

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 2016-532-M
v.	:	A.C. No. 41-049946-407205
	:	
TEXROCK INDUSTRIES, LLC	:	

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 30, 2016, the Commission received from Texrock Industries, LLC (“Texrock”) 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 April 9, 2016, and became a

final order of the Commission on May 9, 2016. Texrock asserts that it filed its notice of contest on June 6, 2016 via overnight mail.¹ Texrock recognizes that this filing was late, but explains that the owner of this very small mine, who was tasked with responding to the assessment, was dealing with a severe family medical condition. The operator also notes that it had received a delinquency notice on June 24, 2016² and responded on July 8, 2016, noting that it had filed a contest and intended to challenge the issuances.³ The Secretary does not oppose the request to reopen.

¹ The actual letter filed by the Operator stating that it intends to contest the citation is dated May 13, 2016. However, the attached check and shipping receipts are dated June 6, 2016. Texrock's request to reopen does not explain this discrepancy, though it does state that the contest was filed on the later date, June 6, 2016.

² The delinquency letter was mailed on June 24, 2016. Texrock's request to reopen was not filed until August 30, 2016, more than 30 days after the delinquency letter was issued. Generally, an operator has 30 days to file a motion to reopen following receipt of a delinquency notice or provide an explanation for any delay beyond 30 days. *See Concrete Mobility, LLC*, 37 FMSHRC 1709, 1710 (Aug. 2015); *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373 (Oct. 2011); *Highland Mining*, 31 FMSHRC 1313, 1317 (Nov. 2009). We consider the fact that the operator sent a response to the delinquency letter to MSHA on July 8, 2016 and the ongoing nature of the owner's family medical situation to be sufficient explanation for the delay in this unopposed matter.

³ In the July 8 letter, the operator states that it filed its contest via overnight mail on May 13, 2016. As noted above, by the time Texrock filed its motion to reopen, it conceded that the contest was mailed on June 6, 2016.

Having reviewed Texrock's request and the Secretary's response, we find that the operator's failure to timely file its contest in this matter was the result of a severe medical condition and constituted excusable neglect. 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

Distribution:

**Valerie Gribble
Texrock, LLC
124 Saint Andrew Lane
Aledo, TX 76008**

**Ali Beydoun, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 401
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**