

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET N.W., 6TH FLOOR  
WASHINGTON, D.C. 20006

**March 20, 1996**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 95-29-M
	:	CENT 95-30-M
REB ENTERPRISES, INC.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 95-239-M
	:	
HAROLD MILLER, employed by	:	
REB ENTERPRISES, INC.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 95-240-M
	:	
RICHARD E. BERRY, employed by	:	
REB ENTERPRISES, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On February 9, 1996, Administrative Law Judge Avram Weisberger issued an Order of Default entering judgment in favor of the Secretary of Labor and ordering REB Enterprises, Inc. (“REB”) and Harold Miller and Richard E. Berry, employed by REB, to pay civil penalties of \$7,550, \$1,200, and \$1,600, respectively. For the reasons that follow, we vacate and remand.

On December 5, 1994, the Secretary filed petitions, which REB answered, for assessment of civil penalties against REB for alleged violations of various safety standards. On September 1, 1995, the Secretary filed petitions for assessment of civil penalties against Miller and Berry pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing, ordering, or carrying out the alleged violations. Thereafter, the judge consolidated the cases and scheduled a hearing.

On January 12, 1996, the Secretary filed a motion for default asserting that REB, Miller, and Berry had failed to respond to a prehearing order and that Miller and Berry had failed to answer the penalty petitions. On January 25, 1996, the Secretary filed a motion for postponement of the hearing. Judge Weisberger granted the motion for default on February 9, 1996.

On March 7, 1996, the Commission received a petition for discretionary review from REB, Miller, and Berry, requesting relief from default.<sup>1</sup> They explain that they had previously not been represented by counsel and were unfamiliar with Commission rules and procedures, and that the Secretary's motion for default and subsequent motion for postponement had "le[f]t the matter in a very confusing status to the laymen involved." REB Pet. at 3.

The judge's jurisdiction in this matter terminated when his decision was issued on February 9, 1996. 29 C.F.R. § 2700.69(b) (1995). 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). The petition was timely filed and we grant it.

The Commission's procedural rules provide that a judge shall issue an order to show cause prior to entry of any order of default or dismissal unless a party fails to attend a scheduled hearing, in which case an order to show cause is not required. 29 C.F.R. § 2700.66(a) & (b). Here, the judge did not issue a show cause order affording the operator and individuals the opportunity to explain their failure to respond to the prehearing order or to answer the penalty petitions. It appears from the record that REB, Miller, and Berry, who were proceeding without counsel, were unfamiliar with Commission procedure, confused by the Secretary's filing of a motion for postponement after he had filed a motion for default, and did not appreciate the consequences of failing to respond to the motion for default. In addition, the prehearing order to which Miller and Berry failed to respond was issued before they were named as parties and made no direct reference to them.

For the foregoing reasons, we vacate the default order and remand this matter to the judge for further appropriate proceedings. *See Patsy v. Big "B" Mining Co.*, 16 FMSHRC 1937, 1938 (September 1994).

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<sup>1</sup> On March 14, 1996, the Commission received an amended petition for discretionary review. The amended petition was filed out of time. *See* 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a).

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner