

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**August 26, 2022**

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 : Docket No. SE 2021-0194  
v. : A.C. No. 22-00650-542085  
 :  
GREEN BROTHERS GRAVEL :  
COMPANY, INC. :

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 March 30, 2022, the Commission received from Green Brothers Gravel Company, Inc. (“Green Bros.”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 21, 2021, the Chief Administrative Law Judge issued an Order to Show Cause in response to Green Bros.’ perceived failure to answer the Secretary of Labor’s October 21, 2021 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on January 20, 2022, when it appeared that the operator had not filed an answer within 30 days.

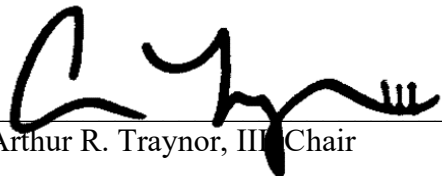
Green Bros. asserts that, due to servicing rules in place during the COVID-19 pandemic, MSHA’s petition for Assessment of Civil Penalty was not mailed to the operator but was instead served by email. Due to a clerical oversight, counsel for Green Bros.’ email address contained a typographical error and, as a result, Green Bros. maintains that it did not receive a copy of the Assessment or the Chief Judge’s subsequent Order to Show Cause and Order of Default. The Secretary does not oppose the request to reopen.

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

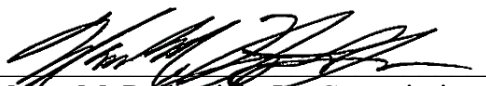
Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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 Green Bros.' request and the Secretary's response, we find that the failure to respond was due to a clerical error and that the operator promptly moved to reopen the case upon discovering the mistake. 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.

  
Arthur R. Traynor, III, Chair

  
William I. Althen, Commissioner

  
Marco M. Rajkovich, Jr., Commissioner

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