

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 14, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-167
v.	:	A.C. No. 15-02132-129470
	:	
WEBSTER COUNTY COAL, 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 December 2, 2009, the Commission received from Webster County Coal, LLC (“Webster”) a motion seeking to reopen a proposed penalty assessment that had allegedly become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On April 13, 2009, Chief Administrative Law Judge Robert J. Lesnick issued a show cause order to Webster because Webster had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on December 28, 2007. In the show cause order, the judge stated that Webster would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. The record shows that Webster received the Order to Show Cause on April 16, 2009. On November 3, 2009, Chief Judge Lesnick issued an order finding that Webster had failed to respond to the show cause order and entering a judgment by default for the Secretary.

On December 2, 2009, the Commission received the motion to reopen from Webster. The motion did not provide reasons regarding why the company had not answered the petition for penalty assessment nor responded to the show cause order. It instead asserted that the operator had no record of receiving the proposed assessment. In her response to the motion, the Secretary opposed the granting of Webster’s request because it does not address any basis for vacating the Chief Judge’s default order.

The Chief Judge's jurisdiction in this matter terminated when his default order was issued on November 3, 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)(A); 29 C.F.R. § 2700.70(a). We construe the motion from Webster to be a timely filed petition for discretionary review.

The petition for discretionary review filed by Webster does not address the validity of the Chief Judge's default order nor provide any reasons why the default order should be vacated. The operator also does not address why it failed to address the show cause order when the record specifically indicates its receipt. In addition, Webster does not indicate how the Secretary had issued a petition for the assessment of civil penalty if Webster had not first contested the initial proposed assessment, which it now claims not to have received. On these grounds, we hereby deny the petition.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ Commissioners Duffy and Young would entertain an amended motion to reopen that directly addresses Webster's failures to answer the petition for assessment of penalty and to respond to the show cause order. Such a motion should include supporting documentation, including affidavits from the individuals involved fully explaining those failures. *See Prairie Materials Sales Inc.*, 26 FMSHRC 800, 801 n.1 (Oct. 2004).

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