FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 6, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2005-116-M
v.	:	A.C. No. 19-01114-56147
	:	
R.J. CINCOTTA COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 18, 2005, Chief Administrative Law Judge Robert J. Lesnick issued a show cause order to R.J. Cincotta Company, Inc. ("Cincotta") stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on July 6, 2005, and that Cincotta would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On November 2, 2005, Chief Judge Lesnick issued an order finding that Cincotta had failed to respond to the show cause order and entering a judgment by default for the Secretary of Labor.

On January 17, 2006, the Commission received from Cincotta a letter stating that the company never received the order of default. The letter also states "we never heard back for [sic] an order to respondent to show cause" (indicating that the company may be confused as to its status as the respondent in these proceedings). Finally, the letter states that Cincotta "would still like to contest this [penalty]." The Secretary states that she does not oppose Cincotta's motion.

The judge's jurisdiction in this matter terminated when his decision was issued on November 2, 2005. 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 judge's order became a final decision of the Commission on December 12, 2005.

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 Cincotta's motion, 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 Cincotta'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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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Distribution

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