

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 26, 2014

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. CENT 2013-542-M
v. : A.C. No. 23-00217-315870
 :
CONTINENTAL CEMENT COMPANY, LLC :

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners¹

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 June 10, 2013, the Commission received from Continental Cement Company, LLC (“Continental”) 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).

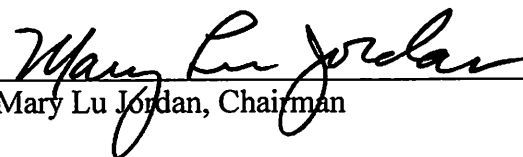
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission 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

¹ Commissioner Althen was recused from this case.

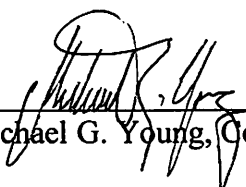
good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 14, 2013, and became a final order of the Commission on April 15, 2013. Continental asserts that it mailed a timely contest and its payment for the uncontested penalties to MSHA’s payment center in St. Louis, MO. Continental discovered that MSHA had not processed the contest after receiving MSHA’s delinquency notice, dated May 29, 2013, and promptly filed this motion to reopen. The Secretary does not oppose the request to reopen, but notes that the payment center in St. Louis, MO, is only a payment processing office which does not recognize or process contest forms. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, VA.

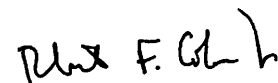
Having reviewed Continental’s request and the Secretary’s response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent 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

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