

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 6, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2009-602
	:	A.C. No. 34-01062-185628
JOSHUA COAL COMPANY	:	
	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On July 15, 2009, the Commission received from Joshua Coal Company (“Joshua”) a letter from the owner 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

On May 14, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000185628 to Joshua for five violations totaling \$500. Joshua states that on June 15, 2009, it sent a letter requesting a hearing to MSHA's District Office in Denver, Colorado. It then received a letter from MSHA, dated June 23, 2009, informing it that a safety and health conference would be scheduled once penalties had been assessed and contested. Joshua sent another letter, dated July 14, 2009, to the same MSHA District Office stating its opposition to the citations and noting its intent to contest the penalties. In its letter to the Commission, Joshua described its attempts to contest the penalties, and states that it does not understand when the 30-day period to file its contest began and requests an opportunity for a hearing.

The Secretary indicates that she does not oppose Joshua's request to reopen. She explains that the MSHA District Office was not aware that the proposed penalty assessment had been issued when it received the operator's letter. She urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner and mailed to the address for the MSHA Civil Penalty Compliance Office in Arlington, Virginia, included in the notice accompanying all proposed assessments.

In this case, Joshua had 30 days from its receipt of the Proposed Assessment dated May 14, 2009, within which to file a contest of the assessment. Its June 15, 2009, letter would have been timely, but since it was sent to the wrong MSHA office, the Secretary treated it as not having been filed.<sup>1</sup>

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<sup>1</sup> Commissioner Cohen would find that Joshua's contest of the proposed assessment was timely filed.

Having reviewed Joshua's request and the Secretary's response, in the interests 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. 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.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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