

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 3, 2022

|                        |   |                           |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR,    | : |                           |
| MINE SAFETY AND HEALTH | : |                           |
| ADMINISTRATION (MSHA)  | : |                           |
|                        | : | Docket No. CENT 2018-0361 |
| v.                     | : | A.C. No. 23-01836-466310  |
|                        | : |                           |
| TABLE ROCK ASPHALT     | : |                           |
| CONSTRUCTION, INC.     | : |                           |

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 11, 2019, the Commission received from Table Rock Asphalt Construction, Inc. (“Table Rock”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 15, 2018, the Chief Administrative Law Judge issued an Order to Show Cause in response to Table Rock’s failure to answer the Secretary of Labor’s Petition for Assessment of Civil Penalty, which was issued on August 9, 2018. By its terms, the Order to Show Cause was deemed a Default Order on October 31, 2018, when the operator had not filed an answer within 30 days.

Table Rock asserts that it did not realize that it had failed to file an answer until it was notified while conducting settlement negotiations in this case with a Conference Litigation Representative with the Department of Labor’s Mine Safety and Health Administration. The operator states that its safety manager, who was responsible for maintaining records and filing answers, had recently been replaced. Table Rock also notes that there is a copy of its Answer in its files but admits that it has no way to confirm that the answer was mailed to the proper addresses. The Secretary does not oppose the request to reopen, but urges the operator to take future penalty petitions seriously and answer them 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.

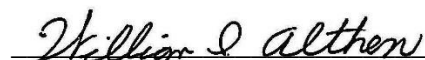
In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying 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 Table Rock's request and the Secretary's response, we find that the operator acted with excusable neglect due to its safety manager being replaced during the time in question, and that it acted in good faith in intending to timely file its answer based on the copy of the answer retained in the operator's files. 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. Rajkovich, Jr., Commissioner

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