

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 29 2017

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

v.

CROELL REDI-MIX

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: Docket No. WEST 2016-404-M  
: A.C. No. 39-01494-401433  
:  
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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 April 13, 2016, the Commission received from Croell Redi-Mix, (“Croell”) 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 January 22, 2016, and

became a final order of the Commission on February 22, 2016. Croell asserts that it received two different proposed penalty assessments on separate dates following a single inspection of its mine. The operator avers that it did not return its contest regarding the first assessment until it had already received the second, believing that they would have the same deadline. The Secretary confirmed that MSHA received the late-filed contest in this matter postmarked March 1, 2016. The operator did not learn of its error until it received a delinquency letter, which was sent March 17, 2016.

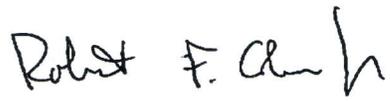
The Secretary does not oppose the request to reopen, but notes that his sole reason for not opposing reopening is because the contest was mailed only nine days late. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Croell's request and the Secretary's response, we find that it mistakenly waited until it had received a related assessment before filings its contest. 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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