

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 06 2017

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. CENT 2016-511-M
BAM HEAVY EQUIPMENT & REPAIR : A.C. No. 41-04570-408288-B3319

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 August 17, 2016, the Commission received from BAM Heavy Equipment & Repair (“BAM”) 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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was addressed to BAM and dated April 19, 2016. The Secretary states the proposed assessment was delivered on April 25, 2016, and that it became a final order of the Commission on May 25, 2016. The Secretary did not provide any proof of delivery of the proposed assessment.

BAM asserts that it did not receive any notice of the citation until August 10, 2016. According to BAM, the initial citation was served only to the owner of the mine, B.V.S. Construction, Inc., but not to the contractor, BAM. BAM asserts that its employee, who was the subject of the citation for not having received new miner training, was told to leave the job site, and was never given any verbal or written documentation stating that he was to receive a citation. We note that the citation, which had been issued on March 1, 2016, included a correction noting that it had been issued to the wrong company. 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.

Having reviewed BAM's request and the Secretary's response, under the facts of this case, BAM's failure to timely contest the proposed assessment was excusable because of the operator's confusion over the citation's issuance. 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

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