

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

May 16, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1053
v.	:	A.C. No. 15-12564-183615
	:	
LEFT FORK MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 April 11, 2011, Left Fork Mining Company, Inc. (“Left Fork”) filed with the Commission a motion to reopen this proceeding and relieve it from default.

On December 3, 2010, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Left Fork’s failure to answer the Secretary’s June 25, 2009 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default as of the next day. The Commission apparently did not receive a copy of Left Fork’s answer within 30 days, so the order of default became effective on January 3, 2011.

The operator’s motion states that on December 9, 2010, it did file its answer to the Secretary’s Petition, and the operator includes a copy of its answer. Therein, Left Fork responded to 17 of the penalties and conceded the other 17. Left Fork states that its answer was received by the assigned attorney in the Office of the Solicitor of Labor but apparently not by the Commission.

The judge’s jurisdiction in this matter terminated when the default occurred. 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). Consequently, here the judge’s order became a final decision of the Commission on Monday, February 14, 2011.

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 Left Fork timely attempted to file its answer in response to the show cause order and that it is unclear why the answer was not in the Commission’s files. Additionally, the Secretary has not opposed the motion to reopen.

In the interest of justice, we hereby reopen the proceeding and vacate the order of default. This case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. In addition, if it has not done so already, Left Fork should pay the 17 penalties that it is no longer contesting.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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