

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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January 26, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2008-290
v.	:	A.C. No. 36-08341-143134
	:	
R & K COAL COMPANY, INC.	:	

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

DIRECTION FOR REVIEW AND 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 22, 2009, Chief Administrative Law Judge Robert Lesnick issued to R & K Coal Company, Inc. (“R & K”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On January 5, 2010, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On January 11, 2010, the Commission received from R & K a request to set aside the default order. Attached to its request is a letter from Independent Miners and Associates (“IMA”) addressed to the Chief Judge dated April 24, 2009, that appears to be R & K’s answer to the Secretary’s petition. In addition, a fax cover sheet from IMA to the Regional Solicitor’s Office dated April 24, 2009, is attached to the request.

The judge’s jurisdiction in this matter terminated when his decision was issued on January 5, 2010. 29 C.F.R. § 2700.69(b). 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). We deem R & K’s request to constitute a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

R & K allegedly submitted an answer in April 2009 to the Secretary’s petition for assessment of penalty. However, the Commission apparently did not receive R & K’s answer at that time. Accordingly, the judge entered a default judgment against R & K. Based on the

present record, we are unable to determine whether R & K timely submitted its answer, and if so, why it apparently was not received.

Having reviewed R & K's request, in the interest of justice, we remand this matter to the Chief Administrative Law Judge, who shall determine whether relief from default is warranted, and for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.<sup>1</sup>

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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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<sup>1</sup> The request for relief and R & K's answer were filed by IMA. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an owner, partner, officer or employee of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). IMA is not a party in this proceeding, and it is unclear whether IMA satisfied the requirements of Rule 3 when it filed the request and answer on behalf of R & K. We have determined that, despite this, we will act on the petition in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, R & K must be represented by its owner, partner, officer, or employee, or IMA must demonstrate to the Commission or presiding judge that it fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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