

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

December 23, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEST 2004-397-M
	:	A.C. No. 35-03260-28580
HARVEY W. BUCHE ROAD	:	
BUILDING, 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 22, 2004, Chief Administrative Law Judge Robert Lesnick issued to Harvey W. Buche Road Building, Inc. (“Buche”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On November 22, 2004, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On December 13, 2004, the Commission received from Buche a letter, dated December 8, setting forth its reasons for failing to respond to the judge’s show cause order. Mot. Buche states that, after the show cause order issued, it began negotiations with an attorney from the Solicitor’s Office and reached a settlement agreement. *Id.* However, Buche continues that the agreement was inadvertently misplaced, and as soon as the matter was brought to its attention it forwarded the signed agreement to the Solicitor’s Office. *Id.* Buche requests the Commission to reopen the case in order for the settlement agreement to be processed. *Id.* The Secretary has not responded to Buche’s request.

The judge’s jurisdiction in this matter terminated when his decision was issued on November 22, 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 Buche's letter to be a timely filed petition for review, 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 Buche "to send an Answer to this Commission within 30 days or show good reason for [its] failure to do so." Order to Show Cause. However, according to Buche, it appears that the parties agreed to settle the case prior to the judge's entry of the Order to Default, but that Buche inadvertently failed to sign the settlement agreement and return it to the Solicitor's Office in a timely manner. Mot.

Having reviewed Buche'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 Buche'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

Distribution

Kelly C. Moehnke, Office Manager
Harvey W. Buche Road Building, Inc.
35111 S. Wilhoit Rd.
Molalla, OR 97038

Patricia N. Drummond, Esq.
Office of the Solicitor
U.S. Department of Labor
1111 Third Avenue, Suite 945
Seattle, WA 98101-3212

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247