

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 18, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEST 2005-51-M
	:	
JAMES CARNEY CONSTRUCTION	:	
	:	

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 January 28, 2005, Chief Administrative Law Judge Robert Lesnick issued to James Carney Construction (“Carney”) an Order to Show Cause for failing to answer the Secretary of Labor’s petition for assessment of penalty. On March 21, 2005, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On March 28, 2005, the Commission received a handwritten correspondence from Carney’s owner, Jim Carney, which we construe to be a timely petition for discretionary review. In that petition, Jim Carney states that he did not receive the show cause order and that he opposes the citation on the merits. Letter at 1. The Secretary does not oppose the petition for review and states that the case should be remanded to the judge so that the parties can litigate whether there was a violation.

The judge’s jurisdiction over this case terminated when he issued his decision on March 21, 2005. 29 C.F.R. § 2700.69(b). 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). We deem Carney’s correspondence to be a timely filed petition for review, which we grant. See, e.g., *Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) in 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).

Based on the present record, it is not clear whether Carney received the show cause order. In the interest of justice, we vacate the judge’s March 21 order and remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Carney’s failure to timely respond to the judge’s show cause order, and for further proceedings as appropriate. *See RBS, Inc.*, 26 FMSHRC 751 (Sept. 2004).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Direction

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