that it allegedly mailed to MSHA. Attach. 1, 2.

The judge's jurisdiction in this matter terminated when his decision was issued on October 16, 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 Concrete Materials' request 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 a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, we are unable to evaluate the merits of Concrete Materials' position. In particular, we note that, while Concrete Materials maintains that its Medina Pit was cited by MSHA, the relevant citations identify the cited mine as the South Boulder Grazing Association Pit. Because of this confusion in the record, and 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. *See San Juan Coal Co.*, 23 FMSHRC 800, 801-03 (Aug. 2001) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order because MSHA allegedly failed to send the

documents to the designated company official); *Agronics Inc.*, 21 FMSHRC 475, 475-77 (May 1999) (vacating default and remanding to judge where operator claimed it did not answer Secretary's petition or judge's show cause order because documents were allegedly sent to wrong company official). 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.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

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