

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

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

DEC 18 2015

v.

BRODY MINING, LLC,

:
:
: Docket No. WEVA 2014-2005
: A.C. No. 46-09086-350238
:
:

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 August 11, 2014, the Commission received from Brody Mining, LLC (“Brody”) a motion seeking to reopen Order No. 7166788 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 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).

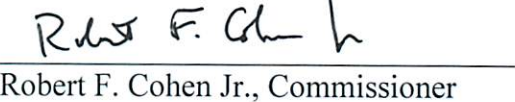
The Mine Safety and Health Administration’s (“MSHA”) Mine Data Retrieval System indicates that the proposed assessment became a final order of the Commission on June 11, 2014, and thus, it can be reasonably inferred that the proposed assessment was delivered to

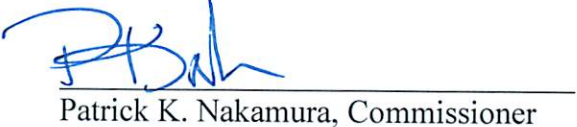
Brody on May 12, 2014. Brody asserts that it intended to contest the penalty but failed to do so due to a discrepancy between the proposed assessment and the order. Brody points to the fact that it timely filed a pre-penalty Notice of Contest of Order No. 7166788 and a Motion to Consolidate and Expedite Order No. 7166788 on October 30, 2013. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Brody'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.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner


Robert F. Cohen Jr., Commissioner


Patrick K. Nakamura, Commissioner


William I. Althen, Commissioner

Distribution:

**Michael T. Cimino, Esq.
Jackson Kelly, PLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322**

**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 Ave. N.W., Suite 520N
Washington, DC 20004-1710**

**Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450**