

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2022-0104
v.	:	A.C. No. 03-01730-549529
	:	
BENTON COUNTY STONE CO. INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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 July 22, 2022, the Commission received from Benton County Stone Co. Inc. (“Benton”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May 23, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Benton’s failure to answer the Secretary of Labor’s March 22, 2022 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on or about June 23, 2022, when it appeared that the operator had not filed an answer within 30 days.

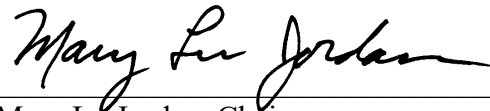
Benton asserts that its failure to timely file occurred due to certain medical circumstances and the hospitalization of the Operator’s Safety Director and MSHA Consultant. According to e-mail correspondence offered by the operator, MSHA had sent an email concerning the case to Benton’s Safety Director on June 8, 2022, however he was hospitalized for surgery and on medical leave prior to this date. MSHA informed the operator on July 19, 2022 that the Order to Show Cause was deemed a Default Order, and the operator filed its motion to reopen on the same day. The Secretary does not oppose the request to reopen, but cautions that she may oppose future requests to reopen penalty assessments that are not contested in a timely manner.

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).

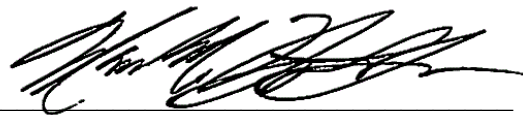
Having reviewed Benton's request and the Secretary's response, we find that the operator acted with excusable neglect due to the medical circumstances and hospitalization surrounding the operator's safety director and MSHA consultant. In the interest of justice, we hereby reopen the proceeding and vacate 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.



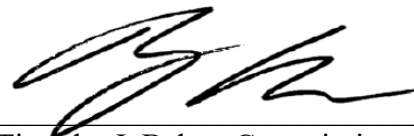
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

Distribution:

Blake Tice
Benton County Stone Co, Inc.
P.O. Box 968
Pryor, OK 74362
safety@kempquarries.net

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov