

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 16, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-389-M
v.	:	A.C. No. 13-02138-312685
	:	
L & W QUARRIES, INC.	:	

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 April 5, 2013, the Commission received from L & W Quarries, Inc. (“L&W”) 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 became a final order of the Commission on March 6, 2013. L&W asserts that it mistakenly believed that it did not need to forward the proposed assessment to its counsel because it had previously contested the underlying citations. L&W's counsel discovered the delinquency on March 27, 2013, after reviewing the MSHA data retrieval system. L&W states that it has modified its office procedures to contact counsel upon receipt of MSHA documents. The Secretary does not oppose the request to reopen.

We hereby reopen Order No. 8737420. However, with respect to Citation Nos. 8737422 and 8737425, L&W's motion does not establish that its failure to contest the civil penalties assessed for these two citations arose from mistake, inadvertence, or excusable neglect.

In its motion, L&W asserts that it asked counsel to file notices of contest for the order and two citations at issue. Mot. at 1. A notice of contest for Order No. 8737420 was timely filed. See Attachment 1. L&W states that it mistakenly believed that it was not required to subsequently forward the proposed assessment form to counsel, because it had asked its counsel to file the appropriate notices of contest. Mot. at 2. Conspicuously absent from L&W's request to reopen is any documentation which establishes that notices of contests for Citation No. 8737422 or Citation No. 8737425 were filed.


While there is no precise formula for evaluating an operator's request for reopening, "we consider the entire range of factors relevant to determining mistake, inadvertence, surprise, excusable neglect, or other good faith reason for reopening." *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

L&W demonstrated some intent to contest the civil penalty assessed for Order No. 8737420 when it filed a notice of contest. It appears that its failure to forward the proposed assessment to counsel was the result of mistake, inadvertence or excusable neglect. Moreover, L&W promptly sought reopening of the order when it learned of its default. Therefore, it is appropriate to reopen Order No. 8737420 for further proceedings.

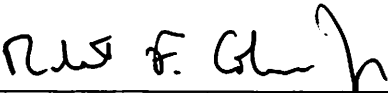
Based on the record before the Commission, we cannot conclude that L&W demonstrated a similarly justifiable reason to reopen Citation Nos. 8737422 and 8737425. While L&W asserts that it requested that its counsel file notices of contest for both citations, a request made to counsel does not demonstrate sufficient intent to contest the civil penalty in the absence of evidence that the citations were actually contested by counsel.


Accordingly, we hereby deny L&W's request to reopen Citation Nos. 8737422 and 8737425.

Having reviewed L&W's request and the Secretary's response, in the interest of justice, we hereby reopen Order No. 8737420 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:

Diana Schroeder, 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., 25<sup>th</sup> 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