

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 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”). This is the second time that this case has come before us. On February 6, 2006, we issued an order remanding the matter to Chief Administrative Law Judge Robert J. Lesnick to determine whether good cause existed for the failure of R.J. Cincotta Company, Inc. (“Cincotta”) to respond to a show cause order issued by Chief Judge Lesnick. On April 11, 2006, Chief Judge Lesnick issued an order denying Cincotta’s request to reopen the penalty assessment and ordered payment of the penalty.

On May 2, 2006, the Commission received from the Secretary of Labor a motion to relieve Cincotta from the April 11 order of default and order to pay. In the Secretary’s motion, her counsel asserts that shortly after the proposal for assessment of civil penalty was served on Cincotta in July 2005, a settlement was reached in early August 2005. Mot. at 2. Counsel states that he telephoned the Office of Administrative Law Judges and reported the matter settled. *Id.* The Secretary did not, however, file a motion to approve settlement. Counsel also asserts that he telephoned the Office of the Administrative Law Judges notifying the person to whom he spoke that the matter was settled, after the judge issued an order to show cause on August 18, 2005. *Id.* Counsel states that he also told the operator that he had reported the matter settled. *Id.* Again, however, no motion was filed setting forth the particulars of the settlement. On November 2, 2005, an order of default was issued. On January 17, 2006, the Commission received a letter from Cincotta requesting that the case be reopened. We remanded Cincotta’s request to the Chief Judge on February 6, 2006.

While on remand, the Secretary filed a motion for approval of settlement with the judge. However, counsel did not explain that the matter had been settled the previous August, nor that the Secretary had delayed in filing the settlement motion. *See* Sec’y Mot. for Approval of Settlement and Order. On the record before him, the judge denied Cincotta’s request to reopen. The Secretary then filed the instant motion to relieve respondent from the order of default, alleging that the Secretary’s delay in filing the settlement motion resulted from counsel’s absence due to the illnesses of his elderly parents. Mot. at 3; Aff. ¶ 7.

The judge’s jurisdiction in this matter terminated when his decision was issued on April 11, 2006. 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 May 22, 2006.

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 Res., 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).

Although the Chief Judge has once denied Cincotta's request to reopen this case, it appears from the record that the Judge was never made aware that the Secretary had entered into a settlement agreement with Cincotta and was responsible for the delay in filing the appropriate pleadings with the Commission. Accordingly, in light of the Secretary's admitted failure to timely file a motion for approval of settlement, in the interest of justice, we hereby reopen this matter and remand it to the Chief Judge for a determination of whether the motion for settlement should be approved, and for other appropriate relief pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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