

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

AUG 07 2017

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2016-40-M
v.	:	A.C. No. 44-00025-388289
	:	
LUCK STONE CORPORATION	:	

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 November 2, 2015, the Commission received from Luck Stone Corporation (“Luck Stone”) 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 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).

On August 13, 2015, Luck Stone received a proposed penalty assessment from the Secretary. On September 14, 2015, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.¹ Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a delinquency notice was mailed to the operator on October 29, 2015.

Luck Stone asserts that its employees believed that the proposed penalties had been properly contested, but because the contest was not sent via certified mail, there is no record of when the contest was sent. The Secretary does not oppose the request to reopen, and acknowledges that Luck Stone's contest would have been mailed while MSHA was transitioning to a new office, and may not have been delivered properly.

Having reviewed Luck Stone's request and the Secretary's response, we find that Luck Stone's apparent failure to timely contest is excusable in light of the Secretary's problems receiving contests through the mail. *See Allstate Materials, LLC*, 38 FMSHRC 645, 646 (Apr. 2016) (granting motions to reopen involving a similar mailing issue following the move of MSHA's headquarters). Indeed, the Commission received at least 20 motions to reopen penalty contests that were not delivered, apparently because of MSHA's relocation. We therefore hold that the circumstances here may indicate that the operator may have timely contested the proposed assessment, and 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.

¹ Monday, September 14, 2015, was the first business day following the 30th day. *See* 29 C.F.R. § 2700.8.

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

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