

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 6, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEST 2003-11-M
	:	A.C. No. 26-00827-05501 A933
SCOTT ANDERSON TRUCKING	:	

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 December 13, 2002, former Chief Administrative Law Judge David Barbour issued to Scott Anderson Trucking (“Anderson”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On March 12, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On June 13, 2003, the Commission received from Anderson a letter 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. Anderson states that it negotiated a settlement with the Secretary in which it agreed to pay civil penalties in the sum of \$721 instead of the proposed penalties of \$1442. *Id.*; Mot. to Correct Caption and Approve Settlement at 2. Anderson submits that on April 24, 2003, it paid the settlement amount of \$721. Mot. It states that the Secretary’s counsel apparently failed to file the settlement motion in a timely manner because, on March 28, 2003, the operator received the judge’s default order, directing Anderson to pay penalties in the amount of \$1442. *Id.*; Default Order dated March 12, 2003. Anderson subsequently received a letter from Judge Barbour stating that the settlement motion was filed on March 31, 2003, after the judge had issued the default order. Letter from Judge Barbour dated May 28, 2003. Finally, Anderson suggests that some confusion in these proceedings may have

been attributable to the use of an incorrect case number in the Secretary's petition for assessment of penalty. Mot. Anderson attached to its letter a copy of Judge Barbour's letter dated May 28, 2003; an Unopposed Motion to Correct Caption and Approve Settlement; and the judge's order of default.

The judge's jurisdiction in this matter terminated when his decision was issued on March 12, 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, which became a final order of the Commission on April 21, 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 Anderson'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 Anderson's failure to respond to the show cause order and for further proceedings as appropriate.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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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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