

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 22, 2004

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| | : | |
| v. | : | Docket No. SE 2004-154-M |
| | : | A.C. No. 31-02188-22481 |
| CURRITUCK SAND, INC. | : | |

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

DIRECTION FOR REVIEW AND 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. (2000) (“Mine Act”). On September 9, 2004, Chief Administrative Law Judge Robert Lesnick issued to Currituck Sand, Inc. (“Currituck”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On October 14, 2004, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On November 10, 2004, the Commission received from Currituck a Motion to Reopen setting forth its 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 2-3. Currituck states that it was initially delayed in responding to the Secretary’s petition because it confused this proceeding with another pending proceeding with a similar docket number and believed that it had already answered the petition. *Id.* at 2. Currituck also states that the judge’s Order of Default was issued prematurely on October 14, 2004, prior to the expiration of the 30 day period during which it was permitted to file an answer in the judge’s show cause order. *Id.* Currituck explains that it received the judge’s Order to Show Cause on September 17, 2004, and believed it had 30 days from receipt of the order to respond and file an answer, making its answer due on October 18, 2004. *Id.* Currituck further states that it timely filed an answer on October 18. *Id.* Currituck asserts that it also filed a Motion to Vacate the judge’s default order, but the judge concluded that he no longer had jurisdiction. *Id.* Currituck requests the Commission to reopen this proceeding pursuant to

Fed. R. Civ. Pro. 60(b) so it may continue its contest. *Id.* at 3. The Secretary does not oppose Currituck's request to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on October 14, 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 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 Currituck's motion to be a timely filed petition, which we grant.

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).

The show cause order directed Currituck "to send an Answer to this Commission *within 30 days* or show good reason for [its] failure to do so." Order to Show Cause (emphasis added). The judge issued the show cause order on September 9, 2004. *Id.* Based on the language of the show cause order, it appears that the judge intended Currituck to respond to the show cause order within 30 days of the date of the order, making the 30th day October 12, 2004. Accordingly, the judge's default order was properly issued after the 30th day on October 14, 2004. *Id.*; Order of Default. However, it appears that Currituck mistakenly believed that the 30 day period began to run from its receipt of the judge's show cause order, and thus believed it timely filed its response.

Having reviewed Currituck'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 for Currituck's failure to timely respond to the judge's show cause order and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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