

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 19, 2020

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2019-0360
v.	:	A.C. No. 47-03449-497534
	:	
MILESTONE MATERIALS DIVISION	:	
OF MATHY CONSTRUCTION	:	

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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. (2012) (“Mine Act”). On April 16, 2020, the Commission received from Milestone Materials Division of Mathy Construction (“Milestone”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 9, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Milestone’s perceived failure to answer the Secretary of Labor’s October 8, 2019, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on December 30, 2019, when it appeared that the operator had not filed an answer within 30 days.

Milestone filed an answer one day after the Order became final. Milestone asserts that the answer was inadvertently filed late because counsel was out of the office for the two weeks following the issuance of the Show Cause Order. Counsel became aware of the Order upon his return to the office on December 31, and promptly filed an answer.¹ The Secretary does not oppose the request to reopen, but urges the operator to take all steps necessary to ensure that

¹ Milestone alternatively asserts that the penalty contest was timely filed, noting that the Order to Show Cause was sent by certified mail and that “[w]hen a party serves a pleading by a method of delivery resulting in other than same-day service, the due date for party action in response is extended 5 additional calendar days.” 29 C.F.R. § 2700.8(b). However, as indicated by the plain language, this extension applies only to responses to party filings, not responses to orders issued by Commission Judges.

future penalty assessments the operator wishes to contest are contested in a timely manner, and that such contests are properly filed.

The Judge's jurisdiction in this matter terminated when the default occurred. 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)(A)(i); 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). Consequently, the Judge's order here has become a final decision of the Commission.

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 the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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, 786-89 (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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Milestone's request and the Secretary's response, we find the operator's answer was untimely due to an internal delay in processing the Order to Show Cause, i.e., an administrative mistake. To prevent repetition of such a mistake, however, procedures should be put in place to ensure that future orders are timely received and processed even when counsel of record is unavailable.

In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Marco M. Rajkovich, Jr., Chairman


William I. Althen, Commissioner


Arthur R. Traynor, III, Commissioner

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