

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

March 29, 2004

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

RAY BROWN ENTERPRISES

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Docket No. SE 2003-43-M
A.C. No. 38-00638-05533

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On February 11, 2003, former Chief Administrative Law Judge David Barbour issued to Ray Brown Enterprises (“RBE”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On April 3, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to his show cause order.

On May 7, 2003, the Commission received from a representative of RBE a petition for discretionary review setting forth RBE’s reasons for failing to answer the Secretary’s petition for assessment of penalty and to respond to the judge’s show cause order. Mot. at 2. RBE states that beginning in February 2003, it was engaged in settlement negotiations with the Secretary. *Id.* RBE also states that the parties reached an agreement on February 20, 2003, that the Secretary mailed the agreement to the operator on March 5, and that the operator signed and mailed the agreement along with a check back to the Secretary on April 2. *Id.* RBE further states that before the parties could forward the settlement to the judge, he issued his default order dismissing the proceeding. *Id.* No supporting documentation was attached to the RBE petition. The Secretary states that she does not oppose RBE’s request for relief.

The judge's jurisdiction in this matter terminated when his decision was issued on April 3, 2003. 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 Commission has not directed review of the judge's order here, which became a final decision of the Commission on May 5, 2003.

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 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 (July 2002). 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 RBE's request, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse RBE's failure to respond to the show cause order and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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