

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 18 2015

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

JAMES L. DECK

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Docket No. SE 2014-322-M
A.C. No. 38-00740-342730 A

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura and Althen, 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. (2012) (“Mine Act”). On May 29, 2014, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.


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 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).

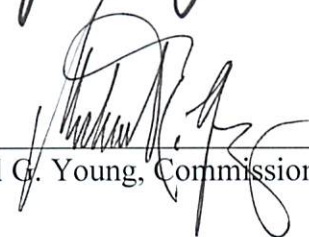
Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on February 8, 2014, and became a final order of the Commission on March 10, 2014. Deck asserts that as part of earlier settlement negotiations, the Secretary had agreed to administratively withdraw this 110(c) proceeding.¹ The Secretary does not dispute this. However, the Secretary mistakenly failed to do so, and a proposed penalty assessment was subsequently issued to Deck in this 110(c) proceeding. Deck further asserts that the Secretary informed him he did not need to timely contest the proposed assessment. The Secretary disputes this but does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Deck’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.

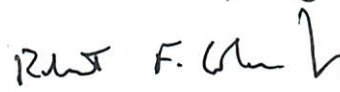
¹The Secretary’s alleged agreement in settlement negotiations to not pursue section 110(c) charges against Deck does not appear in the settlement agreement which was tendered to the Judge and approved by him. *See* Deck’s Unopposed Motion to Reopen Contest of Civil Penalty Assessment, Exhibit B (Decision Approving Settlement and Order to Pay issued April 30, 2014 in *Secretary v. Deck Sand Company, Inc.*, Docket No. SE 2013-201M et al.). However, the Secretary does not dispute Deck’s assertion, and we accept it as true. In the future, we urge the Secretary and operators to include all material terms in proposed settlement agreements, including agreements that section 110(c) charges related to the settled citations will not be pursued.




Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

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