

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

August 22, 2022

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2020-0362
v.	:	A.C. No. 45-02314-515508
	:	
FARWEST PORTABLE CRUSHING,	:	
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 April 1, 2021, the Commission received from Farwest Portable Crushing Inc. (“Farwest”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 7, 2021, the Chief Administrative Law Judge issued an Order to Show Cause in response to Farwest’s perceived failure to answer the Secretary of Labor’s August 30, 2020, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 6, 2021, when it appeared that the operator had not responded to it within 30 days.

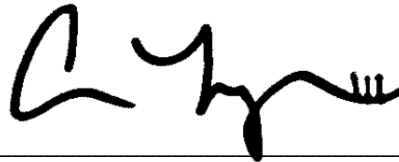
Farwest asserts that it timely filed an Answer to the Secretary’s Petition. In support of this assertion, Farwest submits a copy of a certified mail receipt, postmarked September 29, 2020, addressed to “MSHA Review Commission” at 1331 Pennsylvania Ave., N.W. Washington, D.C. 20004-1710. The operator asserts further that it also responded to the Judge’s January 7, 2021, Order to Show Cause by resubmitting its paperwork. To support this claim, Farwest submits copies of a certified mail receipt postmarked January 22, 2021, addressed to “MSHA” but sent to the Commission’s address, referenced above. Farwest explains that in both cases it did not receive signature confirmation of receipt, but neither did it receive its envelope back. The Secretary does not oppose the request to reopen.

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

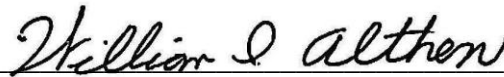
issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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).

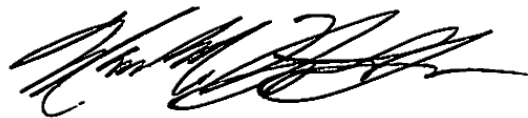
Having reviewed Farwest's request and the Secretary's response, we find that, although Farwest did not achieve a successful delivery until April 1, 2021, the operator has submitted documentation of its prior attempts to file timely responses to both the Secretary's Petition and the Judge's show cause order. 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.



Arthur R. Traynor, III, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

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