FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 31 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-1310-M
v.	:	A.C. No. 46-00007-330019
ESSROC CEMENT CORP.	:	

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 November 10, 2014, the Commission received from Essroc Cement Corp. ("Essroc") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 18, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Essroc's failure to timely answer the Secretary of Labor's October 21, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on January 21, 2014, when it appeared that the operator had not filed an answer within 30 days. On May 28, 2014, MSHA mailed a delinquency notice to Essroc. After receiving no response, MSHA sent the case to the U.S. Treasury for collection on September 18, 2014.

Essroc asserts that it submitted a detailed position statement, dated December 13, 2013, to MSHA and the Commission, and believed that it was participating in ongoing negotiations regarding the case with the Conference and Litigation Representative ("CLR") and Solicitor. The operator offers e-mail correspondence demonstrating that it submitted the answer to MSHA on December 17, 2013. The answer, however, does not appear to have ever been sent to the Commission, and the operator does not offer any proof of delivery of the answer to the Commission. The operator further claims that it was led to believe by MSHA that negotiation of the case was still ongoing. Specifically, it cites e-mail correspondence where the CLR allowed additional time for the operator to submit its position statement[1] as well as an e-mail where the

[1] A CLR does not have the authority to grant an extension of time for an operator to file an answer.

CLR thanked the operator for submitting the answer while informing Essroc that it would "start reviewing [its] mitigation" upon returning after the holidays. The operator also cites an e-mail from the Solicitor giving notice of substitution of counsel to the operator on March 4, 2014 and inquiring about the operator's settlement positions. Finally, Essroc claims that it never received the Order to Show Cause, and that it did not know that the case had been closed until it was contacted by the collections office on November 6, 2014. However, U.S. Post Office records show that on December 21, 2013, a notice of attempted delivery of the Order to Show Cause was left with Essroc.

The Secretary does not oppose the request to reopen, and he confirms that he received the December 13, 2013 position statement from the operator. However, he notes that his decision not to oppose reopening in this case should not be construed as condoning Essroc's "inadequate or sloppy office procedures." The Secretary urges the operator to take steps to ensure that it timely responds to petitions, Administrative Law Judge's orders and MSHA delinquency notices in the future.

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).

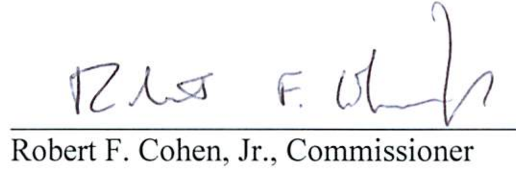
Having reviewed Essroc's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Essroc's December 13, 2013 position statement represented a very substantial, albeit untimely, response to the Secretary's Petition for Assessment of Civil Penalty, and the Secretary's counsel continued discussing resolution of the case with Essroc past the time when the Order of Default became final.

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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