

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

MAR 05 2018

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

v.

SSS, INC.

:
:
:
:
:
:
:
:
:
:

Docket No. CENT 2017-208-M
A.C. No. 23-00192-422615

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 February 21, 2017, the Commission received from SSS, Inc. (“SSS”) 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), 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).

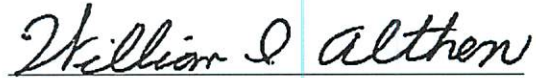
We have held, however, that in appropriate circumstances we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission 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 20, 2016, and

became a final order of the Commission on November 21, 2016. SSS asserts that it inadvertently mailed its notice of contest to MSHA's payment processing plant in St. Louis, MO instead of to the MSHA office in Arlington, VA. The notice was mistakenly included with the payment for a citation the operator did not intend to contest. The operator did not learn of the mistake until it received a delinquency notice on February 6, 2017.¹ SSS has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The operator avers that it has implemented new procedures to ensure that this mistake does not recur. The Secretary does not oppose the request to reopen.

¹ After learning of its mistake, the operator immediately contacted the MSHA via telephone. According to the Motion to Reopen, during that telephone conversation MSHA informed the operator that it could request reopening but "interest and penalties would accrue until the [reopening] was decided . . ." While the Commission attempts to respond to all Motions to Reopen expeditiously, we recognize that there is some delay between the filing of a request and our subsequent Order. We do not believe it would be appropriate for MSHA to punish operators with penalties and interest for delays caused by the Commission's deliberative process.

Having reviewed SSS's request and the Secretary's response, we find that the operator's failure arose from excusable error. It claims it inadvertently mailed the contest notice to the wrong address and the Secretary has not opposed the request to reopen. 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.



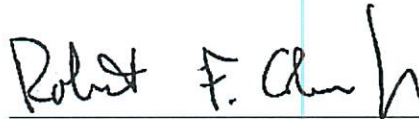
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution:

Michael T. Stevinson
General Manager/Engineer
WBS, Inc./SSS, Inc./HEX
P.O. Box 474
10415 Hwy. 79 South
Louisiana, MO 63353

Ali Beydoun, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 401
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