

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

October 14, 2020

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 : Docket No. WEST 2019-0353  
v. : A.C. No. 04-04674-491494  
 :  
AMES CONSTRUCTION, INC. :

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. (2018) (“Mine Act”). On November 4, 2019, the Commission received from Ames Construction, Inc. (“Ames”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 8, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Ames’ perceived failure to answer the Secretary of Labor’s July 15, 2019 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on October 29, 2019, when it appeared that the operator had not filed an answer within 20 days.

Ames asserts that it never received the Order to Show Cause. The Secretary does not oppose the request to reopen, but requests that Ames, having contested the penalty at issue, take its further obligations seriously.

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.

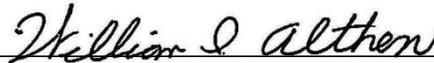
In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party

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).

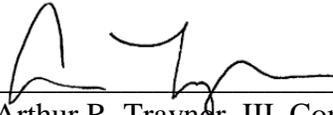
Having reviewed Ames’ request and the Secretary’s response, we find that Ames’ request to reopen so soon after the due date to respond to the Order to Show Cause merits reopening of the case. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case 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

Distribution (e-mail):

Jeff Klante  
California Area Safety Manager  
391 N. Main Street, Suite 302  
Corona, CA 92880  
[jeffklante@amesco.com](mailto:jeffklante@amesco.com)

Emily Scott, Esq.  
Office of the Solicitor  
[Scott.Emily.T@dol.gov](mailto:Scott.Emily.T@dol.gov)

Chief Administrative Law Judge Glenn Voisin  
Federal Mine Safety & Health Review Commission  
[GVoisin@fmshrc.gov](mailto:GVoisin@fmshrc.gov)

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
[Garris.Melanie@DOL.GOV](mailto:Garris.Melanie@DOL.GOV)