

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, DC 20004-1710

August 30, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2021-0275
	:	A.C. No. 02-03338-535671
v.	:	
	:	
SOUTHWEST ROCK PRODUCTS, 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 January 11, 2023, the Commission received from Southwest Rock Products, Inc. (“SW Rock”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 31, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to SW Rock’s perceived failure to answer the Secretary of Labor’s September 30, 2021, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 2, 2022, when it appeared that the operator had not filed an answer within 30 days.

SW Rock asserts that it did not receive documentation about the defaulted docket. The Secretary does not oppose the request to reopen but notes that the Order to Show Cause, which incorporates the order of default, was mailed to the address listed on the Legal Identification Report that SW Rock filed with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). She states that MSHA sent a delinquency notice to the operator on May 18, 2022, which was later forwarded to the U.S. Department of the Treasury for collection on July 12, 2022. The Secretary notes that SW Rock’s address and contacts were not updated until November and December 2022. The Secretary further observes that the operator did not explain why it did not file a motion to reopen until several months after receiving MSHA’s delinquency notice.

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).

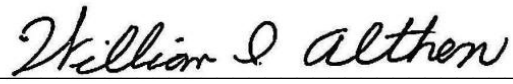
Having reviewed SW Rock's request and the Secretary's response, we conclude that the operator has failed to provide sufficient information to determine whether good cause may exist to reopen the final order. We have held that a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest." *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008). However, SW Rock's motion to reopen provided only a cursory explanation for its failure to timely respond to the Chief Judge's Order to Show Cause, stating that they "are unsure as to why this docket defaulted and have received no documentation stating such." Moreover, SW Rock failed to provide any explanation regarding whether it maintained its correct legal address with MSHA – a problem that was clearly known to the company at the time the motion to reopen was filed.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we also 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 operator only attempted to reopen the case nearly a year after the Order was issued, after having been sent a delinquency notification and notice that the assessment had been sent to Treasury for collection. No explanation is provided for this lengthy delay nor for having missed multiple attempts to warn the operator of its error.

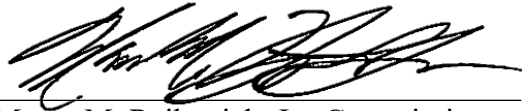
Accordingly, we deny SW Rock's request to reopen with prejudice.



Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

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