

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**April 19, 2022**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2020-0167
v.	:	A.C. No. 26-02279-507222
	:	
LAS VEGAS PAVING CORP.	:	

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 10, 2021, the Commission received from Las Vegas Paving Corporation (“Las Vegas Paving”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

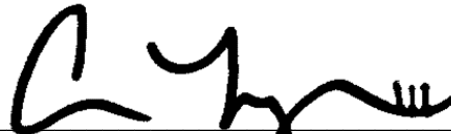
On April 28, 2020, the Chief Administrative Law Judge issued an Order to Show Cause in response to Las Vegas Paving’s perceived failure to answer the Secretary of Labor’s February 20, 2020 Petition for Assessment of Civil Penalty. On August 5, 2020, the Chief Administrative Law Judge issued a second Order to Show Cause to the operator. By its terms, the second Order to Show Cause was deemed a Default Order on September 4, 2020, when it appeared that the operator had not filed an answer within 30 days.

Las Vegas Paving asserts that it never received the Secretary’s Petition for Civil Penalty and acknowledges that a mistake was made on its part. It states that it has not yet been able to ascertain why the Petition was not received and submits evidence to “demonstrate a very good track record of correspondence . . . on many previous assessments and contested cases.” Las Vegas Paving contends that this type of mistake “does not typically happen” and that it has reviewed its procedures to prevent any similar mistakes from occurring in the future. In its submission, the operator outlines a methodical tracking of its inspections, citations and penalty assessments, in order to demonstrate that it takes assessments and Petitions very seriously. The Secretary does not oppose the request to reopen but urges the operator to timely file an answer to all penalty petitions and to take Show Cause Orders from the Administrative Law Judge 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).

We note that operators should take Show Cause Orders seriously and should adequately explain any delays in responding to such orders. However, having reviewed Las Vegas Paving's request and the Secretary's response, we find that the operator acted with mistake. In reaching this conclusion, we consider the inadvertent failure to receive the Secretary's Petition, and in particular, the operator's overall record of timely responding to proposed assessments and Petitions. 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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Arthur R. Traynor, III, Chair



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William I. Althen, Commissioner



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Marco-M. Rakovich, Jr., Commissioner

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