

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 24, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEVA 2004-208
	:	A.C. No. 46-08315-33802
MARFORK COAL COMPANY, 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 October 21, 2004, Chief Administrative Law Judge Robert Lesnick issued to Marfork Coal Co., Inc. (“Marfork”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On December 20, 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 29, 2004, the Commission received from Marfork a petition captioned “Petition for Reconsideration” stating that it did answer the Secretary’s petition for assessment of penalty and respond to the judge’s show cause order. Pet. at 1. Marfork states that it filed an answer on October 28, 2004, a copy of which was submitted to the Commission on December 28, 2004. *Id.*; Answer. Marfork asks the Commission to reconsider the judge’s default order. Pet. at 1. The Secretary has not taken a position on Marfork’s request to reopen.

The judge’s jurisdiction in this matter terminated when his decision was issued on December 20, 2004. 29 C.F.R. § 2700.69(b). This precludes reconsideration of the default order by the judge under Rule 78 of our procedural rules. Nevertheless, 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 Marfork's petition to be a timely filed petition for discretionary 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).

Marfork allegedly submitted an answer in October to the Secretary's petition for assessment of penalty. However, the Commission did not receive Marfork's answer at that time. Accordingly, the judge entered a default judgment against Marfork. Based on the present record, we are unable to determine whether Marfork timely submitted its answer, and if so, why it was not received.

Having reviewed Marfork'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 Marfork'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

M. Shane Harvey, Esq.  
Massey Coal Services, Inc.  
315 70<sup>th</sup> Street  
Charleston, WV 25304

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

Karen Barefield, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021