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MSHA V. M. M. SUNDT CONSTRUCTION
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FMSHRC-WDC
September 15, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. CENT 86-6-M

M. M. SUNDT CONSTRUCTION
COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, lastowka, and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982), Commission Administrative Law Judge John J. Morris issued an Order of Dismissal on July 11, 1986, finding respondent M.M. Sundt Construction Company ("Sundt") in default, dismissing Sundt's contest of the Secretary of Labor's proposal for a civil penalty, affirming the two citations in issue, and assessing a civil penalty of \$40. 8 FMSHRC 1099 (July 1986)(ALJ). After the judge's decision was issued, Sundt submitted to the judge a "Motion for Reinstatement" requesting the reopening of the proceeding. Ultimately, this motion was forwarded to the Commission itself after the judge's order had become a final decision of the Commission by operation of the statute. For the reasons explained below, we deem Sundt's motion to constitute a request for relief from a final Commission decision, vacate the judge's dismissal order, and remand for further proceedings.

The main points of the procedural history of this matter may be stated briefly. On December 2, 1985, the Secretary filed with the Commission a Complaint Proposing Penalty, based on citations

issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") at Sundt's Arizona crusher operation alleging violations of 30 C.F.R. §§ 56.5001 & 56.5050 (1985) (control of exposure to airborne contaminants and control of exposure to noise, respectively). Sundt filed an answer contesting both alleged violations, and the case was assigned to Judge Morris of the Commission's Office of Administrative Law Judges in Denver, Colorado.

~1270

After scheduling a hearing in this matter for July 24, 1986, the judge issued a Prehearing Order on June 6, 1986, requiring the parties to file certain documents by June 24, 1986. Sundt did not respond to the Prehearing Order and on June 26, 1986, the judge issued an Order to Show Cause directing Sundt to demonstrate "good cause," within 10 days, for the failure to respond. Sundt again did not respond. On July 11, 1986, the judge issued the Order of Dismissal, based on Sundt's failure to respond to the Prehearing Order and the Order to Show Cause. (As noted, the judge found Sundt in default, dismissed its contest, affirmed the citations, and assessed a \$40 civil penalty.)

On July 15, 1986, a letter dated July 8, 1986, was received at the judge's office. The letter was signed by Brian H. Murphy, Sundt's "Loss Control Manager." The letter apologized for Sundt's failure to respond to the prehearing order and asserted that Sundt's "records do not indicate our company ever receiving that correspondence." The letter belatedly requested an extension of time for compliance with the prehearing order. By letter dated July 15, 1986, the judge replied that he could not grant the requested extension of time because his jurisdiction had terminated upon the issuance of his dismissal order on July 11, 1986.

By "Motion of Reinstatement" dated August 7, 1986, and received in the judge's Denver Office on August 11, 1986, Sundt requested a reopening of the proceeding. The motion alleged that there had been "a lack of communication between MSHA and ourselves for which we would, again, like to apologize." By letter dated August 19, 1986, the judge again explained that his jurisdiction had terminated. He forwarded a copy of the Motion for Reinstatement to the Commission's Docket Office in Washington, D.C., where it was received on August 21, 1986.

The judge correctly indicated that his jurisdiction in this matter terminated when his dismissal order was issued on July 11, 1986. 29 C.F.R. § 2700.65(c). Any potential relief available to Sundt lay with the Commission in the form of a petition for discretionary review, which must be filed with the Commission, not the trial judge, within 30 days of a judge's decision. 29 C.F.R. §§ 2700.5(b) and 2700.70(a). Sundt's Motion for Reinstatement was submitted improperly to the judge and was not filed with the Commission until August 21, 1986, one day after the judge's decision had become final by operation of law. 30 U.S.C. § 823(d)(1). Under the circumstances, Sundt's Motion for Reinstatement must be construed as a request for relief from a final Commission decision. 29 C.F.R.

2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. Pro. 60 (Relief From Judgment or Order). See generally *Harry L. Wadding v. Tunnelton Mining Co.*, 8 FMSHRC , No. PENN 84-186-D, slip op. at 1 (August 20, 1986).

Two questions are presented: (1) Whether preliminary relief from a final order should be permitted by accepting Sundt's motion as a late-filed petition for discretionary review; and (2) whether the judge's default order should stand or Sundt's failure to timely respond to the

~1271

prehearing and show cause orders should be excused and the proceeding on the me reopened. We address the first question with reference to the standards set forth in Fed. R. Civ. P. 60(b)(1), which provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... mistake, inadvertence, surprise, or excusable neglect....

Sundt has proceeded without the benefit of counsel. Although Sundt's motion was not filed with the Commission's Docket Office until the 41st day after the judge's decision, it was submitted to the Commission's Denver Office within the required 30 days of the judge's decision. Therefore, we will treat the failure to file a timely petition as resulting from "mistake, inadvertence, ... or excusable neglect." Accordingly, we accept Sundt's submission as a late-filed petition for discretionary review. Cf. *Gerald D. Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1232-33 (July 1982).

As to the substantive aspects of Sundt's motion, the Commission has observed repeatedly that default is a harsh remedy. See e.g., *Easton Constr. Co.*, 3 FMSHRC 314, 315 (February 1981). In general, if a defaulting party can make a showing of adequate or good cause for the failure to respond to an order, the failure may be excused and appropriate proceedings on the merits permitted. See *Valley Camp Coal Co.*, 1 FMSHRC 791, 792 (July 1979) (default for failure to file a timely answer vacated upon showing of adequate cause for the failure). In assessing the existence of adequate cause, explanatory factors akin to those mentioned above in Fed. R. Civ. P. 60(b)(1) -- mistake, inadvertence, surprise, or excusable neglect -- may be relevant. *Valley Camp*, supra, 1 FMSHRC at 792 & n. 3. The absence of bad faith on the part of the defaulting party is also a relevant concern. *Easton*, supra. An attempt to comply at least partially with the order in question may be a mitigating factor as well. See e.g., *Sigler Mining Co.*, 3 FMSHRC 30 (January 1981). In one instance where an operator made a colorable showing of a failure in the service upon it of the relevant show cause order, the Commission vacated a default order and remanded for resolution of whether proper service had occurred. *Pocahontas Constr. Co.*, 3 FMSHRC 1184, 1184-85 (May 1981).

Sundt's July 8, 1986 letter to the judge and its Motion for Reinstatement, when read together, appear to allege that Sundt did not receive the prehearing order. We have examined the record and are unable to determine why Sundt did not receive the prehearing order.

The existing record makes it difficult to evaluate at this point the merits of Sundt's motion, its reasons for delay, its good faith, and the equities involved. Accordingly, we are not yet prepared to summarily rule on the adequacy of Sundt's proffered reasons for its failure to timely respond. Cf. *Pocahontas*, supra, 3 FMSHRC at 1185. Sundt has raised the possibility of defects in service or communication and, as noted, has proceeded without counsel. In the interests of justice, Sundt should have the opportunity to explain its position to the judge.

~1272

For the foregoing reasons, the judge's Order of Dismissal is vacated and the matter is remanded for proceedings consistent with this order. */

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

*/ Sundt is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

~1273

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