FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-82-M
v.	:	A.C. No. 21-03672-302353
80TH STREET AGGREGATES	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, 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 July 31, 2013, the Commission received from 80th Street Aggregates ("Aggregates") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 6, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Aggregates' failure to answer the Secretary of Labor's November 26, 2012 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on March 11, 2013, when the operator did not appear to have filed an answer within 30 days.

Aggregates asserts that it filed a timely answer in response to the Order to Show Cause with the Commission on February 25, 2013, as well as with MSHA on July 13, 2013. Aggregates supplies copies of two delivery confirmation receipts to support its claims, as well as a copy of its undated letter. The Secretary does not oppose the request to reopen and notes that although Aggregates did file an answer with MSHA, it incorrectly sent the answer to MSHA's St. Louis payment processing address and not to MSHA's Duluth District Office, as required.

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, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 Aggregates' request and the Secretary's response, 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.

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

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