

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 12 2016

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

v.

BCJ SAND & ROCK, INC.,

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: Docket No. WEST 2015-7M
: A.C. No. 04-05547-357447
:
:

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

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 2, 2014, the Commission received from BCJ Sand and Rock, Inc. (“BCJ”) 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 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).

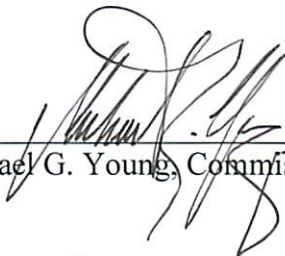
Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on August 4, 2014, and became a final order of the Commission on September 3, 2014. BCJ asserts that its employees managing

MSHA matters did not notify management of the proposed penalties and that it was unfamiliar with the contest procedures. BCJ also notes that the motion to reopen was filed less than 30 days after the penalties became final orders of the Commission. 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 BCJ'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



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

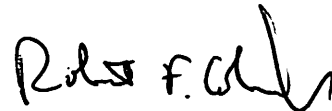
Commissioner Cohen dissenting:

My colleagues have concluded that BCJ Sand and Gravel has established cause to reopen the captioned proceeding. I dissent because I believe that BCJ's excuse for its failure to timely contest the proposed assessment is contradicted by the record evidence, and raises factual questions which should be resolved by the Chief Administrative Law Judge.

BCJ contends that it failed to timely file, in part, because its employees neglected to notify management when it received the proposed assessment in the mail. The motion to reopen includes an affidavit from BCJ President Brad Slender, which states that he was unaware that the mine received the proposed assessment because he works at the main office in Santa Rosa, California, approximately 160 miles away from the mine site in Oroville, California. R. Ex. B.

However, the record before the Commission includes a United States Postal Service tracking receipt which reflects that the proposed assessment was actually mailed to Santa Rosa, California (the location of Mr. Slender's office) and was received and signed for by an individual with the initials "B.S."

In light of this evidence, I have to question the operator's representation that mistakes at the Oroville mine site contributed to the failure to timely file. The U.S. Postal Service tracking receipt raises factual questions which need to be resolved by an administrative law judge before the Commission can decide whether to reopen the penalty assessment. Accordingly, I dissent, and would remand the case to the Chief Administrative Law Judge for fact-finding on the motion.



Robert F. Cohen, Jr., Commissioner

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