

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

WASHINGTON, DC 20004-1710

**MAR 05 2018**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2016-510-M
v.	:	A.C. No. 25-00998-413282 A8144
	:	
MIDWEST MECHANICAL INDUSTRIAL	:	
SERVICES	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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 16, 2016, the Commission received from Midwest Mechanical Industrial Services (“Midwest”) 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), 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 June 29, 2016, and became a final order of the Commission on July 29, 2016. Midwest asserts that it mailed the contest on July 14, 2016. The operator claims that the contest was never received by MSHA, but because the contest was not sent via certified mail, no record of the mailing exists. Midwest asserts that it contacted MSHA repeatedly to see if the package had arrived.

Attached to its motion to reopen, Midwest included a copy of the contest for this case. The contest included a cover page from a separate case (Case No. 000415616)<sup>1</sup> and the remittance coupon for that case and the case that Midwest seeks to reopen (Case No. 000413282). The cover page was signed by Jeff Allen, Midwest Vice President, on August 2, 2016. These facts appear to contradict Midwest's claim that it filed its contest on July 14, 2016. Instead, it appears likely that Midwest mistakenly included the contest of Case No. 00413282 when it subsequently contested Case No. 000415616 on August 2, 2016.

Midwest filed its request to reopen less than one month after the assessment became final and before a delinquency notice was issued. Moreover, even if Midwest did not file its contest of Case No. 000413282 until August 2, 2016, this was only four days after the assessment became a final order of the Commission. Midwest has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen.

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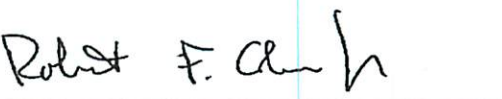
<sup>1</sup> This case was properly contested and was assigned Docket No. CENT 2016-496-M. On June 28, 2017, Chief Judge Lesnick approved a motion to withdraw Midwest's contest and the case was dismissed.

Having reviewed Midwest's request and the Secretary's response, we find that Midwest inadvertently failed to timely contest this matter because it mistakenly confused two pending cases. 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.

  
William I. Althen, Acting Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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