

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 10, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2004-161
v.	:	A.C. No. 46-07009-27582 A
	:	
JOEL DINGESS, Employed by	:	
ELK RUN COAL COMPANY	:	

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

ORDER

BY: Duffy, Chairman; Suboleski and Young, Commissioners

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 August 19, 2004, Chief Administrative Law Judge Robert Lesnick issued to Joel Dingess an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. Dingess was charged by the Secretary with a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c). On November 8, 2004, Administrative Law Judge Gary Melick issued a Default Decision and Order to Pay upon Dingess’s failure to respond to the Chief Judge’s show cause order.

On January 27, 2005, the Commission received correspondence from Karen Barefield of the U.S. Department of Labor’s Office of the Solicitor transmitting to the Commission two handwritten letters from Dingess alleging that the fine proposed against him was excessive and requesting Judge Melick “look over my case and reassess my fine.” Dingess offers no explanation for his failure to respond to Judge Lesnick’s Show Cause Order. In her transmittal letter, Ms. Barefield states that “Mr. Dingess is cooperating with the Secretary and wishes to have his case reopened.” We are treating Dingess’ letters that were forwarded to the Commission as a motion to reopen the penalty assessment.

The judge’s jurisdiction in this matter terminated when his decision was issued on November 8, 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). The Commission has not directed review of the judge's order here, which became a final decision of the Commission on December 20, 2004.

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"); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993). 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 Dingess's request, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Dingess'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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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Chairman Jordan, dissenting,

I would deny Joel Dingess's request to reopen this matter. He seeks review of the judge's order of default, but has offered no explanation for his failure to timely file an answer to the Secretary's petition for assessment of penalty or to the judge's show cause order. This case is thus similar to *Cusic Trucking, Inc.*, 21 FMSHRC 701 (July 1999), in which the Commission denied the operator's request for relief from the final Commission decision because the operator had offered no reason for its failure to respond to the petition for penalty assessment or to the judge's show cause order. *Id.* at 702-03. We noted in *Cusic* that, as in the instant case, "the judge's show cause order . . . unambiguously and in plain language ordered [the operator] to 'send an Answer . . . within 30 days or show good reason for [failing] to do so.'" *Id.* at 702 n.1 (citation omitted). Given the complete lack of any explanation as to why this instruction was entirely disregarded, I would deny this request for relief from a final order. *See also Prairie Materials Sales Inc.*, 26 FMSHRC 800, 801 (Oct. 2004) (denying operator's petition for discretionary review because it did not address the validity of the Chief Judge's default order nor provide any reasons why the default order should be vacated). Accordingly, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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