

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 14, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. PENN 2006-26-M
v. :
 :
NEISWONGER CONSTRUCTION, 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 February 3, 2006, Chief Administrative Law Judge Robert Lesnick issued to Neiswonger Construction, Inc. (“Neiswonger”) an Order to Show Cause for failing to answer the Secretary of Labor’s petition for assessment of civil penalty. On March 23, 2006, Chief Judge Lesnick issued an Order of Default entering judgment for the Secretary and directing Neiswonger to pay the proposed civil penalty immediately.

On May 1, 2006, the Commission received a letter from William Klingensmith, Neiswonger’s superintendent, seeking review of the Chief Judge’s default order. This letter, however, offers no explanation for why the company failed to file an answer or respond to the Chief Judge’s show cause order. Instead, the letter states “all letters were replied to within the [requisite] time frame.” The Secretary has not filed a response to Neiswonger’s request for relief.

The Chief Judge’s jurisdiction in this matter terminated when he issued his default order. 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 review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Here, Neiswonger did not file a timely petition for review, and consequently, the Chief Judge’s order became a final order of the Commission on May 2, 2006. 30 U.S.C. § 823(d)(1).

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).

Upon review of the record, we have determined that the wording of the Order to Show Cause did not conform to the Commission’s Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. *See REB Enterprises, Inc.*, 18 FMSHRC 311 (March 1996).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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