

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

June 20, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-515-M
v.	:	A.C. No. 41-00070-317641-02
	:	
COLD SPRING GRANITE COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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 May 29, 2013, the Commission received from Cold Spring Granite Company (“Cold Spring”) 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).

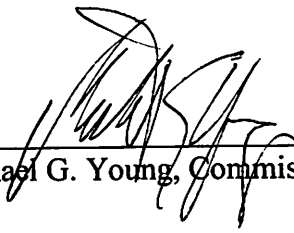
Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment, containing 17 penalties, was delivered on April 9, 2013. Cold Spring timely contested four of the penalties and paid the remaining 13 penalties. Two of the contested citations were issued for alleged violations at Cold Spring's shot saw shop. Cold Spring avers that it originally contested those citations because it believed that MSHA lacks jurisdiction over the shop. It now seeks to reopen seven of the 13 uncontested penalties, stating that these citations also relate to the shot saw shop.

The Secretary opposes the motion to reopen, stating that Cold Spring made knowledgeable decisions regarding which citations to contest. The Secretary contends that Cold Spring's subsequent "change of mind" does not constitute a "mistake, inadvertence, surprise or excusable neglect" that justifies the reopening of uncontested citations. Sec'y's Opposition at 4 (citing *Ackermann v. United States*, 340 U.S. 193, 198 (1950)). In response, Cold Spring asserts that it timely contested two citations issued for alleged violations at the shop and inadvertently failed to contest seven others because it did not initially recognize that those citations involved occurrences at the same shop.

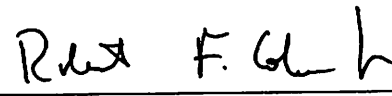
Certainly, "[a] change of mind is not adequate grounds to reopen a final judgement pursuant to Rule 60(b)." *Brzeczek v. Centerior Energy*, 2000 WL 875744, No. 99-3900, slip op. at 1-2 (6th Cir. June 20, 2000). *See, e.g., Ackermann v. United States, supra*. In this case, however, Cold Spring has demonstrated that it originally intended to challenge all the citations originating from the inspection of the shot saw shop. Its failure to contest the seven citations at issue was the result of a mistake. After discovering its mistake, Cold Spring promptly sought reopening of the citations.

Having reviewed Cold Spring's requests and the Secretary's response, 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.


Mary Lu Jordan, Chairman



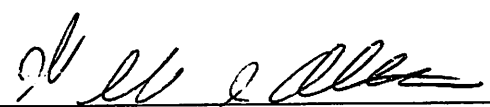
Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

Distribution:

Gary L. Vischer, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710