

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

October 12, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2004-94-M
v.	:	A.C. No. 11-02972-21590
	:	
PRAIRIE MATERIALS SALES INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) (“Mine Act”). On September 27, 2004, the Commission received from Prairie Materials Sales Inc. (“Prairie Materials”) a letter seeking review of an order of Chief Administrative Law Judge Robert J. Lesnick entering a default judgment for the Secretary of Labor in this case.

The Chief Judge’s jurisdiction in this matter terminated when his default order was issued on September 2, 2004. 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 review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We construe the letter from Prairie Materials to be a timely filed petition for discretionary review.

On July 21, 2004, Chief Judge Lesnick issued a show cause order to Prairie Materials stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on May 13, 2004, and that Prairie Materials would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On September 2, 2004, Chief Judge Lesnick issued an order finding that Prairie Materials had failed to respond to the show cause order and entering a judgment by default for the Secretary.

On September 27, 2004, the Commission received a letter from Dave Mashek, the Safety Director of Prairie Materials, seeking review of the Chief Judge's default order. The letter did not provide reasons regarding why the company had not answered the petition nor responded to the show cause order but instead briefly discussed the merits of the citation in question. In her response to the letter, the Secretary opposed the granting of Prairie Materials' petition for discretionary review because it does not address the basis for the Chief Judge's default order.

Because the petition for discretionary review filed by Prairie Materials does not address the validity of the Chief Judge's default order nor provide any reasons why the default order should be vacated,<sup>1</sup> we hereby deny the petition.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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<sup>1</sup> The Commission has 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). See also Rule 60(b) of the Federal Rules of Civil Procedure. If Prairie Materials can justify its failure to answer the petition for penalty assessment and to respond to the show cause order, it may submit a request to the Commission, with supporting documentation, asking it to reopen this case.

Distribution

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