

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

DEC 04 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. SE 2015-144-M
v.	:	A.C. No. 54-00135-366307
	:	
EMPRESAS ORTIZ BRUNET, INC.	:	

BEFORE: Young, Nakamura, and Althen, 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 January 21, 2015, the Commission received from Empresas Ortiz Brunet, Inc. (“Empresas”) 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).

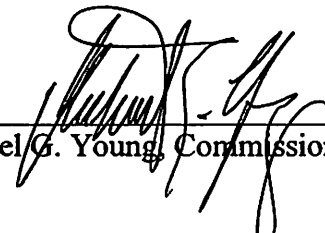
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission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

¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).


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”) demonstrate that the proposed assessment was delivered on November 10, 2014, and became a final order of the Commission on December 10, 2014. *Empresas* asserts that its failure to timely submit the contest form arose from its confusion with other cases, causing the operator to mistakenly believe that the contest form had been sent.² The Secretary does not oppose the request to reopen, but notes that the operator reached out to MSHA on January 14, 2015 to resolve this matter and urges *Empresas* to ensure that future penalty assessments are contested in a timely manner.

Having reviewed *Empresas*’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.



Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

² We note that the Safety and Health Coordinator, Jorge Negron, who is responsible for contesting proposed assessments by MSHA, is based in Puerto Rico and does not appear to be a native English speaker.

Distribution:

Jorge Negrón
Safety & Health Coordinator
Empresas Ortiz Brunet, Inc.
P.O. Box 1839
Guaynabo, PR USA 00970
jorgen@eobpr.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St., South, Suite 500
Arlington, VA 22202-5450

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