

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

AUG 04 2015

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

v.

CONCRETE MOBILITY, LLC

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Docket No. CENT 2013-519-M
A.C. No. 41-04898-320563-01
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Docket No. CENT 2013-520-M
A.C. No. 41-04898-320563-02

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners¹

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 July 1, 2014, the Commission received from Concrete Mobility, LLC (“Concrete”) a motion seeking to reopen two penalty assessment proceedings and relieve it from the Default Orders entered against it.

On August 8, 2013, the Chief Administrative Law Judge issued Orders to Show Cause in response to Concrete’s perceived failure to answer the Secretary of Labor’s June 7, 2013 Petitions for Assessment of Civil Penalty. By its terms, the Orders to Show Cause were deemed to be Default Orders on September 9, 2013, when it appeared that the operator had not filed an answer within 30 days.

Concrete asserts that none of the individuals at the mine were aware of any MSHA procedures, and thus the operator failed to respond to the Petitions for Assessment of Civil Penalty and the Orders to Show Cause. Furthermore, the operator asserts that it could not have prevented the violations at issue. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on February 10, 2014, and the cases were referred to the U.S. Department of Treasury for collection on April 3, 2014.

¹ Commissioner Cohen has elected not to participate in this matter.

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.

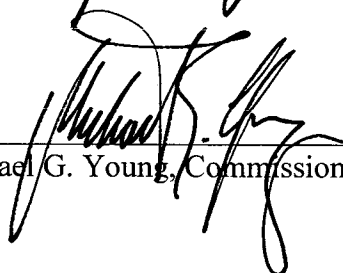
In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying 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).

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. See, e.g., *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delay in responding to MSHA's delinquency notice amounted to more than 30 days. Concrete failed to explain its delay in filing this motion to reopen after receiving the delinquency notice. This lack of explanation is grounds for denial.

Having reviewed Concrete's request and the Secretary's response, we conclude that Concrete has failed to establish good cause for reopening the proposed penalty assessments.

Accordingly, we deny its motion with prejudice.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

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