

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 7, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2008-102
v.	:	A.C. No. 36-08065-130918
	:	
THOMAS J. SMITH, INC.	:	

BEFORE: Duffy, Chairman; Jordan, 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 May 4, 2009, the Commission received from Thomas J. Smith, Inc. ("Smith") a letter seeking review of an order of Chief Administrative Law Judge Robert J. Lesnick entering a default judgment for the Secretary of Labor in this case.

The Chief Judge's jurisdiction in this matter terminated when his default order was issued on April 9, 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 review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). We construe the letter from Smith to be a timely filed petition for discretionary review.

On August 26, 2008, Chief Judge Lesnick issued a show cause order to Smith stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary on January 3, 2008, and that Smith 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. On April 9, 2009, Chief Judge Lesnick issued an order finding that Smith had failed to respond to the show cause order and entering a judgment by default for the Secretary.

On May 4, 2009, the Commission received a letter from L. Ray Bashline, Smith's Safety Director, seeking review of the Chief Judge's default order. The letter did not provide reasons regarding why the company had not answered the petition nor responded to the show cause order, other than stating that the show cause order had not been forwarded to the Safety Director.

Because Smith's letter does not address the validity of the Chief Judge's default order, nor provide any reasons why the default order should be vacated, we hereby deny the petition. Consequently, Smith currently stands in default in this matter.

However, we have 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). Moreover, 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, 787 (May 1993).

Consequently, if Smith can justify its failure to answer the petition for penalty assessment and its failure to respond to the judge's show cause order, it may submit a request to the Commission, with supporting documentation, asking it to reopen this case. *See Prairie Materials Sales, Inc.*, 26 FMSHRC 800, 801, & n.1 (Oct. 2004). Such a request, which must be filed within 30 days of the date of this order, should explain in detail why the operator failed to file an answer to the Secretary's penalty petition and why it failed to respond to the judge's show cause order. Smith should include a full description of the facts supporting its claim of "good cause," including why the show cause order was not transmitted to the Safety Director.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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