

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 15, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-357-M
	:	A.C. No. 32-00153-139261
v.	:	
	:	
DUSEK SAND & GRAVEL, INC.	:	

BEFORE: Duffy, Chairman; Jordan, 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 December 8, 2008, Administrative Law Judge Gary Melick entered an order of default against Dusek Sand & Gravel, Inc. (“Dusek”) for its failure to file an answer to the Secretary of Labor’s petition for assessment of civil penalty. On December 22, 2008, the Commission received a motion from the Secretary requesting that the Commission relieve Dusek from the order of default.

The judge’s jurisdiction in this matter terminated when his decision was issued on December 8, 2008. 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). We construe the Secretary’s motion to be a timely filed petition for review, which we grant.

In her motion, the Secretary requests that Dusek’s response to the Secretary’s motion for summary judgment filed on November 26, 2008, be treated as an answer to the civil penalty petition and that the Commission reopen the case in order that the parties’ agreement to settle the proposed penalty assessment can be approved.

In evaluating requests to reopen final section 105(a) 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 inadvertence or mistake. *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”); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (Dec. 2004). 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).

Having reviewed the Secretary’s motion, we hereby reopen this matter and remand it to Administrative Law Judge Melick for a determination of whether the motion for settlement should be approved, and for other appropriate relief pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. *See Tresca Brothers Sand & Gravel, Inc.*, 28 FMSHRC 494 (Aug. 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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