

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 28, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. WEVA 2008-1101
v.	:	A.C. No. 46-08553-147762
	:	
ELK RUN COAL 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 November 4, 2009, Chief Judge Lesnick issued to Elk Run Coal Company, Inc. (“Elk Run”), an Order to Show Cause for not answering the Secretary’s June 30, 2008 Petition for Assessment of Civil Penalty and ordered it to file its answer within 30 days of his order. On August 13, 2010, Judge Lesnick issued an Order of Default to Elk Run for failing to comply with his show cause order.

On November 10, 2010, the Commission received a motion by counsel to reopen the penalty assessment proceeding and relieve Elk Run from the order of default entered against it. The operator states that on December 2, 2009, via counsel, in response to the Order to Show Cause, it filed its answer to the Secretary’s Petition contesting 11 citations. Elk Run’s Answer was received by the assigned Solicitor but not by the Commission. The parties immediately began discovery and settlement negotiations. Elk Run explains that the default order was mailed to Elk Run’s president, Craig Boggs. The operator states that although Boggs received the order, not understanding what it meant and knowing that settlement negotiations were ongoing, he assumed it was a courtesy copy and did not forward it to counsel. Counsel learned of the default order on November 2, 2010, after receiving the Mine Safety and Health Administration’s (MSHA) delinquency letter from Elk Run. It immediately contacted the Commission to investigate, and subsequently filed its motion to reopen on November 9, 2010. Elk Run indicates in its motion that the Secretary does not oppose its request to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on August 13, 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 22, 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) ("*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 Elk Run timely filed its answer to the Secretary's Petition for Assessment of Civil Penalty in response to the Chief Judge's Order to Show Cause. The Answer contains a certificate of service certifying that it was served by counsel on the representative for the Secretary on December 2, 2009, within 30 days of the show cause order. Additionally, the Secretary has not opposed the motion.

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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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