

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**October 14, 2020**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2019-0105
v.	:	A.C. No. 36-07416-491552-MFH
	:	
A-POSITIVE ELECTRIC CO., 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 September 30, 2019, the Commission received from A-Positive Electric Co., Inc. (“A-Positive”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.


On August 28, 2019, the then-Acting Chief Administrative Law Judge issued an Order to Show Cause in response to A-Positive’s perceived failure to answer the Secretary of Labor’s June 27, 2019 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 18, 2019, when it appeared that the operator had not filed an answer within 20 days.

A-Positive asserts that it responded to the Order to Show Cause but its response was returned to it due to an incorrect address. The Secretary does not oppose the request to reopen, but requests that A-Positive, having contested the penalty at issue, take its further obligations seriously.

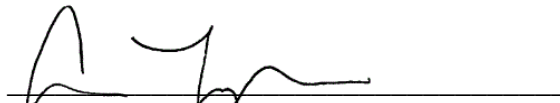
The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 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 A-Positive’s request and the Secretary’s response, we find that A-Positive’s 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.

  
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Marco M. Rajkovich, Jr., Chairman

  
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William I. Althen, Commissioner

  
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Arthur R. Traynor, III, Commissioner

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