

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

MAY 1 / 2017

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

v.

FERRAILOLO CONSTRUCTION

:  
: Docket No. YORK 2016-47-M  
: A.C. No. 17-00584-397754  
:  
: Docket No. YORK 2016-108-M  
: A.C. No. 17-00584-397754  
:

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 6, 2016, the Commission received from Ferraiolo Construction (“Ferraiolo”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 1, 2015, the Mine Safety and Health Administration (“MSHA”) issued a proposed assessment to Ferraiolo at its address at 279 Main Street, Rockland, Maine. Ferraiolo timely contested the proposed assessment, listing the aforementioned address as its address of record. Nevertheless, when the Secretary subsequently filed his Petition for Assessment of Civil Penalty in Docket No. YORK 2016-47-M, his representative mailed the operator’s copy of the Petition to a different address, 28 Gordon Drive, Rockland, Maine.<sup>1</sup>

Ferraiolo did not file an Answer to the Secretary’s Petition. Accordingly, on March 10, 2016, the Chief Administrative Law Judge issued an Order to Show Cause directing Ferraiolo to respond or else the docket would be dismissed. This order was also mailed to the 28 Gordon Drive address, and was returned undelivered by the Post Office 12 days later. By its terms, the Order to Show Cause was deemed a Default Order on April 11, 2016, when it appeared that the operator had not filed an answer within 30 days.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Since no petition for discretionary review was filed, the Judge’s order here has become a final order of the Commission. 30 U.S.C. § 823(d)(1).

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<sup>1</sup> The Gordon Drive address apparently was Ferraiolo’s prior address.

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).

Upon review of the record, we find that the Petition for Assessment of Civil Penalty and the Order to Show Cause were delivered to an incorrect address and that Ferraiolo never received them.<sup>2</sup> Ferraiolo also cites to correspondence with an MSHA Conference and Litigation Representative (“CLR”) in which the operator provided, at the request of the CLR, a written explanation as to why the penalty was contested. The following day, the CLR thanked Ferraiolo for the e-mail and stated that he would get back to the operator at a later date. Ferraiolo asserts that, based on these communications, it believed that it had done all that was required for purposes of contesting the penalty. The Commission has received no opposition from the Secretary regarding the vacating of the default order and the reopening of these proceedings.

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<sup>2</sup> Based on the parties’ pleadings (which implied that the case involved a failure to timely contest MSHA’s proposed penalty), the Commission had construed the motion to reopen as arising from a failure to contest a proposed assessment under section 105(a) of the Act, despite the Chief Judge having issued the Order to Show Cause. As a result, the Commission assigned the motion to reopen to another docket, No. YORK 2016-108-M, despite having already assigned the substantive case to Docket No. YORK 2016-47-M upon the filing of the Secretary’s Petition. Because the subsequent case was docketed in error and is duplicative, we hereby dismiss Docket No. YORK 2016-108-M.

Having reviewed Ferraiolo's request, we hold that the operator has sufficiently demonstrated a basis for relief due to the fact that the Petition for Assessment of Civil Penalty and the Order to Show Cause were sent to the wrong address and because the operator was confused by the correspondence with the CLR. Therefore, 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:

John Ferraiolo  
279 Main Street  
Suite 1  
Rockland, ME 04841

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
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