

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2021

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2020-0141-M
v. : A.C. No. 42-01729-499482
 :
W.W. CLYDE & CO. :

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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 7, 2020, the Commission received from W.W. Clyde & Co. (“W.W. Clyde”) a motion seeking to reopen a penalty assessment that appeared to have 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 proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

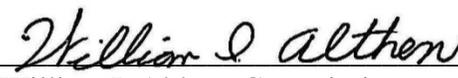
Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 30, 2019, and would have become a final order of the Commission on December 3, 2019. W.W. Clyde's motion says that was in regular contact with MSHA concerning this assessment, and that it received the proposed assessment by email on October 17, 2019. The motion says an MSHA employee helped the operator's safety director fill out the form over the telephone. The motion says the operator then mailed the notice of contest via certified mail, return receipt requested, and includes documentation supporting this claim.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed at the correct address. However, it appears that the operator did in fact submit its notice of contest to the correct address before the proposed assessment became final. The problem is that the operator returned its notice of contest, having received it in advance by email, before MSHA had recorded the delivery of its assessment by certified mail.

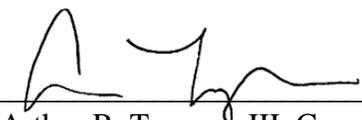
Having reviewed W.W. Clyde's request and the Secretary's response, we find that the proposed assessment did not become final because the operator submitted a timely notice of contest. Thus, the operator has not been properly found to be in default. Accordingly, the operator's motion is denied as moot. This case remains open, and 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.



Marco M. Rajkovich, Jr., Chairman



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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