

**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) :  
v. : Docket No. KENT 2017-314-M  
: A.C. No. 15-04469-434648  
: :  
HUELSMAN-SWEENEY :  
CONSTRUCTION, INC. :

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 July 21, 2017, the Commission received from Huelsman-Sweeney Construction, Inc. (“Huelsman”) 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).

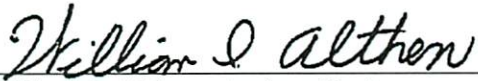
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of 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 March 29, 2017, and became a final order of the Commission on April 28, 2017. Huelsman explains in great detail that it has in place procedures to ensure that penalties are promptly contested and that it expressed its intent to contest the penalty at issue to counsel on March 29, 2017, the day the proposed assessment was received. Moreover, counsel for Huelsman avers in an affidavit that its billing records confirm that counsel spoke with his client about this case and drafted the contest on the same date. Counsel further maintains that, per his normal procedure, he would have clearly indicated the proper mailing address and placed the contest in his secretary's inbox so that she could mail the contest to MSHA.

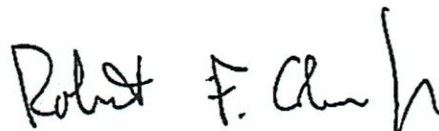
Huelsman states that both company management and counsel first learned that the contest was not timely filed from a delinquency letter sent by MSHA dated July 11, 2017. Significantly, Huelsman has not filed any other motions to reopen with the Commission in the last two years and filed its motion to reopen on July 21, 2017, less than 30 days after MSHA sent the delinquency notice. 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.

We recognize that the operator has implemented a usually reliable system for processing contests of proposed assessments and that both the operator and counsel took swift actions in responding to the proposed assessment and the subsequent deficiency letter. Therefore, having reviewed Huelsman's request and the Secretary's response, we find that the failure to timely file the contest with MSHA was the result of mistake or inadvertence and that the case warrants reopening. 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:

Jeffrey Phillips, Esq.  
Steptoe & Johnson PLLC  
One Paragon Centre  
2525 Harrodsburg Rd., Suite 300  
Lexington, KY 40504

Ali Beydoun, 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