

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 31 2017

SECRETARY OF LABOR, : Docket No. SE 2016-207-M
MINE SAFETY AND HEALTH : A.C. No. 31-00057-395250
ADMINISTRATION (MSHA) :
 :
v. : Docket No. SE 2016-208-M
 : A.C. No. 31-00057-395250
 :
METZGER REMOVAL, INC. :

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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. (2012) (“Mine Act”). On April 28, 2016, the Commission received from Metzger Removal, Inc. (“Metzger”) a motion seeking to reopen a penalty assessment¹ that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). 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”); *JWR*, 15 FMSHRC at 787. 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

¹ Two dockets were created for assessment number 000395250—Docket Nos. SE 2016-207-M and SE 2016-208-M. Because they both deal with the same assessment, they should be considered duplicate dockets and resolved in tandem. Accordingly, we hereby consolidate docket numbers SE 2016-207-M and SE 2016-208-M. 29 C.F.R. § 2700.12.

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on October 26, 2015, and became a final order of the Commission on November 25, 2015. The Secretary’s records further reflect that a delinquency notice was mailed on January 11, 2016.

Metzger asserts that it attempted to timely contest the assessment, but MSHA did not register two of the citations as having been contested. Metzger further states that as a result of this situation, when a settlement motion was submitted, a Commission Administrative Law Judge did not approve the settlement for the two uncontested citations. The Secretary explains that the Metzger mistakenly believed that the citations involved in this assessment were included in another assessment, which Metzger did timely contest. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

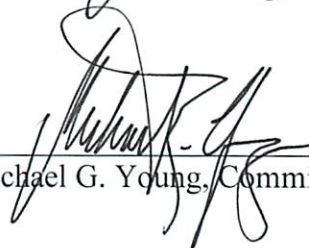
Having reviewed Metzger’s request and the Secretary’s response, we find that the failure to contest the two citations herein was an inadvertent mistake by an inexperienced pro se operator. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



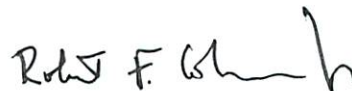
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