

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

WASHINGTON, DC 20004-1710

MAY 04 2018

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2017-492-M
v.	:	A.C. No. 45-00637-423672
	:	
HOLROYD CO., 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 June 13, 2017, the Commission received from Holroyd Co., Inc. (“Holroyd”) 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 November 10, 2016, and

became a final order of the Commission on December 10, 2016. Holroyd asserts that it inadvertently sent the contest form to MSHA's St. Louis office with a check for uncontested citations instead of to the Arlington office.

The operator asserts that the contest was mailed on November 16, 2016. The Secretary mailed a delinquency notice on January 25, 2016, having not received the contest. However, the operator claims it only learned of the delinquency in mid-to-late February. Holroyd asserts that it then attempted to contact MSHA to dispute the debt. Holroyd asserts it repeatedly reached out to MSHA, and left phone and email messages with MSHA's representative on February 28, 2017. The operator claims that MSHA's representative did not return the phone call until March 29, 2017. At that time, Holroyd asserts that MSHA representative stated that MSHA had received the notice of contest that he would "take care of this" and that a backlog of cases was causing delays.¹ Holroyd claims it believed that the matter was then being resolved.

Holroyd claims that on May 5, 2017 it received a notice from the U.S. Department of the Treasury showing that it owed money to MSHA. The operator asserts it was surprised by this notice, believing that MSHA was resolving the matter. The operator alleges that on May 15, 2017, the MSHA representative e-mailed Holroyd and stated that the contest had been filed late. The operator claims it was confused because of the discrepancy between this e-mail and the March 29, 2017 conversation with MSHA and that it decided to obtain counsel. Holroyd claims that through counsel it learned, for the first time, on May 30, 2017, that it had sent the contest to the wrong address. The operator then filed its motion to reopen on June 13, 2017. Holroyd has not filed any other motions to reopen with the Commission in the last two years. 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.

¹ In his Response, the Secretary of Labor agrees that a telephone conversation occurred in March 2017, but disagrees with the operator's characterization of the conversation. The Secretary provides no specifics regarding his disagreement, instead stating it is unnecessary to resolve the discrepancy because the Secretary does not oppose reopening.

Having reviewed Holroyd's request and the Secretary's response, we find that the operator inadvertently sent its notice of contest to the wrong address. The operator then diligently pursued the matter until it learned the source of its mistake and then promptly rectified it. 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.



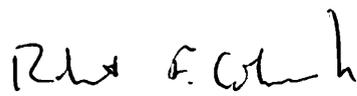
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution:

Selena C. Smith, Esq.
Davis Grimm Payne & Marra
701 Fifth Ave., Suite 4040
Seattle, WA 98104

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