

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

MAY 04 2018

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

v.

WESCO

:
:
:
: Docket No. WEST 2016-321
: A.C. No. 48-01353-403777
:
:

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 February 7, 2017, the Commission received from WESCO a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May, 23, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to WESCO’s failure to answer the Secretary of Labor’s April 14, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on June 23, 2016, when it appeared that the operator had not filed an answer within 30 days.

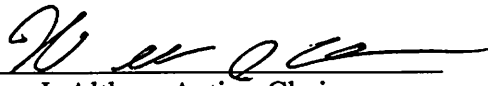
WESCO filed a contest to MSHA’s proposed assessment and asserts that it always intended to continue to contest the single citation at issue. However, during the week of February 22, 2016, the operator moved offices to a new address. While the operator contends that it properly filed a change of address notification with MSHA, it claims that it never received any of the paperwork related to this citation after contesting the proposed assessment.¹ The operator asserts that it learned that the citation became final when it began to receive collection notices. WESCO has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen and does not challenge any of the assertions made by the operator.

¹ We note that the Order to Show Cause issued by Chief Judge Lesnick lists the operator’s previous address on the distribution list.


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).

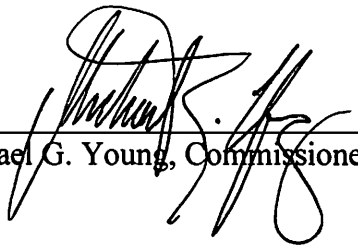
Having reviewed WESCO's request and the Secretary's response, we find that the operator inadvertently failed to respond to the Show Cause Order because the document was sent to its old address. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this 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.



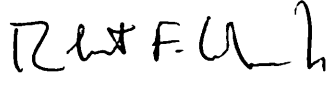
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution:

**Tim Wright
HSE Manager
WESCO
3135 S. Richmond St.
Salt Lake City, UT 84106-3053**

**Ali Beydoun, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave. N.W., Suite 520N
Washington, DC 20004-1710**

**Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450**