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MSHA V. KELLEY TRUCKING
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FMSHRC-WDC
DEC 30, 1986

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

v. Docket No. CENT 85-109

KELLEY TRUCKING COMPANY

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on July 21, 1986, finding Kelley Trucking Company ("Kelley Trucking") in default and assessing a civil penalty of \$400. Approximately four and one-half months later, the Commission received a handwritten letter from Curtis Kelley, president of Kelley Trucking, requesting a hearing. For the reasons explained below, we deem this letter to constitute a request for relief from a final Commission order, vacate the judge's default order and remand for further proceedings.

On April 18, 1985, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Kelley Trucking a citation pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and a withdrawal order pursuant to section 104(g)(1), 30 U.S.C. § 814(g)(1), alleging a violation of 30 C.F.R. § 48.25(a). This enforcement action was taken on the grounds that two of the company's drivers, hauling coal under contract at the Bokoshe N.W. Mine of Commercial Fuels, Inc. ("Commercial Fuels"), lacked required

miner's training. On June 20, 1985, MSHA's Office of Assessments, under the special assessment procedures of 30 C.F.R. § 100.5, notified Kelley Trucking that it proposed a civil penalty of \$400 for the alleged violation. On July 12, 1985, Kelley Trucking timely filed its "Blue Card" request for a hearing before this independent Commission. On August 20, 1985, the Secretary of Labor filed a Complaint Proposing Penalty. The record indicates that Kelley Trucking did not file an answer to the complaint.

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On April 25, 1986, approximately eight months after the Secretary's complaint was filed, Judge Merlin issued an Order to Show Cause directing Kelley Trucking to answer the complaint within 30 days or be placed in default. On July 21, 1986, for failure to respond to the show cause order or to file the requested answer, the judge issued an Order of Default against Kelley Trucking directing it to pay the \$400 civil penalty proposed by the Secretary. Kelley Trucking did not file with the Commission a request for review of the default order and review was not directed by the Commission on its own motion. Accordingly, the judge's default order became a final order of the Commission 40 days after issuance. 30 U.S.C. § 823(d)(1).

On December 8, 1986, the Commission received by certified mail a four-page, handwritten letter of explanation from Curtis Kelley, owner of Kelley Trucking, attached to which was a copy of a letter dated July 30, 1986, on behalf of Kelley Trucking to Allen R. Tilson, Esq., of the Secretary's Office of Solicitor in Dallas, Texas. In addition to contesting the violation and requesting a hearing, the December 8 letter stated that after receiving "the letter" from Judge Merlin, "everytime I would get any mail concerning this matter, I would answer ... and would ask for a hearing." Kelley stated specifically that he had answered the April 25, 1986 show cause order, requesting a hearing, but had received no response. The July 30, 1986 letter to the Secretary's Solicitor's Office explained Kelley's position generally and his inability to pay the civil penalty in one lump sum.

The judge's jurisdiction in this matter terminated when his default order was issued on July 21, 1986. 29 C.F.R. § 2700.65(c). Because the judge's decision has become final by operation of law, Kelley Trucking's request for a hearing must be construed as a request for relief from a final Commission decision incorporating by implication a late-filed petition for discretionary review. See e.g., *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1270-71 (September 1986). Two questions are presented: (1) whether preliminary relief should be permitted by accepting Kelley Trucking's letter as a late-filed petition for discretionary review; and (2) whether the judge's default order should stand or Kelley Trucking's failure to answer the complaint and show cause order should be excused and the proceeding on the merits reopened. *Id.*

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; ... or ... any other reason justifying relief from the operation of the judgment.

Kelley Trucking appears to be a small, independent trucking firm, and has proceeded without benefit of counsel. On its face, Kelley Trucking's

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December 1986 letter also reveals a lack of understanding of relevant Mine Act and Commission procedures and confuses the separate roles of the Commission and the Department of Labor. We note in mitigation that Kelley Trucking did arrange to have a letter sent to the Department of Labor's Dallas Office explaining its general situation shortly after issuance of the default order. Under the circumstances, we accept Kelley Trucking's submission as a late-filed petition for discretionary review. See Sundt, supra. 8 FMSHRC at 1271.

As to the substantive aspects of Kelley Trucking's request, we have observed repeatedly 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 respond, the failure may be excused and appropriate proceedings on the merits permitted. Sundt, 8 FMSHRC at 1271. Rule 60(b)(1) factors: the forefront, we find relevant the fact that the company appears to be a small trucking firm, which has proceeded without benefit of counsel. The company filed a timely "Blue Card" request for a hearing. Kelley Trucking's December letter alleges that it submitted a response to the judge's show cause order and that it communicated in good faith throughout the proceedings below. The record does not contain any such response to the show cause order. However, Kelley Trucking has raised the possibility of an unintended failure of communication or breakdown in the mail delivery system. On the present record, we cannot evaluate the credibility of this assertion and are not prepared to rule summarily. Sundt 8 FMSHRC at 1271. In the interest of justice, we conclude that Kelley Trucking should have the opportunity to present this position to the judge, who shall determine whether relief from the default order is warranted.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded for proceedings consistent with this order. Kelley Trucking 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.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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