

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

September 23, 2009

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

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v.

Docket No. CENT 2008-420-M

DARBY SANDERS, Formerly Employed by
NATURAL MATERIALS, LLC

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 4, 2008, Chief Administrative Law Judge Robert J. Lesnick issued to Darby Sanders, formerly employed by Natural Materials, LLC (“Natural Materials”), an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of civil penalty against him. The case was subsequently assigned to Administrative Law Judge Gary Melick and, on February 6, 2009, Judge Melick entered an Order of Default against Mr. Sanders.

On May 14, 2009, the Commission received a motion from Mr. Sanders requesting that the Commission reopen the penalty assessment proceeding and relieve him from the order of default. Mr. Sanders states that he was employed by Natural Materials from May 2005 until December 2007, when the company filed for bankruptcy, and that he remained in contact with the company throughout the first half of 2008. Mr. Sanders submits that he told Natural Materials that he had requested a hearing, and that the operator assured him that it would handle everything including setting a hearing date. Mr. Sanders explains that he moved from the area for work and had difficulty communicating with the operator because his letters were returned and the operator’s phones were disconnected. Mr. Sanders later contacted former Natural Materials management officials and discovered that the operator was not, in fact, acting on his behalf. The Secretary did not respond to the request to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on February 6, 2009. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, 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). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The judge's order became a final decision of the Commission on March 18, 2009.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Upon review of the record, it appears that Mr. Sanders may not have received the show cause order in a manner that permitted his timely response. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to Administrative Law Judge Gary Melick for further appropriate proceedings. *See generally Oak Grove Res., LLC, 29 FMSHRC 766, 767 (Sept. 2007) (vacating default when show cause order provided inadequate notice).*

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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