

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

JUL 10 2017

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

v.

BUZZI UNICEM USA

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: Docket No. CENT 2016-0190
: A.C. No. 23-00134-382897
:
:

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 January 28, 2016, the Commission received from Buzzi Unicem USA (“Buzzi”) a motion seeking to reopen a penalty assessment 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 another 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 proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). Under Rule 60(c) of the Federal Rules of Civil Procedure, a Rule 60(b) motion should be made within a reasonable time.

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on June 8, 2015, and became a

final order of the Commission on July 8, 2015. Buzzi asserts that MSHA received its contest late, in part due to the assessment form incorrectly listing an old address for MSHA's Civil Penalty Compliance Office ("CPCO").¹ Buzzi's safety and health manager first sent its contest form to the old address, then re-sent the form to the correct MSHA address after the initial form was returned undelivered. Buzzi's safety and health manager later contacted MSHA to ask about the case and learned that the proposed penalty assessment had become a final order.

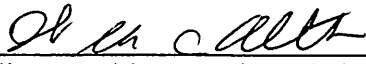
The Secretary opposes the request to reopen, asserting that the operator's initial attempt to send its contest form was made too late, regardless of MSHA's change of address. MSHA further asserts that the operator's motion to reopen was not filed within a reasonable time because Buzzi waited five months after receiving a delinquency notice before filing its motion to the Commission. According to MSHA's records, a delinquency notice was mailed to the operator on August 24, 2015, and this case was referred to the Department of Treasury for collection on October 29, 2015.

It is unclear from the record when Buzzi first attempted to file its contest of MSHA's proposed penalty assessment. We have previously acknowledged the problems that resulted from MSHA's address change and liberally granted operators' requests to reopen proceedings filed during that period. *See Allstate Materials, LLC*, 38 FMSHRC 645, 646 (Apr. 2016). Even assuming Buzzi's initial effort was made late, in these special circumstances, we would err on the side of concluding that the late filing was the result of an excusable mistake.

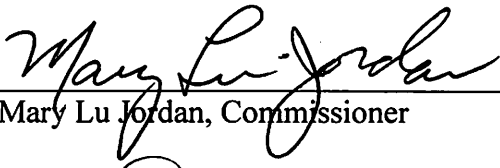
Although the Secretary also asserts that Buzzi should have filed its motion to reopen more promptly, the delinquency notice was delivered shortly after the pro se operator sent its contest to the correct MSHA address. Given the timing of these events, the operator's failure to understand that the delinquency notice indicated the proposed assessment had become a final order is, in this instance, excusable. Upon later inquiring about the citation and learning the contest had arrived late, the operator promptly moved to reopen this matter.

¹ MSHA's office moved to a new address on July 15, 2015.

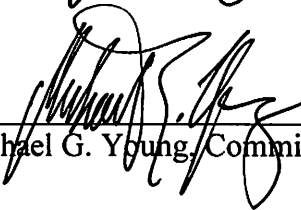
In light of our past precedent addressing the relocation of MSHA's office, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



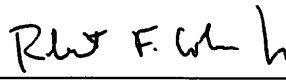
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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