

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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August 2, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 2005-118-M
	:	A.C. No. 19-00364-55319
v.	:	
	:	
TRESCA BROTHERS SAND	:	
& GRAVEL, 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 November 2, 2005, Chief Administrative Law Judge Robert J. Lesnik entered an order of default against Tresca Brothers Sand & Gravel, Inc. (“Tresca”). On May 2, 2006, the Commission received a motion from the Secretary of Labor requesting that the Commission relieve Tresca from the order of default.

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.

On May 3, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) sent to Tresca the proposed penalty assessment at issue. In the Secretary’s motion, her counsel asserts that in early August 2005, a settlement was reached between the parties and counsel for the Secretary called the Commission’s Office of Administrative Law Judges to report that the case was settled. Mot. at 2. The Secretary did not, however, file a motion to approve settlement. On September 12, 2005, an order to show cause was issued requiring that Tresca file

an answer with the judge. According to the Secretary's counsel, he again notified the Office of Administrative Law Judges by telephone that the matter had been settled. Aff. ¶ 6. Again, however, no motion was filed setting forth the particulars of the settlement. On November 2, 2005, an order of default was entered against Tresca. Almost four months later, on February 27, 2006, the Secretary filed a motion for approval of settlement. On April 11, 2006, the judge sent a letter to the parties indicating that he was unable to rule on the motion as his jurisdiction had terminated when he issued the default order. 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. Aff. ¶ 7.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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"); *JWR*, 15 FMSHRC at 787. 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).

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.

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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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