FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2008-738-M
	:	A.C. No. 54-00298-150207
CANTERA HIPODROMO, INC.	:	

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

ORDER

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

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 9, 2009, Chief Administrative Law Judge Robert J. Lesnick issued to Cantera Hipodromo, Inc. ("Cantera") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of civil penalty. On August 11, 2010, Judge Lesnick entered an Order of Default against Cantera.

On September 20, 2010, the Commission received a motion from Cantera requesting that the Commission reopen the penalty assessment proceeding and relieve it from the order of default. Cantera explains that it never received the Judge's December 9 Order to Show Cause. The operator requests an opportunity to file an answer to the Secretary's petition for assessment of penalty. The Secretary does not oppose the operator's motion to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on August 11, 2010. 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 September 20, 2010.

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). 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 Cantera did not receive the show cause order. The envelope containing the show cause order was marked with a message indicating that it was not deliverable as addressed. In the interest of justice, we hereby reopen the proceedings and vacate the Order of Default. *See generally Sanders, formerly emp. by Natural Materials, LLC*, 31 FMSHRC 1022, 1024 (Sept. 2009) (vacating default order when show cause order might not have been received). Cantera shall file a response to the judge's show cause within 30 days after the date it receives this order.[1]

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Mary Lu Jordan, Chairman

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

[1] Our colleagues Commissioners Duffy and Young would have the Commission reopen the case directly rather than require a response to the judge's show cause order, in order to "conserv[e] judicial resources." While this approach is simpler, it fails to recognize that the matter before us is the show cause order which Cantera did not respond to because it did not receive it. It is the province of the Chief Judge, not us, to determine whether Cantera can demonstrate good cause for its failure to answer the Secretary's petition for assessment of civil penalty, as required by 29 C.F.R. § 2700.29.

Commissioners Duffy and Young, concurring in part and dissenting in part:

We conclude that Cantera Hipodromo, Inc. has provided adequate justification and documentation to support its request for relief from default, particularly given that the Secretary of Labor does not oppose the operator's request. Like our colleagues in the majority, we would vacate the order of default. However, in the interests of justice and conserving judicial resources, rather than requiring the operator to respond to the show cause order, we would require the operator to file an answer to the Secretary's petition for assessment of penalty within 30 days of this order.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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