FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 2, 2021

WAYNE J. SAND AND GRAVEL, INC.	:	
v.	:	Docket No. WEST 2019-0097-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2019-0111 A.C. No. 04-01915-477311
v.	:	
WAYNE J. SAND AND GRAVEL, INC.	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, 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. (2018) (the "Mine Act"). An Order to Show Cause was issued for the penalty proceeding in Docket No. WEST 2019-0111 on July 8, 2019, which by its terms was deemed a Default Order on July 29, 2019. Accordingly, an order dismissing the related contest proceeding in Docket No. WEST 2019-0097-RM was issued on August 26, 2019. On December 18, 2020, Wayne J. Sand and Gravel, Inc. ("Wayne") submitted a filing in Docket No. WEST 2019-0097-RM, which we construe as a motion to reopen both the contest and penalty proceedings.

The Judge's jurisdiction in the captioned matters terminated when the default occurred and the dismissal order was issued. 29 C.F.R. § 2700.69(b). 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, both orders here have become final decisions.

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 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).

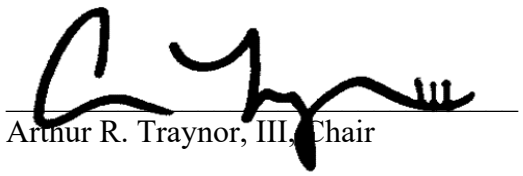
Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

Wayne's motion was filed in December 2020, more than 16 months after the default and dismissal became final orders of the Commission. Accordingly, the motion to reopen is untimely under Rule 60(c). *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

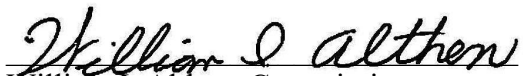
We find Wayne's explanations unpersuasive with respect to justifying the delay. Wayne asserts that it was unaware of the penalty proceeding because it never received the Secretary's Penalty Petition or the Judge's Order to Show Cause. However, Wayne concedes that it received delinquency notices regarding the penalty dated October 2019 and April 2020.[1] Wayne suggests that it was not aware of these letters until August 2020, because the operator's secretary was out of the office due to the Covid-19 pandemic. While a brief or moderate delay in mail processing due to the pandemic may be considered excusable, a failure to process mail for ten months is not. The operator should have been aware that it had failed to timely contest the penalty proceeding in October 2019, more than a year before this motion was filed.

[1] Records suggest that the operator received documents mailed to its legal address of record for Health and Safety matters (P.O. Box), but did not receive documents mailed to its general legal address of record (Buena Vista Road address), which the operator also provided in its notice of contest. We make no finding here as to whether a failure to collect mail from a legal address of record would constitute an excusable mistake if the motion was timely. However, the operator is urged to enact procedures to ensure that all legal addresses of record are correct and checked regularly.

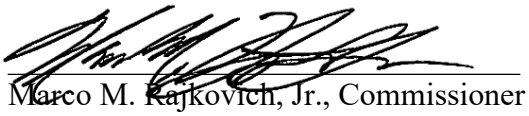
Accordingly, we deny Wayne's motion.[2]



Arthur R. Traynor, III, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

[2] Wayne provides no separate justification with regard to the contest proceeding. Accordingly, having considered and rejected the operator's justifications regarding the penalty proceeding, we deny the motion to reopen in full.

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