FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : : :	
v.	: :	Docket No. LAKE 2024-0014 A.C. No. 47-00028-00574809A
ROGER J. ROHLOFF, employed by DAANEN & JANSSEN, INC.	: :	

BEFORE: Jordan, Chair; Baker and Marvit, 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. (2018) ("Mine Act"). On October 12, 2023, the Commission received from Roger J. Rohloff, employed by Daanen and Janssen, Inc. ("Daanen") a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had appeared to become a final order of the Commission.[1]

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

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

[1] The Secretary of Labor has filed a motion to amend the cases caption to properly reflect "Roger J. Rohloff, employed by Daanen & Janssen, Incorporated" for who this motion is filed and to remove Daanen & Janssen, as it is not a party to this docket. Consistent with Commission Rule 5(d), 29 C.F.R. § 2700.5(d), the Secretary's motion to amend the caption is granted. The caption of this order reflects this change.

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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the U.S. Postal Service attempted delivery of the proposed assessment via certified mail on April 17, 2023, and a notice was left as there was no authorized recipient available. The assessment was then mailed to Rohloff's address, but later returned to MSHA as "unclaimed." The assessment became a final order of the Commission on May 17, 2023.

On February 11, 2022, following a rock fall incident at a mine operated by Daanen & Janssen, Inc., MSHA issued three citations to Daanen and two citations to miner Roger Rohloff under section 110(c) of the Mine Act. Counsel for Rohloff notes that during the section 110(c) investigation, the complaint processer for MSHA reached out and confirmed Rohloff's address and that MSHA would send all communication regarding its investigation of Mr. Rohloff to his counsel. However, counsel for Rohloff and Daanen states that it was not until an August 30 status conference before a Commission ALJ that he was first informed of the assessment and that it had become a final order. Rohloff's Counsel states that during the conference MSHA's Counsel "said that she would look into the matter and get back to [them] with more information," which MSHA's counsel did on September 5, 2023. MTR at 3. Counsel for Rohloff maintains that neither Daanen nor Rohloff received the penalty assessment and still had not received a copy at the time of filing this motion. He asserts that Rohloff only received "particular notice" on September 5 and that he timely mailed his motion to reopen on October 4, 2023—29 days later.

Rohloff's counsel argues that leaving a general Postal Service notice at Rohloff's address that unidentified mail from an unidentified party is waiting at the post office does not constitute proper service of the assessment or receipt that would start the clock to file a notice of contest. He further asserts that MSHA cannot prove that the Postal Service actually left a notice. Counsel notes that Rohloff acted in good faith and had been watching for the assessment. Had he received the notice, he would have retrieved the assessment because he had no incentive to delay the progress of the case. In fact, the ALJ stayed the underlying citation cases so that Rohloff's pending 110(c) assessment could be consolidated with the citation cases, which all have meritorious defenses. Counsel maintains that Rohloff's delay in contesting amounts to excusable neglect. It further argues that although it paid the penalty assessment on December 7, 2023, the case is not moot because Rohloff only paid the citation "to avoid any wage garnishment, withholding of my tax refunds or adverse impact on my credit report" as threatened by you U.S. Treasury, Bureau of the Fiscal Service in its October 31, 2023 letter. Rohloff Ex. A.

The Secretary opposes the motion arguing that it should be denied as moot because Rohloff paid the penalties and interest in full. Additionally, MSHA mailed the proposed assessment to Rohloff's address, but Rohloff does not claim that he does not reside at or receive mail at that address, nor has he explained why he never collected his mail at the post-office.

Additionally, Rohloff's motion to reopen was not timely because he filed it 43 days after first learning of the assessment at the August 30, 2023 status conference and 45 days after a delinquency notice was sent on August 28, 2023. Rohloff does not explain the delay in filing its motion to reopen.

Commission Procedural Rule 25 provides, in pertinent part, that the Secretary "shall notify . . . any other person against whom a penalty is proposed of the violation alleged." 29 C.F.R. § 2700.25. Accordingly, a proposed assessment under section 110(c) does not become a final order within 30 days, if the manner in which the proposed penalty was delivered to the individual does not provide him or her with actual notice of the proposed assessment. *See Coleman, employed By Carmeuse Lime and Stone*, 33 FMSHRC 1139, 1140 (June 2011) (finding that a proposed assessment does not become a final order when it was received and signed for at the mine by another miner but not delivered to the named miner); *Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891 (Dec. 2005); *Beelman Truck Co*., 40 FMSHRC 1104, 1104 (Aug. 2018) (determining assessment had not become final order where assessment was returned to MSHA as unclaimed and operator had never received it).

In the Instant matter, the Secretary was aware that Respondent was represented by counsel. Email correspondence confirms that a representative for MSHA agreed to send "all correspondence for Mr. Rohloff" to his counsel but ultimately failed to do so. Rohloff Reply Br. at 34, Ex. B. As such, we conclude that Rohloff was not provided with notice, as required by Procedural Rule 25, 29 C.F.R. §2700.25. Accordingly, the proposed assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a Judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

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