

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 31 2017

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

WILLITS COMPANY, INC.

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Docket No. WEST 2014-1049-M
A.C. No. 48-01540-360049

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 August 10, 2015, the Commission received from Willits Company, Inc. (“Willits”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 30, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Willits’s failure to timely answer the Secretary of Labor’s November 7, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on June 1, 2015, when it appeared that the operator had not filed an answer within 30 days. On July 27, 2015, MSHA mailed a delinquency notice to Willits.

Willits claims not to know how the case became a final order of the Commission and that it has been negotiating the case with the Solicitor in the Denver Regional Solicitor’s office. The Secretary does not oppose the request to reopen, and he confirms that ongoing negotiations have been occurring between the operator and the Solicitor, and that the Solicitor was unaware that the case had been closed for default. The Secretary also notes that Willits filed an answer in another case and has been negotiating it with the Solicitor as well. However, the Secretary notes that his decision not to oppose reopening in this case should not be construed as condoning Willits’s failure to take orders of the Commission seriously, and that the Order to Show Cause clearly alerted the operator that it needed to respond to the order within 30 days.

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 Willits's 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.



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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