

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

SEP 14 2017

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEVA 2016-389-M
v. : A.C. No. 46-02805-397860
 :
U.S. SILICA COMPANY, LLC, - :
BERKELEY PLANT :

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 15, 2016, the Commission received from U.S. Silica Company, LLC – Berkeley Plant (“U.S. Silica”) 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).

On March 31, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in the related contest proceeding (WEVA 2015-903-RM¹) after determining that the citation at issue had been paid in full by the operator. U.S. Silica responded to that Show Cause Order on April 15, 2016. In that response, U.S. Silica conceded that it had not filed a timely contest to the proposed assessment in this matter. If the operator fails to contest the Secretary’s proposed penalty assessment, the 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

¹ U.S. Silica had contested the citation referenced by the proposed assessment.

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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment became a final order of the Commission on January 15, 2016. U.S. Silica asserts that the plant never received the proposed penalty assessment and the operator therefore was unaware of the deadline. U.S. Silica avers that the operator's accounting department inadvertently paid the penalty for the citation. U.S. Silica argues that it further demonstrated its intent to contest the proposed penalties by corresponding with the MSHA District Manager about settlement negotiations and by promptly filing the instant Motion to Reopen upon receiving the Show Cause Order in the related contest case.

The Secretary does not oppose the request to reopen, and does not dispute the operator's contention that the plant did not receive the proposed assessment.

Having reviewed U.S. Silica's request and the Secretary's response, we determine that U.S. Silica's failure to contest this assessment was excusable because the operator did not receive the proposed penalty assessment. U.S. Silica consistently demonstrated its intent to contest the citation. Therefore, in the interest of justice, we hereby 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. 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.



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution:

Rebecca J. Oblak, Esq.
Bowles Rice, LLP
7000 Hampton Center
Morgantown, WV 26505

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave. N.W., Suite 520N
Washington, DC 20004-1710

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450