

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 05 2018

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

v.

RMS GRAVEL, INC.

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Docket No. YORK 2017-36-M
A.C. No. 30-03883-416552

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 November 29, 2016, the Commission received from RMS Gravel, Inc. (“RMS”) 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 August 10, 2016, and became

a final order of the Commission on September 9, 2016. RMS asserts that after the instant citation was issued, the MSHA inspector indicated he would be issuing a revised citation. The operator thus says it did not challenge the citation, even though it believed that it had a meritorious defense, because it was waiting for the revised citation.

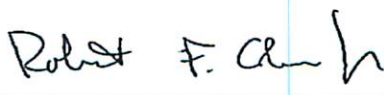
No revised citation was issued, and MSHA issued a delinquency notice on October 25, 2016. RMS did not realize that the citation and assessment were considered final until so advised by counsel following receipt of that notice. The operator also avers that it was unfamiliar with the procedure for MSHA special investigations. RMS has not filed any other motions to reopen with the Commission in the last two years and responded immediately upon discovering its mistake. The Secretary does not oppose the request to reopen, but denies that the MSHA inspector ever indicated that he intended to issue a revised citation.

Having reviewed RMS' request and the Secretary's response, we find that the operator mistakenly believed that the citation at issue would be revised and that it was not necessary to file a contest until that revision was made. 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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