

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20001

November 22, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2009-65-M
v.	:	A.C. No. 38-00007-165394
	:	
GIANT CEMENT HOLDING COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 October 9, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000165394 to Giant Cement Holding Company (“Giant Cement”). On December 11, 2008, after Giant Cement had timely contested certain proposed penalties, the Secretary of Labor (“Secretary”) filed a petition for assessment of civil penalty with the Commission regarding those contested penalties. On January 13, 2010, Chief Administrative Law Judge Robert Lesnick issued an Order to Show Cause to Giant Cement for failure to file an answer to the Secretary’s petition. On October 12, 2010, the judge issued an Order of Default entering judgment for the Secretary and directing Giant Cement to pay the proposed civil penalties immediately. On November 10, 2010, the Commission received a petition for discretionary review from Giant Cement, requesting that the Commission issue an order directing review and vacating the default order.

In support of its petition, Giant Cement states that on December 17, 2008, it timely filed its answer to the petition, but acknowledged that the answer’s caption inadvertently referenced Docket No. “SE 2008-1016-M” as opposed to Docket No. SE 2009-65-M. An internal review of the case file for Docket No. SE 2008-1016-M revealed that Giant Cement’s answer referencing contested Citation Nos. 6117058 and 6117065 was, in fact, received by the Commission on December 23, 2008. Giant further states that it timely filed an answer to the show cause order on February 1, 2010, explaining that it had timely filed its answer to the Secretary’s petition. The

Commission has not received a response from the Secretary.

The Chief Judge's jurisdiction over this case terminated when he issued his default order on October 12, 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 conclude that Giant Cement's petition for discretionary review was timely filed, and we hereby grant it.

Upon review of the record and an internal review of the case files, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. *See REB Enterprises, Inc.*, 18 FMSHRC 311 (Mar. 1996).

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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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