

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)

v.

ELMORE SAND & GRAVEL, INC.

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: Docket No. SE 2015-25-M
: A.C. No. 01-01138-357167
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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 October 9, 2014, the Commission received from Elmore Sand & Gravel, Inc. (“Elmore”) 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).

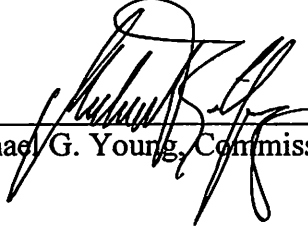
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission 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 August 1, 2014, and became a final order of the Commission on September 2, 2014. The operator asserts that towards the end of July 2014, the company's safety director resigned and did not tell anyone about the proposed assessment. The operator offers a letter to support that it submitted the contest form on September 3, 2014. The operator's counsel also maintains that he "traveled extensively," which resulted in a delay filing the motion to reopen. The operator asserts that since this case arose, it has taken steps, such as reassigning office personnel, to ensure that all contests are timely filed. The Secretary does not oppose the request to reopen. However, he urges Elmore to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Elmore'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

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